



This Fortnight In Arbitration

1 February 2022 to 15 February 2022

VOLUME II | ISSUE 3

By the Editorial team

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1 FEBRUARY 2022 - 15 FEBRUARY 2022

VOLUME II | ISSUE 3

NFRAL is a forum for cutting-edge writing and research on arbitration. Our Biweekly Highlights review the latest cases and key developments in arbitration. We draw the material from courts across the country and endeavour to provide you with an accurate gist. Each issue is categorised topic-wise and linked to our [Category Cloud](#).

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APPOINTMENT, SUBSTITUTION AND TERMINATION OF MANDATE OF ARBITRATORS

Whether Amity University is a generating company or a consumer of electricity should be decided by the arbitrator: Delhi High Court

09 February 2022 | IL & FS Energy Development Co Ltd v. Amity University | Arb P 572 of 2020 | Delhi High Court | 2022 SCC OnLine Del 498

Disagreeing *prima facie* with the argument that Amity was a generating company under the Electricity Act because of the parties' transaction, the Delhi High Court has allowed the application for the appointment of an arbitrator.

IL&FS installed a solar power plant in the Amity campus. Their agreement envisaged IL&FS would operate the plant for fifteen years and then hand it over to Amity. So, Amity argued that IL&FS was a 'generating company' under the Electricity Act since it commissioned the power plant and Amity was the co-owner because it had a stake in it. The argument was run to avoid arbitration because an authority decides the dispute between generating companies under the Electricity Act.

The court examined the terms of the power purchase agreement and was of the *prima facie* view that Amity was a consumer and not a generating company. It noted that because the point was arguable, the matter should be referred to the arbitrator in any case.

Read the decision [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Section 11 \(6A\) ACA](#) | [Existence of Arbitration Agreement](#) | [Competence Competence](#) | [Arbitrability](#) | [Section 16 ACA](#) | [Competence of Arbitral Tribunal to Rule on its Jurisdiction](#) | [Competence Competence](#) | [Jurisdiction of Arbitral Tribunal](#) | [Kompetenz Kompetenz](#) | [Who Decides Question](#) | [Vidya Drolia](#) | [Electricity Act](#) | [Functions of State Commission](#) | [Section 86 \(1\) \(f\) Electricity Act](#) | [Section 86 Electricity Act](#) | [Statutory Arbitrations](#)

Ground of nonarbitrability based on extinguishment of the claim post a resolution plan considered plainly arguable and an arbitrator appointed: Delhi High Court

11 February 2022 | Bharat Petroresources Ltd v. JSW Ispat Special Products Ltd | Arb P No 1154 of 2021 | Delhi High Court | Vibhu Bakhru J | 2022 SCC OnLine Del 443

Summarising and following the law laid down in *Vidya Drolia* (2021) 2 SCC 1 and subsequent cases, the Delhi High Court appointed an arbitrator because it believed that the ground of nonarbitrability was contentious.

The respondent had been earlier admitted into insolvency. Resisting the application for appointment, it argued that future claims not covered in the resolution plan stood extinguished. The petitioner had challenged the approval of the resolution plan in the NCLAT, but it was dismissed, noting that merely because the resolution professional did not collate future claims was not a ground to challenge the plan.

For the proposition that an arbitrator should be appointed if contentions of non-arbitrability are plainly arguable, the court cited *Mohammed Masroor* 2022 SCC OnLine SC 132 (decided on 02 February 2022).

Read the decision [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Competence Competence](#) | [Arbitrability](#) | [Nonarbitrability](#) | [Section 16 ACA](#) | [Competence of Arbitral Tribunal to Rule on its Jurisdiction](#) | [Competence Competence](#) | [Jurisdiction of Arbitral Tribunal](#) | [Kompetenz Kompetenz](#) | [Section 11 \(6A\) ACA](#) | [Existence of Arbitration Agreement](#) | [Who Decides Question](#) | [Vidya Drolia](#) | [Global Mercantile](#)

INTERIM RELIEF BY COURTS AND TRIBUNALS

A post-award Section 9 is meant to protect the fruit of an award. A declaratory relief vouchsafing entitlement to seek specific performance by a separate suit is not the fruit: Delhi High Court

14 February 2022 | Zostel Hospitality (P) Ltd v. Oravel Stays (P) Ltd || OMP (I) (Comm) 290/2021 | C Hari Shankar J | Delhi High Court | 2022 SCC OnLine Del 455

The Delhi High Court has declined a petition for interim relief, filed after the award, noting that when exercised at a post-award stage, [Section 9 ACA](#) is meant to protect the fruits of the arbitral award and to ensure that the award is not rendered incapable of enforcement [citing *Dirk India* 2013 SCC OnLine Bom 4811 and *Hindustan Construction* (2020) 17 SCC 324].

The court found that the award only declared that Zostel was *entitled to seek* specific performance of a term sheet and, thus, bring a suit for specific performance. The tribunal itself did not direct specific performance because the parties had not finally consented to the terms of the agreement.

The court, therefore, declined to grant any relief premised on the argument that the tribunal had directed specific performance. It rejected the argument that the arbitrator could never have intended Zostel to file a fresh suit.

The court also rejected the argument that a new suit would be barred by [Section 8 ACA](#) or [Section 47 CPC](#).

Mayawanti (1990) 3 SCC 1 was distinguished because, in that case, the form of the agreement annexed as a draft to a memorandum of understanding was not open for negotiation and, thus, was a concluded contract.

Read the decision [here](#).

Categories: [Section 9 ACA](#) | [Interim Measures by Court](#) | [Scope of Section 9 ACA](#) | [Conditions for Grant of Interim Measure](#) | [Just and Convenient](#) | [Prima Facie Case](#) | [Balance of Convenience](#)

SEAT AND VENUE OF ARBITRATION

Exclusive jurisdiction clause given primacy over seat clause: Delhi High Court

02 February 2022 | Hunch Circle (P) Ltd v. Futuretimes Technology India (P) Ltd | AP No 1019 of 2021 & connected petitions | C Hari Shankar J | Delhi High Court | 2022 SCC OnLine Del 361

The parties' contract fixed the seat of arbitration at Delhi and the venue India. Another clause conferred exclusive jurisdiction over matters arising out of the agreement "especially for granting interim relief and enforcement of arbitral awards" on courts at the place where the main premises of the petitioner is located (which was Gurgaon).

Interpreting these clauses, the court ruled:

- (a) Ordinarily, the courts at the seat have jurisdiction. But where a court is conferred exclusive jurisdiction regarding arbitral proceedings, the [Section 11](#) petition would have to be filed in the High Court having jurisdiction over that place [citing *Cars24 Services Pvt Ltd* 2020 SCC OnLine Del 1720].
- (b) Here, jurisdiction for [Section 9](#) and [Section 34](#) has been invested in Gurgaon courts. So, [Section 11](#) jurisdiction would necessarily lie with the High Court of Punjab and Haryana, despite the seat at Delhi.
- (c) Else, a piquant situation would arise in which [Section 11](#) jurisdiction would be exercised by the Delhi High Court and [Section 9](#), and [Section 34](#) jurisdiction would be exercised by courts at Gurgaon. This would be discordant with Section 42 ACA.

The reader may note that in *Cars24 Services*, the seat was Delhi, but the appointing authority was a court at Haryana; so, the Delhi High Court enforced the clause and declined jurisdiction. See *Arjun Sethi* 2021 SCC OnLine Del 5343 (highlight [here](#)) and *Orix Leasing* Arb P. 637 of 2019, decided on 23 November 2021.

Read the judgment [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Section 20 ACA](#) | [Place](#) | [Place of Arbitration](#) | [Seat](#) | [Seat of Arbitration](#) | [Venue](#) | [Venue of Arbitration](#) | [Exclusive Jurisdiction](#) | [Choice of Seat](#) | [Designation of Arbitral Seat](#) | [Tests for Determination of Seat](#) | [BGS Soma](#) | [Party Autonomy](#) | [Party Autonomy to Select Appointing Authority](#) | [Pathological Arbitration Clause](#)

SETTING ASIDE ARBITRAL AWARDS

Application of set aside grounds iterated and award partly set aside for jurisdictional error: Supreme Court of India

01 February 2022 | Indian Oil Corporation Ltd v. Shree Ganesh Petroleum | Civil Appeal No 837-838 of 2022 | Indira Banerjee & Abhay S Oka JJ

A 2-judge bench has restated how the set-aside court should act and apply the set-aside grounds.

Following *Associate* (2015) 3 SCC 49 and *Ssangyong* (2019) 15 SCC 131, it has observed:

- (a) There is a distinction between failure to act in terms of a contract and an erroneous interpretation.
- (b) If a dispute is validly and lawfully submitted to arbitration, an error in interpreting a contract is an error within the jurisdiction.
- (c) The Court does not ordinarily interfere with the tribunal's interpretation unless patently unreasonable or perverse.
- (d) Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the court cannot interfere with the arbitral award only because it thinks another possible interpretation would have been a better one.

In the case, it found that the tribunal was appointed under a distributorship agreement, but it made findings on another agreement of lease and had altered the terms of that agreement.

Thus, allowing the appeal and reversing the appellate court's judgment, the award was set aside insofar as it had increased the monthly lease rent and reduced the lease period.

Read the judgment [here](#).

Categories: [Section 34 ACA](#) | [Application for Setting Aside Arbitral Award](#) | [Section 37 ACA](#) | [Appealable Orders](#) | [Section 34 \(2\) \(a\) \(iv\) ACA](#) | [Section 34 \(2A\) ACA](#) | [Arbitrability](#) | [Dispute Beyond Scope of Submission](#) | [Jurisdiction of Arbitral Tribunal](#) | [Scope of Reference](#) | [Patent Illegality](#) | [Reappraisal of Evidence](#) | [Revaluation of Evidence](#) | [Arbitrators Interpretation of Contract](#) | [Merits Based Review](#) | [Review on the Merits of the Dispute](#) | [Plausible View](#) | [Associate Builders](#) | [Ssangyong](#) | [Unconscionable Contract](#)

ARBITRATION APPEALS

The question of applicability of CPC to arbitration cases is pending in the Supreme Court: Kerala High Court

11 February 2022 | Coxswain Projects & Estates (P) Ltd v. NJ Constructions | Arb A No 27 of 2020 | PB Suresh Kumar & CS Sudha JJ | Kerala High Court | 2022 SCC OnLine Ker 856

Is a cross objection maintainable in a proceeding under Section 37 ACA? The Kerala High Court begins its decision with this question but, in answer, notes that the issue is pending before the Supreme Court. So, it relied on the fact that the cross-objection was not timely filed even if it was maintainable.

The court also reversed the set-aside court's findings and upheld the tribunal's findings on liquidated damages against the respondent. However, the post-award interest rate was modified to 6% from 18% granted.

In a 2002 decision, *ITI Ltd v. Siemens* (2002) 5 SCC 510, a 2-judge bench of the Supreme Court had ruled that because the applicability of the Code of Civil Procedure, 1908 is not expressly excluded, it applied to cases arising under the ACA. Accordingly, they concluded that the remedy of revision under Section 115 CPC was available.

In 2016, another 2-judge bench --*MTNL v. Applied Electronics* (2017) 2 SCC 37--disagreed with *ITI* and referred the matter to a larger bench. It was of the view that the application of CPC in arbitration cases was not conceivable, and cross-objections were not maintainable. This 3-judge bench matter is pending (Civil Appeal No. 11584/2016).

Read the decision [here](#).

Categories: [Section 37 ACA](#) | [Appealable Orders](#) | [Section 34 ACA](#) | [Application for Setting Aside Arbitral Award](#) | [Section 34 \(2A\) ACA](#) | [Patent Illegality](#) | [Reappreciation of Evidence](#) | [Revaluation of Evidence](#) | [Arbitrators Interpretation of Contract](#) | [Merits Based Review](#) | [Review on the Merits of the Dispute](#) | [Plausible View](#) | [Associate Builders](#) | [Ssangyong](#) | [Unconscionable Contract](#) | [Section 31 \(7\) ACA](#) | [Section 31 ACA](#) | [Award of Interest](#) | [Form and Contents of Arbitral Award](#) | [Grant of Interest](#) | [Hyder Consulting](#) | [Interest](#) | [Post Award Interest](#) | [Applicability of Code of Civil Procedure](#)