NATIONAL FORUM FOR RESEARCH IN ARBITRATION LAW

This Fortnight In Arbitration

1 October 2021 to 15 October 2021

VOLUME I | ISSUE 15

By the Editorial team

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APPOINTMENT OF ARBITRATOR

Follow the pre-arbitral conciliation before seeking appointment of the arbitrator: Delhi High Court

1 October 2021 | Sanjay Iron and Steel Limited v. Steel Authority of India | Arb. P. 408 of 2021 | Delhi High Court | Suresh Kumar Kait J | 2021 SCC OnLine Del 4566

A clause in an agreement required the parties to explore conciliation as a pre-arbitral step. In an application filed for appointing an arbitrator, the Delhi High Court directed the parties to conciliate before applying for appointment. It said that "the very purpose of keeping a conciliation clause in any Agreement is to shorten the path for settlement of disputes between the parties. Therefore, parties in the present petition are directed to first explore possibility of resolution of disputes through Conciliation in terms spelt out in Clause-10 of the Agreement."

The court also set a timeline for the parties to conclude that process.

Read the judgment here.

Categories: Appointment of Arbitrators | Pre Arbitral Mechanism | Pre Arbitral Procedure | Section 11 ACA | Conciliation

Agreement specifying limitation period for filing Section 11 application less than statute is void: Delhi High Court

6 October 2021 | Sagar Constructions v. Govt. of NCT of Delhi | Arb. P. 856 of 2021| Delhi High Court | Vibhu Bakhru J | 2021 SCC OnLine Del 4648

An application for the appointment of an arbitrator was resisted on the ground that the petitioner did not invoke arbitration within the time specified by the agreement (less than prescribed by law), and the claim was barred by limitation.

Could the period for invoking the arbitration be restricted to less than the Limitation Act, 1963?

The court said that the point was no longer *res integra*. It relied on *Grasim Industries Limited* v. *State of Kerala* (2018) 14 SCC 265, where it has been ruled that providing a restricted period for raising an arbitral dispute would be void under Section 28(b) of the Contract Act, 1872.

The court also referred to a decision by a coordinate bench in *National Highways Authority India* v. *Mecon - Gea Energy Systems India Ltd. JV* (2013) 199 DLT 397.

All contentions including the one on limitation were left open for the tribunal in light of *Vidya Drolia* (2021) 2 SCC 1).

Read the judgment here.

Categories: Appointment of Arbitrators | Limitation | Limitation Under Section 11 ACA | Vidya Drolia

Disputes can be raised at different stages. A counterclaim not taken on record can be raised as claim in separate arbitration because where there is a right there is a remedy. Pre-arbitral step not necessary when it is an empty formality: Delhi High Court

12 October 2021 | Airone Charters Pvt. Ltd. v. Jetsetgo Aviation Services Pvt. Ltd | Arb. P. 245 of 2020 | Delhi High Court | C Hari Shankar J | 2021 SCC OnLine Del 4693

The Delhi High Court has allowed an arbitration to proceed rejecting the respondent's argument that its claims ought to have been much earlier.

Jetsetgo initiated arbitration in April 2018. The tribunal set a schedule in December that year. Airone filed its counterclaim beyond the time allotted and the tribunal in July 2019 said it could not take it on record unless Airone obtained at least six months' extension. Airone applied to the court for extension but withdrew it (in September 2019) with liberty to pursue appropriate remedy available in law." Airone again applied to the tribunal, but this time it "struck off" the counterclaim observing that

Airone had liberty to pursue another remedy.

In May 2020, Airone issued a notice of arbitration and proposed the same tribunal be appointed. Jetsetgo refused. Then, Airone applied to the court for the appointment of an arbitrator. It was sent to the extension-court for containing clarifications. The extension-bench disposed of the application for clarification, stating that its order was crystal clear. However, with a view to put a quietus to the controversy, it clarified that the court had not foreclosed any remedy that Airone may avail.

Now, Airone brought another application for an appointment. Hari Shankar J first addressed the argument that the High Court had in the other proceedings disallowed Airone's initiation of arbitration. He noted that that was not so and cautioned that while referring to judicial orders, parties should ensure that no words not contained in the order are read into it.

Then, examining the merits, he relied on the Latin expression *ubi jus ibi remedium* to say that allowing Jetsetgo's argument impinges on Airone's right to legal redress.

He next examined if the claims were time-barred and found that they were not.

Jetsetgo's main arguments were that:

(a) Because the arbitration clause required "all disputes" to be referred to arbitration, Airone should also have referred its counterclaim at the same time Jetsetgo referred its claims (rather than filing it late before the tribunal).

(b) Airone was estopped from invoking arbitration in absence of any explanation why it did not raise its claim when the tribunal did not take the counterclaim on record or when the extension was not allowed.

Rejecting this, Hari Shanker J distinguished Supreme Court's *Dolphin Drilling* v. *ONGC* (2010) 3 SCC 267. He noted that in *Dolphin*, the agreement required a party to refer all existing disputes in the notice of arbitration, but there was no such condition in this case. All that was required was all disputes should be arbitrated.

He also referred to the principles enunciated by a co-ordinate bench judgment in *Gammon India Ltd.* v. *NHAI*, 2020 SCC OnLine Del 659 but said those should be read with the understanding of the facts of *Dolphin* and would apply where, as in *Dolphin*, invocation of the arbitration at the first instance is required, per contract, to embrace all existing claims.

However, that principle would not apply where two sets of claims being sought to be referred to arbitration are by different parties to the contract.

He also said that in the absence of any inhibiting factor in the ACA or any decision, the request for a reference of the petitioner's claims to arbitration could not be denied.

He also rejected the argument on not following the pre-arbitral mechanism noting, after discussing precedent, that the clause required an attempt at resolving the dispute by mutual discussion. But because the Jetsetgo had questioned Airone's claims even on merits, at every stage, relegating the parties to any mutual discussion would be an empty formality.

Lastly, he also rejected the argument that a composite petition under Section 11 ACA was not maintainable. Instead, relying on a decision of the Bombay High Court, he said that though *Duro Felguera* requires independent arbitrations, the mere fact that a consolidated Section 11 petition was filed is no ground to reject the petition altogether.

However, Airone's prayer to refer the dispute to the same tribunal was denied in view of party autonomy noting that a party cannot insist on, and the court cannot thrust, a pre-existing tribunal unless the other side consents.

[**Ed.** Jetsetgo's argument on delay does not appear to have been specifically examined]

Read the judgment here.

Categories: Appointment of Arbitrators | Pre Arbitral Mechanism | Pre Arbitral Procedure | Section 11 ACA | Conciliation | Notice of Arbitration | Section 21 ACA | Counterclaim | Duro Felguera | Party Autonomy | Composite

Petition | Composite Reference | Choice of Arbitrator | Ubi Jus Ibi Remedium | Empty Formality

The mere mention in the superseding counteroffer of the prior offer letter containing an arbitration clause is not enough: Delhi High Court

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6 October 2021 (corrigendum issued on 22.10.2021) | Airox Technologies (P) Ltd. v. Shantimukand Hospital |Arb. P. 315 of 2020 | Delhi High Court | Sanjeev Narula J | SCC OnLine Del 4770

An offer letter had an arbitration clause. The offer was not accepted but a counteroffer—a purchase order—was issued and accepted. There was a mention of the offer letter in the purchase order. Held, there was no arbitration agreement because the offer letter had remained an offer.

The mention of the offer letter in the purchase order would not imply that the offer letter was incorporated (by reference). The purchase order was at complete variance with the offer letter and superseded it.

Also, the exchange of communications and the response to the notice of arbitration has to be holistically read. They reveal the respondent always refuted the existence of an arbitration agreement.

Read the judgment here.

Categories: Appointment of Arbitrators | Section 11 ACA | Notice of Arbitration | Section 21 ACA | Incorporation | Incorporation by Reference | Incorporation of Arbitration Agreement | Arbitration Agreement | Section 12 ACA | Existence of Arbitration Agreement | Arbitration Agreement | Form of Arbitration Agreement | Formal Validity of Arbitration Agreement

Arbitrability, Validity and Existence of Arbitration Agreements

Appointing court refuses to enforce a pathological arbitration clause that used the expression "arbitration" but did not manifest any intent to arbitrate: Delhi High Court

03 October 2021 | Universal Design Build v. Dealskart Online Services Private Limited and Others | ARB.P. 558 of 2020 | Delhi High Court | Sanjeev Narula J | 2021 SCC OnLine Del 4567

The following clause does not constitute an arbitration agreement:

> Clause 19 "This Agreement and all rights, duties and obligations arising hereunder shall be governed in accordance with the laws of India. Subject to Section 20 sub-section (b) (Arbitration), any dispute, disagreement or proceeding arising under or related to this Agreement shall be subject to the exclusive jurisdiction of the courts at New Delhi, India."

The court reasoned that:

(a) Although the word 'Arbitration' is mentioned, the clause lacks the ingredients to constitute a valid arbitration agreement under Section 7 ACA. The intention to arbitrate must be manifest from the arbitration agreement itself, which is not so in this case.

(b) The word 'arbitration' is preceded with a reference to "Section 20 sub-section (b)". There is no such Section 20 subsection (b) in the ACA. One could postulate that, due to an inadvertent typographical error, the reference is to subsection 2 of Section 20 ACA, which deals with the place of arbitration, or

(c) The reference could also perhaps be to Section 20(b) CPC which deals with court's jurisdiction. If read in that light, clause 19 would make more logical sense as it seeks to confer exclusive jurisdiction on the courts in Delhi.

Even if we were to ignore the phrase "Section 20 sub-section (b)' and assume that 'subject to …(Arbitration)" refers to the entire ACA, it would merely mean that the agreement is governed, controlled, effected by, or subservient to the ACA. Still, that is not an intention to arbitrate.

Further, even in its entirety, the clause confers exclusive jurisdiction to the courts of New Delhi. This is an intent to refer the dispute to court.

Read the judgment here.

Categories: Section 11 ACA| Appointment of Arbitrators | Arbitration Agreement in Writing | Form of Arbitration Agreement| Formal Validity of Arbitration Agreement| Section 7 ACA | Written Arbitration Agreement | Pathological Arbitration Clause

INTERIM RELIEF BY COURT AND TRIBUNAL

An arbitral tribunal cannot grant ex parte relief: Bombay High Court

13 October 2021| Godrej Properties Ltd. v. Goldbricks Infrastructure Pvt. Ltd. | Commercial Arbitration Petition (L) No. 23500 of 2021| GS Kulkarni J | High Court of Bombay | 2021 SCC OnLine Bom 3448

The case concerns a real estate development project. The respondent's entitlement in the revenue was already the subject matter of an application before the tribunal. However, the respondent made another application praying several injunctions (against the sale of inventory, disclosure etc.). The tribunal granted the injunction without conducting a hearing but fixing a date for a hearing.

Setting the order aside, while giving liberty to move the tribunal for a hearing, the Bombay High Court ruled that:

(a) Treating parties with equality and giving parties a full opportunity to present the case are fundamental requirements [citing Sections 18 ACA, 19 & 24 ACA].

(b) The crucial provision, however, is of Section 24. Sub-Section (2) of Section 24, among other things, mandates that the parties 'shall be' given sufficient advance notice of 'any hearing.'

(c) Section 18, 19 and 24 would be required to be read in conjunction, as there is a common thread passing through these provisions concerning the conduct of the arbitral proceedings, i.e., fair treatment at all stages and adequate opportunity incumbent upon the arbitral tribunal to give sufficient notice of any hearing to the parties.

(d) The Indian legislature has not accepted the 2006 Amendment in the UNCITRAL Model Law on International Commercial Arbitration, allowing the tribunal to grant ex parte reliefs.

(e) Even assuming that there was jurisdiction to pass an ex parte ad-interim order (when in there is none), such order was undoubtedly not warranted considering the nature of the Section 17 application as filed.

(f) The requirement of Rule 3 of Order XXXIX CPC, which is notice before granting an injunction, is recognized by sub-section (2) of Section 24 ACA.

(g) However, the proviso, which deals with the power conferred on the court to pass ex parte orders, cannot be applied to arbitral proceedings because of sub-section (2) of Section 24, read with Section 18 ACA.

(h) So, even if the arbitral tribunal has the same power for making orders as that of the court, for the purposes of and in relation to any proceedings before it, it cannot grant reliefs without advance notice of any hearing, equal treatment, and giving a full opportunity to present its case.

Read the judgment here.

Categories: Section 18 ACA | Section 19 ACA | Section 24 ACA | Equal Treatment of Parties | Determination of Rules of Procedure | Hearings and Written Proceedings | Section 17 ACA | Interim Measures Ordered by Arbitral Tribunal | Fair Hearing | Natural Justice | Section 37 ACA | Applicability of Code of Civil Procedure | Duties and Powers of Arbitral Tribunal

TV anchor cannot be prohibited from working with competitor even if she did not serve notice period: Delhi High Court

12 October 2021| ABP Network Private Limited v. Malika Malhotra | OMP (I) (Comm. 292 of 2021| C Hari Shankar J | High Court of Delhi | 2021 SCC OnLine Del 4733

A TV anchor's contract with a news network prohibited her from working with a competing business for six months post-employment. The

agreement could be terminated by either party with ninety days' notice. The anchor joined a competitor channel without serving the notice period. The news network applied for an injunction. An *ad interim* order was granted by Hari Shankar J (she had not appeared even though served), but later the petition was dismissed.

The first question considered was what is a contract determinable in its nature? The question arose because an injunction cannot be granted to prevent the breach of a contract that cannot be specifically enforced [Section 42 of the Specific Relief Act, 1963 ("SRA")]. A contract that is determinable in its nature cannot be specifically enforced.

Analysing precedent, it was ruled that a contract which is determinable, whether by efflux of time or at the option of either of, or both, the parties, and whether preceded by the requirement of issuance of notice or any other pre-termination formality, or not, is, to be regarded as "in its nature determinable," within the meaning of Section 14(d) Specific Relief Act ("SRA").

The second question considered was could an injunction be granted to enforce a negative covenant. This question arose because if a case falls under Section 42, SRA, to enforce performance of a negative covenant, an injunction can be granted, Section 41 SRA notwithstanding.

The court however ruled, following precedent, that availability of the benefit of Section 42 SRA in a contract of employment of personal service, would be subject to the consequence of grant of such benefit not resulting in the employee being consigned to idleness or being forced to work for the employer. Hari Shankar J followed an ad interim order of the court in *Independent News Service* v. *Anuraag Muskan*, 2013 SCC OnLine Del 1270 (though not precedent, to maintain consistency) to say that considering the nature of the work of the respondent, she would be compelled to either work for the petitioner or idleness if the negative covenant were to be enforced. That apart, secondly, such a course would effectively be enforcing a positive covenant also.

Read the judgment here.

Categories: Determinable Contract | Interim Measures by Court | Section 9 ACA | Termination of Contract | Determinable Contract | Specific Performance | Section 14 Specific Relief Act | Section 42 Specific Relief Act | Negative Covenant | Injunction To Perform Negative Covenant | Contracts Not Specifically Enforceable

SEAT

Seat is where the courts were given exclusive jurisdiction; "place of arbitration" was the venue chosen by parties": Andhra Pradesh High Court

8 October 2021 | Kei-Rsos Petrolium & Energy Pvt. Ltd. v. RAK Ceramics (I) Pvt. Ltd | Arbitration Application No. 2 of 2019 | Arup Kumar Goswami CJ | High Court of Andhra Pradesh at Amaravati | 2021 SCC OnLine AP 3114

A clause of the agreement (executed in 2015, post-bifurcation of the then State of Andhra Pradesh) was tilted "governing law and dispute resolution."

The first sub-clause stated: "The Courts of the State of Andhra Pradesh alone shall have sole and exclusive jurisdiction with respect to any proceedings arising out of or in relation to this Agreement." The second sub-clause provided for a resolution of disputes by arbitration. The third sub-clause stated: "The arbitration proceedings shall be conducted in English and the place of arbitration shall be Hyderabad or any place mutually agreed by parties in Andhra Pradesh."

In an application for appointment, the question of territorial jurisdiction arose, and hence the question what was the seat of arbitration? If the seat of the arbitration was Hyderabad, the High Court of Telangana had jurisdiction, and not the High Court of the State of Andhra Pradesh where the application was filed.

The court allowed the application and ruled that the seat of arbitration was Andhra Pradesh.

The court's reasons were that:

(a) The intention of the parties is clear that the Courts of State of Andhra Pradesh shall have sole and exclusive jurisdiction.

(b) The distinction between "seat of arbitration" and "venue of arbitration" assumes utmost importance if there is any contrary indicia. "Venue" in all circumstances is not synonymous with the "seat" of arbitration. Here, the expression used is "place of arbitration."

(c) Seat is fixed but the place of arbitration can be at the convenience of the parties and in such circumstances the place is merely a "venue" for holding arbitration hearings/meetings.

(d) In this case, place of arbitration is not confined to Hyderabad alone. It could be Hyderabad "or any place mutually agreed by parties in Andhra Pradesh."

(e) The clauses do not suggest parties intended to anchor arbitral proceedings at Hyderabad.

Read the judgment here.

Categories: BGS Soma | Choice of Seat | Designation of Arbitral Seat | Determination of Seat | Exclusive Jurisdiction | Seat | Seat of Arbitration | Tests for Determination of Seat | Venue | Venue of Arbitration | Place | Place of Arbitration | Section 11 ACA | Appointment of Arbitrators

Pending cheque bouncing case not bar for appointing arbitrator: Bombay High Court

7 October 2021 | Rishi Kawatra v. Rishi Sekhri | Appln. for Appointment of Arbitrator No. 8 of 2021 | MS Sonak J | High Court of Bombay at Goa | 2021 SCC OnLine Bom 3342

The Goa bench of the Bombay High Court appointed an arbitrator in a case where a case under Section 138 of the Negotiable Instruments Act, 1881 was pending. The court said that the scope of criminal proceedings and the civil proceedings, is entirely different. The proceedings under Section 138 of the Negotiable Instruments Act cannot, strictly speaking, be regarded as proceedings for recovery of money simpliciter. In any case, having regard to the provisions of the said Act and the law on the subject, this cannot be a ground to resist from appointment of an arbitrator. Once, the arbitrator is appointed, no

doubt, the respondent will be at liberty to raise all permissible defences, including the defence that is now raised before me."

Advocate present in court was appointed arbitrator.

Read the judgment here.

Categories: Appointment of Arbitrators | Existence of Arbitration Agreement | Section 11 ACA | Validity | Vidya Drolia | Arbitrability | Section 11 (6) ACA | Section 16 ACA | Existence of Arbitration Agreement | Competence Competence | Competence of Arbitral Tribunal to Rule on its Jurisdiction | Jurisdiction of Arbitral Tribunal | Kompetenz Kompetenz

ENFORCMENT (DOMESTIC)

There should be mechanism for information of all execution petitions on a common platform: Delhi High Court

4 October 2021 (*corrigendum issued on 21 October 2021*) | Gati Kausar India Ltd. v. BK Structural Contracts Private Ltd. | Ex. FA 14 of 2021 and CM Appl. 25078 of 2021 | Prathiba M Singh | Delhi High Court | 2021 SCC OnLine Del 4780

Disposing an execution first appeal, the Delhi High Court has requested the concerned Rules committee of the Delhi High Court to consider whether any practice directions need to be issued in respect of the entertaining of execution petitions. The court was also of the view that, since arbitral awards may be executable in courts across the country, the e-Committee, Supreme Court of India should also examine if there ought to be any mechanism for information relating to arbitral awards to be uploaded on an online platform such as National Judicial Data Grid.

In the case, an execution petition was filed even prior to the expiry under Section 34 ACA of the time limit of three months from the date of the (interim) award. The executing court was unaware and not informed of the proceedings before the Commercial Court, and vice versa. The judgment debtor delayed serving the decree holder with the application under Section 34 of the Act. The executing court was proceeding *ex-parte* on the ground that the interim award was not challenged.

Later, the decretal amount was paid in view of the warrants of attachment, subject to the order of the set-aside court. The executing court disposed the petition noting the submission that the payment was under protest and the set-side petition was pending. Subsequently, a final award awarding more sum was passed. The first appeal was also disposed on these terms.

Read the judgment here.

Categories: Appealable Orders | Commercial Courts Act | Enforcement | Execution of Arbitral Award | Section 37 ACA | Section 34 ACA | Application For Setting Aside Arbitral Award

PARTIES TO ARBITRATION

When non signatory cannot be roped into arbitration: Madras High Court

12 October 2021| S Sivagurunathan v. R Mennan and another| CMA No. 2049 of 2021| Abdul Quddhose J | High Court of Madras | 2021 SCC OnLine Mad 5501

Upholding the arbitral tribunal's decision, the Madras High Court has summarized its idea of the position in law on non-signatory being made parties to arbitration.

In a dispute among the partners, the non-signatory was also impleaded. Allowing his application under Section 16 ACA, the tribunal terminated the arbitration proceedings.

The High Court ruled that none of the circumstances in which a non-signatory can be roped into an arbitration applied.

Read the judgment here.

Categories: Appointment of Arbitrators | Arbitration Agreement | Binding Non Signatory to Arbitration | Chloro Controls | Construction of Arbitration Agreement | Incorporation | Incorporation by Reference | Incorporation of Arbitration Agreement | Interpretation of Arbitration Agreement | Joinder of Non Signatories | Necessary Party | Proper Party | Section 11 ACA | Section 7 ACA

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