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By the Editorial team

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APPOINTMENT OF ARBITRATORS

Applying the Perkins discourse, the respondent's nominee as well as the chairman appointed by the court: Madras High Court

18 November 2021 | SRP Clean Enviro Engineers Pvt. Ltd. v. Commissioner, Nagercoil City Municipal Corporation | Arbitration OP (Comm. Div.) No. 106 of 2021 | Madras High Court | Senthilkumar Ramamoorthy J | 2021 SCC OnLine Mad 5864

In a concise order, Senthilkumar Ramamoorthy J of the Madras High Court has, though without referring to it, applied *Perkins* and the discourse generated post-*Perkins*, to appoint the respondent's nominee as well as the presiding member of the 3-member tribunal. The reader may recall that the Supreme Court's *CORE* 2019 SCC OnLine SC 1635 misses taking note of the clause that gave the respondent the right also to appoint the presiding arbitrator. See our Update on *CORE* here.

A Concession Agreement provided that the arbitration "shall be by a panel of three arbitrators, one to be appointed by each party and the third to be appointed by the Commissioner of Municipal Corporation [the respondent].

The petitioner nominated its arbitrator and had applied to the court to constitute the tribunal.

Several arguments were made resisting the referral (unlawful extension of contract, arbitrability, pendency of criminal proceedings etc.). Ramamoorthy J noted that "under the revised regime in relation to appointment of arbitrators, these are not valid grounds to reject a petition for appointment of an arbitrator."

He noted that "although the arbitration clause provides for the appointment of a presiding arbitrator by the Commissioner of Municipal Administration, such appointment by an interested party is not in consonance with the Arbitration and Conciliation Act, 1996."

Read the judgment here.

Categories: Section 11 ACA| Appointment of Arbitrators| Bias | CORE | Fifth Schedule | Grounds for Challenge | Impartiality of Arbitrator | Independence and Impartiality of Arbitrator | Independence of Arbitrator | Neutrality of Arbitrator | Perkins | Right to Appoint Arbitrator | Right to Nominate Arbitrator | Section 12 (5) ACA | Section 12 ACA| Seventh Schedule| Sole Arbitrator | TRF | Voestalpine | Perkins | CORE | Unilateral Appointment of Arbitrators

Arbitrator to be appointed can decide issues of res judicata, joinder of non-signatory: Madras High Court

23 November 2021| KS Srinivasan v. Land Mark Housing Projects (India) Pvt. Ltd.| Arbitration OP (Com. Div.) No. 155 of 2021 | Senthilkumar Ramamoorthy J | Madras High Court | 2021 SCC OnLine Mad 5943

In an earlier IBC proceeding, the court concluded that the petitioner was not a financial creditor. He then invoked the arbitration clause and applied for the appointment of an arbitrator. The court allowed the application leaving all questions (including *res judicata*, joinder of non-signatory) for the tribunal.

Read the judgment here.

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

ARBITRABILITY, VALIDITY AND EXISTENCE OF ARBITRATION AGREEMENTS

The existence of an arbitration clause does not oust the jurisdiction of the NCLT to adjudicate disputes relating to the insolvency of the Corporate Debtor. But here, the power was exercised wrongly because the dispute had no relation to the insolvency: Supreme Court of India

23 November 2021 | Tata Consultancy Services Limited v. Vishal Ghisulal Jain | Civil Appeal No. 3045 of 2020 | Supreme Court of India | DY Chandrachud & AS Bopanna JJ | 2021 SCC OnLine SC 1113

The Corporate Insolvency Resolution Process was initiated against SK Wheels Private Limited ("Corporate debtor") under IBC, 2016. The Corporate Debtor had a Facilities Agreement with the appellant Tata under which the former had to provide premises and facilities to the appellant for conducting examinations for educational institutions. This agreement had an arbitration clause.

Alleging several breaches, Tata terminated the agreement. The Corporate Debtor applied under Section 60(5)(c) IBC for quashing the notice. The NCLT stayed the termination by an interim order, and the appellate tribunal upheld that order.

The Supreme Court had several questions before it on the powers of the NCLT under Section 60 IBC and the effect of Section 238 IBC—"Provisions of this Code to override other laws." It set aside the impugned orders as lacking jurisdiction.

One of the appellant's arguments was that the arbitration agreement should be enforced. Related to this point, the court decided:

(a) Section 238 IBC provides that the IBC override any other law for the time being in force or any instrument having effect by virtue of any such law.

(b) In *Indus Biotech* (2021) 6 SCC 436, a 3-judge bench of the Supreme Court had concluded--in the context of Section 8 ACA filed in proceedings under Section 7 IBC--that if there is default and the debt is payable, the bogey of arbitration to delay the process would not arise.

(c) In *Gujarat Urja* (2021) 7 SCC 209 too, though a power purchase agreement that had an arbitration clause was involved, it was decided that the NCLT had jurisdiction over those disputes which arose in the context of insolvency proceedings.

(d) So, given Section 238 IBC and the decisions, the existence of an arbitration clause does not oust the jurisdiction of the NCLT to exercise its residuary powers under Section 60(5)(c) IBC. NCLT has very wide jurisdiction to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. The NCLT and NCLAT are vested with the responsibility of preserving the Corporate Debtor's survival and can intervene if an action by a third party can cut the legs out from under the CIRP.

(e) But the NCLT cannot exercise its jurisdiction over matters *dehor*s the insolvency proceedings since such matters would fall outside the realm of IBC.

(f) But here, there is nothing to indicate that the termination was motivated by the insolvency of the Corporate Debtor. The appellant had time and again informed the Corporate Debtor that its services were deficient, and it was falling foul of its contractual obligations. The termination was not a smokescreen because of the insolvency.

(g) So, the NCLT did not have any residuary jurisdiction to entertain the contractual dispute.

Read the judgment here.

Categories: Arbitrability | Arbitrability of Insolvency Disputes | Power to Refer Parties to

Arbitration | Test of Arbitrability | Validity | Vidya Drolia | Insolvency | Moratorium | Section 14 IBC | Arbitration and Insolvency | Enforcement of Arbitration Agreement | Tata Consultancy

INTERIM RELIEF BY COURT AND TRIBUNAL

Law on injunction relating to bank guarantees surveyed by Narula J and relief refused: Delhi High Court

16 November 2021 | TRF Ltd. v. Indure Private Limited and connected cases | OMP (I) (Comm.) 371/2021 | Sanjeev Narula J | Delhi High Court | 2021 SCC OnLine Del 5023

Noting that the law against injuncting invocation/encashment of an unconditional bank guarantee is settled and there could be no interference unless there is egregious fraud, or special equities are pleaded and established, the court dismissed an application under Section 9 ACA.

It had found from its terms that the guarantees were unconditional and, therefore, had to be paid by the issuing bank without demur or protest.

As regards the plea of fraud, the court found that the petitioner did not discharge the burden of proof.

An argument that because proceedings under IBC are pending, there may not be a chance to recover the amount later was also rejected. Narula J said that the point goes to another exception to the invocation of the guarantee, irretrievable harm, but it was speculative.

Lastly, the point that the purpose for which the bank guarantee was furnished stood fulfilled was also rejected because *Gangotri Enterprises* v. *Union of India* (2016) 11 SCC 720 that had been cited for the point was stated to be *per incuriam* in *State of Gujarat* v. *Amber Builders* (2020) 2 SCC 540.

Read the judgment here.

Categories: Section 9 ACA | Interim Measures by Court | Bank Guarantee | Encashment of Bank Guarantees | Injunction against Bank Guarantee | Irretrievable Injury | Section 9 ACA | Special Equities | Egregious Fraud | Unconditional Bank Guarantee | Insolvency

Law on injunction relating to bank guarantees surveyed by Bakhru J, special equities explained: Delhi High Court

16 November 2021 | Zee Entertainment Enterprises Ltd. v. Railtel Corporation of India Ltd. | OMP (I) (Comm.) 366 of 2021 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 5004

An injunction was prayed in a Section 9 ACA application against the invocation of bank guarantee because of the force majeure event due to the outbreak of Covid-19.

There was no dispute the guarantee was unconditional.

Bakhru J noted the law on the point in detail. Some of the key observations are:

(a) Undeniably a bank guarantee cannot be interdicted unless the court is persuaded to accept that not granting an injunction would cause irretrievable injustice. However, as explained by the Supreme Court in *Svenska Handelsbanken* v. *M/s Indian Charge Chrome* (1994) 1 SCC 502, mere irretrievable injustice without a *prima facie* case of established fraud would be of no consequence in restraining the encashment of the bank guarantees.

(b) Special equities do not create a separate exception for granting an injunction of a bank guarantee. If there exists any third exception of special equity, it must be akin to irretrievable injustice or putting a party in an irretrievable situation [citing *Teestavalley* 2014 SCC OnLine Del 4741].

(c) In a sense, special equities are a special circumstance that would justify granting the exceptional relief for interdicting a bank guarantee as not granting the said relief would cause irretrievable harm or injury to the party who has otherwise established a compelling case.

(d) Commercial disputes arising in relation to the transactions do not present any special equities.

(e) *Hindustan Construction Co. Ltd.* v. *National Hydro Electric Power Corporation Ltd.* [Delhi HC DB] must be read in context and cannot be read to say the scope of what constitutes special equities has been expanded.

(f) A dispute between the parties relating to the performance of obligations under the contract does not give rise to any special equities warranting interdiction of a bank guarantee.

As to *force majeure*, a clause in the contract was noted that said that that would not excuse the performance of the payment obligations, and an undertaking to pay had also been given after the outbreak.

Read the judgment here.

Categories: Section 9 ACA | Interim Measures by Court | Bank Guarantee | Encashment of Bank Guarantees | Injunction against Bank Guarantee | Irretrievable Injury | | Egregious Fraud | Unconditional Bank Guarantee | Force Majeure

That no 'authoritative' decision discusses the impact on commercial contracts of amendments to Specific Relief Act is no ground for interfering with arbitral tribunal's order: Delhi High Court

18 November 2021 | National Highways Authority of India v. Panipat Jalandhar NH-1 Tollway Pvt. Ltd. and connected matter | ARB. A. (Comm.) 66 of 2021| Sanjeev Narula J | Delhi High Court | 2021 SCC OnLine Del 5066

An appeal against the tribunal's order under Section 17 ACA refusing to stay the termination of a contract has been dismissed by the Delhi High Court.

Sanjeev Narula J rejected the argument that the appeal should be admitted because there is no authoritative decision so far on the impact of the 2018 Amendments to the Specific Relief Act, 1963 vis-a-vis commercial contracts.

Among others, in the tribunal's view, the matter related to a commercial contract is determinable in its nature and could not be specifically enforced. PEL argued the effect of the impugned order was that a termination notice could never be stayed under Section 17 ACA, and in a commercial contract, specific performance could never be granted even post-2018 amendments to SRA.

Narula J found no reason to interfere because it was only a *prima facie* view of the tribunal, and if the termination was found illegal, the petitioner could always be compensated.

Read the judgment here.

Categories: Section 17 ACA | Interim Measures Ordered by Arbitral Tribunal | Section 37 ACA | Appealable Orders | Scope of Section 37 (2) (b) ACA | Section 37 (2) (a) ACA | Determinable Contract | Termination | Termination of Contract | Determinable Contract | Specific Performance | Section 14 Specific Relief Act | Section 42 Specific Relief Act | Contracts Not Specifically Enforceable | 2018 Amendments to Specific Relief Act | Section 37 (2) (b) ACA | Balance of Convenience | Interim Measures by Court | Irreparable Loss | Prima Facie Case

Section 9 is not a tool to recover money: Delhi High Court

18 November 2021 | Pinaka Studios Pvt. Ltd. v. MX Media and Entertainment Pte. Ltd. | OMP (I) (Comm.) 377 of 2021| C Hari Shankar J | Delhi High Court | 2021 SCC OnLine Del 5033

The respondent developed, produced and exploited a web series known as "Raktanchal." It commissioned the services of the petitioner for Season 2. Parties executed a production agreement.

Later, the respondent terminated the agreement alleging several breaches. The petitioner applied to restrain the respondent from using the content of 550 minutes of Season 2 handed up to the respondent.

Dismissing the petition, C Hari Shankar J ruled that:

(a) Section 9 ACA cannot be used as a tool to compel the opposite party to pay money to the claimant.

(b) In a case where the claim of the claimant is monetary in nature, ordinarily, the highest that can be sought from a Court under Section 9 is securing of the monetary claim under Section 9(1)(ii)(b) ACA (for which there is no prayer). Any direction for securing the amount can be passed only if the case, in principle, fulfils the requirements of Order XXXVIII Rule 5 Civil Procedure Code, 1908.

Read the judgment here.

Categories: Interim Measures by Court | Interim Measures Ordered by Arbitral Tribunal | Scope of Section 9 ACA | Section 17 ACA | Section 9 ACA | Order XXXVIII CPC | Section 37 ACA | Securing the Amount in Dispute in Arbitration

EXTENT OF JUDICIAL INTERVENTION

Certiorari can be issued in a petition under Article 227 and not Article 226: Allahabad High Court

18 November 2021 | Magma Leasing Ltd. v. Badri Vishal | Writ (C) No. 16753 of 2010 | Yogendra Kumar Srivastava J | Allahabad High Court | 2021 SCC OnLine All 806

The Allahabad High Court has applied the law that a writ of certiorari against an order of the civil court does not lie in a petition under Article 226 of the Constitution. Thus, it dismissed a challenge against an order made in enforcement proceedings under Section 36 ACA. Earlier, the petitioner's enforcement petition was dismissed due to non-appearance. The application for restoration was also rejected as time-barred. It then filed a writ petition under Article 226.

The law applied in the case was laid in the 9-judge bench decision in *Naresh Shridhar Mirajkar* v. *State of Maharashtra* (1966) 3 SCR 744 followed in *Radhey Shyam* v. *Chhabi Nath* (2015) 5 SCC 423. See more discussion here.

The court, however, noted that a petition under Article 227 would lie. The reader would note that, though the provisions quite differ in their scope and application, it is a practice in several High Courts to style a writ petition under both Articles 226 and 227.

Read the judgment here.

Categories: Section 36 ACA | Enforcement | Article 226 Constitution of India | Article 227 Constitution of India | Extent of Judicial Intervention| Judicial Review | Patent Lack of Inherent Jurisdiction | Power of Superintendence Over All Courts by the High Court | Section 5 ACA | Self Contained Code | Special Act v General Act | Certiorari | Mirajkar | Bhaven Construction |

SETTING ASIDE ARBITRAL AWARD

Reminders do not extend limitation period: Delhi High Court

16 November 2021 | Renewable Energy Systems Limited v. Bharat Sanchar Nigam Limited | OMP (Comm.) 524 of 2019 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 4992

The High Court has upheld an award that had rejected the claims are limitation-barred.

The court rejected the argument that the cause of action was a continuing one. It reasoned that "the fact that a debt has remained outstanding, does not extend the period of limitation."

Also, mere reminders did not extend the period either [citing *Geo Miller* 2019 SCC OnLine SC 1137].

Read the judgment here.

Categories: Section 37 ACA | Appealable Orders | Section 34 ACA | Accrual of Right to Apply | Limitation | Limitation Under Section 34 ACA

Principle that set-aside court cannot interfere with a finding of fact applied to issues of waiver and abandonment: Kerala High Court

17 November 2021 | CPG Consultants India Pvt. Ltd. v. MFAR Realtors Pvt. Ltd. | Arb. A No. 69 of 2017 | PB Suresh Kumar and CS Sudha JJ | Kerala High Court | 2021 SCC OnLine Ker 4285

The High Court noted that, though the expression 'waiver' was not used in the award, the tribunal had found that there was waiver and conscious abandonment of a particular claim (of "additional compensation", i.e., liquidated damages).

The court asked: the findings may or may not be correct on facts, but the question is whether the said findings could be corrected in a proceeding under Section 34 ACA? It answered that the question of waiver is a pure and simple question of fact to be rendered on an appraisal of the evidence on record and a finding to that effect, even if it is rendered on an erroneous application of the law, cannot be corrected under Section 34 ACA.

ONGC Ltd. v. *Saw Pipes Ltd*., (2003) 5 SCC 705 was cited to argue that the arbitrator cannot decide beyond the contract terms.

The court said that there could not be any doubt to that proposition, especially in the light of Section 28 (3) ACA, but here the tribunal's finding was that there was a conscious abandonment of a term.

Read the judgment here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | Public Policy of India | Fundamental Policy of Indian Law | Patent Illegality | Arbitrators Interpretation of Contract | Merits Based Review | Public Policy | Reappreciation of Evidence | Revaluation of Evidence | Review on the Merits of the Dispute | Waiver | Abandonment | Section 28 ACA | Rules Applicable to Substance of Dispute

Setting aside upheld where arbitrator acted in unnecessary haste and hurry. Both speedy disposal and reasonable opportunity are essential: Supreme Court of India

18 November 2021 | Narinder Singh and Sons v. Union of India | Civil Appeal No. 6734 of 2021 | Supreme Court of India | MR Shah and Sanjiv Khanna JJ | 2021 SCC OnLine SC 1082

The Supreme Court has applied Section 34(2)(a)(iii) ACA and Section 34(2)(b)(ii) ACA to uphold the appellate court's reversal of the award. It agreed with the appellate court that the respondent Railways was unable to present its case, and the arbitrator acted in "unnecessary haste and hurry."

These were the observations of Sanjiv Khanna J authoring for the 2-judge bench:

(a) Under Section 19 ACA, the tribunal is bound by the Civil Procedure Code, 1908 or the Indian Evidence Act, 1872. In the absence of any agreement between the parties as to the procedure,

it may conduct the proceedings in the manner it considers appropriate.

(b) But Section 18 ACA mandates that both parties shall be treated with equality, and each party shall be given a full opportunity to present his case.

(c) Sections 24 and 25 ACA and the newly enacted Section 29A ACA (though not applicable) emphasize quick and prompt adjudications.

(d) Both speedy disposal and reasonable opportunity are essential for an even-handed and correct decision. Neither should be sacrificed nor inflated to prolong or trample a just and fair adjudication.

(e) A pragmatic and common-sense approach would invariably check any discord between the desire for expeditious disposal and adequacy of opportunity to establish one's case.

The facts were that the claim and defence were exchanged quickly. The appellant's witness was examined the same day his evidence was filed. Railways' request for deferral of his cross-examination was refused. Railways were directed to file the affidavit and produce its witness for cross-examination on the next hearing date. When Railways requested additional time to file an affidavit, an order was made subject to the payment of costs. Sine costs were not paid, the affidavit of evidence was not taken on record. Then the matter was posted for arguments, and an *ex parte* award was made.

Parties agreed that the court might appoint the arbitrator, which it did and directed the proceedings to begin from the stage of respondent cross-examining the claimant's witness.

Read the judgment here.

Categories: Section 34 ACA | Section 34 (2) (a) (iii) ACA | Section 19 ACA | Application for Setting Aside Arbitral Award | Inability to Present Case | Determination of Rules of Procedure | Flexibility of Procedure | Section 18 ACA | Equal Treatment of Parties | Public Policy of India | Section 34(2)(b) (ii) ACA | Applicability of Code of Civil Procedure | Applicability of Evidence Act | Speedy Disposal

Tribunal cannot modify award in the garb of correction: Supreme Court of India

22 November 2021 | Gyan Prakash Arya v. Titan Industries Limited | Civil Appeal No. 6876 of 2021 | MR Shah and BV Nagarathna JJ | Supreme Court of India | 2021 SCC OnLine SC 1100

The Supreme Court has set aside the "corrections" made to an award and restored the original award ruling that what was done amounted to a modification of the award, which was beyond the scope of Section 33 ACA.

The arbitrator had allowed Gyan Arora's claim of recovery of gold and directed Titan to return to him 3648.80 grams of pure gold along with interest. The value of gold was calculated at the rate Gyan had sought, i.e., Rs. 740 per gram.

Gyan's alternative prayer for money was also awarded with interest, i.e., INR 27,00,112 [3648.80 x 740] with interest.

Later, Gyan applied under Section 33 ACA to correct an "arithmetical" error in the statement of claim, and thus the award, by substituting 740 per gram to 20,747 per 10 gms. (i.e., 2074.7 per gm).

The application was allowed. Titan's set aside application was dismissed, and so was its appeal.

The Supreme Court set aside the modification ruling that this was not a case of arithmetical/clerical error and the modification was outside Section 33 ACA.

Read the judgment here.

Categories: Section 33 ACA | Section 34 ACA | Correction and Interpretation of Award | Additional Award | Form and Contents of Arbitral Award | Application for Setting Aside Arbitral Award | Modification of Arbitral Award | Recourse Against Arbitral Award

Unless expressly authorized, a tribunal cannot decide ex aequo et bono or as amiable compositeur. Award set aside because there was no adjudication on the principal issue and parties were directed to equally bear the responsibility: Delhi High Court

22 November 2021 | DMRC v. Kone Elevators India (P) Ltd. | OMP (Comm.) 227 of 2021 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 5048

The principal issue in the arbitration was whether Kone had erred in not claiming the Input Tax Credit in respect of the excise duty paid for the elevators it had supplied to DMRC.

So, the tribunal was required to answer if Kone was entitled to claim Input Tax Credit and, if so, whether DMRC was obliged to reimburse the GST, notwithstanding that Kone had not availed of such benefits.

The tribunal found both the parties wanting for not engaging in joint discussions to explore the possibility of availing Input Tax Credit. Accordingly, it directed that both the parties should equally bear the amount that may have been possibly available.

Bakhru J set aside the award because it did not address the dispute. He also reasoned that given Section 28(2) ACA, the tribunal could not decide *ex aequo et bono* (according to equity and conscience) or as *amiable compositeur* (an unbiased third party not bound to apply strict rules of law and who may decide a dispute according to justice and fairness) unless expressly authorized by the parties.

Read the judgment here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | Section 28 ACA | Rules Applicable to Substance of Dispute | Section 28 (2) ACA | Amiable Compositeur | Ex Aequo Et Bono

ARBITRATION APPEALS

Cancellation of work order stayed because it was passed in breach of natural justice: Uttarakhand High Court

23 November 2021 | Bharti Airtel Services Limited v. Directorate of Treasuries | Appeal From Order No. 233 of 2021 | Raghvendra Singh Chauhan CJ and Narayan Singh Dhanik J | Uttrakhand High Court | 2021 SCC OnLine Utt 1318

In an appeal from an order dismissing an application under Section 9 ACA, a 2-judge bench of the Uttarakhand High Court has applied the principle of breach of natural justice to stay the operation of cancellation of a work order.

Airtel was declared the lowest bidder in a tender issued by the respondent, and a work order was issued to it. However, on Reliance's complaint, the work order was cancelled without being given an opportunity of hearing.

The commercial court dismissed an application filed by Airtel under Section 9 ACA (reasons not stated in HC's order).

In appeal, the High Court stayed the cancellation, observing that:

(a) It is, indeed, a settled principle of law that no adverse order can be passed against a party without giving that party an opportunity of hearing.

(b) Thus, *prima facie*, the cancellation order is patently illegal.

(c) Therefore, the appellant has a strong *prima facie* case in its favour since the work order was issued to the appellant, the balance of convenience also lies in favour of the appellant. In case the work order was to be cancelled, and that too without giving the opportunity of hearing, an irreparable loss will be caused to the appellant.

Read the judgment here.

Categories: Section 17 ACA | Interim Measures Ordered by Arbitral Tribunal | Section 37 ACA | Appealable Orders | Scope of Section 37 (2) (b) ACA | Section 37 (2) (a) ACA | Termination | Termination of Contract | Balance of Convenience | Interim Measures by Court | Irreparable Loss | Prima Facie Case | Natural Justice

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