NATIONAL FORUM FOR RESEARCH IN ARBITRATION LAW

This Fortnight In Arbitration

16 October 2021 to 31 October 2021

VOLUME I | ISSUE 16

By the Editorial team

TABLE OF CONTENTS

APPOINTMENT AND SUBSTITUTION OF ARBITRATOR

Participating in arbitral proceedings does not amount to waiving objection about arbitrator's de jure ineligibility: Delhi High Court

21 October 2021| Delhi Buildtech Pvt. Ltd. v. Satya Developers Pvt. Ltd | OMP (T) (Comm.) 83 of 2021 and IA No. 10800 of 2021 | Vibhu Bakhru J| Delhi High Court | 2021 SCC OnLine Del 4785

Applying the *Perkins* rule to substitute the arbitrator, the Delhi High Court has reiterated that participation in the arbitral proceedings is not an "express agreement in writing" within the meaning of Section 12 (5) ACA. Following *Bharat Broadband Network Limited* v. *United Telecoms Limited* (2019) 5 SCC 755, Bakhru J ruled that in view of the unambiguous language of the proviso, a waiver under Section 12(5) ACA could not be inferred by the conduct of the parties. It must necessarily be by an express agreement in writing. He also said, it is well settled that where a statute provides a particular manner of doing a particular act, it must be done in that manner and no other.

The argument that the petitioner did not allege bias was also held "unmerited" as the question was of ineligibility attracted by the operation of law.

Read the judgment here.

Categories: Appointment of Arbitrators | Bharat Broadband | De jure Ineligibility | Express Agreement in Writing |Failure or Impossibility to Act| Grounds for Challenge | Ineligibility of Arbitrator | Section 11 ACA | Section 12 (5) ACA | Section 12 ACA | Section 13 ACA | Section 14 ACA | Section 15 ACA | Termination of Mandate and Substitution of Arbitrator | Seventh Schedule | Unilateral Appointment of Arbitrator | Waiver

The arbitrator would decide if the dispute arose from the MOU or the subsequent settlement agreement: Delhi High Court

21 October 2021 | Pooja Infotech Pvt. Ltd. and others v. Prabhuprem Infotech Pvt. Ltd. |Arb. P. 573 of 2020 | Sanjeev Narula J | Delhi High Court | 2021 SCC OnLine Del 4749

There was a memorandum of understanding for transfer of shares that did not contain an arbitration clause. Some disputes arose later, and the parties executed a settlement agreement. Disputes arose again and an application was made for appointment of an arbitrator. It was resisted on two grounds, first, the claim had arisen under the MOU and not the settlement agreement, and two, the claim was hit by limitation. Both were considered matters for the tribunal. On limitation, the court found that it was not the exceptional category of cases set out in the *Bharat Sanchar Nigam Ltd.* v. *Nortel Networks India Pvt. Ltd*., (2021) 5 SCC 738.

[**Ed**. It appears that the court erred in not making the distinction between the petition for appointment being barred by limitation, versus the time-barred claim itself].

Read the judgment here.

Categories: Section 11 ACA | Appointment of Arbitrators | Competence Competence | Competence of Arbitral Tribunal to Rule on its Jurisdiction | Existence of Arbitration Agreement | Jurisdiction of Arbitral Tribunal | Kompetenz Kompetenz | Limitation | Limitation and Jurisdictional Question | Section 16 ACA | Existence of Arbitration Agreement | Vidya Drolia | Nortel Networks

On demise of arbitrator to whom full fees had been paid, another appointed for 40% fees: Delhi High Court

25 October 2021| Centre for Development of Telematics v. Xalted Information Systems Pvt. Ltd. | OMP (T) (COMM.) 103 of 2021 | C Hari Shankar J | Delhi High Court | 2021 SCC OnLine Del 4814

Since the previous arbitrator to whom all fees was paid had passed away, following the example of another coordinate bench, the Delhi High Court appointed another arbitrator (a former judge of the court) to continue and complete the arbitral proceedings between the parties on 40% fees.

Read the judgment here.

Categories: Arbitral Fees | Costs | Deposits | Fees | Fourth Schedule | Section 31 (8) ACA | Section 38 (1) ACA | Section 38 ACA

SAROD has a broad based panel. So, following the contract, arbitrator should be appointed from its panel: Delhi High Court

28 October 2021| CG Tollway Ltd. v. NHAI and another| Arb. P. 888 of 2021| Suresh Kumar Kait J | Delhi High Court | SCC OnLine Del 4838

The agreement provided that the dispute shall be finally referred to Society for Affordable Resolution of Disputes (SAROD), a Society registered under Societies Registration Act, 1860. Under the SAROD Rules, each party is to select one arbitrator who would jointly select the third. In various set of other legal proceedings, the parties were directed to take recourse to arbitration.

An application was moved for appointment of a sole arbitrator by the court. It was dismissed ruling that:

(a) The SAROD Rules stipulate that the arbitrator appointed under the rules shall be a person on the panel of SAROD and the manner for appointment of Presiding Arbitrator is also prescribed.

(b) There are total 89 arbitrators on the panel of SAROD, which includes bureaucrats, Chief Engineers, Secretaries to Government of India hailing from different educational background and also former Judges of the High Court and the Supreme Court, and their trustworthiness and integrity cannot in any way be doubted.

The court also referred to *CORE* 2019 SCC OnLine SC 1635 and said that though it has been referred to a larger bench, it remains the law.

Read the judgment here.

Categories: Appointment of Arbitrators | Broad Based Panel | Independence and Impartiality of Arbitrator | Section 11 ACA | CORE | SAROD Rules | Bharat Broadband | TRF | Voestalpine | Perkins

DMRC's panel is valid, so parties should follow the contract and appointment arbitrators from the panel: Delhi High Court

28 October 2021| BCC Developers and Promoters Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd |Arb. P. 813 of 2021| Suresh Kumar Kait J |Delhi High Court | 2021 SCC OnLine Del 4837

In an application for appointment of a sole arbitrator, the petitioner suggested that the respondent DMRC's power to provide the panel of arbitrators "stands disqualified" under Section 12 ACA.

Rejecting the argument, the court relied on *CORE* 2019 SCC OnLine SC 1635 and observed that in that case the court "rejected the decision of High Court appointing independent arbitrator, without resorting to the procedure for appointment of arbitrators as prescribed under the [agreement]." It ruled that the panel of arbitrators drawn out of railway employees or ex railway employees, are not statutorily ineligible. It directed the parties to follow the procedure set out in the agreement (that is, one monimation each and the third to be appointed by the two nominees).

Read the judgment here.

Categories: Appointment of Arbitrators | Broad Based Panel | Independence and Impartiality of Arbitrator | Section 11 ACA | CORE | SAROD Rules | Bharat Broadband | TRF | Voestalpine | Perkins

INTERIM RELIEF BY COURT AND TRIBUNAL

Prima facie case alone not sufficient for grant of interim mandatory injunction: Delhi High Court

22 October 2021| Punjab National Bank v. NHAI & another | OMP(I) (COMM) No. 211 of 2020 | Vibhu Bakhru J | Delhi High Court 2021 SCC OnLine Del 4784

In a dispute among the NHAI, one of its concessionaire and Punjab National Bank (the lender of the concessionaire), while refusing the relief, Justice Bakhru has surveyed the law on grant of an interim mandatory injunction. He found that though PNB met the standard of a *prima facie* case (even higher), that by itself was not sufficient. He found that there would be no irreparable injury unlike in the case of *Jetpur Somnath* v. *NHAI* 2017 SCC OnLine Del 9453.

Read the judgment here.

Categories: Admitted Liability | Interim Measures by Court | Jetpur Somnath | Section 9 ACA | Securing the Amount in Dispute in Arbitration | Termination Payment | Adhunik Steels | Conditions for Grant of Interim Measure | Grant of Injunction | Interim Mandatory Injunction | Interim Measures by Court | Just and Convenient | Mandatory Orders | Order XXXIX CPC | Order XXXVIII CPC | Section 37 ACA | Securing the Amount in Dispute in Arbitration | Prima Facie Case

SEAT

Delhi is the "venue", that is, convenient location for hearings, and not the juridical seat because with the consent of parties, the arbitrator may agree upon another venue. The seat is at Guwahati because courts there have exclusive jurisdiction: Delhi High Court

21 October 2021 | Isgec Heavy Engineering Ltd. v. Indian Oil Corporation Limited | Arb. P. 164 of 2021| Sanjeev Narula J | Delhi High Court | 2021 SCC OnLine Del 4748

In a very crisp decision summarizing key aspects of the concept of seat, place and venue, Sanjeev Narula J has interpreted an arbitration clause which stated that "the venue of the arbitration shall be New Delhi, provided that the Arbitrators may with the consent of the (parties) agree upon any other venue."

He concluded that New Delhi was not the juridical seat:

(a) 'Seat' and 'venue' have different connotations. They are not synonymous. These two expressions do not find any mention under the ACA. The expression used in Section 20 ACA is 'place.'

(b) The Supreme Court's *BALCO* judgment makes it clear that the expression "place" used in Section 20 (1) & (2) ACA refers to the juridical 'seat.' But in Section 20 (3) ACA the word 'place' is equivalent to 'venue', i.e., the location of the meeting of arbitral proceedings.

(c) In *BGS SGS Soma*, the Supreme Court ruled that whenever in an arbitration clause, there is a designation of someplace as being the 'venue' of the arbitration proceedings, the expression 'arbitration proceedings' would make it clear that the venue is really the seat.

(d) But, *BGS* also refers to "contrary indicia." [**Ed.** *BGS* ruled that "venue" is really the seat if it is used in conjunction with "arbitration proceedings" (i.e., not any particular hearing but the proceedings as a whole including the making of the award). But, there should be no significant contrary indicia against such interpretation]

(e) Here, the clause provides a general stipulation that the 'venue' so designated can be changed by the arbitrators, with the consent of the parties. This, prima facie, suggests that the 'venue' specified is not really envisaged as the 'seat' of the proceedings, which should be specified in certain terms.

(f) This interpretation is also in sync with Section 20(3) ACA.

After this analysis the court referred to a provision of the contract that conferred exclusive jurisdiction on the courts at Guwahati. It found that that provision was worded in clear, unambiguous, and directory terms and was a 'contrary indica' demonstrating that the 'venue' in the other clause is only a physical place of meeting under Section 20(3) ACA. It held that the seat of the arbitration was Guwahati. [**Ed**. Several courts have said that seat is akin to exclusive jurisdiction and some courts have said that exclusive jurisdiction clause is akin to seat. In its sequence of reasoning, the court could well have first highlighted the exclusive jurisdiction point as the main reason why Delhi was not the seat, rather than stating it to be a contrary indicia].

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

EXTENT OF JUDICIAL INTERVENTION

Tribunal's order of not taking oral testimony of witnesses is not wrong: Delhi High Court

28 October 2021 | Telecommunication Consultants India Ltd. v. BR Sukale Construction | CM(M) 958 of 2021 | Amit Bansal J | Delhi High Court| 2021 SCC OnLine Del 4863

The Delhi High Court has rejected a challenge to an arbitral tribunal's order that no further (oral) evidence of witnesses would be held for the time being and it would hear arguments. The tribunal had ordered so to curtail delay and because all issues were already articulated in writing.

A petition under Article 227 of the Constitution was filed challenging this. Rejecting the challenge, Amit Bansal J noted the legal position that:

(a) Parties are free to agree on the procedure to be followed by the arbitral tribunal. The arbitral tribunal is not bound by the procedure laid down under the Civil Procedure Code, 1908 or the Indian Evidence Act, 1872. If there is no agreement between the parties, it may conduct the proceedings in the manner it considers appropriate. It has the power to decide whether proceedings shall be conducted on the basis of documents and other materials or whether oral evidence is required or not.

(b) The arbitral tribunal also has the power to determine the admissibility, relevance, materiality and the weight of any evidence.

Since there was no agreement between the parties with regard to the procedure, the arbitrator's decision was considered not faulty.

Bansal J also relied on and followed *Surender Kumar Singhal* v. *Arun Kumar Bhalotia* 2021 SCC OnLine Del 3708 where Prathiba Singh J has summarized the law on interfering with an arbitral case in writ jurisdiction.

Read the judgment here.

Categories: Determination of Rules of Procedure | Flexibility of Procedure | Rules of Procedure | Section 19 ACA | Applicability of Code of Civil Procedure | Applicability of Evidence Act | Admissibility of Evidence | Oral Evidence | Article 226 Constitution of India | Article 227 Constitution of India | Bhaven Construction | Deep Industries | Extent of Judicial Intervention | Judicial Review in Arbitration | Patent Lack of Inherent Jurisdiction | Power of High Courts to Issue Certain Writs | Power of Superintendence Over All Courts by the High Court

TIME LIMITAITON

Limitation period to file a setting aside petition does not depend on whether the award received by a party is sufficiently stamped or not: Delhi High Court

22 October 2021| NCS Sugars Ltd v. PEC. Limited |OMP (COMM) 18 of 2020 and IA 456 of 2020 & 457 of 2020 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 4826

A petition to set aside an award was filed around seventeen months after the signed copy of the award was received. The petitioner argued that the petition was within limitation because limitation began to run only when a duly stamped and executed award was received.

Bakhru J found the contention, "plainly, unmerited." He reasoned that:

(a) Under Section 33 of the Stamp Act, 1899 an instrument which is insufficiently stamped is required to be impounded; it does not cease to be an instrument.

(b) Under Section 2(12) of the Stamp Act, 1899 "executed" and "execution", used with reference to instruments, mean "signed" and "signature includes attribution of electronic record within the meaning of Section 11 of the Information Technology Act, 2000.

(c) Thus, an arbitral award insufficiently stamped is an arbitral award nonetheless.

Read the judgment here.

Categories: Application for Setting Aside Arbitral Award | Condonation of Delay | Limitation | Limitation for Setting Aside | Limitation Under Section 34 ACA | Section 34 (3) ACA | Stamping of Award

SETTING ASIDE

Examination by tribunal of limitation-barred claim did not violate public policy of India. Even if it did, there cannot be merits-based review to examine if the claim was barred: Delhi High Court

Oriental Insurance Company Limited v. April USA Assistance Inc. | OMP (COMM) 14 of 2020 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 4843

The respondent was the Overseas Service Provider for policies issued by the petitioner. They had executed three agreements. In return for its services, the respondent was entitled to receive fees and bonuses calculated on the 'annual audited premium' received by the petitioner from the policy holders. This term was not defined in the agreement.

The dispute arose with respect to a group policy the petitioner issued but on discounted premium. Was the discount required to be deducted from the premiums when calculating the fees/bonus of the respondents?

The tribunal found in the respondent's favour. It decided that, broadly, because the agreements did not contemplate any group insurance policies, the expression 'annual audited premiums' would denote standard premiums.

In the set-aside application several grounds were raised and at the sur-rejoinder stage of arguments the point that the claims were limitation barred was also made.

Examining if a limitation-barred claim violates the most basic notions of morality or justice, Bakhru J concluded that since statute of limitations cuts off the remedy but does not extinguish a debt or a cause, entertaining a limitation-barred claim does not offend any basic notion of morality or justice.

Then he examined if, on the limitation issue, the award contravened the fundamental policy of Indian law. He found that the tribunal had said the transactions were on a running account basis and the claims were all along kept alive before they came to be disputed, but seen from that date the claims were in limitation. This was a finding of fact after examination of evidence that, as per the court, warranted no interference.

Even if it is accepted that the law of limitation embodies a fundamental policy of Indian law, an arbitral award cannot be set aside by re-examining and re-evaluating the evidence and reviewing the decision on a disputed question of fact, which may be involved in addressing the controversy whether a dispute is barred by limitation.

The other argument examined by the court was if the tribunal's interpretation of 'annual audited premium' was perverse. He ruled that the contention that the expression 'annual audited premiums' must necessarily mean net premiums (premiums less discounts) as accounted in the books and the decision of the tribunal to not accept so, falls foul of the fundamental policy of Indian law is plainly, unmerited.

Read the judgment here.

Categories: Section 34 ACA | Section 34 (2) (b) ACA | Application for Setting Aside Arbitral Award | Public Policy of India | Fundamental Policy of Indian Law | Most Basic Notions of Morality or Justice | Patent Illegality | Public Policy of India | Arbitrators Interpretation of Contract | Merits Based Review | Natural Justice | Public Policy | Reappreciation of Evidence | Revaluation of Evidence | Review on the Merits of the Dispute | Time Barred Claim | Limitation

Tribunal's interpretation of contract cannot be disturbed, but award unreasoned on another principal contention, hence set-aside: Delhi High Court

29 October 2021 | GVK Jaipur Expressway Private Limited v. NHAI | OMP (Comm.) 377 of 2020 | Vibhu Bakhru J | Delhi High Court | SCC OnLine Del 4851

A recent decision of a single-judge bench of the Delhi High Court is a noteworthy example of applying the set-aside grounds.

The majority award pivoted on the interpretation of one clause of the contract (Clause 18.1). The court completely disagreed with the tribunal's interpretation. But it said that that by itself may not make the award amenable to challenge because the court is not required to

re-adjudicate the disputes and supplant its view over that of the tribunal unless it is hit by public policy or patent illegality on the face of the award.

There was, however, another clause (clause 18.4) on which the respondent in the arbitration had relied but which the majority award did not consider at all. Accordingly, the court found that not dealing with a principal contention made the award unreasoned and set the award aside.

We have covered this case in an Update here and the PDF can be found here.

Read the judgment here.

Categories: Application for Setting Aside Arbitral Award | Dyna | Patent Illegality | Section 31 (3) ACA | Section 34 ACA | Standard for Setting Aside Arbitral Award | Unreasoned Award | Merits Based Review | Natural Justice | Public Policy | Reappreciation of Evidence | Revaluation of Evidence | Review on the Merits of the Dispute

AWARD OF INTEREST

Tribunal has a substantial discretion to award interest under Section 31(7) ACA: Supreme Court of India

20 October 2021 | Punjab State Civil Supplies Corporation Limited (PUNSUP) and another v. Ganpati Rice Mills and another | SLP (C) No. 36655 of 2016 | Sanjeev Khanna & Bela M Trivedi JJ | Supreme Court of India

The arbitrator granted interest at the rate of 18% per annum from the date of the award till the date of realization. In the respondent's set aside application, the rate of interest was reduced to 12% per annum. The respondent challenged that decision too in an appeal under Section 37 ACA. The High Court reduced the interest to 9% per annum relying on the judgement under the 1940 Act.

Restoring the rate of interest awarded by the set aside court (not challenged by the petitioner), the Supreme Court has observed that Section 31 (7) ACA grants substantial discretion to the arbitrator in awarding interest and no reason and grounds have been given by the appellate court to reduce it.

Read the judgment here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | Section 37 ACA | Arbitration Appeals| Section 31 | Form and Contents of Arbitral Award | Section 31 (7) ACA | Interest | Grant of Interest | Award of Interest | Section 31 (7) (a) | Pre Award Interest | Section 31 (7) (b) ACA | Post Award Interest | Hyder Consulting| Public Policy of India | Patent Illegality

If post-award interest is granted only on the principal sum, the calculation of the principal sum would not include into it the pre-award interest: Delhi High Court

21 October 2021 | Overseas Drilling Ltd. v. Directorate General of Hydrocarbons of India | EFA(OS) (Comm.) 2 of 2021 and CM No. 10663 of 2021 | Manmohan and Navin Chawla JJ | Delhi High Court |2021 SCC OnLine Del 4824

A 2-judge bench of the Delhi High Court has ruled that when the arbitrator granted post-award interest only on the principal sum, there was no scope for adding the pre-award interest into the principal amount for calculating the post-award interest by applying Section 31 (7) (b) ACA.

To recall, under Section 31 (7) (a) ACA, unless otherwise agreed by the parties, where an arbitral award is for the payment of money, the tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable. Then, under sub-clause (b) a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent higher than the current rate of interest.

For the law on the subject, please see the 3-judge bench decision of the Supreme Court in *Hyder Consulting (UK) Ltd.* v. *State of Orissa*, (2015) 2 SCC 189. Bobde and Sapre JJ constituted the majority and Dattu CJ the minority view. On the issue if post-award interest was mandatory, Sapre J expressed no opinion, Bobde J ruled that it was mandatory, but the rate discretionary, and Dattu CJ had ruled that it was not mandatory.

Read the judgment here.

Categories: Section 37 ACA | Arbitration Appeals | Section 31 | Form and Contents of Arbitral Award | Section 31 (7) ACA | Interest | Grant of Interest | Award of Interest | Section 31 (7) (a) | Pre Award Interest | Section 31 (7) (b) ACA | Post Award Interest | | Hyder Consulting

Conditions of Particular Application (COPA) in NTPC contracts prohibit pre-award interest: Delhi High Court

26 October 2021 | National Thermal Power Corporation Limited v. Patel Engineering Ltd. | OMP (Comm.) 504 of 2020 Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 4827

A package of the hydroelectric project awarded to the respondent was later on scrapped. The respondent was awarded various claims in arbitration relating to idle charges.

Several challenges were made to the award and

most of them were rejected because the issues raised were covered by another judgment between the parties in OMP (Comm.) No. 156 of 2018. The remaining question was of interest. PEL had claimed pre-suit, pendente lite and future interest at the rate of 18% per annum. The tribunal granted interest at the rate of 12% per from a specified date till the award and future interest till date of the payment.

The grant of interest was disputed on the ground that Clauses 77 and 78 of the Conditions of Particular Application (COPA) did not permit it. Clause 78 prohibited interest on money lying with NTPC or delay in clearing the payments or in *any other respect whatsoever*.

Bakhru J noted that the issue (in particular the meaning of the phrase italicized above) was discussed in several judgments.

And, in view of Supreme Court's *Reliance Cellulose Products Ltd.* v. *Oil and Natural Gas Corporation Ltd.* (2018) 9 SCC 266; *Jai Prakash Associates Ltd.* (2019) 17 SCC 786, the question whether Clause 78 of the COPA had to be interpreted in wide terms, is no longer *res integra*.

Hence, the pre-award interest was held prohibited by the terms of the contract, and set aside.

Read the judgment here.

Categories: Section 34 ACA | Application for Setting Aside Arbitral Award | Section 31 | Form and Contents of Arbitral Award | Interest | Award of Interest | Pre Award Interest

National Forum for Research in Arbitration Law is a forum for writing and research.

Our Fortnightly Highlights offer a glimpse of the latest developments--cases, legislative, or policy. The material is meticulously analyzed, written, and finalized over two weeks to present to the reader the most accurate gist.

While Biweekly Highlights are written in-house, original contributions analyzing an issue relevant to the understanding or developing arbitration law are welcome either as an article, a blog post, or a case comment. Visit our website www.nfral.in for details.

The Highlights are descriptive and meant for general information for the professional fraternity, students, and academia. For any legal advice on any case, please contact your counsel.