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# This Fortnight in Arbitration

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(1)

## Award against BCCI patently illegal (Bombay High Court)

16 June 2021 | Board of Control for Cricket in India v. Deccan Chronicle Holdings Ltd. | GS Patel J | 2021 SCC OnLine Bom 834

BCCI had a dispute with Deccan Chronicle Holdings Limited, which operated a cricketing franchise Indian Premier League ("IPL") and owned the Deccan Chargers team. Disputes between the parties led to the termination of the franchise agreement on 10 April 2008. In an arbitration that followed, the sole arbitrator directed BCCI to pay DCHL INR 4814,17,00,000 crores, interest and costs.

Writing in his inimitable style, GS Patel J set aside the award in his judgment of 176 pages except for the limited extent of an award of INR 36 crores.

An effective summary of the judgment that would have taken at least a day to prepare (if not more) is made simple by Patel J's incredibly pithy summary in paragraph 284. He notes as follows:

"Taking a step back, what emerges is this. At the broadest level, there were three defaults — not paying players and others, creating charges on assets, and the insolvency event (the IFCI winding-up petition). The contract said the first two were curable; if uncured, they invited termination. The third could trigger immediate termination (leaving aside the fact that BCCI gave time to DCHL to have this resolved as well). Not one of the three is convincingly shown to have been cured or not to exist. All three continued. The Award proceeded in places without reasons, in others by ignoring evidence, in yet others by wandering far afield from the contract, and in taking views that were not even possible. In doing so, it brushed aside objections about insufficient pleadings. It granted reliefs not even prayed for and took views that were not possible, i.e. that no reasonable person could have done. Effectively, it rewarded the party in unquestionable breach of its contractual obligations. That is inconceivable and not even a possible view."

Access the decision here.

**Categories:** Section 34 | Application for Setting Aside Arbitral Awards | Patent Illegality | Perverse Award | Unreasoned Award | Fundamental Policy of Indian Law | Ssangyong | Associate Builders | Show Cause Notice | Curable Breach | Incurable Breach | Termination | Interpretation of Contract | Substantial Compliance | Pleadings | Public Law in Arbitration | Merit Based Review | Avitel | Article 14 Constitution | Amiable Compositeur | Section 28 ACA | Rules Applicable to Substance of Dispute | Perversity | Breach of Contract

(2)

## Doubting independence of a named arbitrator, another appointment made (Delhi High Court)

18 June 2021| Monica Khanna & others v. Mohit Khanna & another | JR Midha J | 2021 SCC OnLine Del 3421

The arbitration clause in a family settlement agreement of June 2020 identified by name a sole arbitrator. But when the disputes arose, the petitioners applied to the court under Section 11 ACA to appoint an 'independent' arbitrator. They said that the named arbitrator was ineligible under Section 12(5) read with Seventh Schedule ACA because he was a respondents' consultant, a director and a shareholder in a company in which a respondent was also a director.

The respondents' case was that the arbitrator was named at the insistence of the petitioner, and he knew the entire family for the last 40 years. So, the petitioner could not wriggle out of the arbitration agreement after agreeing to his name.

The court did not make any specific analysis on the *de jure* ineligibility or the applicability of Section 12 (5) ACA on the facts. It said that "on careful consideration of the rival contentions, this Court has serious doubts about the independence of the named arbitrator." Another arbitrator was appointed.

Access the judgment here.

**Categories**: Section 11 ACA| Appointment of Arbitrators | Section 12 ACA | Grounds for Challenge | Section 12 (5) ACA | Seventh Schedule | Ineligibility of Arbitrator | De jure Ineligibility | Waiver | Bharat Broadband

(3)

**No sovereign immunity against enforcement of an arbitral award arising out of a commercial transaction (Delhi High Court)**

18 June 2021 | KLA Const Technologies Pvt. Ltd. v. The Embassy of Islamic Republic of Afghanistan and Matrix Global Pvt. Ltd. v. Ministry of Education, Federal Democratic Republic of Ethiopia | JR Midha J | 2021 SCC OnLine Del 3424

In the connected petitions, separate petitioners sought enforcement of arbitral awards against the Embassy of Afghanistan and the Ministry of Education of Ethiopia. As a result, two questions of law arose for consideration before the court:

(a) Whether the prior consent of the Central Government is necessary under Section 86(3) of the Code of Civil Procedure ("CPC") to enforce an arbitral award against a foreign State?
(b) Whether a foreign State can claim sovereign immunity in such an action?

The court answered both questions in the negative and ruled that an action to enforce an arbitral award is not suit within the meaning of Section 86 CPC. The court's reasons were as follows: -

(a) Section 36 of the ACA treats an arbitral award as a "decree" of a Court for the limited purpose of enforcing the award under the CPC. It cannot be read to defeat the underlying rationale of the ACA, namely, speedy, binding and legally enforceable resolution of disputes between the parties.
(b) The protection under Section 86(3) of CPC does not apply to cases of implied waiver. An arbitration agreement in a commercial contract between a party and a foreign State is an implied waiver by the foreign State from raising a defense against enforcement action.

(c) Once a foreign State opts to wear the hat of a commercial entity, it would be bound by the rules of the commercial legal ecosystem.

(d) A foreign State cannot ignore that the arbitral award is the culmination of the process it consented to.

(e) This is in accord with the growing international law principle of restrictive immunity, juxtaposed with the emergence of arbitration as the favoured international dispute resolution mechanism.

The court had also called for the views of the Central Government, which took the position that consent was not required.

Access the judgment here.

**Categories:** Section 48 ACA | Enforcement of Arbitral Awards | Enforcement | Section 86 CPC | Sovereign Immunity | Public International Law | Object of ACA

(4)

**The Limitation Act applies to an arbitration under MSMED Act, and counterclaim is maintainable (Supreme Court of India)**

29 June 2021 | M/s Silpi Industries etc. v. Kerala State Road Transport Corporation & another | M/s. Khyaati Engineering v. Prodigy Hydro Power Pvt. Ltd. | R Subhash Reddy & Ashok Bhushan JJ | 2021 SCC OnLine SC 439

The Supreme Court has ruled that the Limitation Act, 1963 applies to arbitration proceedings under Section 18 (3) of the Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act").It took note that if conciliation under the MSMED Act fails, the Facilitation Council (constituted under that enactment) ("FC") "shall either itself take up the dispute for arbitration or refer it to any institution or centre … for …arbitration and the provisions of [ACA] shall then apply to the dispute …." Hence, the court said that since Section 43 ACA expressly applies the Limitation Act to arbitrations, the matter needed no further elaboration.

In another batch of connected petitions, the court also ruled that counterclaim is maintainable in an arbitration under the MSMED Act. The respondent Prodigy had applied to the Facilitation Council for an arbitration.

Still, the petitioner Khyaati applied to the court to appoint an arbitrator asserting that the FC had

been constituted to deal with disputes raised only by the supplier and does not envisage a counterclaim by the other party. Rejecting the submission, the court concluded that:

(a) In an arbitration before the FC, the ACA applies. Section 23 (2A) ACA gives a right to the respondent to make a counterclaim or plead set-off.
(b) If a counterclaim cannot be filed, the buyer may approach another forum, and there may be conflicting decisions.
(c) Section 24 MSMED Act gives an overriding effect to Sections 15 to 23 of the MSMED Act. The MSMED Act is a special enactment that contains several beneficial provisions for micro, small and medium enterprises. There are fundamental differences in the settlement mechanism between the MSMED Act and arbitration under the ACA: mandatory conciliation mechanism; pre-deposit of 75% of the awarded amount if the award is challenged; compound interest at three times of the bank rate. Simply because the buyer pleads that a counterclaim is not maintainable, these benefits could not be denied.

Access the judgment here.

**Categories**: Section 23 (2A) ACA | Statement of Claim and Defence | Section 43 ACA | Limitations | MSMED Act | Limitation | Limitation Under MSMED Act | Counterclaim | Section 23 ACA

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