

# MONTHLY ROUND-UP

NATIONAL INTERNATIONAL COMMERCIAL CORPORATE

## INDIAN ARBITRATION LAW REVIEW

OCTOBER

NOVEMBER 2023

## **COURT HAS HELD THAT NO COMPENSATION CAN BE AWARDED TO PROLONG THE CONTRACT IN THE SITUATION WHERE THE CONTRACTOR HAS NOT RESERVED THEIR RIGHT TO SUCH COMPENSATION WHILE SEEKING FOR A TIME EXTENSION**

The Delhi High Court, in the case of *Government of NCT of Delhi v. R.S. Sharma Contractors Pvt. Ltd.*, has upheld the Tribunal's decision in relation to the prolongation cost being denied due to the contractor's failure to reserve this right while asking for an extension of time. The Court held that this situation does not need any such intervention by it, under Section 34 of the Arbitration and Conciliation ("A&C") Act, 1996.

## **AN ARBITRATOR CANNOT REFUSE ANY ADDITIONAL MATERIAL EVIDENCE ON THE MERE GROUNDS THAT A PARTY HAS NOT PAID PROCEDURAL COSTS WHILE SUBMITTING SUCH EVIDENCE**

In the case of *Zakir Hussain v. Sunshine Agrisystem Pvt. Ltd.*, the High Court of Delhi held that the failure to accept additional evidence due to issues in procedural aspects is not a valid basis for overturning the award. The ruling also held that all parties must give sufficient time to the other party to address all documents in their rebuttal evidence, in the situation that the party seeks to introduce a document before the start of cross-examination.

## **DELHI HIGH COURT HAS HELD THAT NO STAMP DUTY IS TO BE PAYABLE ON AN INSTRUMENT EXECUTED BY OR ON BEHALF OF THE GOVERNMENT**

The Bench of Justice Rekha Palli in the case of *M/s SVK Infrastructures v. Delhi Tourism and Transportation Development Corporation Ltd.* held that the judgement delivered in the case of *N.N Global* has no standing in applications of agreements by, or, on behalf of the government. The Bench also held that the Court exercising powers under Section 11 of the A&C Act, 1996 does not have the power or capability to refuse to appoint an arbitrator once it has been decided that the instrument is within the exception mentioned in the Stamp Act by the government.

## **THE COURT HAS HELD THAT PROVISIONS OF UTTAR PRADESH REGULATION OF COLD STORAGE ACT, 1976 DOES NOT EXCLUDE THE REMEDY OF ARBITRATION**

In the case of *Zakir Hussain v. Sunshine Agrisystem Pvt. Ltd.*, the Court determined that the 1976 Act does not establish any unique rights, remedies or procedures that cannot be pursued before a Civil Court or Arbitral Tribunal.

What it does is, merely establishing an informal mechanism for resolving disputes and there is no explicit limitation on the arbitral jurisdiction. The Bench held that a restriction on using arbitration is applicable in situations where the alternative remedy serves as a comprehensive legal framework on its own and offers a specific Statutory Right or protection that cannot be granted by a Civil Court.

## **THE DELHI HIGH COURT HAS RULED THAT CLAIMS RESOLVED THROUGH A RESOLUTION PLAN CANNOT BE SUBJECT TO ARBITRATION, AS REFERRING SUCH CLAIMS FOR ARBITRATION WOULD ESSENTIALLY REOPEN THE RESOLUTION PLAN**

In the case of *IOCL v. Arcelor Mittal Nippon Steel India Limited*, the Bench emphasized the “clean slate” doctrine, which necessitates that a successful resolution application starts with a clean slate. The parties are obligated to address the claims outlined in the resolution plan and should not be made to defend claims which were originally not included in the plan, neither shall they face actions which are related to the unacknowledged debts of the Corporate Debtors. Furthermore, the Court also observed that once the Supreme Court has given its official approval to the plan submitted by the parties, by establishing an arbitral tribunal, this would amount to re-opening the resolution plan which is not ideal.

## **WRIT PETITION IS NOT MAINTAINABLE WHEN ALTERNATIVE REMEDY EXISTS**

Calcutta HC recently upheld the precedential notion of the maintainability of writs, wherein a writ is not maintainable under Art. 226 if an alternative remedy exists. The alternative remedy may be in the form of an arbitral clause of the contract that provides for the resolution of matter by an arbitral tribunal under the A&C Act, or any other prescribed seat of arbitration.

## **PRESENCE OF ASSETS WITHIN ARBITRAL JURISDICTION IS PIVOTAL FOR ENFORCEMENT PROCEEDINGS**

The Delhi High Court recently clarified, in the case of *Taqa India Power Ventures v. NCC Infrastructure Holdings*, that the presence of assets within its jurisdiction is pivotal for enforcement proceedings, rejecting the notion that writing off debt erases its legal standing. Additionally, the ruling confirmed the right of the award holder to initiate enforcement proceedings wherever their assets exist, regardless of diminished value.

## **AN ARBITRATION CLAUSE CAN BE EXAMINED BY COURT IF IT IS ARBITRARY AND VIOLATES ARTICLE 14**

The bench of Justice Rekha Palli in the case of *M/s SVK Infrastructures v. Delhi Tourism and Transportation Development Corporation Ltd.* held that the judgement delivered in the case of *N.N Global* has no standing in applications of agreements by, or, on behalf of the government. The Bench also held that the Court exercising powers under Section 11 of the A&C Act, 1996 does not have the power or capability to refuse to appoint an arbitrator once it has been decided that the instrument is within the exception mentioned in the Stamp Act by the government

## **THE COURT CANNOT ALLOW CLAIMS REJECTED BY THE ARBITRAL TRIBUNAL**

It was clarified by the court in the case of *Bharti Airtel v Jamshed Khan* that while exercising its power under Section 34 of the A&C Act which empowers the court to set aside arbitral awards on certain grounds, cannot allow claims that were rejected by the tribunal. The court further observed that the Court would have the authority to partially set aside an arbitral award; it would not, however, be competent to alter the arbitral award by granting a claim that the arbitration tribunal had already rejected.

## **INSEPARABLE ADDITIONAL WORK CARRIED OUT WITHOUT EXECUTION OF A FORMAL AGREEMENT WILL ALSO BE COVERED BY ARBITRATION CLAUSE IN THE ORIGINAL CONTRACT**

The Jammu & Kashmir and Ladakh High Court in the case of *A.K. Engineers & contractors Pvt Ltd v union territory of J&K* has held that the arbitration clause contained in the original contract would also govern any dispute arising out of an additional work carried out without execution of a formal agreement. In the present case the contractor, initially tasked with constructing a single-lane bridge, was subsequently directed by the employer to expand the scope to build a two-lane bridge without formalizing a new agreement or amending the original contract, in this case the terms of the initial contract, including the arbitration clause, extend to cover the additional work

## **EXCLUSIVE JURISDICTION CLAUSE OVERRIDES GENERIC JURISDICTION CLAUSE**

The court clarified in the case of *R.P. Infosystems Pvt Ltd v Redington (India) Ltd* that an exclusive jurisdiction clause would override and general jurisdiction clause contained in any agreement between the same parties. It further held that the moment an arbitration clause confers exclusive jurisdiction on the Court at a particular place or the seat of arbitration is declared, it would mean that all other courts would not have the jurisdiction to entertain any petition arising out of the arbitration agreement.

## **THE ARBITRAL TRIBUNAL IS NOT EMPOWERED TO CREATE SECURITY ON A PROPERTY ENCUMBERED BY THIRD-PARTY**

The Delhi High Court recently concluded in the case of *Asset Reconstruction Company India Ltd v. ATS Infrastructure Limited*, that an arbitral Tribunal, under Section 17 of the A&C Act, lacks the authority to create security on a property already encumbered by a charge in favour of a third party, not signatory to the arbitration agreement or underlying contract. Additionally, registering a charge establishes the charge holder as a secured creditor, giving them priority over unsecured creditors.

## **CATEGORIES REGARDING ARBITRATION COSTS WERE RECENTLY OUTLINED**

The Delhi High Court held in the recent case of *H.P. Cotton Textile Mills Ltd v. The Oriental Insurance Company Limited*, emphasized the Court's inability to delve behind the Award during execution proceedings to aid the decree-holder in producing additional evidence. The tribunal made a significant observation regarding arbitration costs wherein it explained that there are three categories to the same- The first two shall be quantified while the third is related to decree holder's counsel fees which may lack quantification despite the submission of a cost statement, as in the given case.

## **THE APPELLATE INTERVENTION ON ARBITRAL TRIBUNAL'S DECISION MUST BE LIMITED**

The Delhi High Court emphasized the importance of safeguarding the interests of both parties while avoiding prejudice to other involved parties. It clarified that appellate intervention should be limited, intervening only if the arbitral Tribunal's decision is clearly unreasonable or unconscionable, which was not found to be the case in *Concrete Developers LLP v Gaurav Churiwal and Ors.*

## **DENIAL OF INTERIM RELIEF ON STAMP DUTY ISSUES MAYBE BURDENSOME AND UNFAIR**

The Bombay High Court, while interpreting the impact of the *N.N. Global* judgement, affirmed that Section 9 of the A&C Act allows for granting interim measures regardless of the stamp duty status on the arbitration or main agreement and it aims to provide immediate relief during arbitration proceedings without scrutinizing stamp duty adequacy, akin to a civil court's approach. Unlike Section 11, which concerns arbitrator appointments and mandates a valid and adequately stamped arbitration agreement, Section 9 primarily focuses on addressing the party's urgent relief requests.

## **HONG KONG COURT OF FIRST INSTANCE DECLINED TO UPHOLD AN AWARD FROM THE CHENGDU ARBITRATION COMMISSION OWING TO GROSSLY UNFAIR AND UNJUST PROCEDURE**

In the case of *CIC v Wu and Ors.*, the Court remarked that the video evidence presented shows the arbitrator was displaying significant behavioral irregularities during the hearing. The arbitrator was seen moving from room to room without using headphones, engaging in conversations with others and being distracted by his surroundings rather than paying attention to the proceedings. Based on this, the Court decided to reject the award to maintain the Fundamental Principles of Justice within their jurisdiction. The Court decided to reject the enforcement of the award based on public policy under the ground of Section 5(3) of the Hong Kong Arbitration Ordinances.

## **THE HONG KONG COURT OF FIRST INSTANCE HAS REJECTED A CHALLENGE TO ENFORCE A \$50 MILLION ARBITRAL TRIBUNAL THAT WAS ISSUED IN CHICAGO WHICH WAS IN FAVOUR OF A U.S LAW FIRM AND PERTAINED TO THE SUCCESS FEE AGREEMENT**

In the case of *BB v KO*, the main contention brought about was whether the fee agreement was linked in part to litigation in Hong Kong, making the enforcement of the award contrary to public policy. The common law principles prohibit the Hong Kong litigation from accepting such agreements and thus it was held as invalid and the challenge was rejected.

## **SENIOR ADVOCATE GOURAB BANERJI HIGHLIGHTS THE IMPORTANCE OF ALIGNING INDIAN ARBITRATION LAW WITH THE UNCITRAL MODEL LAWS**

Gourab Banerji lauded the importance of the recent attempts of the UK Law Commission to bring the UK Arbitration Act of 1996 more in consonance with the UNCITRAL Model Laws, especially in the aspect of confidentiality and arbitrator disclosure. This is contrasted with their erstwhile approach of deliberately excluding the Model Laws into their domestic legislation. He went on to elaborate upon the ongoing reforms in India to incorporate the Model Laws into the A&C Act, 1996, and noted that despite the divergent approaches in these jurisdictions, the core principles of separability and *Kompetenz-Kompetenz* has influenced the respective domestic arbitration laws.

## **FEDERAL COURT OF AUSTRALIA AFFIRMS JURISDICTION TO ENFORCE ARBITRAL AWARDS AGAINST FOREIGN STATES PARTY TO THE NEW YORK CONVENTION**

In the case of *CDM Holdings, LLC v Republic of India*, the Federal Court of Australia dismissed India's application to set aside an arbitral award based on the principles of sovereign immunity. The issue in dispute pertained to the alleged waiver of India about sovereign immunity, as they are a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). It was held by the Federal Court that India has waived off their sovereign immunity as it has submitted to the Court's jurisdiction by agreement, as understood within the meaning of the Foreign States Immunities Act 1985. This was operative due to India being a signatory to the New York Convention as well as the tendering of the Mauritian investors, of the arbitral award along with the arbitration agreement.

## **SHIAC LAUNCHES NEW ARBITRATION RULES**

The Shanghai International Arbitration Centre ("SHIAC"), has announced revision of its arbitration rules. The new rules will go into effect from January 1, 2024. Article 25 of the new rules includes provisions for emergency arbitration. Article 15 the provision of single arbitration under multiple contracts; Article 35.3 provides for disclosure of funding arrangements; Article 11 permits publication of desensitized and anonymized awards with the consent of parties; and Article 10 authorizes "online" arbitration using the SHIAC "E-Platform."

## **DUBAI COURT UPHOLDS VALIDITY OF ARBITRATION AGREEMENTS BEYOND FILE CLOSURE**

The General Assembly of the Dubai Court of Cassation overruled the prior principle established in the 2013 Decision, which considered arbitration agreements abandoned if an arbitration center closed the file due to the parties' non-payment of advance costs. The recent ruling says that the arbitration agreement shall remain valid even after file closure for non-payment. Reference was made to the UAE Arbitration Law, particularly Articles 45(1) and 54(4), emphasizing that unless explicitly agreed otherwise, an arbitration agreement persists post-award nullification, except in cases where the agreement itself doesn't exist, has forfeited its term, is null, or is incapable of performance.



## **COURT UPHOLDS ARBITRATION AGREEMENTS WITH ANTI-TRUST INJUNCTION IN SANCTIONS DISPUTE**

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