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INDIAN ARBITRATION LAW REVIEW

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IALR Indian Arbitration Law Review

THE RIGHT TO OPPOSE APPOINTMENT OF ARBITRAL TRIBUNAL ON GROUNDS OF NON-FULFILMENT OF PRE-ARBITRAL PROCESS IS FORFEITED UPON PARTY'S AGREEMENT TO CONSTITUTE THE TRIBUNAL

The Delhi High Court recently held in the case of *Surya Alloy Industries Ltd v. Union of India and Anr.*, that once a party agrees to the constitution of an Arbitral Tribunal, they are prohibited from subsequently challenging the appointment of an arbitrator on the grounds of failure to comply with pre-arbitral procedures.

The Respondents had agreed, through a letter, to constitute the Arbitral Tribunal. The Petitioner filed an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the Act") for appointment of a single arbitrator for the proceedings. The Respondent argued that the Petitioner did not comply with the required pre-arbitral process.

The single judge bench comprising Justice Sachin Dutta rejected the Respondents' contention and held that once a party has consented to constitute an Arbitral Tribunal, it cannot thereafter refuse arbitration by relying on contract clauses that pertain to pre-arbitral proceedings.

SECTION 21 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS MANDATORY IN NATURE

In the case of *M/s Samyam Industries and Others v. Shivalik Small Finance Bank Ltd.*, the Allahabad High Court ruled that Section 21 of the Act is mandatory in nature.

A writ petition under Article 226 of the Constitution was being adjudicated by the Allahabad High Court. The Petitioners challenged the arbitration procedures initiated against them by the Respondents, which were initiated without the proper service of a Notice Invoking Arbitration under Section 21 of the Act. The Respondent initiated arbitration proceedings and submitted a Notice Invoking Arbitration to the Petitioner, thereafter appointing a solitary arbitrator in a unilateral manner. However, the aforementioned notice was not received by the Petitioners, and the Respondent Bank was unable to provide any evidence of its delivery.

The arbitration procedures were quashed by the Court due to non-compliance with the conditions outlined in Section 21 of the Act. The Single Judge Bench finally held that compliance with Section 21 of the Act is mandatory.

CONSUMER FORUM IS NOT EMPOWERED TO ASSUME JURISDICTION WHEN A SPECIAL STATUTE STIPULATES ARBITRATION

In the case of *The Secretary, E & NF Railway Junior Co-operative Credit Society Limited, Eastern Railway v. Sri Jyotish Chandra Sarkar & Anr*, the Calcutta High Court held that pursuant to Section 84 of the Multi-State Co-operative Societies Act, 2002, the Petitioner and Complainant should have had their dispute referred to arbitration as it was a statutory mandate. The Complainant had filed a complaint, contending that despite having repaid his loans prior to his retirement, he had not paid the dues. The District Consumer Disputes Redressal Forum, Kolkata, rendered an ex-parte order mandating that the Petitioner pay the outstanding balances along with interest and provide compensation to the Complainant. The West Bengal State Consumer Disputes Redressal Commission had upheld the ruling rendered by the District Consumer Forum.

The Single Judge Bench of Justice Prasenjit Biswas ruled that in cases where a special law designates a forum for adjudication, the consumer forum is not permitted to assume jurisdiction. The High Court consequently ruled that the State Commission's order had material irregularity, and allowed the revisional application.

ABSENCE OF ADEQUATE REASONING IN AN ARBITRAL AWARD GIVES RISE TO PATENT ILLEGALITY

The Delhi High Court ruled in the case of *Gorkha Security Services v. Govt. of NCT of Delhi*, that an arbitral award that lacks adequate reasoning is inherently flawed due to its patent illegality. It was held that a reasoned order should be adequate, intelligible, and proper. Failure to comply with these conditions may result in challenges under Section 34 of the Act.

The Petitioner challenged the award under Section 34 of the Act, arguing that no pre-award interest was awarded. The Petitioner said that it had prayed for an interest rate of 18% per annum from the date of payment until the payment was fully realized. Nevertheless, the arbitral tribunal failed to offer a rationale for limiting the duration of the interest period only to the period between the date of the ruling and its actualization.
The award did not provide an adequate explanation for the rejection of pre-award interest. While the arbitrator has a discretionary power in granting interest, this authority must be exercised reasonably. The High Court determined that upon examining the contested award, it became evident that there was a notable lack of justification for the denial of pre-award interest. As a result, it was determined that an award that lacks sufficient justification suffers from patent illegality.

THE SWISS FEDERAL SUPREME COURT'S DECISION REITERATED THE STANCE OF INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID) RULING, AFFIRMING TO THE NARROW JURISDICTION OF ARBITRAL TRIBUNALS.

In this matter two Singaporean businesses that ran phosphate mines in the Sichuan province of China were at the centre of the conflict. The businesses were forced to shut down operations due to China's new policy, which forbade phosphate exploration near specific reserves. Under the terms of the China-Singapore BIT, the claimants claimed expropriation, which led to ICSID arbitration. Article 13 of the specified BIT was explored and it was finally decided that the given arbitration clause could not be given a broader interpretation inflating the jurisdiction. It was upheld that the Arbitral Tribunal's decision was based on unambiguous and clear consent. This has definitely added fuel to the ongoing debate in the international jurisprudence concerning the interpretation of the narrow dispute resolution clause. The majority reasoned that the clause only addressed disagreements regarding the precise amount of compensation; it did not address issues regarding the timing or legality of expropriation.

REVERSAL OF THE PRIOR PRACTICE OF CLOSING THE CASE AND DECLARING THE ARBITRATION CLAUSE INVALID MERELY BECAUSE OF THE FAILURE TO PAY THE ARBITRATION COSTS.

The Dubai Court of Cassation (Decision of the General Authority of the Cassation Court. Appeal no. 10 of 2023) has reversed the prior practice that was followed by the Cassation Court, wherein the case file was closed whenever the arbitration cost was not paid and the proceedings were deemed to be over. As a result the arbitration clause was declared invalid in this case. The Court in its recent decision has held that such non-payment would not render the arbitration clause invalid and it would not result to the failure of the arbitration agreement. This decision is a guiding light for a arbitration friendly landscape in the UAE.

AWARDS ARE REMITTED BY THE HONG KONG COURT OF FIRST INSTANCE TO ALLOW THE ARBITRATOR TO RESOLVE ANY CONFLICTS OVER ILLEGALITY WITH HONG KONG PUBLIC POLICY.

In this case, the intriguing question was how public policy should be applied when illegality is brought up as a defence to a claim and how far the Court can go in exercising its authority under Article 34 of the Model Law. This is in the context of a case where the Arbitral Tribunal took into consideration what it believed to be the public policy of the relevant jurisdiction before deciding whether to grant or deny remedy, following a finding of illegality. The arbitrator was given the chance to take any action that, in his opinion, would eliminate the setting aside grounds, and the court decided that it would be more appropriate to remit the matter to him after suspending the setting aside procedures for three months.

UNCONDITIONAL PAYMENTS HINDER THE APPLICATION TO SET ASIDE AN AWARD.

The German Federal Court of Justice ("BGH") was faced with the issue of determining the question if the losing party in an arbitration fulfils the award without reservation, can they nonetheless start a setting-aside proceeding against the award before a German State Court. The key question in this matter is whether a payment has really been made without reservations in the manner described above. The BGH holds that the appropriate State Court must carefully consider that issue on a case-by-case basis. In this regard, the Court has to specifically look into whether the other party, receiving the payment, recognised any misgivings.

It is typically maintained that, with reference to state court procedures, paying the sum specified in a verdict in dubio should not be interpreted as "acceptance" as final and binding, but rather as a means of preventing the judgment's immediate enforcement. Generally speaking, if the losing party in the arbitration pays the awarded amount without reservation, it forfeits its right to start a setting-aside proceeding against the verdict. On a case-by-case basis, the appropriate State Court will verify whether the payment has really been made in full. The losing parties in German arbitration procedures ought to give careful consideration before disbursing the sum specified in an arbitral decision.