

# MONTHLY ROUND-UP

NATIONAL INTERNATIONAL COMMERCIAL CORPORATE

## INDIAN ARBITRATION LAW REVIEW

DECEMBER 2023

## **THE SUPREME COURT HELD THAT THE 'GROUP OF COMPANIES' DOCTRINE IS FOUNDED ON PRINCIPLES WHICH ARE DIFFERENT FROM 'ALTER EGO' OR 'LIFTING OF CORPORATE VEIL' PRINCIPLES**

The Court clarified that the expression "claiming through or under" in Sections 8 and 45 is intended to provide a derivative right; and it does not enable a non-signatory to become a party to the arbitration agreement. Thereby, a distinction was made between Section 2(1)(h) which defines "party" and Section 7 which contains "persons claiming through or under them". As the principle of alter ego disregards the intention of the parties and group of company's doctrine facilitates the intention of the parties and thus, the Court drew a distinction between them.

## **THE DELHI HIGH COURT HELD THAT SEC 34 SETTLEMENT AGREEMENT CANNOT BE CHALLENGED MERELY ON THE GROUND OF RAISING FRAUD OR COERCION**

The Court noted that the Settlement Agreement's binding nature was upheld due to the absence of substantial evidence supporting claims of fraud, coercion, or duress. A fair interpretation of the agreement demonstrated the voluntary consent and shared intent of the parties to form a conclusive and binding contract. Furthermore, the Court highlighted the significance of promoting amicable settlements and discouraging litigants from disputing settlements on weak or unfounded grounds.

## **CONSUMER COMMISSION'S JURISDICTION IS NOT BARRED BY THE ARBITRATION AGREEMENT: NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION (NCDRC), NEW DELHI**

The complaint was affirmed by the NCDRC, citing the Consumer Protection Act's provision that permits complaints exceeding Rs. 1 crore to be lodged with the NCDRC. In this instance, the claimed amount exceeded this limit. The NCDRC also referred to a precedent, Emaar MGF Land Limited v Aftab Singh, where the Supreme Court clarified that consumer forums operate in addition to, not in contradiction of, the Arbitration and Conciliation Act, 1996 (the A&C Act). Thereby, the existence of an arbitration clause in the agreement does not preclude the aggrieved party from approaching the NCDRC.

## **THE SUPREME COURT HELD THAT THE CANCELLATION OF A DEED OR A DECLARATION OF RIGHTS ARISING FROM THE DEED WOULD ONLY BE AN ACTION IN PERSONAM AND NOT IN REM**

The Court permitted arbitration in a property dispute between the parties, relying on the comprehensive wording of the arbitration clause found in the Tripartite Agreements. The argument that the dispute, focused on the annulment of a deed, was non-arbitrable due to its in-rem nature was dismissed by the Court. Instead, the Court asserted that the cancellation of a deed constituted an action in personam and was therefore suitable for arbitration. It noted that the Tripartite Agreements served as the foundation for all subsequent agreements between the parties, including those leading to present dispute.

## **THE ARBITRATOR IS NOT PERMITTED TO APPROVE DAMAGES FOR THE VIOLATION OF A MEMORANDUM OF UNDERSTANDING (MOU) LEADING TO THE FORMATION OF AN AGREEMENT THAT LACKS A LIABILITY CLAUSE.: DELHI HIGH COURT**

The Court ruled that an arbitral tribunal does not possess the power to award damages in cases of a Memorandum of Understanding (MoU) breach, especially when the MoU functions as a preliminary agreement for a subsequent definitive contract. This holds particular importance when the MoU involves no financial obligations and incorporates a clause explicitly barring any monetary liability for a breach. The Court stressed that breaching an agreement, particularly one focused on exploratory discussions for potential future contracts on a case-by-case basis, does not warrant damages.

## **REFERRING A DISPUTE TO ARBITRATION IS NOT PERMISSIBLE IF INITIATED BY ONE PARTNER OF THE FIRM WITHOUT THE INVOLVEMENT OF THE REMAINING PARTNERS: BOMBAY HIGH COURT**

The Court ruled that if a partner initiates arbitration for a business-related dispute within the firm without the involvement of other partners, it exceeds the implied authority granted to a partner. This is in accordance with Section 19(2)(a) of the Partnership Act, 1932, and is supported by the precedent set in the case of MSEDCL v Godrej and Boyce Manufacturing Company Limited. Additionally, the Court determined that a notice invoking arbitration without the consent of the concerned partner in such circumstances would be considered defective and would not establish grounds for filing an application under Section 11 of the A&C Act.

## **THE RULING ON THE 2G CASE IS CONSIDERED A 'LEGAL MODIFICATION,' AND THE COURT CANNOT ANNUL THE MAJORITY DECISION WHILE ENDORSING THE MINORITY VERDICT: DELHI HIGH COURT**

Following the 2G judgment, the Supreme Court abolished the First Come First Serve policy, which was the standard practice for granting spectrum under the law. The court mandated that spectrum could only be allocated through new auctions. The Delhi High Court interpreted this decision as a legal change and asserted that filing a petition under Section 34 to overturn either a majority or dissenting opinion is not permissible. The court cautioned against the trend of nullifying majority awards, as it would amount to modifying an award, which is not allowed under the A&C Act, 1996.

## **SERVING SIGNED ARBITRAL AWARD TO LAWYER OR AGENT OF THE PARTY IS NOT A VALID DELIVERY: DELHI HIGH COURT**

The Court emphasized that in Section 31(5) of the A&C Act, the term 'party' specifically refers to the real entity that entered into the arbitration agreement. This excludes representatives such as agents or lawyers acting on behalf of the party. Consequently, it was clarified that providing a copy of the signed arbitral award solely to the lawyer or agent, without delivering it directly to the party, does not meet the requirements for valid delivery.



## **THE LATEST RESOLUTION FROM THE GENERAL ASSEMBLY OF THE DUBAI COURT OF CASSATION ALIGNS THE REPERCUSSIONS OF NOT SETTLING ARBITRATION COSTS IN DIAC ARBITRATION WITH GLOBAL BEST PRACTICES**

The General Assembly's recent stance, based on a comprehensive interpretation of Articles 45 and 54 of the UAE Federal Arbitration Law 2018 as amended (the FAL), essentially protects the parties right to bring their dispute to arbitration, regardless of their initial ability or willingness to pay the initial costs. In simpler terms, even if the arbitration process is closed due to the party's failure to make full payment initially, their obligation to engage in arbitration persists, and they must resort to arbitration to settle their dispute. Practically, this implies that if a party attempts to invoke the general jurisdiction of the Dubai Courts for the same dispute, the Dubai Courts will consider an arbitration defence under Article 8(1) FAL.

## **THE JCAA COMMEMORATES SEVEN DECADES OF INTERNATIONAL ARBITRATION IN AN EVOLVING GLOBAL LANDSCAPE**

Tokyo stands as a top-tier city, possibly the flagship of the world's third-largest economy. Ongoing legislative initiatives by the Japanese government signal a commitment to future development. Consequently, Tokyo merits recognition as a focal point for Asia's expanding influence in international arbitration. The positive outcome of this occasion holds potential to consolidate the diverse events hosted in Tokyo throughout the year into a more substantial arbitration gathering, comparable to Hong Kong's Arbitration Week or Seoul's Arbitration Festival.

## **THE FAIR WORK COMMISSION (FWC) IN AUSTRALIA DETERMINED THAT IT LACKED THE AUTHORITY TO MEDIATE A DISPUTE OVER A FLEXIBLE WORK ARRANGEMENT INITIATED BY AN EMPLOYEE BECAUSE THE REQUEST WAS DEEMED INVALID**

The FWC outlined the criteria for a valid flexible work arrangement request, including the employee meeting relevant circumstances, completion of 12 months continuous service, a written formal request to the employer, and a clear explanation of the requested changes and their basis. The ruling emphasized that meeting all these requirements is crucial for validity, with the absence of any rendering the request invalid. In this instance, the FWC deemed the employee's request invalid due to the failure to identify reasons in writing linked to the Act's circumstances and insufficient continuous employment of less than 12 months.

## **THE MEGA-AWARD DISPUTE CONCLUDES IN NIGERIA FOLLOWING THE DENIAL OF A UK APPEAL**

A London judge strongly criticized the conduct of Process & Industrial Development Ltd (P&ID) during secret legal proceedings, declaring the fraudulently obtained \$11 billion (€10 billion) arbitration award against Nigeria for a failed gas deal "should not have come into existence" and must be invalidated. The judge, who previously found the award tainted by bribes, ruled that the case cannot be referred back to the arbitration tribunal. Additionally, permission for P&ID to appeal the decision was denied by the court.

## **PAKISTAN WINS AT PCA AGAINST SAUDI COMPANY, TUWAIQI STEEL OVER VIOLATIONS OF OIC AGREEMENTS**

In a legal dispute at the Permanent Court of Arbitration (PCA) in The Hague, Netherlands, Pakistan has emerged triumphant against a Saudi steel company, Tuwairqi Steel, and its investors, Dr Hilal Hussain Al Tuwairqi and Al Ittefaq Steel Products Company Ltd. The arbitration proceedings, initiated in February 2018, alleged violations of the Organisation of Islamic Cooperation (OIC) investment agreement. The dispute centered on Pakistan's alleged failure to fulfill sovereign assurances, including the committed supply of natural gas at a predetermined tariff, for the claimants' steel-production facility in Port Qasim, Karachi. The arbitration tribunal, formed under the OIC investment agreement, dismissed all claims by the Saudi company and mandated them to pay over 1.8 million euros in costs and legal fees to Pakistan.

## **INDIA'S APPEAL OVER THE SATELLITE AWARD IS UNSUCCESSFUL AGAINST DEUTSCHE TELEKOM AG, SINGAPOREAN COMPANY**

India's appeal in Singapore concerning a terminated satellite deal has been unsuccessful, and it has been mandated to compensate \$140 million. The Singapore Court of Appeal affirmed the enforcement of the investment treaty award against India, asserting that the state is barred from re-litigating matters already resolved by the courts at the arbitration's location.