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IALR Indian Arbitration Law Review

GAUHATI HIGH COURT: ARBITRATION MAY BE INVOKED DESPITE ALTERNATIVE REMEDY UNDER RERA, 2016.

The Gauhati High Court recently, in the case of Pallab Ghosh v. Simplex Infrastructures Limited, held that arbitration can be invoked by a party even when an alternative remedy is available under the Real Estate (Regulation and Development) Act, 2016 (RERA Act). This decision came from an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (A&C Act) for the appointment of an Arbitrator, as the Arbitration Clause between the parties required a tribunal of three Arbitrators. Justice Michael Zothankhuma noted that, according to various Supreme Court judgments, arbitration is not the only remedy for consumers; they can choose between arbitration and filing a complaint under the Consumer Protection Act. The Delhi High Court and Patna High Court judgments clarified that the Arbitration Act does not conflict with the RERA Act. Therefore, a party can invoke arbitration despite the RERA Act's alternative remedy.

BOMBAY HIGH COURT: APPELLATE COURTS SHOULD NOT INTERFERE WITH LOWER COURT'S DISCRETION UNLESS ARBITRARILY EXERCISED

The Bombay High Court, in a recent appeal held that Section 37 of the Arbitration Act is limited to cases where the lower court's order was arbitrary, capricious, perverse, or ignored settled legal principles on interlocutory injunctions. Section 37 of the Arbitration Act permits appeals against specific arbitration-related orders, such as refusals to refer to arbitration, measures under Section 9, and decisions on arbitral awards under Section 34. The High Court emphasized that appellate courts should not interfere with the lower court's discretion unless it was exercised arbitrarily, capriciously, perversely, or in disregard of established legal principles. The single judge's decision was found reasonable and not perverse. Disputes over contract termination, force majeure, and financial liabilities were deemed arbitration matters, and the present issue involving non-compliance since June 1, 2023, meant monetary resolution was appropriate in arbitration. The High Court, thereafter, concluded there was no exceptional reason to interfere with the single judge's decision under Section 37(1)(b) of the Act setting a precedent to reduce frivolous appeals and judicial interference.

EXTENSION OF MANDATE OF AN ARBITRAL TRIBUNAL EVEN AFTER ITS EXPIRY UNDER SECTION 29A (4) SHALL BE ALLOWED

The Delhi High Court bench, led by Justice Manoj Jain, held that the court is empowered to extend the mandate of an arbitral tribunal even after its expiry under Section 29A (4) of the Arbitration and Conciliation Act, 1996. This section allows courts to extend the tribunal's mandate beyond the original period for making awards. In the given case, arbitration should have concluded within twelve months of completing pleadings on the counter-claim, but there was a delay. Citing the decision in M/S Power Mech Projects Ltd. vs. M/S Doosan Power Systems India Pvt. Ltd., the court confirmed its authority to extend the tribunal's mandate either before or after the period's expiry.

ORISSA HIGH COURT ESTABLISHES THAT THE LIMITATION PERIOD FOR COMMENCEMENT OF ARBITRATION BEGINS WITH THE CAUSE OF ARBITRATION

The Orissa High Court, led by Justice D. Dash, held that the limitation period for commencing arbitration starts when the cause of arbitration accrues, i.e., when the claimant first has the right to take action or request arbitration. This matches the period from when the cause of action would have accrued without an arbitration clause. The court referred to the Supreme Court's decision in M/s. T & AG vs. Ministry of Defence, where it was held that timebarred claims could still be referred to arbitration. Although no specific time limit exists for filing an application under Section 11(6) for appointing an arbitrator, Section 43 of the Arbitration Act and the decision in Consolidated Engineering Enterprises v. Principal Secretary affirm that the Limitation Act, 1963 applies to all Arbitration Act proceedings unless excluded. In the given case, the Court held that the claim was within the limitation period, and an arbitration award shouldn't be overturned merely due to minimal or weak evidence if the arbitrator's approach wasn't arbitrary or capricious.

SUPREME COURT UPHOLDS MEGHALAYA HIGH COURT'S DECISION ON ARBITRAL AWARD TIME LIMIT EXTENSION

In the present case, the Meghalaya High Court rejected the appellant's application to extend the time limit for passing an arbitral award, stating it lacked original civil jurisdiction. It noted that the principal civil court with original jurisdiction should handle such applications. Justices Abhay S. Oka and Ujjal Bhuyan clarified that under Section 29A(4) of the Arbitration Act, the principal civil court of original jurisdiction has the power to extend the time limit for arbitral awards. However, a High Court with original civil jurisdiction can also do so.

The Supreme Court found no merit in the appeal and upheld the High Court's decision, stating that the power under Section 29A (4) of the Arbitration Act vests in the principal civil court of original jurisdiction, which includes a High Court with such jurisdiction.

Since the High Court does not have ordinary original civil jurisdiction, the Special Leave Petition is bound to be dismissed.

TELANGANA HIGH COURT CLARIFIES THE VALIDITY OF CONCURRENT PROCEEDINGS UNDER IBC AND ARBITRATION ACT

In the present case, a Section 9 IBC proceeding instituted by the respondents is sub judice before the NCLT. Notwithstanding, the filing of such a petition does not constitute a bar to the initiation of a proceeding pursuant to Section 11(6) of the 1996 Act.

No statute prohibits a party from starting a proceeding under Section 11 of the 1996 Act, given that no order has been passed under Section 9 of the IBC, the Section 11(6) proceeding is still maintainable.

Section 21 of the 1996 Act states that arbitral proceedings begin when a request for arbitration is received by the respondent, unless agreed otherwise by the parties. Consequently, a sole arbitrator has been appointed and will proceed with the arbitration according to the law.

THE ORISSA HIGH COURT PRECLUDES REAPPRAISAL OF EVIDENCE UNDER SECTION 34

In its recent judgement in Principal Secretary to the Govt v. M/S.Jagannath Choudhury, the High Court of Orissa held that a Section 34 petition does not permit the reappreciation of evidence assessed by an arbitrator.

The single-judge bench comprising Justice D. Dash J. has stated that a Section 34 petition cannot seek reappreciation of evidence. The appellant sought to appeal the decision of the District Court, which had refused to set aside the award rendered by the arbitrator under Section 37 of the Arbitration and Conciliation Act, 1996. The bench relied upon the Supreme Court decision in National Highway Authority of India v. M. Hakeem, wherein it had been held that Section 34 did not accord appellate authority to the court, and allowed for setting aside arbitral awards only on limited grounds. Affirming the decision of the District Court, the bench posited that it could not reappraise the evidence evaluated by the arbitrator and a patent error in the award alone must guide any decision to interfere with an arbitral award.

ONLY A SUBSTANTIAL DEBT DISPUTE MAY GIVE WAY TO THE ARBITRATION OF INSOLVENCY CLAIMS

The Privy Council in London has reversed a decade-long precedent in English law concerning insolvency and arbitration. In a unanimous decision, in Sian Participation Corp v Halimeda International Ltd., it upheld the stance that insolvency proceedings should not be halted in favour of arbitration when the dispute lacks substantial grounds.

The case involved a Cyprus-registered entity seeking to enforce a $140 million loan against a British Virgin Islands ("BVI") based company and through BVI liquidation proceedings. The council declared that the British Virgin Islands courts should dismiss or stay an insolvency petition only if the debt is genuinely and substantially disputed. This ruling nullifies the 2014 English Court of Appeal decision in Salford Estates (No.2) Ltd v Altomart Ltd, which required stays on winding-up petitions if the debt was contested and subject to arbitration agreements.

SIAC TRIBUNAL FAVORS MALAYSIAN AGENCY IN $678 MILLION DISPUTE

A SIAC tribunal has ruled in favour of the Federal Land Development Authority ("FELDA"), a subsidiary of subsidiary FIC Properties ("FICP"), in a $678 million dispute with the Indonesian conglomerate, Rajawali Capital. The tribunal mandated Rajawali to repurchase shares in Eagle High Plantations at a price set by FICP, following a ruling on 14 June.

FELDA, which was founded in the 1950s, has faced multiple corruption scandals. This is the second SIAC arbitration over FELDA's efforts to make Rajawali buy back a 37% stake in Eagle High, which operates over 153,000 hectares of oil palm plantations in Indonesia. Rajawali sold the stake to FICP in 2015 for over $505 million, a deal criticised for overpricing and alleged to be a bailout linked to then-Prime Minister, Najib Razak. FICP financed the acquisition with a $530 million loan but defaulted in 2017. The first arbitration in 2019 favoured Rajawali. FICP's second attempt in 2022 led to the recent favourable ruling.

ABI RAISES CONCERNS OVER FINANCE MINISTRY'S ARBITRATION GUIDELINES

The Arbitration Bar of India ("ABI") and the Indian Arbitration Forum have expressed concerns about a Ministry of Finance memorandum on arbitration in public procurement contracts. The guidelines suggest limiting arbitration to disputes under Rs. 10 crores, directing larger cases to court. Senior Advocate Gourab Banerji, the ABI President, has argued that this move contradicts the government's aim of promoting India as a global arbitration hub and will overburden the judiciary, hindering business operations. ABI has highlighted challenges such as the reluctance among officials to sign settlements. They have proposed the incorporation of Med-Arb clauses in contracts and empowerment officials to propose settlements without the fear of repercussions.

ABI has also recommended independent committees to review arbitral awards. It has urged Finance Minister Nirmala Sitharaman to withdraw the memorandum, stressing the need for a consistent pro-arbitration approach to maintain investor confidence and drive economic growth.

COLOMBIAN SUPREME COURT REJECTS RECOGNITION OF $1.7 BILLION AWARD AGAINST VENEZUELA

The Colombian Supreme Court has refused to recognise a $1.7 billion investment treaty award against Venezuela, citing state immunity from execution. Canadian mining company, Rusoro, initiated arbitration in 2012 after Venezuela nationalised all gold mining operations. A 2016 tribunal found Venezuela liable for expropriation, awarding Rusoro $968 million along with interest, now exceeding $1.7 billion.

On 20 June, a five-judge bench denied Rusoro's application to recognise its ICSID award. The court argued that the ICSID Convention allows states to retain immunity from execution, preventing coercive measures against them. The court emphasised that even if Venezuela waived immunity from jurisdiction, it retained immunity from execution, aligning with Colombian international public policy. This ruling follows protracted legal battles, including annulments and enforcements in France, Ontario, and the US.

SWISS ARBITRATION COURT UPHOLDS TERMINATION OF URALKALI SPONSORSHIP AMID RUSSIA-UKRAINE CONFLICT

The Swiss arbitration court adjudicating the dispute between the Haas Formula 1 team and Uralkali has issued a ruling following the team's decision to terminate their sponsorship agreement amidst Russia's 2022 invasion of Ukraine. Uralkali, which had sponsored Haas and driver Nikita Mazepin, sought a refund of the $13 million fee paid for the 2022 season after the termination. The company claimed that Haas failed to fulfil its sponsorship obligations by ending the agreement prematurely.

The ruling favoured Haas, stating the team had "just cause" to terminate the contract due to the geopolitical circumstances surrounding Uralkali's Russian ties. The panel determined that Haas could retain a portion of the sponsorship fee up to the termination date, refunding the remainder to Uralkali. It dismissed Uralkali's claims for compensation, noting that other sports entities had similarly severed ties with Russian-linked sponsors post-invasion.