

## QUARTERLY ALTERNATE DISPUTE RESOLUTION ROUND-UP

(JANUARY- MARCH 2021)

### January

- 1. Powers under Articles 226 and 227 should be used sparingly by High Courts while interfering with arbitral proceedings.**

The Supreme Court of India in the case of *Bhaven Construction v Executive Engineer Sardar Sarovar Narmada Nigam Ltd*<sup>1</sup> held that the High Courts should take the preamble of the Arbitration and Conciliation Act, 1996 [“the Act”] into account, which is based on the UNCITRAL principle of “unified legal framework for the fair and efficient settlement of disputes” while exercising powers under the Article 226 and 227 of the Constitution of India. The Apex Court relied on the case of *M/s Deep Industries Limited v Oil and Natural Gas Corp Ltd*<sup>2</sup> to state that Section 163 of the Act mandates the issue of the jurisdiction to be first dealt by the arbitration tribunal before court hears the same under Section 324 of the Act. It added that the court interference in the arbitral proceedings should be minimal and to be allowed only wherein one side is rendered remediless under the Act or in case of direct display of “bad faith” by one of the parties.

- 2. Principles of Order XXXVIII Rule 5 of the CPC are applicable to Section 9 of the Arbitration and Conciliation Act, 1996.**

The Delhi High Court in the case of *Beigh Construction Comp P. Ltd v Vahara Infra Ltd*<sup>5</sup> held that an order under Section 9 of the Act to secure an amount cannot be made disregarding substantiated propositions provided under Order XXXIX Rules 1 and 2 and Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 [“CPC”]. This is because the petitioner while asserting the amounts seeks an order in the nature of attachment before judgement. Therefore, the court observed that Order XXXVIII Rule 5 of the CPC would govern the grant of such relief. It enumerated two conditions required to be fulfilled for the same: (i) the petitioner must establish the existence of a prima facie case and ii) the behaviour of the defendant is to defeat the realisation of the decree from being carried out.

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<sup>1</sup> *Bhaven Construction v Executive Engineer Sardar Sarovar Narmada Nigam Ltd* [2021] SCC OnLine SC 8.

<sup>2</sup> *M/s Deep Industries Ltd v Oil and Natural Gas Corp Ltd* [2019] SCC OnLine SC 1602.

<sup>3</sup> The Arbitration and Conciliation Act 1996, s 16.

<sup>4</sup> The Arbitration and Conciliation Act 1996, s 32.

<sup>5</sup> *Beigh Construction Company P Ltd v Vahara Infra Ltd* IA 207/2021.

**3. Challenge to arbitrability is a jurisdictional issue and cannot be decided under Section 14 of the Arbitration & Conciliation Act, 1996.**

The Delhi High Court in the case of *Medisprouts India Pvt Ltd v M/S Silver Maple Healthcare*<sup>6</sup> held that the arbitrability of disputes affects the jurisdiction of the arbitral tribunal and the same does not fall under the domain of Section 32(2) of the Act. Relying on the case of *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products*<sup>7</sup> and the *kompetenz – kompetenz* principle, the court held that the arbitral tribunal’s jurisdiction is to be determined by the tribunal itself. The court further held that the challenge to the arbitrability of dispute is not a subject of recourse under Section 14 of the Arbitration Act unless to challenge the eligibility of an arbitrator as under Section 12(5) of the Act.

**4. The non-payment or underpayment of stamp duty does not invalidate an arbitration agreement.**

The Supreme Court of India in the case of *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. & Others*<sup>8</sup> observed that an arbitration agreement is a “separate and distinct agreement” extraneous from the underlying commercial contract by relying on the doctrine of separability and the *kompetenz–kompetenz* principle. It held that (i) an arbitration agreement is not chargeable under the stamping acts and (ii) the non-payment or underpayment of duty on the contract does not preclude the parties from confiding in the contract encompassing the arbitration agreement. However, the adjudication of rights and duties would only commence after the parties abide by the mandatory stamp duty provisions. The Court, therefore, overruled its previous ruling in *SMS Tea Estates Pvt Ltd. v M/s Chandmari Tea Co Pvt Ltd*<sup>9</sup> and distinguished from its findings in *Garware Wall Ropes Ltd v Coastal Marine Constructions and Engineering Ltd*<sup>10</sup> [“**Garware Wall Ropes**”]. Since a three-judge bench of the court has recently reaffirmed the findings of *Garware Wall Ropes* in the case of *Vidya Drolia & Ors v Durga Trading Corporation*<sup>11</sup> the court referred the issue to a Constitutional Bench.

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<sup>6</sup> *Medisprouts India Pvt Ltd v M/s Silver Maple Healthcare* OMP (T) (COMM) 88/2020.

<sup>7</sup> *Fertilizer Cooperative Limited v Bhadra Products* [2018] 2 SCC 534.

<sup>8</sup> *N N Global Mercantile Pvt Ltd v Indo Unique Flame Ltd & Ors* 2021 SCC OnLine SC 13.

<sup>9</sup> *SMS Tea Estates Pvt Ltd v M/s Chandmari Tea Co Pvt Ltd* 2011 14 SCC 66.

<sup>10</sup> *Garware Wall Ropes Ltd v Coastal Marine Construction and Engineering Ltd* 2019 SCC OnLine SC 515.

<sup>11</sup> *Vidya Drolia & Ors v Durga Trading Corp* 2020 SCC Online Del 313.

**5. An order terminating arbitration proceedings under Section 32(2)(c) of the Arbitration & Conciliation Act, 1996 is not an award.**

The Delhi High Court in case of *PCL Suncon v National Highway Authority of India*<sup>12</sup> clarified the difference between an order and an award. The court held that an order terminating the proceedings upon the claimant's failure to file its statement in the stipulated time is an order under Section 32(2) of the Arbitration Act. The court observed that an order which results in the conclusion of the arbitral proceedings as the tribunal finds it impossible or unnecessary to proceed with the same is not an order. It is merely an expression of the pronouncement of the arbitral tribunal to discontinue the proceeding. The court reasoned its ruling by stating that an arbitral award must resolve or decide on any of the issues between the parties to the arbitration by relying on *IFFCO Ltd v Bhadra Products*<sup>13</sup>. It noted that an award would be a final award in instances where it is dispositive of the whole dispute addressed to the arbitral tribunal, resulting in the termination of the arbitration proceedings. The court further held that in such cases, the recourse available to the parties lies under Section 14 instead of Section 34 of the Act.

**6. Mere commonality of scope of agreements is insufficient for entertaining a composite petition for the appointment of arbitrator.**

The Madras High Court in the case of *Tamil Nadu Road Sector Project II, Highways Department v. IRCON International Ltd and Ors*<sup>14</sup> dealt with the issue as to whether a composite arbitration proceeding can be conducted despite the fact that the petitioner and the respondents had signed two distinct contracts, and the work to be done by the two was interconnected. The court observed that though the two contracts provided for work to be done in an intrinsically intertwined manner but the procedure for the appointment of arbitrators provided therein are totally different. Therefore, the court while dismissing the petition held that mere commonality is insufficient for entertaining the petition for the additional reason of non-compliance with the procedure on the petitioner's part.

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<sup>12</sup> *PCL Suncon v National Highway Authority of India* 2021 SCC OnLine Del 313.

<sup>13</sup> *IFFCO Ltd v Bhadra Products* (2018) 2 SCC 534.

<sup>14</sup> *Tamil Nadu Road Sector Project II, Highways Dept v IRCON International Ltd and Ors* OP 34/2020.

**7. Party resisting arbitration as the preferred mode of dispute resolution and opposing the appointment of arbitrator under Section 11 would deprive itself from claiming interim relief.**

The Punjab and Haryana High Court in the case of *Innovative Facility Solutions Pvt Ltd v AEC Digital Studio Pvt Ltd & Ors*<sup>15</sup> held that a party must have an intention of referring the dispute to arbitration for invoking the jurisdiction of the court under Section 916 of the Act. In the absence of the intention and in case where a party opposes the appointment of arbitrator under Section 11, it would not be entitled to interim relief under Section 9 of the Act. However, the court stated that the party would be entitled to get suitable relief from the arbitral tribunal providing it agrees to refer the dispute to arbitration.

**8. Seat of arbitration clause prevails over jurisdictional clause contained in the arbitration agreement.**

The Bombay High Court in the case of *Aniket SA Investments LLC v Janapriya Engineers Syndicate Pvt Ltd and Ors*<sup>17</sup> held that the choice of seat of arbitration is itself a reflectance of party autonomy and it has the effect of conferring exclusive jurisdiction on the courts of the seat. The court held that in case where two different places have been decided by the parties under seat of the arbitration clause and exclusive jurisdiction clause, the former would prevail over the latter. Therefore, the court affirmed the ruling of *BGS SGS SOMA JV v NHPC Ltd*<sup>18</sup> in which it was held that *Bharat Aluminium Co v Kaiser Aluminium Technical*<sup>19</sup> judgment should be read as a whole and on correct interpretation, it holds that the courts of seat of arbitration would have exclusive jurisdiction if any dispute occurs in the arbitration.

**9. Key changes in the 2021 Rules by the International Chamber of Commerce.**

The International Chamber of Commerce [“ICC”] has introduced new rules for arbitration [“2021 Rules”]<sup>20</sup> that will apply to cases filed from January 1, 2021, onward. The 2021 Rules respond to the global pandemic by modernizing procedures and increasing the role of technology.

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<sup>15</sup> *Innovative Facility Solutions Pvt Ltd v AEC Digital Studio Pvt Ltd & Ors* FOA No. 2917/2021 (O&M).

<sup>16</sup> The Arbitration and Conciliation Act 1996, s 9.

<sup>17</sup> *Aniket SA Investments LLC v Janapriya Engineers Syndicate Private Limited and Ors* COMAPL 516 of 2019.

<sup>18</sup> *BGS SGS SOMA JV v NHPC Ltd* 2019 SCC Online SC 1585.

<sup>19</sup> *Bharat Aluminium Co v Kaiser Aluminium Technical* (2012) 9 SCC 552.

<sup>20</sup> The 2021 ICC Arbitration Rules, <<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>> accessed April 4, 2021.

*(a) Increased Use of Technology*

Article 3(1) removes the reference to the paper filing by providing that all pleadings and written communications “shall be sent” instead of “supplied in a number of copies” to each party, each arbitrator, and the Secretariat. Additionally, arbitrators will now have increased discretion to conduct a virtual arbitration.

*(b) Expanded scope for expedited proceedings*

In 2017, the ICC created a simplified procedure for smaller quantum or less complex claims, to improve cost-effectiveness and accessibility. Expedited arbitrations are often decided on a “documents only” basis. Building on the success of these procedures, the 2021 Rules increase the opt-out threshold for expedited arbitrations from \$2 million to \$3 million USD.

*(c) Robust Case Management and Consolidation Procedures*

The new Article 10(b) clarifies that the court may, on a party’s request, consolidate where the claims are made under the same arbitration agreement or agreements. Furthermore, Article 10(c) allows consolidation even when the claims are not made under the same arbitration agreement or agreements, provided that the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship, and the court finds the arbitration agreements to be compatible. Article 7(5) of the 2021 Rules now permits joinder of additional parties after the constitution of arbitral tribunals upon a party’s request. The consent of all parties is no longer a requirement, unlike under the 2017 Rules.

*(d) Preventing Unequal Treatment and Conflicts of Interest of Interest*

Article 12(8) in the 2021 Rules allows the Court to disregard “unconscionable arbitration agreements.” The new Article 12(9) limits the right of parties to nominate their own arbitrator in “exceptional circumstances” where there is a “significant risk of unequal treatment and unfairness that may affect the validity of the award.”

**10. Arbitrator may not choose the type of hearings absent an agreement between the parties.**

The Singapore Court of Appeal has dismissed an appeal against the decision of the High Court on the annulment of an award for violation of the principles of natural justice *CBP v Credit*

*Bureau Singapore* [“**CBP v CBS**”].<sup>21</sup> The court held that the arbitrator could not examine the dispute based only on documents and without the consent of the parties. The dispute arose from contracts for the supply of coal between a Singaporean supplier and an Indian buyer. The contract contained an arbitration clause on the referral of disputes to the Singapore Chamber of Maritime Arbitration [“**SCMA**”]. The arbitral tribunal suggested the parties to agree whether to hold an oral hearing or, if they failed to do so, suggested issuing an award based on provided documents in accordance with the arbitration rules. The tribunal decided that absent an agreement between the parties to continue the proceedings based only on the documents available, the hearing would be held, but without the witnesses, since the buyer failed to demonstrate the material value of such testimony. The arbitrator’s award on the merits was subsequently set aside by the High Court of Singapore on the ground that the parties were not given the opportunity to fully present their case. The Court of Appeal held that the arbitrator had no right to choose the type of hearing or impose a requirement for the buyer to prove the material value of witness testimony.

#### **11. Paris Court Agreed with the ICC Decision to Appoint Five-Member Arbitral Tribunal.**

The Paris Court of Appeal upheld a USD 646 million award against a company owned by Angolan billionaire Isabel dos Santos,<sup>22</sup> ruling that the ICC could appoint five arbitrators to consider the dispute and dismissed allegations of bias against two arbitrators. The arbitration clause provided for each party to appoint an arbitrator, with the presiding arbitrator to be chosen by the parties’ appointees. The claimant argued that due to the fact that there were three respondents in the case, constitution of the arbitral tribunal in that matter would contradict the principle of equality (égalité), a mandatory rule of French arbitration law. Despite the objections of the respondents, ICC agreed with the claimant’s position and appointed the whole tribunal. Eventually, the Court of Appeal determined that ICC, as an institution administering the arbitration, was entitled under French law to resolve this dispute in accordance with its rules and the principle of the equality of the parties.

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<sup>21</sup> *CBP v Credit Bureau Singapore* [2020] SGHC 23.

<sup>22</sup> *PT Ventures v Vidatel and Ors* ICC Case No 21404/ASM/JPA (C-21757/ASM).