MONTHLY ROUND-UP

OCTOBER 2022

INDIAN ARBITRATION LAW REVIEW

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Indian Arbitration Law Review

REWRITING COMMERCIAL CONTRACT TERMS IS FATAL TO ARBITRAL AWARDS

The Delhi High Court in the case of ***Calcom Cement India Ltd. v. Binod Kumar Bawri & Ors.*** has ruled that where the parties agree to enter into a mutual consultation in the future, for making amendments to an original agreement, the same would only constitute an "agreement to agree", which is not enforceable in law. The Single Bench of Justice C. Hari Shankar held that the finding of the arbitral tribunal that the original Share Holders Agreement stood altered and extinguished the liabilities of the parties even though the amendment contemplated by the "Amendment to the Share Holders Agreement" was not in fact carried out by the parties, was erroneous in law.

ADMINISTRATIVE MECHANISM FOR DISPUTE RESOLUTION IS NOT A SUBSTITUTE FOR ARBITRATION PROCEEDINGS

The Delhi High Court in the case of ***Prasar Bharti v. National Brain Research Centre & Anr.*** has ruled that the Administrative Mechanism for Resolution of Disputes ("AMRD") is only a mechanism for possible settlement of disputes inter-se governmental organisations and not a substitute for arbitration in cases where there is an arbitration agreement between the parties. Presently, it served as a mechanism between the petitioner and respondent No. 1 in an effort to obviate need for more expensive and time-consuming adjudicatory mechanisms.

PLACE OF ARBITRATION WOULD NOT BECOME "THE SEAT" WHEN EXCLUSIVE JURISDICTION IS CONFERRED

The High Court of Delhi held in the case of ***Kush Raj Bhatia v. DLF Power & Services Ltd.*** that the place of arbitration would not become the seat of arbitration when the parties have conferred exclusive jurisdiction on a Court other than the seat Court. The bench of Justice Neena Bansal Krishna held that conferring exclusive jurisdiction, over a Court different from the Court at the place of arbitration, would be a contrary indicia and the place of arbitration would merely be the venue, and only the Court on which exclusive jurisdiction is conferred shall have the jurisdiction to decide all applications arising out of the arbitration between the parties.

NOTICE STATING RIGHT TO INITIATE ARBITRATION IS NOT A NOTICE UNDER THE ARBITRATION & CONCILIATION ACT

The Delhi High Court in the case of ***Shriram Transport Finance Co. Ltd. v. Narender Singh*** has ruled that a notice issued by a party, merely stating its right to initiate arbitral proceedings if the payment was not made by the opposite party, is a unilateral communication which does not qualify as a notice under Section 21 of the Arbitration and Conciliation Act, 1996 ("Act"). The Division Bench of Justices Rajiv Shakdher and Tara Vitasta Ganju reiterated that the Act does not contemplate unilateral appointment of an arbitrator by one of the parties and that there must be a consensus between the parties for appointment of the arbitrator. The Court added that commencement of arbitral proceedings is incumbent on the receipt of such request or notice, as provided under Section 21 of the Act.

ARBITRAL TRIBUNAL CANNOT RECALL THE ORDER THAT TERMINATED THE ARBITRAL PROCEEDINGS

The High Court of Delhi has held in the case of ***Vag Educational Services v. Aakash Educational Services Ltd***. that once the arbitral tribunal terminates the arbitration proceedings on account of the claimant withdrawing its claims, it cannot recall the order of termination. The bench of Justice C. Hari Shankar held that once the arbitral proceedings are terminated, the arbitral tribunal becomes *functus officio* and it cannot entertain an application recalling its earlier order by which it terminated the arbitral proceedings.

INITIATION OF PROCEEDINGS UNDER THE SARFAESI ACT DOES NOT BAR A DISPUTE FROM BEING ARBITRABLE

The Delhi High Court has ruled in the case of ***Diamond Entertainment Technologies Pvt. Ltd. & Ors. v. Religare Finvest Ltd.*** that the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") provide a remedy in addition to adjudication under the Arbitration and Conciliation Act, 1996 and hence, initiation of proceedings under the SARFAESI Act does not bar arbitration of disputes. The Single Bench of Justice Neena Bansal Krishna held that whether an arbitral award would operate as a *res judicata*, barring the second arbitration under the same agreement, must be decided by the Arbitrator since it involves mixed questions of fact and law.

INTERFERENCE IN THE ARBITRAL AWARD IS JUSTIFIED WHEN THE ILLEGALITY GOES TO ROOT OF THE MATTER

The division judge bench of Justice Tara Vitasta Ganju and Justice Rajiv Shakdher of the Delhi High Court in the case of ***Shriram Transport Finance Co. Ltd v. Shri Narendra Singh*** held that where in the arbitral proceedings, the illegality goes to the very root of the matter, interference by the Court is warranted. Such interference will be justified especially when the arbitrators conduct and impartiality are in doubt. The scope and ambit of a challenge under Sections 34 and 37 of the Act is no longer res integra.

THE QUESTION WHETHER A CLAIM IS A NOTIFIED CLAIM IS BEYOND THE SCOPE OF ARBITRATION

The Delhi High Court recently held that the dispute as to whether a claim was a notified claim was beyond the scope of arbitration. Bench of Justice Vibhu Bakhru heard a petition under Section 11 of the Arbitration and Conciliation Act, 1996 praying that a sole arbitrator be appointed in accordance with Clause 9.0.1.1 of the General Conditions of Contract (GCC). The court directed that, *"In view of the above, the petitioner's request to refer the disputes to arbitration cannot be acceded to at this stage. IOF is bound down to the statement made by the learned counsel on its behalf that the General Manager or the concerned authority shall consider the question including the petitioner's claim as Notified Claims, in accordance with the Contract between the parties, within a period of two weeks."*

THE INTENTION OF AN ARBITRATION CLAUSE IN AN AGREEMENT CANNOT BE ECLIPSED BY MERE USE OF THE WORD 'CAN'

The Single Bench of the Delhi High Court consisting of Justice Prateek Jalan in the case of ***Panasonic India Private Ltd v. Shah Aircon*** held that the intention of an arbitration clause in an agreement cannot be eclipsed by mere use of the word "can". It was opined that the interpretation of an arbitration clause, as indeed of all contractual provisions, must be predicated upon a construction of the contract as a whole, and no particular word or phrase should be unduly emphasised to negate the clause of its true meaning.

SUPREME COURT TO DECIDE ON BINDINGNESS OF ARBITRATION CLAUSE IN AN UNSTAMPED CONTRACT

On a contention that an arbitration agreement entered into between SMS Tea Estates and Coastal Marine Constructions & Engineering Ltd. and Garware Wall Ropes Ltd. was unenforceable because the sub-contract was unregistered and unstamped, the High Court held that the issue can be raised in application under Section 11 or before the Arbitral Tribunal. The matter was referred to the Apex Court on the grounds that non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement. The question thus formed for consideration for the apex court of India is:

"Whether the statutory bar contained in Section 35 of the Indian Stamp Act, 1899 applicable to instruments chargeable to Stamp Duty under Section 3 read with the Schedule to the Act, would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being non-existent, un- enforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument?"