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ARBITRATION AGREEMENT AND BEYOND

In a recent decision of the Bombay High Court in Taru Meghani and Others v. Shree Tirupati Greenfield and Others[1], the issue as to whether an arbitration clause can be circumvented by adding a cause of action, beyond the scope of the Arbitration Agreement entered into between the parties, was decided.

While determining the matter, a single judge bench of Justice N.J. Jamadar opined that the submission of the Plaintiff was fraught with the danger of defeating an Arbitration Agreement, by simply adding a cause of action the Plaintiff may have against the Defendants.

In this case, a summary suit was filed before the Bombay High Court under the commercial division, for recovery of monies arising out of a Memorandum of Understanding ('MoU') and negotiable instruments. It was the case of the Plaintiff that he advanced a total sum of 54 lakh rupees in two tranches; an initial investment of 35 lakh rupees in 2014 under the MoU, which contained an Arbitration clause, and a further investment of 19 lakh rupees made shortly thereafter. Upon default of payment by the Defendant, the Plaintiff approached the Bombay High Court in a summary suit. The Defendant resisted

[1] Summons for Judgment No.71 of 2019 in Commercial Suit No. 1111 of 2019

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the same by raising a preliminary objection that the suit is not maintainable and further, that the dispute ought to be referred to Arbitration, in view of the Arbitration clause in the MoU.

The Plaintiff opposed the reference, contending that the MoU did not cover some of the transactions. It was argued that despite the existence of an arbitration clause in the MoU, the same pertained only to the initial amount advanced. It was contended that in light of the peculiar facts of the case, if the dispute arising out of the MoU was referred to arbitration, the same would amount to bifurcation of adjudication of the transaction. It was also contended that the same would lead to conflicting decisions from diverse proceedings being impermissible under law.

After duly considering the submissions of both sides, the Bombay High Court held that the arbitration clause was comprehensive and covered all the disputes between the two parties, including failure on the part of the Defendant to repay the amounts, as agreed.

Referring to the judgment of the Supreme Court in the case of *Sundaram Finance Limited & Another v. T. Thankam*[2], wherein the Apex Court delineated the approach to be taken by courts dealing with Applications under Section 8 of the Arbitration &

[2] (2015) 14 SCC 444

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Conciliation Act, 1996, the Bombay High Court proceeded to refer the first transaction to Arbitration in terms of the Arbitration Clause as per the MoU. The court also granted liberty to the Plaintiff to institute a fresh suit with respect to the second transaction.

ARBITRATION AGREEMENT SUPERSEDES DISCRETION OF COURT

In a recent judgment of the Hon'ble Supreme Court, by a three judge bench comprising of Justice Banumathi, Justice A.S. Bopanna and Justice Hrishikesh Roy, reaffirmed the law previously laid down that the constitution of an arbitral tribunal must be in accordance with the appointment terms mentioned in the arbitration agreement.

In its decision taken on 17 December, 2019, in the case of the Central Organization for Railway Electrification v. M/s. ECI-SPIC-MCML (JV)[3], the Hon'ble Supreme Court taking note of the arbitration clause, held that the same explicitly provided, that in the event a claim arising out of the agreement

[3] 2019 SCC Online SC 1635

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between the parties exceeded a sum of one crore, the same shall be adjudicated by an Arbitral Tribunal which shall be comprised of three gazette officers, not below the rank of a Junior Administrative.

The decision of the High Court of Allahabad was under challenge before the Apex Court. The High Court passed an order appointing Justice Rajesh Ayal as the sole arbitrator to resolve the disputes between the parties. The said appointment of a sole arbitrator was contrary to clause 64 of the Agreement. In it's reasoning, the High Court held that the powers of the court to appoint an arbitrator under the statute are independent of the agreement between the parties.

On appeal, the Supreme Court held that where an arbitration agreement specifically provides for the constitution and composition of an Arbitral Tribunal, the courts while constituting an arbitral tribunal, must do so in consonance with the terms of appointment. Referring to the facts of the case, it was held that there was no disparity in the appointment of arbitrators caused to the Respondent, as the Respondent was given the option of nominating two out of four proposed arbitrators and hence, the power of the Appellant, is counter-balanced by the power of choice given to the

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Respondent, in the process of constitution of the arbitral tribunal.

With the above observations, the Supreme Court set aside the judgment of the High Court appointing an independent sole arbitrator, in dissonance with the arbitration agreement.

THE FATE OF PROCEEDINGS PRESIDED BY A UNILATERALLY APPOINTED SOLE ARBITRATOR

The Arbitration & Conciliation Act, 1996 was amended by way of the Arbitration & Conciliation (Amendment) Act, 2015. Among other changes, there was an amendment to Section 12 of the Act, brought about with the insertions of Schedules V to VII. This amendment was made with the objective of introducing a system of checks and balances, to ensure impartiality of the arbitrator and to maintain the legitimacy and transparency of arbitration proceedings.

Pursuant to the amendment of the 1996 enactment, the interpretation of the amended Section 12 fell for consideration before the Hon'ble Supreme Court in the matter of ***TRF***

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Limited v Energo Projects Ltd.[4]**.** The point for consideration was as to whether the arbitration clause in the contract, mandating that the arbitral tribunal shall be constituted by the Managing Director of one of the parties to the agreement, was in contravention to Section 12 of the Arbitration & Conciliation (Amendment) Act, 2015. The Supreme Court of India in its decision held, that in the event the Managing Director is rendered ineligible to act as an arbitrator under Section 12(5) read with Schedule VII thereof, notwithstanding the agreement stipulating his appointment, the managing director would be ineligible for appointment as arbitrator.

On a marginally different factual premise, the Supreme Court in the case of ***Perkins Eastman Architects DPC & Anr v HSCC (India) Ltd***,[5] upheld its decision in the *TRF Limited* case on the finding that a person interested in the outcome of the proceedings, shall be disallowed from unilaterally appointing a sole arbitrator.

In light of the aforementioned position of law laid down by the Hon'ble Supreme Court, the same threw up a host of consequential challenges made by parties to arbitration proceedings, which were initiated prior to the decision of the Apex Court and which were presided by unilaterally appointed arbitrators. In one

[4] (2017) 8 SCC 377

[5] AIR 2020 SC 59

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such case before the Delhi High Court in ***Proddatur Cable TV Digi Services v SITI Cables Network Ltd*** [6], the disputant parties had entered into a Distribution Agreement, from which, certain disputes arose between the parties. The Petitioner Proddatur had nominated an advocate as the arbitrator. The said nomination was rejected by the Respondent on the premise, that in terms of Clause 13.2 to the Distribution Agreement, SITI Cables had the right to unilaterally appoint the sole arbitrator. SITI Cables thereafter proceeded to appoint an arbitrator.

During the proceedings, the Sole Arbitrator sought consent from the parties to proceed with the arbitration. At this juncture, the Petitioner refused to give its consent. The Arbitrator in response, expressed that she would continue to conduct the proceedings unless her mandate was terminated by way of a judicial order. Aggrieved by the same, the Petitioner approached the Delhi High Court in a petition filed under Sections 14 and 15 of the Arbitration & Conciliation Act 1996. In the said proceedings, the issue for consideration was the eligibility of the Respondent to unilaterally appoint a Sole Arbitrator to adjudicate the disputes between the parties.

The Court proceeded to look into the principles and rationale in the decision of

[6] 2020 SCC Online Del 350

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Perkins Eastman, whereby the Supreme Court held that the object was to prevent the unilateral appointment of a sole arbitrators by a party which has an interest in the outcome of the arbitral proceedings, with a view to ensure that the ends of justice are met. Applying the principles laid down by the Hon'ble Supreme Court, the Delhi High Court held that despite the powers provided under the Distribution Agreement, SITI Cables Network Limited was not eligible to unilaterally appoint the sole arbitrator as it has an interest in the outcome of the proceedings. It was further held that in such cases, the mandate of the arbitrator shall be terminated *de jure*. Accordingly the High Court proceeded to constitute the arbitral tribunal by appointing a sole arbitrator replacing the previous appointment.

In view of the position of law laid down by the Hon'ble Supreme Court as followed by in the *Proddatur case*, ongoing arbitrations which are presided by arbitrators unilaterally appointed may potentially come under challenge.

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MASCERADING ARBITRATION AGREEMENT

THE SAVOY.
THE ENTR'ACTE, *loq.* :—"Glad to see you together, gentlemen. You'll find this more profitable than pulling different ways."

In a matter before the Division Bench of the Hon'ble Supreme Court, comprised of Justice A.M. Khanwilkar and Justice Dinesh Maheshwari, it was held that an agreement, which clearly provides only for settlement of disputes, shall not be enlarged to treat the same as being an agreement to refer the disputes to arbitration.

The aforesaid decision was rendered in an Appeal filed in the case of ***Food Corporation of India ("FCI") v. National Collateral Management Services Limited ("NCMSL")***[7]**,** seeking to set aside the order of the Delhi High Court. The Delhi High Court had allowed the petition for appointment of an arbitrator and referred the disputes to arbitration. The disputes between the parties arose under three agency agreements. The agreements provided for reference of disputes to the Chairman and Managing Director of FCI. In one of

[7] Civil Appeal Nos. 8338 – 8339 of 2019 dated 4th November, 2019

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the agreements, the settlement clause also stated and clarified that "*It is clearly understood by the parties that the present clause is not an arbitration clause. In case, the dispute still subsists, then Civil Court shall have jurisdiction to adjudicate the same*." The Delhi High Court interpreted the settlement clauses as an intention of the parties to refer the disputes to arbitration.

Referring to its decision rendered in *P. Dasaratharama Reddy Complex vs. Government of Karnataka & Another*[8], the Apex Court held that regardless of the nomenclature of the clause, the settlement clause for reference to the Chairman and Managing Director of FCI, did not vest with him the power to adjudicate the disputes by taking evidence and conducting such other adjudicatory proceedings. It was also held that the clause further clarifies that the parties did not agree to refer the disputes to arbitration and that the aggrieved party is at liberty to seek its remedy before the appropriate court of law. In this regard, it was held that the clarification was not an alteration of the contents of the settlement clause, as erroneously interpreted by the Delhi High Court. The Appeal was disposed of in terms of the said findings.

[8] (2014) 2 SCC 201

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TRANSFERABILITY OF ANARBITRATION CLAUSE

Giriraj Garg V. Coal India Limited Others.[9]

[9] Giriraj Garg vs. Coal India Ltd. and others dated 28.01.2019 MANU/SCOR/03537/2019

In 2007, Coal India Limited introduced a scheme for coal distribution, providing an option for coal buyers to purchase coal through an online portal, which was essentially an e – auction. Pursuant thereof, Giriraj Garg successfully participated in the auction resulting in sale orders being placed by Coal India Limited. Giriraj Garg was however unable to fulfill the orders as it could not lift the coal due to various technical and financial problems.

Subsequently, disputes arose between the parties as the money deposited in the e-auction by Giriraj Garg, was held to be forfeited. Giriraj Garg then filed a petition before the Jharkhand High Court

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under section 11(6) of the Arbitration and Conciliation act 1996, seeking appointment of an arbitrator to refer the disputes arising out of the e-auction to arbitration.

Jharkhand High Court

The Court held that only the scheme contained an arbitration clause and not the sale orders. It was held that nowhere in the sale orders was there any reference to the application of the terms of the scheme to the sale orders. Accordingly, the High Court dismissed the petition holding that there was no arbitration agreement between the parties with respect to the disputes arising out of the sale orders.

Supreme Court

Aggrieved by the dismissal of the petition, Giriraj Garg filed a civil appeal before the Hon'ble Supreme Court challenging the decision of the Jharkhand High Court. The question that fell for consideration before the Apex Court, was whether the arbitration clause contained in the Scheme would be applicable to the Sale Orders.

The Supreme court referred to a decision rendered in an English Case in ***Habas Sanai V. Sometal Sal***[10]***.*** The said case explicates the meaning of a single

[10] MANU/UKCM/0142/2010

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contract case and a two-contract case. It was held, that where the arbitration agreement is contained in another contract, and a reference is made in one contract to incorporate and read the terms of the other contract into the first contract, in such a case the same would be a 'two-contract case'.

It was further explained, that in a two – contract case, the reference to an arbitration clause must be specific.

The Supreme Court in ***Inox Wind Limted V. Thermocables Limited***[11]***,*** also followed the aforementioned position**.**

[11] MANU/SC/0005/2018

Referring to the aforesaid decisions, the Supreme Court held, that the arbitration clause in the 2007 Scheme would stand incorporated in the sale orders issued. It was further held, that in considering the words '*in relation hereto*' appearing in the arbitration clause in the Scheme, the same provide room for the widest interpretation and hence would apply to

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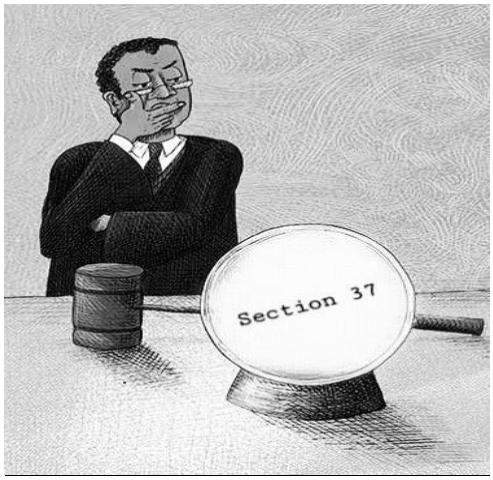
all transactions which took place under the Scheme, including the sale orders.

Accordingly, the Appeal was allowed and the order of the High Court of Jharkhand was set aside.

LIMITATION AND DELAY UNDER SECTION 37



The Hon'ble Supreme Court of India recently rendered its decision in a civil appeal in N. V. International vs. State of Assam & Ors.[12], pertaining to the question of condonation of delay in filing of an appeal under section 37 of the Arbitration and Conciliation Act 1996.

A bench consisting of Justice Rohinton Fali Nariman and Justice S. Ravindra Bhat decided the appeal on 6th December 2019, holding that although 90 days is the stipulated time permitted for filing of appeals under section 37 of the Arbitration and Conciliation Act of 1996, a grace period of 30 days under section 5 of the Limitation Act may be granted.

In this case an Arbitral Award dated 19/12/2006 was passed by Justice K.N. Saikia, (retired) former Judge of the Supreme Court of India. Challenging the Award, a Section 34 petition was filed by N. V. International, which came to be dismissed by the District Judge, Kamrup, Gauhati on 30/05/2016. An appeal under Section 37 of the Arbitration and Conciliation Act, 1996, was filed by N.

[12] **CA No. 9244 of 2019**

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V. International, from the order of dismissal in March, 2017. The appeal was filed with a delay of 189 days beyond the 90 day period, provided under Section 37 of the Arbitration Act.

The Appeal was dismissed by the High Court, holding that no sufficient cause was made out to condone the delay. Challenging the order of dismissal, a civil appeal was filed before the Supreme Court.

The appellants represented by learned advocate Mr. Parthiv K. Goswami, contended that unlike Section 34, Section 37 of the Arbitration and Conciliation Act of 1996, does not exclude section 5 of the Limitation Act and hence, the condonation of delay application should be considered on its own merits in light of the Limitation Act. The Respondents represented by learned counsel Mr. Shuvodeep Roy, argued that the delay could not be condoned, as the object of speedy resolution of disputes referred to arbitration, would be subverted.

Placing reliance on SLP (C) No. 23155/2013, Union of India Vs. Varindera Const. Ltd., the Supreme Court held that any delay beyond 120 days in filing of any appeal under section 37 from an application being either dismissed or allowed under section 34, should not be allowed as it defeats the overall statutory purpose of the arbitration proceedings.

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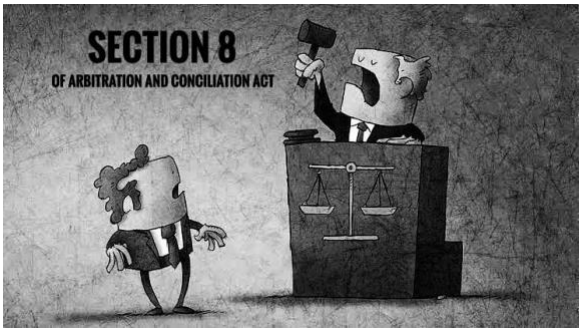
LIMITATION IN LIGHT OF SECTION 8 OF THE ARBITRATION AND CONCILIATION ACT



SSIPL Lifestyle Private Limited v. Vama Apparels (India) Private Limited & Anr[13]

The issue of applicability of the limitation period for filing of a Section 8 application under the Arbitration and Conciliation Act, 1996 came up for consideration before High Court of Delhi.

Two commercial suits were filed seeking recovery of money against Vama Apparels and another. The Defendant-Vama Apparels filed an application under Section 8 of the Arbitration and Conciliation Act of 1996, seeking reference of disputes to arbitration in view of the existence of the arbitration clause in the contract.

A single bench of Justice Prathiba M Singh, dismissed the said application, sustaining the argument of the Plaintiff that the application under Section 8 ought to have been filed within the time prescribed for filing written statements. It was held that the period of limitation

[13] **Cs Comm 735-736/2018**

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provided for filing of written statements in Civil Procedure Code and Commercial Courts Act of 2015, have to be regarded while considering whether the application under section 8 of the Arbitration and Conciliation Act of 1996 was filed within time. It was further held, that since an application under Section 8 is to be filed before filing the statement of defense or written statement, such applications are to be filed before the time period for filing written statements.

In this case, the Defendants were served on April 23 of 2018. By order dated 16th May, 2018, the Joint Registrar granted time to file the written statement. The defendants failed to file the Written Statement and on 13th July, 2018, the opportunity to file written statement was closed. The defendants also did not move any application to bring to the knowledge of the court that insolvency proceedings were underway.

Placing reliance on *M/s SCG Contracts India Pvt. Ltd. (supra*) the High Court held that the period of 120 days for filing of a Written Statement in commercial suits is mandatory. The High Court held that even if the period during which the insolvency proceedings were underway is excluded, the defendants filed the Written Statement on 11th February 2019, which is after the expiry of 120 days from 8th of October 2018 (when the moratorium came to an end). Therefore, the High Court held that the defendants

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did not file the Written Statement within the statutory time period and hence, an application Section 8 of Arbitration and Conciliation Act of 1996 which is to be filed before the written statement would also be barred by limitation. Accordingly, the applications under Section 8 were dismissed.

EXTENSION OF TIME UNDER SECTION 29A OF THE ARBITRATION ACT

The Arbitration and Conciliation (Amendment) Act 2015, sought to negate the scope for delays in arbitration proceedings with the introduction of Section 29A, which makes it mandatory for the arbitral tribunal to pass an award within twelve months from the date of constitution of the tribunal. The period of twelve months may be extended by mutual consent between the parties, by a further period of six months.

On failure to complete the proceedings within a total time period of eighteen months, the mandate of the tribunal would stand terminated. Under such circumstances, the remedy would be for the parties to file an application before the competent court under Section

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29A(5) of the Arbitration and Conciliation Act 1996, by seeking further extension of time for completion of the arbitral proceedings. In considering such an application, the court may impose costs on the party which appears to have been causing unjustified delay in arbitration proceedings.

A very justifiable apprehension, is the quantum of time and money that is consumed in the process of applying for an extension of time before the court. The amendment to Section 29 (A) (4) provides some reprieve, permitting the continuance of arbitration proceedings during the pendency of an application for extension.

In addition to extending the time for concluding arbitration proceedings, the courts considering applications under Section 29A of the Arbitration Act, can also exercise powers to substitute the arbitral tribunal on '*sufficient cause'* being established. However, the courts have adopted a restrictive interpretation of the term sufficient cause in consonance with the object of the amendment, being to prevent any unwarranted delays. The courts have time and again held that Section 29A is to be carefully used and it is only where the Arbitrator fails to proceed expeditiously in the adjudication process, can the same constitute a ground for removal of the Arbitrator. Refer ***NCC***

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***Ltd. v. Union of India*[14].** This principle has been consistently applied by various High Courts in India. Section 29A may therefore be construed as a double edged sword, which has to be wielded carefully.

[14] 2018 SCC OnLine Del 12699

STATUTORY ARBITRATION AND ARBITRATIONS UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

The question of law that came up for consideration before the Hon'ble Supreme Court of India, in State of Gujarat through Chief Secretary and Another v. Amber Builders [15], was whether Section 17 of the Arbitration

[15] Civil Appeal No.8307/ 2019 decided on 8 January 2020

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and Conciliation Act, 1996 (*"**Arbitration Act**"*) would apply to statutory arbitrations, more particularly, arbitrations under Gujarat Public Works Contracts Dispute Arbitration Tribunal Act 1992 ("***the Act***"). The Act governs disputes arising out of contracts for works executed between the State of Gujarat and other entities/ persons/ enterprises, which undertake civil and other contractual works. Disputes arising between the state and such entities are referred to the Gujarat Public Works Contract Dispute Tribunal, which is constituted under Section 3 of the Act.

In this case, disputes arose between the Appellant- State of Gujarat and the Respondent- Contractor. The grievance of the Respondent was the non- payment of bills raised by the Respondent for work done under a contract with the Appellant. The Appellant withheld payment on the premise that the some of the works carried out by the Respondent was defective. The Appellant issued a letter to the Respondent for payment of compensation for the defective work. The Appellant notified the Respondent, that the security deposit and other payments would not be reconciled till such time the Respondent compensates the Appellant in the amount claimed. The Respondent filed a writ petition before the High Court of Gujarat, on the premise that the act of withholding

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payment and claim for compensation were illegal.

The Appellant on the ground contested the petition that the High Court does not have the jurisdiction to decide the issues, and it is the Tribunal constituted under Section 3 of the Act alone that can adjudicate the disputes. The High Court allowed the writ petition, holding that the petition was maintainable and further went on to hold that the letter claiming payment of compensation is unlawful, as there was no crystallization of the amount sought to be recovered.

Aggrieved by the decision of the High Court, the Appellant filed an appeal before the Supreme Court, challenging the order passed in the writ petition, re-asserting its stand that the jurisdiction to decide the disputes vests with the Tribunal.

The Supreme Court, accepting the contention of the Appellant, held that the Respondent could seek interim relief by filing an application under Section 17 of the Arbitration Act 1996. It was held since the Act itself provides for interim relief, and as there is no inconsistency between the Arbitration Act of 1996 and the Act, provisions of the Arbitration Act, 1996 are applicable to arbitration proceedings commenced under Section 3 of the Act. The order of the writ court was set aside, with liberty to the Respondent to seek appropriate reliefs before the Tribunal.

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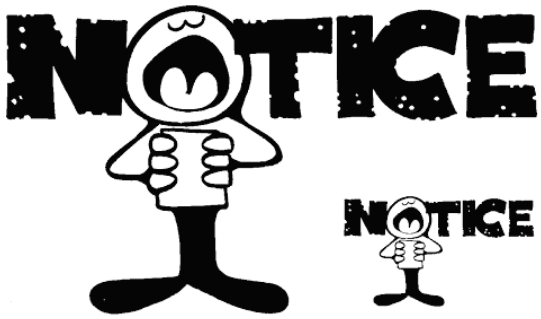
INGREDIENTS FOR INITIATION OF ARBITRATION



In a decision rendered by Delhi High Court in Badri Singh Vinimay Private Limited v. MMTC Limited[16], it was held that a notice calling upon a defaulting party to pay a sum, failing which, the dispute would be referred to arbitration, is sufficient notice as contemplated under Section 21 of the Arbitration Act of 1996.

The validity and legality of the arbitration proceedings was questioned in an Application under Section 34 of the Arbitration 1996, on the premise that the Defendant failed to invoke the arbitration clause by issuing a notice as contemplated under Section 21 of the Act. Construing and interpreting the language adopted in the notice, the court held that there was a clear intention to refer the disputes to arbitration, thereby meeting the requirements of Section 21 of the Act. Accordingly, the challenge to the Award on this premise was rejected.

[16] O.M.P. 225/2015

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Articles:

ONLINE ARBITRATION DURING THE WORLDWIDE PANDEMIC COVID -19

The world today faces the wrath of the outbreak of a contagious virus that is COVID – 19. With lockdowns imposed in several nations and social distancing being the norm, the judicial system is deeply affected by the pandemic. Adhering to these norms has caused a waning impact on the litigation process.

Litigation as a process has been subject to difficulties on account of this lockdown and so has the process of alternate dispute resolution mechanism of arbitration. In view of the hardships suffered by litigants, the Supreme Court of India has taken *suo motu* cognizance in pertinence to the period of limitation under several laws, and has passed an order dated 23/03/2020[17]. In the said order, the court held that the period of limitation in all proceedings before any court of law or tribunal, as the case may be, shall be extended with effect from 15/03/2020 until the passing of any further orders.

Section 29A of the Arbitration & Conciliation Act, 1996, was inserted *vide* the Arbitration & Conciliation

[17] Order in SUO MOTU WRIT PETITION (CIVIL) No. 3/2020

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Amendment Act, 2015, which fixes a time period for passing of an award by an arbitral tribunal. The provision fixes a time period of twelve months from the date of reference of the matter to the tribunal, and is extendable by an additional period of six months with the consent of both the disputant parties. The timeline of the arbitration may be extended by the competent court, however, in the event of failure to extend the same, the mandate of the arbitral tribunal shall be terminated. Though, Section 29A sets the outer limit timeline to ensure timely conclusion of arbitral proceedings, it also provides for a redeeming relief to turn to during testing times such as the present situation. In arbitration proceedings that are pending during this time, with the time period set out being close to its end, the parties may either jointly or individually approach the appropriate court of law upon their reopening, to seek an extension of time for the conclusion, taking shelter under the Government notification dated 23/03/2020, which encompasses not only courts of law, but also extends its applicability to tribunals, including arbitral tribunals.

In an arbitration proceeding, right from the stage of its commencement, the issuance of a notice, and the request for arbitration, appointment and constitution of the arbitral tribunal, is done through electronic medium. The process is

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contactless between the parties, their respective counsels and the tribunal. The case could be managed in the early stages, through the arbitral institution and the tribunal may by way of Email and telephone communications connect and communicate with the parties. In the case of *Bright Simons v. Sproxil Inc.*[18], that came up for consideration before the Delhi High Court, the Court held that statement of claim, statement of defence, the counter claim, the defence to the counter claim, the witness statements, admissions and denials, the applications challenging jurisdiction and/or the composition of the arbitral tribunal and replies thereto etc., can all be served through electronic means. The digital signatures which are affixed by the relevant parties, would also be accepted by the tribunal in light of Section 85B of the Indian Evidence Act, 1872.

Certain challenges may be faced in an online arbitration, such as, the lack of a human element and personal touch which is critical. Cross examinations in person have proven to be more effective, therefore an online arbitration proceeding would not bring out the important elements of the dispute in their right light, the candid emotions and responses of parties in dispute, may not be visible which play an important role. Supporting counsels may not be at ease

[18] Order dated 09.05.2018 in O.M.P. (Comm) No. 471/2016

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while trying to provide necessary input during the argument discourse. In some complex cases, the case may warrant for the participation of several counsels and parties who may argue the separate parts of the same dispute along the same lines, this may require a stronger connectivity and the presence of each party, the issue of privacy and confidentiality has recently cropped up in hearings that may take place by video conferencing, this could be a huge obstruction to the process. Online case handling systems are not built to suit the growing requirement.

Regardless of the hindrances, most arbitral institutions are willing to work harder to ensure their minimal impact and are trying to ensure, that though the pandemic has made it impossible to conduct physical face to face meetings, the show must go on. Certain important institutions have laid down rules to keep abreast with the trying times and they are as follows:

The London Court of International Arbitration (LCIA):[19] An online filing system has been set up along with an Email service for parties to file new cases and pursue pending cases. The online filing system also consists of a payment gateway for the collection of their fee. Arbitrators are

[19] https://www.lcia.org/lcia-services-update-covid-19.aspx

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directed to pass their awards and have the same sent by way of email to the institution. The institution would notify the parties through email and provide certified copies after reopening.

International Chamber of Commerce (ICC)[20]:

All communications with the center are to be done by way of email communications. The center provides institution for only urgent matters through their secure link. The physical hearings at the Paris center have been cancelled and business travel of their staff is suspended. Meetings that were to be conducted at their offices would be conducted virtually.

Singapore International Arbitration Centre (SIAC)

Singapore International Arbitration Centre (SIAC)[21]:

Maxwell Chambers Virtual ADR access has been provided to all members and stakeholders in disputes. In the event of any physical meetings to be conducted, Singapore's official directives for

[20] https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals/

[21] https://www.siac.org.sg/images/stories/press_release/2020/ANNOUNCEMENT%20COVID-19%20Information%20for%20SIAC%20Users_English.pdf

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COVID – 19 lockdown shall be followed.

Hong Kong International Arbitration Centre (HKIAC)[22]

In cases where physical meetings need to be carried out, attendees will be given temperature checks and made to sign declaration forms. The staff of the center would be working remotely.

In recent times, a well-known Indian startup Company, *NestAway*, is facing certain difficulties in securing rental payments from over 75,000 tenant subscribers. The dispute involved small sums of money to be collected by the defaulters, who refused to pay their monthly rent and the process of arbitration proved to be an expensive and cumbersome process. With the help of an online Dispute Resolution platform called 'Cadre' or 'Centre for Alternate Dispute Resolution Excellence', founded by Shalini Saxena and Kanchan Gupta, the resolution of the dispute is done online through their web based platform. In this platform, a party may approach the platform, which then calls upon the other party. If both parties agree, arbitration rules are made applicable and an arbitrator is appointed. The platforms informs parties of the hearing by way of

[22] https://www.hkiac.org/our-services/Facilities

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Whatsapp and SMS messages and conducts video conferences between the parties. The decision is usually issued in about 25 days. It is hence evident that there are takers for a speedy online process which may involve smaller scale disputes between parties and the same is growing to a sizeable number.[23]

The idea of online arbitration or Online Dispute Resolution (ODR) has been around for a few years now, and in these times of quarantine have amassed relevance. Taking to the newer approach and adapting to change however, has always been a gradual process to which the judiciary seems to be coping at an impressive pace. Despite several challenges faced along the way, the judiciary is spearheaded in the direction of speedy justice delivery to parties that capable of adapting to the changes. In these times of expeditious technological advancements, it is imperative that counsels and judicial members get tech savvy and are not averse to a system of judicial growth in this direction.

India as a Signatory to the ICSID

The International Centre for Settlement of Investment Disputes *(ICSID*) is a body that was established in 1968, with the

[23] https://economictimes.indiatimes.com/small-biz/startups/features/online-dispute-resolution-is-beginning-to-find-takers-in-india/articleshow/73206371.cms?from=mdr

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objective of resolving disputes that may arise between international investors through dispute resolution and conciliation. The said centre is funded by part the World Bank Group. As on date, the ICSID has 163 signatory countries.

By subscribing to the the ISCID, signatories have accepted the ISCID as the forum for investor state dispute resolution. This article aims to shed light on the importance of being a signatory to the ISCID and on on the benefits to India to become a signatory.

Over the last two decades, India's Foreign Direct Investment has vastly changed. In other words, the economy has transformed from a restrictive economy, to a fairly open economy as far as foreign investments are concerned. The recent polices have envisaged such change in order to shape the economic growth andto accelerate inflow of investments into India.

Having regard to the above, we must note that India is a part of several bilateral investment treaties. However, without proper norms in place, the effect of being a party to these treaties is not effectively realized. India is also a signatory to various multilateral investment treaties. Since there is an interest in having bilateral and multilateral treaties to foester

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international commercial relations, India would do well to become a signatory with a well-established dispute mechanism forum as provided by the ICSID. Being a country that thrives on on Foreign Investment, it is fitting for India to be party to the well-established and structured model such as the ICSID.

Initiation of ICSID

A mere ratification to the ICSID is not considered sufficient for a party to initiate a claim against another party. As per article 25 of the ICSID, *rationale personae* and *rationale materiae* need to be satisfied. The arbitration clause needs to be express. Hence, to initiate an ICSID claim, the party that is submitting the claim must satisfy the requirements of article 25 including the ambit of *ratio personae*, *ratio materiae*.

Dispute **-** The dispute needs to arise directly from an investment.

Enforcement of Award

Article 53 of the convention casts an obligation on all parties to the dispute to enforce the award. Article 54 makes any pecuniary award, binding and enforceable in all contracting states as a final award of its top court. This means that pecuniary awards against any party can be enforced in any contracting state where the party has assets. This does not apply to non-pecuniary awards, like declaration of rights or specific

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performance. A pecuniary award must be executed unless the same is under challenge.

Article 55 provides that the defence of Sovereign Immunity can apply to the execution of the awards depending upon the laws of the place of execution. If laws of the state do not permit execution of awards against sovereign assets or for acts done by a state in exercise of its sovereign functions, then that portion of the award will not be enforceable. [24]

Conclusion

If India becomes a signatory to the ICSID, the same would attract investors more particularly as Awards can be properly enforced.

Currently, many foreign investors backtrack on their investments in India due to the slow process of enforcement and want of an international institutional dispute resolution mechanism. A board like the ISCID is a neutral body which would create confidence in foreign investors.

International Centre For Settlement Of Investment Disputes ::' (*Icsidfiles.worldbank.org*, 1965) <http://icsidfiles.worldbank.org/icsid/icsid/StaticFiles/basicdoc/partA-chap02.htm> accessed 28 March 2020.

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Other Noteworthy Developments:

The Supreme Court of India in a *suo moto* Writ Petition 3/ 2020 extended the period of limitation for statutory provisions under Section 138 of the Negotiable Instruments Act, 1881, and under the Arbitration and Conciliation Act, 1996 with effect from 15/03/2020.

The Indian Arbitration Forum has in February 2020, released guidelines for conduct of arbitrations known as guidelines version 2.0. The Indian Arbitration Forum is an association of leading arbitration practitioners committed to streamlining the conduct of arbitration in India and promoting arbitration as an effective means of dispute resolution in India and overseas. These Guidelines were the result of a five step process: (i) research of existing international guidelines; (ii) preparation of a questionnaire to understand the gaps in the Indian arbitration practice; (iii) interviews with domestic and international practitioners; (iv) drafting of guidelines; and (v) broad review of the guidelines.

In Suryadev Alloys and Power Private Limited vs. Shri Govindaraja Textiles Private Limited[25], the Madras High Court held that once the mandate of the arbitral tribunal terminates, an award

[25] OP No.955 of 2019 and 15 of 2020

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which is subsequently passed cannot be ratified by the Court retrospectively.

(*Please send in your entries to legal@imcnet.org.*)

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Note from the editorial: Credits to all the members for encouraging and offering suggestions for this bulletin. Thank you for making this possible.

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