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CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION

sarvada

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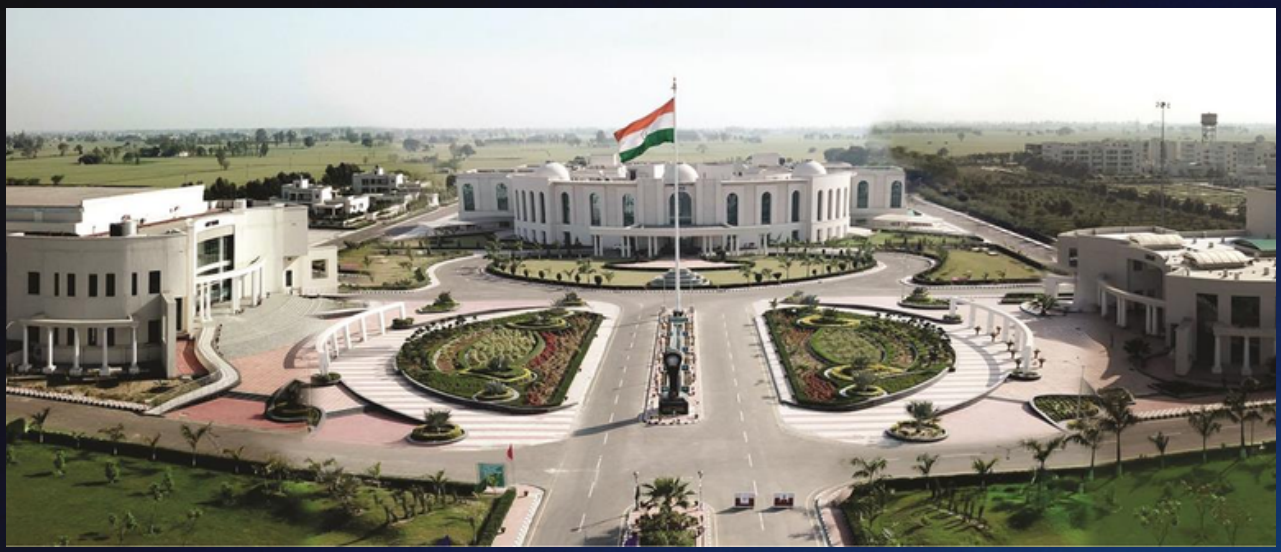
ABOUT US

The Centre for Alternative Dispute Resolution, RGNUL (CADR-RGNUL) is a research centre dedicated to research and capacity-building in ADR. The ultimate objective, at CADR, is to strengthen ADR mechanisms in the country by emerging as a platform that enables students and professionals to further their interests in the field.

In its attempt to further the objective of providing quality research and information to the ADR fraternity, the CADR team is elated to present the Special Edition of the Fourth Volume of 'The CADR Newsletter'. The Newsletter initiative began with the observation that there exists a lacuna in the provision of information relating to ADR to the practicing community. With an aim to lessen this gap, the Newsletter has been comprehensively covering developments in the field of ADR, both national and international. The CADR Newsletter is a one-stop destination for all that one needs to know about the ADR world; a 'monthly dose' of ADR News!



Analytical Review of Public Policy Concerns Surrounding the Enforcement of Foreign Awards in India

- Rahul Kumar[1]

Introduction

India has long been seen as an "unappealing" and rather "unattractive" location for arbitration. For a long time now, Indian courts have been regarded by international parties as being overly interfering in matters of arbitrations and enforcement of arbitral awards. However, while these imputations couldn't have been said to be devoid of substance and logic in the past decade, they do not hold water when we analyse the arbitration regime in India in its present shape and form. With a catena of progressive judgements by the domestic courts and a libertarian, reformist approach of the Legislature, India has witnessed a galactic shift in its approach towards the adjudication of arbitration matters the enforcement of awards as well, particularly, the enforcement of foreign arbitral awards.

The resistance to the enforcement of foreign arbitral awards in India, at present, has been circumscribed within the mandate of Section 48 of the Arbitration and Conciliation Act, 1996 (akin to Article V of the New York Convention). Article V (2) of the New York Convention provides the limited and exhaustive grounds on the basis of which the courts can refuse the recognition and enforcement of a foreign award on its own motion. The grounds are as follows:

A. The subject matter of the difference is not capable of settlement by arbitration under the law of the enforcing country.

B. The recognition or enforcement of the award would be contrary to the public policy of the enforcing country.[2]

India, being a signatory to the Convention since its very inception, followed suit and incorporated the said grounds under Section 48 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act').

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[2] The Indian Arbitration & Conciliation Act, 1996, S. 48(2)(b).

Renusagar Power Company Ltd. v. General Electric Company: Adopting the Narrow Approach

Traditionally, the courts invoked the exception of public policy when they found that the enforcement of an award would be in violation of the 'public policy of India'. This position was concretised in Renusagar Power Company Ltd. v. General Electric Company in which the Supreme Court, inclining towards a narrow interpretation of Public Policy, held that public policy would mean the "doctrine of public policy as applied by the Court in India and not international Public policy".[3] Moreover, this narrow view of public policy was adopted also because as per the Supreme Court, "the underlying object of the Foreign Awards Act was to facilitate international trade and commerce and giving public policy a broad view would defeat this objective."[4]

The rationale of this approach was in consonance with the spirit of the New York Convention and the Model Law, both of which did not envisage a watertight definition or a common interpretation of the concept of public policy. It is always and only the public policy of the State where recognition and enforcement are sought and hence, it can vary from country to country and from time to time.[5] It was also observed that the standards of public policy as applied in the international context varied, in certain respects, from the standards applicable in the domestic context, owing to the social, political, economic fabric of the country, amongst other considerations.

ONGC Ltd. v. Saw Pipes Ltd: Enforcement of Part I and Part II awards distinguished

Later, in 2004, a broad view of public policy was embraced with respect to the enforcement of domestic awards. Thus, the standards of challenges to domestic awards under Section 34 (Part 1) were distinguished from those applicable to the enforcement of foreign arbitral awards in the case of ONGC Ltd. v. Saw Pipes Ltd.[6] It was decided that the "narrower concept of public policy enunciated in Renusagar was applicable only to foreign and not domestic awards."[7]

Now, to the enforcement of domestic awards, the broad view was applicable. The word 'public policy' was given a wide and liberal interpretation while considering a challenge to a domestic

[3] *Renusagar Power Company Ltd. v. General Electric Company [1994] Supp 1 SCC 644.*
[4] *Ibid, para 64-65*
[5] Dr. Anton G. Maurer, *The Public Policy Exception Under The New York Convention: History, Interpretation, and Application* (Juris Net Ll, 2013).
[6] *ONGC Ltd. v Saw Pipes [2003] 5 SCC 705.*
[7] *Ibid.*

award under Section 34 of the Act, and in addition to the three tests enunciated in the Renusagar decision, it was observed that "an award could also be set aside if it was 'patently illegal' and such illegality went to 'the root of the matter' or was so unfair and unreasonable that it shocked the conscience of the court."[8] However, as stated above, it did not extend to the enforcement of foreign awards.

Phulchand Exports Limited v. O.O.O. Patriot: The Erroneous Ruling

In an interesting turn of events, the Supreme Court in its 2008 judgment in Venture Global Engg. v. Satyam Computer Services Ltd (overruled in Bharat Aluminium v. Kaiser Aluminium)[9] went on to decide that a foreign arbitration award can also be challenged before an Indian Court under Section 34 of the Act in India.[10]

Consequently, this led the to the ruling in Phulchand Exports Limited v. O.O.O. Patriot[11] in which the Supreme Court held that the "expression 'public policy of India' appearing in Section 48(2)(b) of Part II of the 1996 Arbitration Act (a foreign award enforcement provision equivalent to Article V(2)(b) of the New York Convention) means the same as that expression in Section 34 of Part I of the Act."

Thus, the broad standard of review of domestic arbitral awards as enunciated in the Saw Pipes judgment (supra) now became applicable to foreign arbitral awards also.

Shri Lal Mahal v. ProgettoGrano Spa: The Correctional Decision

Acknowledging that the court had erred in its 2011 decision in the Phulchand case (supra), the Supreme Court in Shri Lal Mahal case[12] distinguished the standards that must be applied to domestic awards and to enforcement of foreign awards. It was held that "public policy under Section 48(2)(b) of the 1996 Arbitration Act (qua enforcement of foreign awards) must be given a narrower meaning as in Renusagar (supra) and it did not extend to the ground of patent illegality included by Saw Pipes (supra). Renusagar, therefore, continues to govern the meaning of public policy in Part II of the Act for the enforcement of foreign awards."[13]

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[8] *Ibid.*
[9] *Bharat Aluminium Co v. Kaiser Aluminium Technical [2012] 9 SCC 552.*
[10] *Venture Global Engg. v. Satyam Computer Services Ltd. [2008] 4 SCC 190.*
[11] *Phulchand Exports Limited v. O.O.O. Patriot [2011] 10 SCC 300.*
[12] *Shri Lal Mahal Ltd v. Progetto Grano Spa [2014] 2 SCC 433.*
[13] *Ibid.*

Applying the ratio in Shri Lal Mahal, it was evident that the wide interpretation given to the phrase "fundamental policy of Indian law" in ONGC Ltd. v. Western Geco International[14] will not be applicable to Section 48(2)(b) in Part II of the 1996 Act, that is, upon the enforcement and recognition of foreign awards, despite the fact that Section 48(2) and Section 34(2)(b)(ii) use the same expression "in conflict with the public policy of India".

The 2015 Amendment Act

The 2015 Amendment, in order to curb excessive and unpredictable court intervention in arbitration, emphatically incorporated the narrow view into the statutory framework of India with regard to the enforcement and recognition of awards under both, Part 2 and those Part 1 awards which are granted in international commercial arbitrations involving a foreign party.[15]

Post Amendment

In Nobel Resource Ltd. v. Dharni Sampda Private Ltd.,[16] the Bombay High Court described the fundamental policy of Indian law under Section 48 of the Act as an idea that "connotes the basic and substratal rationale, values and principles which form the bedrock of laws in India". The court opined that in order for an award to be refused enforcement in the country, "its enforcement must offend India's core values of its national policy which it cannot be expected to compromise, such as trading in elephant tusks from India and the sale of peacock meat from India."[17]

Further In Government of India v Vedanta Limited,[18] the Hon'ble Supreme Court allowed the enforcement of the foreign award by eliminating the earlier view of his Court in NAFED v. Alimenta[19] and re-affirming the narrow approach of the court enunciated in Renusagar while interfering with an enforcement mechanism under Section 48(2) of the Indian Arbitration and Conciliation Act, 1996. The Court also re-affirmed the pro-enforcement approach by holding

[14] *ONGC Ltd. v. Western Geco International [2014] 9 SCC 263.*
[15] Darius J. Khambata, *"Challenge and Enforcement of Awards: The Brooding Omnipresence of Public Policy"* (2021) Arbitration in India.
[16] *Nobel Resource Ltd. v Dharni Sampda Private Ltd. [2019] SCC OnLine Bom 4415.*
[17] *Ibid.*
[18] *Government of India v. Vedanta Limited Civil Appeal No. 3185 of 2020.*
[19] *NAFED v. Alimenta, [2020] SCC OnLine SC 381.*

that an enforcement can only be denied on the ground of 'public policy' if it violates the fundamental policy, interests of the country, justice and morality.

'Perversity' or 'Patent Illegality': No longer a ground to refuse Foreign Arbitration Award

The decision by the Hon'ble Supreme Court in Ssangyong Engg. and Construction Co. v. NHAI[20] and the 2015th Amendment to the Act settled the position that perversity and patent illegality was no longer a ground for setting aside a foreign arbitral award in India. The ground of patent illegality appearing on the face of the award in an independent ground which is applicable only to the enforcement of domestic arbitral awards under Section 34 of the Act. This view was reiterated by the Hon'ble Supreme Court in Gemini Bay Transcription Pvt. Ltd. v. Integrated sales Service Ltd.[21]

In Vijay Karia v. Prysmian Cavi E Sistemi SRL,[22] the Hon'ble Supreme Court, unconditionally and unequivocally, reaffirmed the adoption of the narrow view of public policy as espoused in the Renusagar case (supra) under Section 48 of the Act. Patent Illegality on the face of the award, perversity and an award devoid of reasoning were held to be grounds that would not affect international commercial arbitration awards made in India and the enforcement of foreign arbitration awards in India.

Consistent with the pro-enforcement approach by the Legislature and the judiciary, Explanation to Sections 34(2) and 48(2) now provide that an award would be 'in conflict with the public policy of India' only if the following circumstances were satisfied:

i. the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81 of the 1996 Arbitration Act;

ii. it is in contravention with the fundamental policy of Indian law; or

iii. it is in conflict with the most basic notions of morality or justice.

[20] *Ssangyong Engg. and Construction Co. v NHAI [2019] 15 SCC 131.*
[21] *Gemini Bay Transcription Pvt. Ltd. v Integrated sales Service Ltd. LL [2021] SC 369.*
[22] *Vijay Karia v Prysmian Cavi E Sistemi SRL [2020] SCC OnLine 177.*

Conclusion

Owing to the vast shift in the judicial mindset and a fluid approach of courts with respect to arbitration, India has come a long way from being a non-evolving, enforcement-defiant jurisdiction of the bygone decade. This has been followed by the trend of gradually increasing inclination of international parties towards India, be it as the seat of arbitration or as the place of final enforcement of the arbitral award. Optimistically, with the current judicial attitude of sheltering awards from excessive judicial review and unreasonable constraints of municipal law, India is well placed in the race of becoming not only a successful but also a coveted place for arbitration.

DOMESTIC ARBITRATION UPDATES

Delay caused by COVID-19 in initiating arbitration proceedings does not require the mandate of the Arbitrator to be terminated: Delhi HC

Upon non-issuing of notice to parties to hold arbitral proceedings by the sole arbitrator, the parties filed a petition u/s 14 of the Act in the Delhi HC to terminate the mandate of the arbitrator. The Court directed DIAC to submit a report in this regard, in which DIAC stated that the major cause of delay was the COVID- 19 pandemic. The Court observed that the pandemic struck shortly after the arbitrator was appointed, and as a result, the operation of DIAC was also impacted. Considering this, the court held that the present case did not warrant for the termination of the mandate of the arbitrator. Read More

Reference to a unilaterally signed proposal containing an arbitration clause, will not amount to an arbitration agreement: Bombay HC

In a case before the Bombay HC, the respondent claimed that there existed an arbitration agreement between the parties and filed an application u/s 8 of the Act. The trial court referred the parties to arbitration, which was challenged by the petitioner through a writ petition in the Bombay HC. The Court observed that the proposal sent by the respondents to the petitioner, which contained an arbitration clause, was unilaterally signed by the respondents. Furthermore, the letter of intent issued by the petitioner, which was signed by both parties, contained certain independent terms and conditions, and made no reference to the arbitration clause in the proposal. Considering the lack of consensus ad-idem and of signing of the proposal by both the parties, the court held that there was no arbitration agreement between the parties. Read More

Arbitration clause must be given its due effect even though it does not expressly confirm the finality and binding nature of award: Supreme Court

Recently, the Supreme Court in the case of *Babanrao Rajaram Pund v. Samarth Builders & Developers*, was dealing with an appeal arising out of the judgement of the Bombay HC. The HC held that a valid arbitration agreement must mandate that the award is final and binding on the parties. However, the SC noted that Section 7 of the Act does not mandate any specific type of arbitration clause to be present in an agreement. Furthermore, the court referred to the wording of the disputed clause and held that it disclosed the intention of the parties to be bound by the award even though the words "final and binding" are not expressly used. Read More

DOMESTIC ARBITRATION UPDATES

Arbitral award cannot be modified by the Court through awarding interest under the A&C Act: Delhi HC

Canara Bank in the case of *Canara Bank v. The State Trading Corporation of India Ltd. & Anr.* before the Delhi HC, challenged the validity of an arbitral award, in which the no pre-arbitration interest was awarded by the arbitral tribunal as no finding was recorded by it in this regard. During the pendency of aforementioned challenge under Section 34 of the Act, an application under Section 34(4) and 34(5) was filed by Canara Bank seeking adjournment of the current proceedings before the HC so that the arbitral tribunal may continue the proceedings and remove the defects. The single-bench of the HC held that the award was invalid on the ground that no pre-arbitration interest was awarded. Subsequently, Canara Bank filed an appeal before the division bench, which made two major findings: First, that the appellant cannot file an application under Section 34(4) and 34(5) after filing an application under Section 34 to set aside the award; Second, that even though a manifest error has been committed by the arbitral tribunal in not awarding the interest, the Court itself cannot award such interest as the same would amount to modification of the arbitral award. Read More

Court not to be bound by Civil Procedure Code when exercising power u/s 9 of the A&C Act: Supreme Court

The Apex Court in its recent decision in the case of *Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited* observed that any court exercising its power u/s 9 of the Act will not be strictly bound by the Civil Procedure Code and thus, should not deny interim relief on a mere technical ground. The matter was first dealt with by the Bombay HC which allowed the interim relief to Arcellor Mittal Nippon Steel India Ltd. Essar House Private Limited appealed to the SC and contended that before granting relief u/s 9, the Court must satisfy itself that the requisites of Order XXXVIII, Rule 5 of the CPC are fulfilled. SC upheld the Bombay HC's decision and noted that strict compliance with CPC is not required u/s 9 of the Act. Read More

An arbitrator has discretionary power to grant post-award interest on whole or part of the principal amount: Supreme Court

In a matter before the Apex Court, the interest awarded by the arbitrator on the principal amount from the date of award to the date of payment, i.e., post-award interest, was challenged. Before appealing to the SC, the Delhi HC had rejected the challenge on such interest observing that the

arbitrator is vested with a discretionary power to award post-award interest. Referring to Section 31(7) of the Act, the SC held that an arbitrator has wide discretionary power to grant both pre-award and post-award interest. The Court further observed that the purpose of such interest is to ensure that the delayed payment is not made by the award debtor. Read More

Curated by: Pratham Malhotra

INTERNATIONAL COMMERCIAL ARBITRATION UPDATES

Superior Court of Justice, Brazil reiterates the application of the 'Kompetenz-Kompetenz' principle in state of insolvency

The Superior Court of Justice (STJ), Brazil reinforced the principle of 'Kompetenz-Kompetenz' which translates into meaning that the jurisdiction to assess their own jurisdiction in matters of arbitration shall rest with arbitrators themselves. This came in light of an appeal in the matter of which a bankrupt architecture firm pleaded that the dispute be referred to litigation despite the contract having an arbitration clause by giving the reasoning that it did not have enough funds to proceed with arbitration. STJ, adopting a pro-arbitration approach, dismissed the judicial lawsuit owing to the presence of the arbitration clause, holding that the arbitrators shall decide whether or not an arbitration clause will be enforced even in an extreme condition of insolvency. **Read More**

European Union has asked to regulate third-party litigation funding

The introduction of legislation governing Third-Party Litigation Funding (TPLF) has been urged by the European Parliament from the European Commission. It could possibly overturn Ireland's long-standing prohibitions on champagne and maintenance. Without a clear EU-wide regulatory framework in place, the European Parliament described TPLF as a practise that was evolving into a market for litigation services. The committee of MEPs said that such a directive should harmonise member states' regulations regarding litigation funders and their operations and set forth minimum requirements to safeguard the legal rights of funded claimants and other intended beneficiaries. **Read More**

Members of the Chartered Institute of Arbitrators Endorse Changes to Charter and Bye-Laws

Chartered Institute of Arbitrators (CIArb), which is a leading professional body that represents the interests of practitioners of alternate dispute resolution with an international network, is endorsing changes in its Royal Charter and Bye-Laws including Chartered Adjudicator (C. Adj.) status. If this is approved by the Privy Council, CIArb will become the first and only professional body with the power of awarding the status of C. Adj. There was overwhelming support in the favour of introducing these modifications which purport to keep in line with best practice and charity law. **Read More**

INTERNATIONAL COMMERCIAL ARBITRATION UPDATES

Supreme Court of New South Wales allows parties to call upon guarantee amidst arbitration proceedings

In the recent case of Daewoo Shipbuilding & Marine Engineering Co Ltd v INPEX Operations Australia Pty Ltd, the Supreme Court of New South Wales has held that a party will not be precluded from calling upon a guarantee simply because arbitration proceedings have commenced and are pending under Australian law. Allowing such an action is consistent with United Nations Commission on International Trade Law (UNCITRAL) Model Law. It was also held that the approach of the court in determining the interim measures is not any different in the case of arbitral proceedings. **Read More**

Curated by: Diya Gaur

INVESTMENT ARBITRATION UPDATES

ICSID Convention ratified by Angola.

The Republic of Angola, on September 21, lodged its Instrument of Ratification of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [ICSID] with the World Bank. Angola joins the list of ICSID Convention Contracting States at number 158. It will take part in the administration of ICSID through participation of its governing body, the Administrative Council, as a Contracting State to the ICSID Convention. Its duties, inter alia, includes approving ICSID case procedure guidelines and choosing the Secretary-General and Deputy Secretary-General. Read More

International Investment Treaty regime and climate action deliberated upon in UNCTAD's issues' notes

Two notes titled "Treaty-based Investor-State Dispute Settlement Cases and Climate Action" and "International Investment Treaty Regime and Climate Action" were released in September by the UNCTAD. These notes address the need to reform the International Investment Agreements Regime and the challenges in Investor–State Dispute Settlement (ISDS) being used to challenge climate policies. Read More

Decree issued by the Egyptian Government to Restrict the Termination of Contracts between the State and Foreign Investors

The Egyptian Prime Minister issued a decree on September 13, mandating all state entities and firms which are wholly or partially controlled by the state, to acquire a prior approval of the Supreme Authority for Arbitration and International Disputes before terminating a contract. The decree is a result of the increase in investment and commercial arbitration procedures brought against Egypt or Egyptian owned firms. The improper handling of contract negotiations with foreign investors by mid-level authorities and inadequate initial contract writing are two causes which the government seeks to tackle through this step. Read More

Arbitration proceedings initiated against Gazprom by Naftogaz.

Naftogaz, Ukraine's state energy company has opened new arbitration proceedings against Russia's gas giant Gazprom, alleging that the Russian firm had failed to pay for the supplied service of gas transportation via Ukraine. The case has been filed with the International Court of Arbitration in Paris, and as per the five-year agreement signed by the parties in 2019 for the transit of 109 million cubic meters, Russia has paid only part of the bill. Read More

Curated by: Dhanya Jha

MEDIATION UPDATES

Trademark suit settled after mediation in the case of Coke Studio v. Cook Studio in the Delhi HC

'The Coca Cola Company' filed a suit against 'Cook Studio' a popular online platform engaged in blogging and production of video relating to cooking for infringement of their registered trademark 'Coke Studio', a music platform. On September 12, the parties amicably resolved their dispute through mediation in Delhi High Court and arrived at a settlement that Nikhil Chopra, the owner of 'Cook Studio' shall use the mark "Cook Pro 6" instead of the mark 'Cook Studio'. Read More

Trademark Infringement Dispute between Chaayos v. Chaiops case referred to mediation by Delhi HC

In the case of Sunshine Teahouse Pvt. Ltd. v. MTRM Global Pvt. Ltd., 'Chaayos', a leading tea cafe chain filed a trademark infringement suit against 'Chaiops', a cafe selling tea products. It was held by the Delhi High Court that there was no similarity in the device and logo of the two parties and that the only issue was regarding the phonetic or ocular similarity of the marks 'Chaayos' & 'Chaiops', It was further held that there is a possibility of amicable resolution of the disputes and hence it was referred to Mediation. Read more

Intellectual Property cases where interim relief is sought, Pre-Litigation Mediation is not mandatory: Delhi HC

The Delhi High Court held in the case of *Bolt Technology OU v. Ujoy Technology Private Limited & Anr.* that pre-litigation mediation is not compulsory in Intellectual Property (IP) suits seeking urgent interim reliefs. Justice Prathiba M Singh held that in IP cases, the relief of interim injunction, including at the ex-parte stage and ad-interim stage, is extremely important. She further added that such cases involve not only the interest of the plaintiffs and the defendants but also the interest of the customers/consumers of the products and services in question. Read more

A new law on Mediation to be introduced by the Centre

The Central government is set to introduce a new bill on mediation in the upcoming winter session of the parliament, Union Law Minister Kiren Rijiju said on September 10. He further added that the government aims to make India an 'arbitration hub' and an international destination of arbitration. Rijiju further said that the Central government is very keen to work closely with all the National Law Universities, law colleges and law academies. Read More

Curated by: Vandana Ragwani

CONTRACTS LAW UPDATES

Judicial Review of Government Contracts permitted only if there is illegality in decision making process placing public interest at risk: Delhi HC

The Delhi High Court in *M/S Verve Human Care Laboratories v. Union of India & Ors.*, has noted that the scope of judicial review in cases involving government contracts is constrained. It can only be used if the authority's decision-making process demonstrates overt unreasonableness, irregularity, irrationality, or illegality, endangering the general public interest. In the absence of the aforementioned circumstances, courts should typically exercise judicial restraint when considering contractual issues in order to avoid creating 'problematic ramifications' that would limit the State's ability to enter into agreements and conduct business with private parties. **Read More**

Arbitrator cannot supersede a contract as it is a creature of the same: J&K&L HC

The Jammu and Kashmir and Ladakh High Court in *Union of India v. M/S D. Khosla Co & Ors.,* recently ruled that an arbitrator is a product of the agreement between the parties. In the event of him disregarding the terms of that agreement, it would be a question of jurisdictional error, which the Court could correct under Section 30 of the J&K Arbitration Act, 2002. For this specific reason, the agreement must be reviewed. Only when an arbitrator's decision is the consequence of corruption, fraud, or where mistakes are obvious on the award's face, may they be challenged. The bench emphasised that in the event of a speaking award, the Court can investigate the circumstances behind the award**. Read More**

Arbitration Clause can be invoked if bid documents establish contractual relationship: Odisha HC

The Odisha High Court in *Emcure Pharmaceuticals v. OSMC* held that the arbitration provision included in the tender document may be used by the bidder, even if no tender is awarded to it, and no formal contract is established between the parties in cases where a tenderer or bidder is designated as a "Preferred Bidder." The Court determined that the arbitration provision in the tender document, constituted an arbitration agreement under Section 7 of the Act. **Read More**

Curated by: Devanshu Mehra

Babanrao Rajaram Pund v. Samarth Builders & Developers SLP(C) 15989 OF 2021
7 September 2022 by Justices Surya Kant and Abhay S. Oka

Introduction

"Intention" is a critical element of criminal law but the role of interpretation of intent varies in cases of contracts in civil law and common law jurisdictions. Common law courts have clearly prescribed when interpreting contracts that the intention of the parties has to be construed from what has been declared by them. In contrast, in civil law, the wording even of a written agreement is less probative. The Indian legal system is based on both legislation and common law.[1] In the recent case of Babanrao Rajaram Pund v. M/s. Samarth Builders & Developers & Anr, the Supreme Court of India (SC) gave primacy to the intention of parties in case of deficiency of words in the agreement.

Background

The Appellant, in the present case, owned a property and entered into a 'Development Agreement' with Respondent No. 1, who was a developer engaged in the construction business for the development of a residential and commercial complex. The dispute arose between the Appellant and the Respondents when Respondent No. 1 failed to complete the development works within the stipulated time of 15 months. This led to the breach of the Development Agreement ("the Agreement"), in furtherance to which, the Appellant served a legal notice to the Respondents and issued a publication, informing the general public of the termination in the newspaper. The Respondents replied to the legal notice by controverting the contents of the same, which led to the dispute.

Seeking an injunction under Section 9 of the Arbitration and Conciliation Act, 1996 ("A&C Act"), the Appellant approached the District Court to restrain Respondent No.1 from selling tenements on the developed property till further orders. The Appellant invoked the purported 'arbitration clause' which stated that the intention of the parties to arbitrate, coupled with the appointment procedure and governing law.

[1] Ashish Bhan, *'Legal systems in India: overview' Thomson Reuters* (United Kingdom, March 2021) https://uk.practicallaw.thomsonreuters.com/w-017-5278?transitionType=Default&contextData=(sc.Default)&firstPage=true.

In pursuance of the arbitration clause, the Appellant issued a notice to the Respondents regarding the referral of the dispute to the sole arbitrator. Since the Respondents failed to respond to the same, the Appellant approached the Bombay High Court (the HC) under Section 11 of the A&C Act.

Before the HC, the Respondents relied on the lack of express wording for a valid and binding arbitration clause. They placed reliance on the SC decisions in Bihar State Mineral Development Corporation and Anr. v. Encon Builders (I) (P) Ltd. and Karnataka Power Transmission Corporation Ltd.[2], where certain essential ingredients of an arbitration agreement or clause were listed. The most relevant one is the mutual intention of the parties to engage in arbitration for the process of dispute resolution, and thus, the absence of the same would amount to an invalid arbitration agreement. The main contention of the Respondents was that the express wording suggesting the binding nature of the award was clearly missing from the impugned arbitration clause.

The HC, while acknowledging the existence of Clause 18 in the Agreement that provides for disputes to be referred to arbitration, held that Clause 18 lacks the essential ingredients of a valid arbitration agreement. The same is because it does not mandate that the decision of the arbitrator will be final and binding on the parties. Thus, the HC dismissed the application. The Appellant consequently appealed to the SC.

The SC Judgment

The court pointed out that the definition of an Arbitration Agreement, as given in Section 7, is not one which prescribes a strict format that must be followed when the agreement is being made. It simply lays down the essential ingredients which must be present, but the form in which the same is made is not under any mandate. The same was held in the case of Rukmanibai Gupta v. Collector, Jabalpur, and Ors.[3]

The Apex Court held that the cases cited by the Respondent are not in consonance with the facts of the case at hand and further pointed out certain elements of the existing factual scenario to show the existence of a valid arbitration agreement. Firstly, the court pointed out the mandatory

[2] *Bihar State Mineral Development Corporation and Anr. v Encon Builders (I) (P) Ltd. and Karnataka Power Transmission Corporation Ltd.* [2003] 7 SCC 418
[3] *Rukmanibai Gupta v Collector, Jabalpur, and Ors.* [1980] 4 SCC 556.

reference to arbitration as the intention of the parties by citing the usage of the term 'shall be' in the arbitration agreement. Secondly, the presence of an appointment scheme of the arbitrators serves to be enough information for the court to decipher the intentions of the party. Lastly, the act of the parties of selecting the governing law for the arbitration proceedings as the A&C Act further established not only the willingness of the parties to partake in the process but also consider the award given to be binding.

It was interpreted by the court that the inclusion of the aforementioned elements serve enough information to derive the intention of the parties and that the information. This led to the nullification of the argument of the non-existence of an arbitration agreement put forth by the Respondents.

Implications and Concluding Remarks

Consent and Party Autonomy have been known as the backbone of the process of arbitration, and the same is often interpreted from the contract itself. The said judgement shows a liberal and purposive approach, wherein the words may not have specifically expressed that the award shall be binding, the same could be easily understood from the other clauses of the Agreement. This is the kind of interpretation that the A&C Act supports and intends to propagate.

A similar construction was supported in the case of Enercon (India) Ltd. and Ors. v. Enercon Gmbh and Anr.[4] wherein the clause for appointing the third arbitrator was absent. The court labelled omissions as such to be obvious in nature, and that the intent of the parties to include the same can be very easily observed. Hence, the binding value of the arbitration proceeding does not always need to be explicitly stated. The same may be deduced from the other clauses as well.

Therefore, the Supreme Court reversed the decision given by the High Court thereby declaring the award to be binding and that the arbitration was nullity, as contended by the Respondents.

- Rakshit Sharma & Aditi Garg

[4] *Enercon (India) Ltd. and Ors. v Enercon Gmbh and Anr.* [2014] 5 SCC 1.

PATRON-IN-CHIEF

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