CADR NEWSLETTER

THE OFFICIAL NEWSLETTER OF
CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION,
RGNUL, PUNJAB

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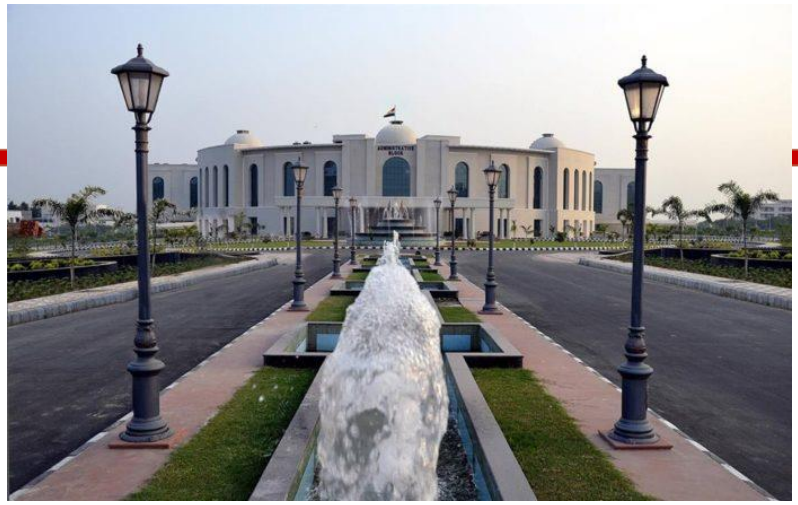
ISSUE 12 | VOLUME III | DECEMBER 2021

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 Twelfth Issue of the Third 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!



ADR UPDATES

ARBITRATION

DOMESTIC ARBITRATION

1. **DMRC IMPLORES COURT FOR MORE TIME TO PAY RELIANCE INFRA IN MULTI-CRORE ARBITRATION AWARD**

The Delhi Metro Rail Corporation (DMRC) has requested more time to arrange the payable amount passed in the order of arbitral dispute with Reliance Infrastructure's Delhi Airport Metro Express Pvt Ltd (DAMEPL). In a recent development, DMRC has already deposited Rs. 1,000 crores in an escrow account with the Delhi High Court. It needs to pay an arbitral award of around Rs. 7,200 crores to Reliance Infrastructure's subsidiary DAMEPL as per the order of a court confirming the arbitral award.

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2. **KERALA HC RULES THAT DISPUTE AGREED TO BE RESOLVED BY AUTHORITY OTHER THAN ARBITRATOR BECOMES ARBITRABLE IF SUCH AUTHORITY FAILS TO TAKE A DECISION**

In the case *of M/s B.E. Billimoria & Co. Ltd. v. Union of India & Anr.*, the Kerala High Court has held that if the parties agree to resolve a dispute by an authority other than the arbitrator, such a dispute becomes arbitrable if the said authority fails to take a decision. However, if the parties have agreed to accept the decision of that authority as final and binding, the same would be an excepted matter and will not be arbitrable.

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3. **EXCLUDED MATTERS IN ARBITRATION AGREEMENT CANNOT BE REFERRED TO RESOLUTION BY WAY OF ARBITRATION: KARNATAKA HC**

In the case of *Global Agency* v. *Union of India,* the Karnataka High Court, placing reliance on *Harsha Constructions* v. *Union of India* (2014) ruled that excepted/excluded matters are not arbitrable and cannot be referred to resolution by way of appointing a sole arbitrator. In this case, a petition was filed by the petitioner company under Section 11(6) of the

Arbitration and Conciliation Act, 1996 seeking resolution of disputes with the respondents-Railways, by referring the same to a sole arbitrator in terms of clause 56 of the Agreement.

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4. **REFERENCE PETITION NOT MAINTAINABLE WHEN THE SAME CLAIM HAS ALREADY BEEN DECIDED BY AN ARBITRATOR APPOINTED BY THE HIGH COURT: SUPREME COURT**

The Supreme Court, in the case of *M.P. Housing and Infrastructure Development Board* v. *K.P. Dwivedi,* held that if the award of the Arbitrator had attained finality and was binding on the parties, there could not be any subsequent fresh proceeding with respect to the same claims such as filing of a fresh Reference Petition before the arbitral tribunal.

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INTERNATIONAL COMMERCIAL ARBITRATION

1. APPLICATION TO STAY LEGAL PROCEEDINGS IN FAVOUR OF ARBITRATION SHOULD BE HEARD BEFORE APPLICATION FOR SUMMARY JUDGMENT: ENGLISH HIGH COURT

In the case of *Deposit Guarantee Fund for Individuals* v. *Bank Frick & Co AG*, the English High Court held that since the Summary Judgment Application is "expressly predicated on the outcome of the stay application, as a matter of logic, that should be heard first, unless there are clear countervailing case management considerations to the contrary."

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2. HONG KONG COURT CONSTRUES INCONSISTENT DISPUTE RESOLUTION CLAUSES IN RELATED COMMERCIAL AGREEMENTS

In the case of *ZPMC-Red Box Energy Services Limited* v. *Philip Jeffrey Adkins and Others* that involved interlinked agreements containing different dispute resolution clauses, the Hong Kong Court of First Instance refused to put a stay on the court proceedings in favour of arbitration, on the ground that the "centre of gravity" of the dispute did not fall within the contracts that contained the arbitration agreement.

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3. TO UPHOLD THE AGREEMENT TO CONFIDENTIALITY, AUSTRALIAN COURT REFUSES TO ENFORCE A CONSENT AWARD THAT HAD BEEN SATISFIED

In the recent case of *EBJ21* v. *EB021*, the Federal Court of Australia declined to enforce an arbitral award that had already been paid in time and in full, holding that there was no justification for recognizing and enforcing an award that had already been satisfied. Doing so would improperly lift the veil of confidentiality.

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4. HONG KONG RECOMMENDS LIFTING BAN ON "SUCCESS FEES" FOR ARBITRATION

In a recently published report titled "Outcome Related Fee Structures for Arbitration", the Law Reform Commission of Hong Kong recommended that Hong Kong allow lawyers to charge success fees for arbitrations and related court proceedings conducted in and outside of Hong Kong Special Administrative Region. This would bring the special administrative region in line with other major arbitral seats.

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INVESTMENT ARBITRATION

1. RUSSIAN ENERGY COMPANY TO BE COMPENSATED FOR LARI DEVALUATION

Inter RAO, a Russian energy company, moved the Arbitration Institute of Stockholm Chamber of Commerce, asking for 200 million USD as compensation on the ground that the measures taken by the Georgian government had an effect on the Inter RAO's investment and it was a dispute over tariffs but ultimately an award of 80.5 million USD was passed.

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2. ANNUAL REPORT FOR 2021 RELEASED BY ICSID

The International Centre for Settlement of Investment Disputes(ICSID), after optimising its services and facilities for the future has published its annual report for FY 2021 indicating multiple record achievements, which included a record number of cases registered and highest number of cases ever administered in a single financial year, despite COVID-19.

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3. ARBITRATION TO START OVER LIMA METRO SYSTEM

A Spanish-Italian consortium, consisting of Cosapi, FCC, Iridium, Salini Impregilo, Ansaldo STS and Ansaldo Breda has laid arbitration claims against Peru before ICSID. It may be mentioned that Lima's metro system is to start the metro project in Peru by this consortium on the ground that the Peruvian government has delayed the project.

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4. MILLIONS OF DOLLARS' WORTH COMPENSATION CLAIMS INITIATED AGAINST COLOMBIA

Eco Oro, a Canadian company. which, as per claims has invested hundreds of millions of dollars during the last twenty years in the development of a project, called Angostura, has filed a claim before ICSID requesting compensation on the ground that the Colombian government has prohibited mining activities in the area. The ICSID Tribunal found in favour of Eco Oro holding that though the measures taken by the Colombian government were legitimate, there was a violation of the minimum standard.

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MEDIATION

1. TWO FORMER SUPREME COURT JUDGES APPOINTED AS MEDIATORS IN THE LALIT MODI FAMILY DISPUTE

Justice Vikramjit Singh and Justice Kurian Joseph were selected as mediators by a three-judge bench, led by CJI NV Ramana, to resolve a property dispute between the founder and first chairman of IPL, Lalit Kumar Modi, and his mother, Bina Modi. The SC suggested the parties to utilize the facilities of the International Arbitration and Mediation Centre (IAMC), Hyderabad to resolve their dispute, and also said that they could request for online mediation.

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2. TWO-AND-A HALF-DECADE LONG JAIPUR ROYAL FAMILY DISPUTE AMOUNTING OVER RS. 15,000 CRORES RESOLVED THROUGH MEDIATION

The Supreme Court of India, using mediation, resolved a two-and-a half decade long drawn and 15,000 crores worth, (former) royal family property dispute. This settlement ends the dispute over the ownership of the Jaimahal Hotel, the Rambagh Palace and the other property worth thousands of crores of rupees. The dispute had started in 1997, after the death of Jagat Singh, the only son of Maharani Gayatri Devi.

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3. MEDIATION CALLED FOR IN THE PURDUE PHARMA BANKRUPTCY CASE

A US Bankruptcy Judge, Robert Drain, ordered mediation in the Purdue Pharma bankruptcy case. The relevant parties were asked to discuss and reach a new settlement, or negotiate changes to an earlier one. With thousands of lawsuits accusing Purdue Pharma and the Sacklers (owners of the company) of fueling the opioid epidemic through deceptive marketing, Purdue, the manufacturers of OxyContin, had filed for bankruptcy in 2019.

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4. CHINA INTRODUCES A NEW INTELLECTUAL PROPERTY MEDIATION RULES

China has implemented new law governing the mediation of intellectual property disputes in what appears to be an effort to regulate and modernize its mediation processes and procedures. The new Intellectual Property Mediation Rules are issued by the Mediation Center of the China Council for the Promotion of International Trade, a national foreign trade

authority, which provide a framework for IP dispute mediation across the country.

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5. IRAN AND SAUDI ARABIA TO RESUME TALKS FOLLOWING IRAQ'S MEDIATION EFFORTS

Iraq has taken the lead towards the mediation efforts between Iran and Saudi Arabia. Iran's Minister of Foreign Affairs, Hossein Amir Abdollahian expressed his gratitude over the efforts of the Iraqi foreign minister and Premier, Mustafa al-Kadhimi in helping resolve the "misunderstanding" between Iran and Saudi Arabia and bring them back to the negotiating table. Both the countries had severed their diplomatic ties back in 2016, and more recently had undergone several talks since April 2021.

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CASE ANALYSIS

PUNJAB STATE CIVIL SUPPLIES CORPORATION V. RAMESH KUMAR

-Prathu Dadhich and Dhanya Jha

FACTS

In a dispute between the appellants and the respondents that arose from a contract which was entered between parties on 4 April 2002 for the supply of 24,900 batons. In pursuance of the contract, the respondents had deposited a sum of Rs. 1,00,000. 22,389 batons were accepted by the appellants while the rest were rejected. The respondents claimed Rs.4,88,437 besides raising a grievance regarding the forfeiture of the security deposit. The dispute between the parties was referred to arbitration in terms of clause 17 of the agreement between them by an order of the Civil Judge on 28 June 2005. The sole arbitrator rejected the claim concerning forfeiture of the security deposit but decreed an arbitral award amounting to Rs. 4,88,437. The award was challenged under Section 34 of the Arbitration and Conciliation Act, 1996 before District Judge at Chandigarh but the petition was rejected by a judgement dated 9 November 2012 as the court did not find any substance in the petition.

This judgement was challenged before the High Court under Section 37 of the 1996 act. The High Court allowed the appeal, inter alia, on the ground that the award lacked reason and the reasons were arbitrary and erroneous. The High Court set aside the award along with the judgement of the District Judge and decreed the claim of respondents for the supply of 22,389 batons, with the security deposit of Rs.1,00,000 and awarded interest at 12% from the date, the amount became due. The Civil Appeal No. 6832 of 2021 arose in the Supreme Court contesting that the High Court while exercising its jurisdiction under section 37, arising from the rejection of the arbitration petition under section 34, has transgressed the limits of its jurisdiction.

ISSUES

Following were the issues raised in the Hon'ble Supreme Court of India by the appellants:

i. The arbitral award, contrary to the finding of the High Court, was not unreasoned but contained elaborate reasons for the decreed arbitral award.
ii. The High Court could not have set aside the award merely based on the acceptance letter dated 4 April 2002. The award did contain a reference to the fact that as far as the supply of batons after the expiry of the period on 4 April 2002 was concerned, a 'deduction' was required to be made in terms of the relevant clauses of the tender document; and
iii. The High Court was not exercising its jurisdiction as a first appellate court in a civil suit and could not have awarded the claim.

JUDGEMENT

A Division Bench comprising of Justice AS Bopanna and Justice DY Chandrachud observed "While considering a petition under Section 34 of the 1996 Act, it is well-settled that the court does not act as an appellate forum. The grounds on which interference with an arbitral award is contemplated are structured by the provisions of Section 34."

The background of the case shows that, by an arbitral award, the sole arbitrator rejected the claims of Respondents amounting to Rs 4,88,437 and upheld the action of Appellantsof forfeiting the security deposit. When the matter reached High Court, it was held that the award lacked reasons and therefore the High Court decreed the claim of the respondents for the supply of 22,389 wooden batons, together with the security deposit of Rs.1,00,000 and awarded interest at the rate of 12% from the date from which the amount became due.

After considering the pleadings, the Apex Court found that the District Judge had correctly concluded that there was no warrant for interference with the arbitral award under section 34. Thus, the High Court seems to have proceeded as if it was exercising jurisdiction in a regular first appeal from a decree in a civil suit, added the Court.

Speaking for the Bench, Justice Chandrachud found that in the present case, the High Court was required to determine as to whether the District Judge had acted contrary to the provisions of Section 34 of the 1996 Act in rejecting the challenge to the arbitral award. However, apart from its failure to do so, the High Court went one step further while reversing the judgment of the District Judge in decreeing the claim in its entirety, which exercise was clearly impermissible, added the Bench. Justice

Chandrachud observed that the arbitrator was entitled to draw relevant findings of fact based on the evidence which was adduced by the parties, which was exactly what was done in the arbitral award.

However, since the award of the arbitrator was challenged unsuccessfully by the respondents under section 34 of the 1996 Act, there was no basis in law for the High Court to interfere with the judgment of the District Judge and to even go a step further by decreeing the claim, added the Bench. Hence, the Apex Court dismissed the appeal filed by the respondents to challenge the rejection of the arbitration petition under section 34 of the 1996 Act.

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