

ACUITY  LAW

DISPUTES
NEWSLETTER

JULY 2019
acuitylaw.co.in

ABOUT ACUITY LAW

Acuity Law was founded in November 2011. Acuity Law comprises of a team of young and energetic lawyers led by Souvik Ganguly, Gautam Narayan and Shankar Iyer who have deep and diverse experiences in their chosen areas of practice. We advise Indian and multinational companies, funds, banks and financial institutions, founders of companies, management teams, international law firms, domestic and international investment banks, financial advisors and government agencies in various transactions in and outside India.

Acuity Law takes pride in rendering incisive legal advice taking into consideration commercial realities. Our areas of practice are divided into three departments.

The Corporate practice is led by Souvik Ganguly, the Tax practice is led by Shankar Iyer and the Disputes practice is led by Gautam Narayan.

As part of the Corporate practice, Acuity Law advises on:

- Mergers and acquisitions;
- Distressed mergers and acquisitions;
- Insolvency Law;
- Private Equity and Venture Funding;
- Employment and labour laws;
- Commercial and trading arrangements; and
- Corporate Advisory

As part of the Tax practice, Acuity Law under the leadership of Shankar Iyer advises on matters such as corporate tax and international tax relating to:

- Withholding taxation
- Double taxation avoidance agreements
- Jurisdiction analysis
- Strategies for acquisitions, mergers, divestitures, diversification or consolidation of businesses
- Inbound structuring
- Externalization structures
- Tax Due Diligences
- Group holding structures
- Distribution strategies
- Endowment planning / wealth planning strategies

As part of the Disputes practice, Acuity Law under the leadership of Gautam Narayan advises and represents clients on domestic and cross - border:

- Civil disputes;
- Criminal law matters; and
- Arbitration matters

Acuity Law actively follows legislative and policy developments in its chosen areas of practice and shares such developments with clients and friends on a regular basis.

If you want to know more about Acuity Law, please visit our website acuitylaw.co.in or write to us at al@acuitylaw.co.in.

The information contained in this document is not legal advice or legal opinion. The contents recorded in the said document are for informational purposes only and should not be used for commercial purposes. Acuity Law disclaims all liability to any person for any loss or damage caused by errors or omissions, whether arising from negligence, accident or any other cause.

INTRODUCTION

This newsletter covers key updates about developments related to Disputes practice during the month of July 2019. We have summarized the key judgments passed by the Supreme Court, the High Courts of various States in India and other key developments. Please see below for a summary of some landmark judgments and other developments during July 2019.

SUBJECT: AMRAPALI MATTER

Matter: Bikram Chatterji and others vs. Union of India and others (**Supreme Court**)

Coram: Justice Arun Mishra and Justice U.U Lalit

Date: 23 July 2019

Facts:

Amrapali Group of Companies proposed to construct 42,000 flats and possession was to be given in 36 months. Many home buyers booked apartments between the years 2010 to 2014. They paid almost 40 % to 100% of the total consideration of the total consideration in accordance with the payment schedule. Amrapali Group of Companies failed to deliver the flats within 36 months. They also did not make any payments to various banks, Noida and Greater Noida Authority. One of the lenders of the Amrapali Group, Bank of Baroda filed a Company Petition before the National Company Law Tribunal (**NCLT**) under Section 7 of the Insolvency and Bankruptcy Code, 2016 against M/s. Amrapali Silicon City Pvt. Ltd. Moratorium was declared and an insolvency resolution professional was appointed. The NCLT order had a direct bearing on the home buyers of Amrapali Centurion Park Ltd. which is virtually owned by Amrapali Silicon City Pvt. Ltd. The order of the NCLT has a direct bearing on the home buyers. Thus, in order to secure the interest of home buyers, a Writ Petition was filed under Article 32 of the Constitution of India by the home buyers.

The Supreme Court held:

That the registration of Amrapali Group of Companies be cancelled under Real Estate (Regulation and Development) Act, 2016 and has further directed the National Buildings Construction Corporation (**NBCC**) to take over and complete the pending projects of the Amrapali Group of Companies. It has directed the Enforcement Directorate under the Prevention of Money Laundering Act and The Foreign Exchange Management Act to initiate action against the Directors and its authorities. Further, the homebuyers have been directed to pay the balance sale consideration to the Supreme Court's UCO Bank branch. This consideration shall be kept in a fixed deposit and will be used by NBCC for completing the construction. The Supreme Court directed that in view of the findings of the forensic auditors, the Enforcement Directorate should investigate the aspect of money laundering and diversion of funds.

SUBJECT: JURISDICTION OF THE HIGH COURT WHILE CONSIDERING "VENUE" OF ARBITRATION

Matter: Brahmani River Pellets vs. Kamachi Industries Limited (**Supreme Court**)

Coram: Justice R. Banumathi and Justice A.S Bopanna

Date: 25 July 2019

Facts:

The Appellant i.e. Brahmani River Pellets and the Respondent i.e. Kamachi Industries Limited entered into an Agreement for Sale (**Agreement**) of iron ore pellets which were to be loaded from Bhadrak in Odisha and off-loaded in Chennai, Tamil Nadu. The Appellant did not deliver the goods to the Respondent. The Respondent claimed damages and invoked the arbitration clause of the Agreement between the parties. As per the Agreement, venue of arbitration would be at Bhubaneswar, which is in the State of Odisha. The Appellant did not agree to the appointment of the Arbitrator. Aggrieved by this action of the Appellant, the Respondent approached the Madras High Court under Section 11(6) of the Arbitration and Conciliation Act (**Act**) for the appointment of a sole Arbitrator. The Madras High Court appointed an Arbitrator in the matter and held that the decision of the seat of arbitration would not oust the jurisdiction of other courts.

The Madras High Court also added that in the absence of a clause giving exclusive jurisdiction to a specific court, both Orissa High Court and Madras High Court would have jurisdiction.

Hence the appeal in the Supreme Court.

The Supreme Court held:

Relying on the judgment of *Swastik Gases (P) Ltd. vs. Indian Oil Corporation Ltd.* 2013 (9) SCC 32, the Supreme Court held that the Madras High Court erred in assuming jurisdiction under Section 11 of the Act when the parties had clearly intended to oust jurisdiction of all courts excepts the courts of Bhubaneshwar and therefore set aside the order passed by the Madras High Court.

SUBJECT: WHETHER A PRIVATE CONTRACT CAN OUST THE JURISDICTION OF ARTICLE 226 OF THE HIGH COURT.

Matter: Maharashtra Chess Association vs. Union of India and others (**Supreme Court**)

Coram: Justice Chandrachud and Justice Indra Banerjee

Date: 29 July 2019

Facts:

All India Chess Federation (**Respondent No. 2**), which is a society registered under the Societies Registration Act, 1860, is the central governing authority for chess in India. Maharashtra Chess Association (**Appellant**) has been an affiliated member of Respondent No. 2 since 1978 and a society registered under Societies Registration Act, 1860. In December 2016, the Respondent No. 2 passed a resolution to disaffiliate the Appellant. Clause 21 of the contract between the Appellant and Respondent No. 2 gave exclusive jurisdiction to the courts of Chennai to hear any disputes between the parties.

Aggrieved by this act, the Appellant filed a Writ Petition before the High Court of Bombay under Article 226 of the Constitution of India (**Constitution**) impleading Respondent No. 2 as a party. The Respondent No. 2 raised a preliminary objection that the High Court of Bombay did not have jurisdiction to entertain the Writ Petition on the ground that Clause 21 of the Constitution and Bye-Laws conferred exclusive jurisdiction on courts at Chennai in disputes involving the Respondent No. 2 and any other party to the Constitution and Bye-Laws, including the Appellant. The High Court of Bombay held that Clause 21 ousted the jurisdiction of all other courts except the courts at Chennai.

The Appellant challenged the order of the High Court of Bombay before the Supreme Court.

The Supreme Court held:

It is a settled principle of contract law that parties by contract cannot exclude jurisdiction of all courts. This would be in contravention of Section 28 of the Indian Contract Act, 1872. However, where parties to a contract confer jurisdiction on one amongst multiple courts having proper jurisdiction, to the exclusion of all other courts, the parties cannot be said to have ousted the jurisdiction of all courts. Such a contract is valid and will bind the parties to a civil action.

The Supreme Court thereafter dealt with the powers of the court under Article 226 of the Constitution. It held that the powers of the High Court in the exercise of its Writ jurisdiction cannot be based on strict legal principles. The decision of the High Court to entertain a particular action under its Writ jurisdiction is discretionary. Also, the limitations placed on the court's decision to exercise or refuse to exercise its Writ jurisdiction are self-imposed. It, therefore, set aside the judgment of the High Court of Bombay and restored the matter to High Court of Bombay for being considered afresh.

SUBJECT: WHEN CAN AN ORDER OF THE ARBITRAL TRIBUNAL AMOUNT TO BE AN INTERIM ORDER

Matter: ONGC Petro Additions Limited vs. Technimont S.P.A and another (**Delhi High Court**)

Date: 1 July 2019

Coram: Justice Sanjeev Narula

Facts:

ONGC Petro Additions Limited (**OPAL**) filed an application under Section 19 of the Arbitration and Conciliation Act, 1996 (**Act**) before the Arbitral Tribunal for placing additional documents and evidence on record and the same was rejected. Being aggrieved, OPAL approached the Delhi High Court stating that the order of the Arbitral Tribunal is an interim Award and can be challenged under Section 34 of the Act. The main question which was considered by the Delhi High Court was whether the order of the Arbitral Tribunal would amount to an interim award.

The Delhi High Court held:

That the order passed by the Arbitral Tribunal was a procedural order and there is no provision in the Act to challenge a procedural order. It held that for an order to be an interim Award, it had to conclusively decide an issue in the arbitration proceedings. In the present case, the Arbitral Tribunal only rejected OPAL's application for placing additional documents on record. The recourse to a court under Section 34 of the Act could only be through an Arbitral Award and hence rejected the contention of OPAL.

SUBJECT: THE COURTS CAN INTERFERE UNDER SECTION 34 AND 37 OF THE ARBITRATION AND CONCILIATION ACT, 1996 IF THE FINDING RECORDED BY THE ARBITRATOR IS IRRATIONAL AND LACKS REASONABLENESS

Matter: Bharat Petroleum Corporation vs. Anuradha Ajit Malgoankar (**Bombay High Court at Goa**)

Date: 4 July 2019

Coram: Justice C.V Bhadang

Facts:

One Anuradha Malgoankar (**Respondent**) obtained LPG cylinder distributorship at Ponda from Bharat Petroleum Corporation Limited (**Appellant**). Disputes arose between the parties and the Appellant terminated the dealership as per the Dealership Agreement dated 21 May 1986 (**Dealership Agreement**). By the order of the Senior Civil Judge at Panjim, Goa the dispute was referred for arbitration under the old Arbitration Act, 1940. The Respondent filed a claim and the Appellant also filed a counter claim. By filing a joint application, the parties agreed for the dispute to be adjudicated as per the provisions of the Arbitration and Conciliation Act, 1996 (**Act**). The Arbitrator dismissed the claim of the Respondent as well as the counter claim filed by the Appellant by way of an Award dated 23 August 2006 (**Award**). Aggrieved, the Appellant challenged the Award before the District Judge under Section 34 of the Act. The Respondent did not pursue her claim further. The District Judge dismissed the Petition filed by the Appellant challenging the Award. Hence, the Appellant approached the Bombay High Court (at Goa) in appeal.

The Bombay High Court (at Goa) held:

That counter claim can be filed by Defendants after filling of the written statement, provided that, the cause of action arose prior to such delivery of defense. The Bombay High Court (at Goa) further held that though under Section 34 and 37 of the Act, the role of the court in an appeal is limited and is supervisory however, it is open to challenge in a Writ jurisdiction of superior courts if the Award passed by the Arbitrator is irrational and lacks reasonableness. The Courts can intervene under its supervisory jurisdiction if the finding recorded by the Arbitrator is perverse and patently illegal.

SUBJECT: INTERIM RELIEF GRANTED TO A FOREIGN COMPANY UNDER PART 1 OF THE ARBITRATION AND CONCILIATION ACT, 1996

Matter: Dalian Huarui Heavy Industry International Company Limited vs. West Quay Multiport Private Limited and others

And

Dalian Huarui Heavy Industry International Company Limited vs. Tuticorn Coal Terminal Private Limited and Others (**Bombay High Court**)

Coram: Justice G.S Kulkarni

Date: 8 July 2019

Facts:

Dalian (**Applicant**) had sold machinery to the purchasers (**Respondent No. 1**) vide a purchase order in the year 2012. It was for a project work to be done by Respondent No. 3 i.e. the Board of Trustees, Vishakhapatnam Port Trust. The Respondent No. 1 have abandoned the work. Claims were made by both Respondent No. 2 which is Bank of Baroda and Respondent No. 3. Therefore, the Applicant filed a Section 9 under the Arbitration and Conciliation Act, 1996 seeking interim relief restraining the Respondents from disposing or dealing with the machinery.

The High Court of Bombay held-

Granted interim relief under Part 1 of the Arbitration and Conciliation Act, 1996 to the Petitioner and restrained the Respondents from alienating, disposing with, or creating third party rights with respect to the machinery.

SUBJECT: ONCE PATENT INFRINGEMENT IS ESTABLISHED, THE ONUS SHIFTS TO THE DEFENDANT TO DISPROVE IT

Matter: Communication Components Antenna Inc vs. Ace Technologies Corp and others (**Delhi High Court**)

Coram: Justice Pratibha M. Singh

Date: 12 July 2019

Facts:

A suit seeking permanent injunction restraining patent infringement was filed by the Plaintiff. The patent is for an antenna which has an asymmetrical beam pattern and other features as detailed in the specification. The Plaintiff is a Canadian Company. It has licensed it to various parties. The Defendant No. 1 is a South Korean Company. The Defendant Nos. 3 and 4 are its Indian subsidiaries (**Defendants**). In 2017, the Plaintiff discovered that the Defendants were infringing its patent. Thereafter, the plaintiff filed the present suit. The Defendants argued that the validity of the suit patent is already under challenge before another court.

The Delhi High Court held:

The language of the claims in different jurisdictions cannot be examined in a minute way, while determining infringement in India. To ascertain infringement of a patent granted in India, it would need to be seen along with complete specification. It further stated that "*In a patent infringement action, once the Plaintiff, prima facie establishes infringement, the onus shifts on the Defendants, to disprove the same*". The Delhi High Court directed the defendants to deposit a bank guarantee for a total sum of around Rs. 540 million with the Registrar General of the Delhi High Court within one month from the date of the order.

CENTRAL GOVERNMENT HAS NOTIFIED THE NEW DELHI INTERNATIONAL ARBITRATION CENTRE ACT, 2019

The Central Government has notified the New Delhi International Arbitration Centre Act, 2019 (**DIAC Act**). DIAC Act has come into effect from 2 March 2019. The DIAC Act has been established for the creating an autonomous and an independent regime for institutionalized arbitration in New Delhi.

The object of the DIAC Act is to promote research and study, facilities and administrative assistance for conciliation, mediation and arbitral proceedings. It shall also maintain a panel of accredited arbitrators, conciliators and mediators both at national and international level. Further, to set up facilities in India and abroad to promote the activities of the New Delhi Arbitration Centre (**NDAC**).

The NDAC will establish a Chamber of Arbitration and empanel the arbitrators and scrutinize the applications for admission in the panel of reputed arbitrators to maintain a permanent panel of arbitrators. It shall consist of arbitrators of national and international repute and people who have vast experience in alternative dispute resolution and conciliation.

The NDAC shall be headed by a Chairperson who has been a Judge of the Supreme Court or High Court, two full time / part time members, one part time member who is representative of a recognized body of commerce and industry and 2 ex-officio members from the Department of Legal Affairs

THE CONSUMER PROTECTION ACT, 2019 REPEALS THE EXISTING CONSUMER PROTECTION ACT, 1986

The Consumer Protection Act, 2019 (**New Act**) received the assent of the President of India and the same was published in the Official Gazette of India on 9 August 2019. This Act has substituted the existing Consumer Protection Act, 1986 (**Old Act**). The New Act provides for a consumer grievance redressal mechanism and seeks to provide better protection of the interests of consumers in India. The emergence of global supply chains, rise in international trade and rapid development of e-commerce has necessitated a new statutory framework for consumer protection.

The New Act seeks to establish the Central Consumer Protection Authority for the purpose of preventing unfair and restrictive trade practices and to curb false and misleading advertisements. The New Act also provides for Consumer Disputes Redressal Commissions at District level, State level and National level with pecuniary jurisdictions of Rs. 10 million, Rs. 100 million and above Rs. 100 million respectively. Further, the New Act provides for redressal against product liability on the part of the manufacturer / service provide / seller and unfair contracts which are significantly in favour of the manufacturer / trader / service provider. Such provisions were absent under the Old Act. The New Act also expands the ambit of unfair trade practices which was provided under the Old Act.

Our co-ordinates:

Mumbai

C – 702, Marathon Nextgen Innova
Off Ganpath Rao Kadam Marg
Lower Parel, Mumbai – 400 013

Delhi

D-17, Lower Ground Floor, Lajpat Nagar
Part-3, New Delhi-110 024, India

Bangalore

C/o Wework, 9th floor, RMZ Latitude Commercial Building
Bellary Road, Hebbal, Bangalore-560024

Email: AL@acuitylaw.co.in