ACUITY LAW

DISPUTES

NEWSLETTER

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ABOUT ACUITY LAW

Acuity Law was founded in November 2011. Acuity Law comprises of a team of young and energetic lawyers/ professionals led by Souvik Ganguly, Gautam Narayan and Deni Shah 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 Global Trade and Tax practice is led by Deni Shah 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 Global Trade and Tax practice, Acuity Law advises on:
- Cross-border tax planning and jurisdiction analysis
- Strategies for acquisitions, mergers, divestitures, diversification or consolidation of businesses
- Inbound and outbound investment structuring
- Endowment planning / wealth management strategies
- Global Trade & Customs laws, including foreign trade policy
- International supply chain optimization
- Goods & Services Tax and other Indirect taxes

As part of the Disputes practice, Acuity Law 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.

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INTRODUCTION

This newsletter covers key updates about developments in civil and arbitration disputes for the quarter April - June 2021.

We have summarized the key judgments passed by the Supreme Court of India and various High Courts of India. Please see below the summary of the relevant regulatory developments.

ORDERS PASSED BY THE SUPREME COURT OF INDIA ("SC")

1) SC HOLDS THAT PARTIES TO ARBITRATION CAN CHANGE THE SEAT OF ARBITRATION BY MUTUAL AGREEMENT.

Matter: Inox Renewables Limited v. Jayesh Electricals Limited

Order dated: 13 April 2021.

Summary:

A dispute arose between Inox Renewables Ltd. ("**Inox**") and Jayesh Electricals Ltd. ("**JEL**") and arbitration commenced under the purchase order which named 'Jaipur' as the venue. However, the parties had agreed to hold the proceedings at Ahmedabad. The award was passed in favour of JEL and was subsequently challenged by Inox in the commercial court at Ahmedabad. Inox argued that as the arbitration was held in Ahmedabad, the courts of Ahmedabad had exclusive jurisdiction to hear the challenge. The Ahmedabad court and subsequently, the Gujarat HC disagreed, and Inox approached the SC.

The SC found that the parties had mutually agreed to change the venue to Ahmedabad and observed that there was no need for this agreement to be in writing. Once Ahmedabad was mutually agreed as venue, it also became the 'seat' of the arbitration, so the courts of Ahmedabad had exclusive jurisdiction over any challenges.

2) SC CLARIFIES THAT TWO INDIAN PARTIES CAN CHOOSE FOREIGN SEAT OF ARBITRATION.

Matter: PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited

Order dated: 20 April 2021.

Summary:

A contractual dispute arose between PASL Wind Solutions Private Limited ("**PASL**") and GE Power Conversion India Private Limited ("**GE Power**"), both incorporated in India. As per the terms of the agreement the disputes were referred to arbitration in Zurich, Switzerland, in accordance with the rules of the International Chamber of Commerce ("**ICC**"). The sole arbitrator passed its award ("**Arbitrator's Award**") rejecting the claim of PASL and directing PASL to reimburse GE Power their legal costs and expenses with accumulated interest. GE Power initiated enforcement proceedings under the Arbitration and Conciliation Act, 1996 ("**Indian Arbitration Act**") before the Gujarat HC, within whose jurisdiction the assets of PASL were located. The Gujarat HC's order, which was decided in favor of GE Power, was appealed before the SC by PASL.

SC noted that the Indian Arbitration Act has been divided into several parts with part I, dealing with domestic arbitration and international commercial arbitration, while part II specifically dealt with the enforcement of foreign awards. Therefore, to answer the question of whether an award is deemed to be regarded as a foreign award, the courts must solely be guided by the definition of foreign awards provided under section 44 in part II of the Indian Arbitration Act. For an award to fall under the scope and the ambit of section 44, the requirements are:

(a) the dispute must be considered to be a commercial dispute under the laws of India;

(b) the dispute must arise between 'persons';

(c) the award must be passed in pursuance of a written agreement for arbitration; and

(d) the award must be passed in one of such territories notified by the Indian government to be a territory to which the New York convention applies.

As Switzerland is a signatory to the New York convention and all the other ingredients set out in section 44 of the Indian Arbitration Act were fulfilled in the present case, the SC held that the Arbitrator's Award is a 'foreign award' as defined under the Indian Arbitration Act and the nationality or domicile or place of incorporation / residence of the parties cannot have any bearing on the definition of foreign award laid down under section 44 of the Indian Arbitration Act.

SC further held that section 9 of the Indian Arbitration Act, which deals with interim measures before constitution of the arbitral tribunal remains available even if two Indian parties adopt a foreign seated arbitration and Indian courts may grant interim reliefs in such cases if the assets of one of the parties is situated in India and interim orders are required for preservation of such assets.

3) SC ISSUES DIRECTIONS REQUIRED TO BE FOLLOWED BY ALL COURTS EXECUTING DECREES.

Matter: Rahul S Shah v. Jinendra Kumar Gandhi and Ors.

Order dated: 22 April 2021.

Summary:

The appeals filed before the SC arise out of a common judgment and order of the Karnataka HC dismissing several writ petitions. The said matter pertains to a suit relating to a property whereby the execution of the decree was obstructed by the judgment debtors by filing appeals, criminal proceedings, and objections.

The SC taking note of the difficulties faced by the judgment creditors in executing decrees issued directions that are required to be followed by all executing courts so that the execution of decrees can be carried out expeditiously. Some of the main directions issued by the SC are mentioned below:

(a) The trial court, in suits relating to delivery of possession, is required to examine the parties to the suit in relation to third party interest and exercise the power under the Civil Procedure Code, 1908 ("**CPC**") asking parties to disclose and produce documents, upon oath.

(b) The court may appoint commissioner to assess the accurate description and status of the property where possession is not disputed.

(c) After examination of parties or production of documents under the relevant provisions of CPC or receipt of commission report, the court is required to add all necessary or proper parties to the suit to avoid multiplicity of proceedings.

(d) A court receiver may be appointed as per the provisions of the CPC to monitor the status of the property in question as *custodia legis* for proper adjudication of the matter.

(e) The court before passing the decree pertaining to delivery of possession of a property is required to ensure that the decree is unambiguous regarding description and status.

(f) The court, in a money suit, is required to invariably resort to ensuring immediate execution of decree for payment of money on oral application.

(g) In a money suit, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent he is being made liable in a suit.

(h) The court may, at any stage, using powers under CPC, demand security to ensure satisfaction of any decree.

(i) The execution court must not issue notice on an application of third-party claiming rights in a mechanical manner. Further, the court should refrain from entertaining applications already considered by the court while adjudicating the suit.

(j) The court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method.

(k) Courts must award costs and even arrest in cases of frivolous or malafide. Police assistance may be called to for such officials who are working towards execution of the decree.

(l) The executing court may direct the concerned police station to provide police assistance to such officials who are working towards execution of the decree.

4) AN ENTITY SHOULD BE REGISTERED UNDER THE PROVISIONS OF THE MSME DEVELOPMENT ACT, 2006 ("MSMED ACT") AS ON THE DATE OF ENTERING INTO THE CONTRACT IN ORDER TO AVAIL BENEFITS UNDER THE MSMED ACT.

Matter: Silpi Industries v. Kerala State Road Transport Corporation.

Order dated: 29 June 2021.

Summary:

The MSMED Act is a welfare legislation which aims to promote and develop micro, small and medium enterprises which are small businesses. In order to ensure speedy recovery of their dues, the MSMED Act provides that micro and small enterprises can refer the dispute to the Micro and Small Enterprises Facilitation Council ("**Council**"), which will try to resolve the dispute first by conciliation, and if that fails then through arbitration.

In the present case, there were two issues for consideration before the SC, namely:

(a) Whether the provisions of Indian Limitation Act, 1963, is applicable to arbitration proceedings initiated under the MSMED Act; and

(b) Whether counter claim by the opposite party against the micro and small enterprises is maintainable in such arbitration proceedings.

The SC noted that as per the provisions of the MSMED Act, in case conciliation fails, the Council will take up the dispute for arbitration or it may refer to the matter to an institution or centre which provides for arbitration, and the provisions of Arbitration and Conciliation Act, 1996 ("**Indian Arbitration Act**") will be made applicable as if there was an agreement between the parties under the Indian Arbitration Act. On this reasoning, the SC held that as the Indian Limitation Act, 1963, applies to the Indian Arbitration Act, it will also apply to arbitration proceedings initiated under the MSMED Act.

The SC further took note of the beneficial provisions of the MSMED Act and reasoned that if the counter claims by the opposite parties are not allowed, then it will lead to multiplicity of proceedings as the buyer availing goods or services from micro and small enterprises will either initiate separate arbitration proceedings or will approach the court to initiate suits for recovery of their dues, and the micro and small enterprises will be constrained to fight multiple proceedings. This would defeat the beneficial intent of the MSMED Act. The SC, therefore, held that the various benefits available to micro and small enterprises under the MSMED Act cannot be denied, and counter claims by the opposite party are maintainable before the Council.

The SC then noted that in order to avail benefits of the provisions of the MSMED Act, the micro and small enterprises should have registration under the MSMED Act as on the date of entering into the contract. No benefit can be sought by an entity if registration is not obtained or where supply of goods or rendering of services pursuant to the contract was done prior to the registration of the entity under provisions of the MSMED Act. Accordingly, the court held that appellant parties, who had provided goods and services prior to obtaining registration, cannot seek reference to arbitration under the MSMED Act.

ORDERS PASSED BY THE HIGH COURTS ("HC")

5) NON-SIGNATORY MADE PARTY TO ARBITRATION

Matter: Shapoorji Pallonji and Co. Pvt. Limited v. Rattan India Power Limited & Anr.

Order dated: 07 April 2021.

Summary:

Rattan India Power Ltd. ("**Rattan**") invited bids to develop a thermal power plant. Shapoorji Pallonji and Co. Pvt. Limited's ("**SP**") bid was accepted. Letter of award was entered between SP and Elena (subsidiary of Rattan) and subsequently a contract was executed. Further, a work order was issued to SP for some civil and structural work by Rattan. Disputes arose between the parties

pursuant to which SP sent arbitration notice and called upon Rattan and Elena to jointly nominate an arbitrator. Rattan responded stating that it had not entered into the agreement and therefore, no arbitration agreement existed between Rattan and SP.

SP contended that (a) although the contract was signed by Elena, it was on behalf of Rattan; (b) bank guarantees were issued in favour of Rattan; (c) payments were made directly to Rattan. And therefore, even though Rattan had not signed the contract, it would nonetheless be bound by the arbitration clause. On the other hand, Rattan contended that it had entered into an agreement with Elena. Elena had entered sub-contracts with various parties for procurement of material and services.

The main issue before the Delhi HC ("**DHC**") was whether Rattan can be compelled to arbitrate even though it is not a signatory to the contract. The DHC noted that a non-signatory cannot be compelled to arbitrate on the assumption that the said party has not acceded to arbitration. However, it also noted that the said rule is not without exceptions such as implied consent, agent-principal relations, group of companies doctrine, assignment. The DHC also referred to the judicial decisions of Indian as well as foreign courts.

Considering the above, the DHC observed that Rattan (a) fully participated in the formation and was directly involved in the contract; (b) was the beneficiary of the work executed by SP; (c) invited offers for the contract; (d) was provided bank guarantees by SP; (e) made payments to SP; and (f) accepted the revised offer of SP. Further, the officials of Rattan acting on behalf of Elena indicate Rattan's substantial and dominant direct control over the affairs of Elena. Finally, the DHC compelled Rattan to participate in the arbitration as there was sufficient material to show that Elena is its alter ego of Rattan.

6) COURT CANNOT INTERFERE WITH THE ARBITRAL TRIBUNAL MERELY ON THE GROUND THAT IT DOES NOT CONCUR WITH THE INFERENCE DRAWN BY THE ARBITRAL TRIBUNAL.

Matter: Megha Enterprises and Ors. v. Haldiram Snacks Private Limited

Order dated: 15 April 2021.

Summary:

A petition was filed before Delhi HC ("**DHC**") under the Arbitration and Conciliation Act, 1996 ("**Indian Arbitration Act**") for setting aside the arbitral award rendered by an arbitral tribunal constituted by a sole arbitrator. The issues considered by the DHC was whether the arbitral tribunal had grossly erred in (a) evaluating the evidence led in the case; and (b) misapplying the provisions of section 18 of the Limitation Act, 1963.

With respect to evaluating the evidence led in the case, the DHC observed on contention of the petitioner, that the arbitral tribunal had grossly erred in accepting evidence without an affidavit (*as required under the Indian Evidence Act, 1872 ("**Evidence Act**")*), cannot be accepted because Evidence Act is not applicable to proceedings before an arbitrator and no such objection was taken by the petitioners at the appropriate stage before the arbitrator. The DHC held that the scope of examination of an arbitral award under the Indian Arbitration Act is extremely limited and therefore, the DHC cannot undertake the exercise of re-appreciation of evidence on the ground of patent illegality.

With respect to misapplying the provisions of the Limitation Act, 1963 the DHC observed that the arbitral tribunal had examined the question of limitation in detail. On evaluation of evidence led before the arbitral tribunal, it observed that the email and the letter clearly confirmed that the outstanding was due and payable. Further, it also observed that the witness of the respondent herein too had acknowledged the payment.

Accordingly, the DHC held that as an award can be challenged only under the limited grounds mentioned under the Indian Arbitration Act even if the evaluation of evidence by the arbitral tribunal may be erroneous and the court may take a different view, the court cannot interfere with the arbitral tribunal merely on the ground that it does not concur with the inference drawn by the arbitral tribunal from the evidence led by the parties.

7) DELHI HIGH COURT GRANTS ANTI-ENFORCEMENT INJUNCTION

Matter: Interdigital Technology Corporation & Ors. v. Xiaomi Corporation & Ors.

Order dated: 03 May 2021.

Summary:

A suit filed by Interdigital Technology Corporation ("**Interdigital**") against Xiaomi Corporation ("**Xiaomi**") seeking injunction against Xiaomi for alleged infringement of patents of Interdigital. The brief facts are as follows:

(a) *09 June 2020*: Xiaomi filed suit before the Wuhan court to determine the global royalty rate based on which they could obtain licence from Interdigital;

(b) *29 July 2020*: Interdigital filed a suit before the Delhi HC ("**DHC**") seeking injunction, alleging infringement of certain patents by Xiaomi, held and registered in the name of Interdigital;

(c) *04 August 2020*: Xiaomi filed anti-suit injunction for a restraint against Interdigital from prosecuting its suit before the DHC; and

(d) *23 September 2020*: Wuhan court granted injunction directing Interdigital to withdraw its application seeking injunction before the DHC.

Pursuant to the Wuhan court's directions, Interdigital filed an application before the DHC seeking injunction against Xiaomi from enforcing Wuhan court's directions. The DHC considered the following factors to decide whether injunction against enforcement ("**Anti-Enforcement Injunction**") of the Wuhan court's directions may be granted or not – a) the principle of comity i.e., the principle in accordance with which the courts of one state or jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect; b) difference between anti-suit and anti-enforcement injunctions; c) principles from foreign jurisprudence; e) possibility of conflicting orders and f) distinguishing the grounds of Wuhan court's directions.

After a detailed analysis of the, the DHC also noted that it was the only court which had jurisdiction to entertain the subject matter. Considering the above factors along with the circumstances of the case, the DHC granted an Anti-Enforcement Injunction i.e., injuncted Xiaomi from enforcing the Wuhan court's directions. A detailed analysis of this order is available here.

8) AN ARBITRAL TRIBUNAL CANNOT GO BEYOND THE TERMS OF THE CONTRACT BETWEEN THE PARTIES AND CANNOT APPLY PUBLIC LAW PRINCIPLES ON FAIRNESS AND REASONABLENESS.

Matter: Board of Control for Cricket in India v. Deccan Chronicle Holdings Limited

Order dated: 16 June 2021.

Summary:

Board of Control for Cricket in India ("**BCCI**") terminated an agreement with Deccan Chronicle Holdings Limited ("**DCHL**") on grounds of breach of contractual obligations by DCHL. Aggrieved by such an action, DCHL referred the matter to arbitration and a sole arbitrator was appointed, who directed BCCI to pay DCHL a sum of over INR 4.8 billion for wrongful termination of the agreement. The sole arbitrator's award ("**Award**") was challenged by BCCI before the Bombay HC.

The Bombay HC noted that the Award goes beyond the terms of the agreement between the parties. The Bombay HC held that role of the arbitrator is to arbitrate within the terms of the contract and the arbitrator has no power apart from what the parties have given him under the contract. Further the arbitrator cannot go beyond the pleadings and the evidence of the parties and cannot pass order on the basis of the conduct of one of the parties with other third parties which were not signatory to or part of the agreement.

The HC further clarified that an arbitral tribunal is not a court of law and its orders are not judicial orders and its functions are not judicial functions. Therefore, it cannot exercise powers of the writ courts and pass orders on the basis of principles of public policy like fairness and reasonableness which is the domain of the writ courts in India. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference, unless the parties, by mutual consent agree to entitle the arbitrator to settle a dispute by applying what they conceive is 'fair and reasonable'.

The Bombay HC further found DCHL to be in unquestionably breach of the agreement on multiple grounds and set aside the Award.

9) SOVEREIGN IMMUNITY CANNOT BE CLAIMED BY A FOREIGN STATE AGAINST ENFORCEMENT OF AN ARBITRAL AWARD EMERGING FROM A COMMERCIAL TRANSACTION.

Matter: KLA Const Technologies Private Limited v. The Embassy of Islamic Republic of Afghanistan

Order dated: 18 June 2021.

Summary:

The Delhi HC ("**DHC**") was dealing with two separate petitions seeking enforcement of arbitral award passed against foreign states, one against the Embassy of Islamic Republic of Afghanistan and the other against Ministry of Education, Federal Democratic Republic of Ethiopia. The DHC dealt with two important questions of law (a) whether prior consent of central government is necessary under section 86 of the Code of Civil Procedure ("**CPC**") to enforce an arbitral award against a foreign state; and (b) whether a foreign state can claim sovereign immunity against enforcement of arbitral award arising out of a commercial transaction.

The DHC held the following (a) that prior consent of central government is not necessary under CPC to enforce an arbitral award against a foreign state and that a foreign state cannot claim sovereign immunity against enforcement of an arbitral award arising out of a commercial transaction; (b) that an arbitration agreement in a commercial contract between a party and a foreign state is an implied waiver by the foreign state to preclude it from raising a defence against an enforcement action premised upon the principle of sovereign immunity. Therefore, protection under CPC with respect to suits against foreign state i.e., section 86 of the CPC would not apply to cases of implied waiver and the same has limited applicability; (c) that the purpose and nature of the transaction of the foreign state would determine whether the transaction represents a purely commercial activity or whether the same is a manifestation of sovereign authority; and that a foreign state cannot contend that its consent must be sought once again at the time of enforcing the arbitral award as the arbitral award is the culmination of the arbitration process which the foreign state has consented to.

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