

ACUITY **LAW**

DISPUTES
NEWSLETTER

April-June 2022

acuitylaw.co.in

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, Deni Shah and Renjith Nair 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 with assistance from Renjith Nair.

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.

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 LLP 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 in civil and arbitration disputes for the quarter April – June 2022.

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

ORDERS PASSED BY THE HIGH COURTS (HC)

1) CLAIMS UNDER A CONTRACT NOT ADDRESSED IN PREVIOUS ARBITRATION ARE NOT BARRED FROM FURTHER /FRESH ARBITRATION

Matter: *M/s Orissa Concrete and Allied Industries Ltd. v. Union of India*

Order date: 05 April 2022

Summary:

Orissa Concrete and Allied Industries Ltd. (**OCAI**) was awarded a tender by the Union of India and Ors. (**UOI**) for manufacturing sleepers. In pursuance to the contract between the parties, OCAI manufactured and dispatched a part of the order to UOI. However, upon receiving the order, UOI terminated the contract, and a dispute arose between the parties. Aggrieved by the termination, OCAI invoked arbitration as contemplated in the contract and sought compensation for the sleepers already supplied. The arbitral tribunal granted the award in favor of OCAI. Thereafter, OCAI approached the Delhi HC under another petition to seek appointment of new arbitral tribunal to deal with the issue of sleepers /part of the order that was not dispatched. The petition was opposed by UOI on the grounds of *res judicata* i.e., an award has already been rendered in respect to the contract between the parties. Therefore, OCAI cannot re-invoke arbitration on the premise of the same contract.

The Delhi HC, while referring to the nature of the claim raised by OCAI, held that the claim of OCAI in the previous arbitration was evidently different. It held that the present claim was limited to the sleepers that were not dispatched and the same was not adjudicated upon in the previous arbitration. It was further observed by the Delhi HC that since UOI had not taken a decision with respect to the issue of sleepers that had not been dispatched, no cause of action had arisen at the time of the earlier arbitration. Additionally, the Delhi HC pointed out that the contract between the parties does not contemplate any restriction on referring further disputes to arbitration. On this backdrop, the Delhi HC appointed a new arbitral tribunal to adjudicate upon the remaining issues that were not referred to in the previous arbitration.

2) JUDICIAL OFFICER BELOW THE RANK OF DISTRICT JUDGE CONFERRED WITH THE POWER TO DECIDE ARBITRATION MATTERS IS NOT CONTRARY TO THE ARBITRATION ACT

Matter: *MG Mohanty and Anr. v. State of Odisha and Ors.*

Order date: 08 April 2022

Summary:

In *MG Mohanty & Anr. v. State of Odisha & Ors.*, 5 writ petitions came to be filed by different entities raising concern over the interpretation as well as interplay of the provisions of Commercial Courts Act, 2015 (**CC Act**) and the Arbitration & Conciliation Act, 1996 (**Arbitration Act**). By way of a notification, the Law Department of State of Orissa empowered the Court of Civil Judge (Senior Division) to exercise jurisdiction and power under the CC Act. That is to say, the powers of Commercial Courts were conferred upon Court of Civil Judge (Senior Division). In light of this notification, the District & Sessions Judge transferred certain arbitration petitions to the Court of Civil Judge (Senior Division). The petitioners contended that matters under Section 9, 14 and 34 of the Arbitration Act cannot be decided by a judicial officer below the rank of a district judge. Being aggrieved by the seeming contradiction between the jurisdiction of courts mentioned in the notification and the Arbitration Act, writ petitions were filed before the Orissa HC.

Therefore, the question posed before the Orissa HC is whether a judicial officer subordinate to the rank of a District Judge can be conferred with the power to decide arbitration matters under the CC Act despite there being a contrary provision under the Arbitration Act.

While holding that there is no such apparent conflict between the notification amending the CC Act and the Arbitration Act, the Orissa HC cited examples to show that a judicial officer subordinate to the rank of a District Judge can very well be conferred with the power to decide arbitration matters. Moreover, the Court went on to hold that the Arbitration Act must yield to the CC Act given the fact that the objective of both the Acts is speedy resolution of disputes and CC Act is a later enactment. Thus, the petitions were dismissed.

3) JUDGMENTS PASSED BY FOREIGN COURTS MUST BE RESPECTED BY THE INDIAN COURTS, UNLESS THE SAME FALLS UNDER THE EXCEPTIONS PROVIDED UNDER THE INDIAN CODE OF CIVIL PROCEDURE, 1908

Matter: *Toshiaki Aiba, as the Bankruptcy Trustee of the estate of Vipin Kumar Sharma v. Vipin Kumar Sharma and Anr.*

Order date: 26 April 2022

Summary:

In the present matter, a suit was filed before the Delhi HC by Toshiaki Aiba, as the Bankruptcy Trustee of the estate of Mr. Vipin Kumar Sharma (**Mr. Vipin Kumar**) invoking the provisions of the Japanese Bankruptcy Act. The suit was filed to administer certain properties of Mr. Vipin Kumar in India towards realization of monies. One of the defendants filed an application for rejection of plaint. The Delhi HC dealt with *inter alia* the following (i) whether an order passed by the Tokyo District Court declaring Mr. Vipin Kumar as bankrupt and appointing Toshiaki Aiba as the Bankruptcy Trustee Administrator has any evidentiary value in India, as it is passed by the court of a non-reciprocating territory; and (ii) whether an Indian Court can dismiss a suit filed by a foreign party on the ground that the same is barred under the Japanese law.

With respect to issue (i), the Delhi HC observed that Toshiaki Aiba, who is the bankruptcy trustee, was not seeking to execute the judgment of the Tokyo District Court in India but was acting in furtherance of the judgment of the Tokyo District Court to administer the estate of Mr. Vipin Kumar, who was adjudicated being bankrupt in Japan. Accordingly, the Delhi HC held that judgments passed by foreign courts must be respected by the Indian Courts, unless the same are shown to be falling under the limited exceptions provided under the Indian Code of Civil Procedure, 1908 (**CPC**).

With respect to issue (ii) the Delhi HC held that under the CPC a plaint can be rejected where the suit appears, from the statement in the plaint, to be barred by 'any law'. However, the term 'any law' referred under the CPC is only with respect to an Indian law and not the law of a foreign country. Therefore, an Indian Court cannot dismiss a suit filed by a foreign party on the ground that the same is barred under Japanese law. Accordingly, the Delhi HC dismissed the application for rejection of plaint.

4) ORDER RELATING TO TRIBUNAL'S OWN JURISDICTION CANNOT BE TERMED AS INTERIM ORDER, AND SHALL BE SUBJECT TO CHALLENGE UNDER SECTION 34 ONLY AFTER REMAINING ISSUES ARE ADJUDICATED UPON

Matter: *Board of Trustees for the Syama Prasad Mookerjee Port, Kolkata v. Marinecraft Engineers Private Limited*

Order date: 17 May 2022

Summary:

The Board of Trustees for Syama Prasad Mookerjee Port, Kolkata (**the Board**) awarded a tender in favor of Marinecraft Engineers Private Limited (**Marinecraft**) for the purposes of conducting four yearly survey and dry dock repair of Tug Bijoy Singha. Meanwhile, certain disputes arose between the parties and Marinecraft, being a "micro enterprise", referred the dispute to Micro Small and Medium Enterprise Facilitation Council (**the Council**) under Micro, Small and Medium Enterprises Development Act, 2006 (**MSME Act**). Pursuant to the failure of conciliation proceedings, the matter was referred to the Council for arbitration as per the provisions of the MSME Act. During the proceedings, the Board challenged the jurisdiction of the Council stating that it had already invoked arbitration contemplated under the contract and therefore the Council lacks jurisdiction to decide the present dispute. However, the said contention came to be rejected by the Council and the order in this behalf came to be termed as an "interim award". In this backdrop, the Board filed an appeal under the Arbitration Act challenging the said "interim award" before the Calcutta HC.

The Calcutta HC, while declining to adjudicate upon the merits of the case, held that the order passed by the Council relates to Council's own jurisdiction. That is to say, it is not an interim or a final award, and therefore, it does not qualify to be challenged under Section 34 of the Arbitration Act. On this premise, the Calcutta HC dismissed the challenge and held that an order of a council /tribunal upon its own jurisdiction is not an interim award and cannot be subject to challenge before the arbitral award is passed.

5) AN ARBITRAL TRIBUNAL CANNOT RE-WRITE THE TERMS OF A COMMERCIAL CONTRACT

Matter: *Union of India, Ministry of Railways, Railway Board & Anr. v. Jindal Rail Infrastructure Ltd.*

Order date: 23 May 2022

Summary:

In this matter, Indian Railways (**Railways**) and Jindal Rail Infrastructure Ltd (**JRIL**) entered into a contract wherein the Indian Railways had issued an order for the manufacture and supply of a certain number of wagons from JRIL. Under the contract, the Railways reserved the right to increase /decrease the ordered quantity during the term of the contract, on the same price and terms and conditions. Accordingly, Railways placed an additional order on JRIL for more wagons without revising the contract rates. In the interval, the Railways floated other tenders for the supply and manufacture of more wagons at higher rates per wagon. JRIL, being aggrieved by the dual pricing of wagons, invoked arbitration.

The arbitral tribunal in its award held that the Railways could not have exercised its right under the contract for placing additional orders on JRIL without revising the contract rates when the price of the wagons was lower than the costs for the manufacture of the wagons and the revised rate of wagons was found to be increased in the subsequent bids. Accordingly, Railways was liable to compensate JRIL for the difference in the contract price and the market price of the additional wagons. The Railways challenged the Award before the Delhi HC.

The Delhi HC observed that the Railways was entitled to increase the quantity of the wagons during the currency of the contract at a particular price and JRIL had agreed to the same. Accordingly, the Delhi HC, noting that a commercial contract between parties cannot be avoided on the ground that one of the parties subsequently finds it commercially unviable to perform the same, held that an arbitral tribunal cannot re-write the terms of a commercial contract and set aside the arbitral award.

6) CLOSE RELATIONSHIPS FOR THE PURPOSE OF DETERMINING INDEPENDENCE AND IMPARTIALITY OF AN ARBITRATOR ONLY INCLUDE BLOOD RELATIONS

Matter: *Himanshu Shekhar v. Prabhat Shekhar*

Order date: 31 May 2022

Summary:

In *Himanshu Shekhar v. Prabhat Shekhar*, a dispute arose between two brothers, Himanshu (**A**) and Prabhat (**B**) engaged in the family business of manufacturing and dealing in jewelry ornaments. A and B referred the dispute to arbitration by way of an agreement dated 04 October 2021 and appointed a sole arbitrator (**Arbitrator**) therein. The agreement of 04 October 2021 clearly mentioned that the Arbitrator was related to both the parties in so much that he was the father-in-law of the daughter of Vivek Shekhar (**C**), who was a sibling of A and B and was not party to the arbitration. Pursuant to the receipt of intimation of appointment, the Arbitrator accepted the same and made requisite declaration as per the Arbitration Act regarding his independence and impartiality.

However, during the arbitral proceedings, A filed an application before the Arbitrator praying that the Arbitrator must recuse himself from the proceedings considering he is related to B and that it may lead to impartiality and biasness while rendering the decision. The Arbitrator rejected the contention and continued with his appointment. Aggrieved, A approached the Delhi HC under the

present petition to terminate the mandate of the Arbitrator on the grounds that he is ineligible to act in the present dispute since he is related to B.

The Delhi HC observed that while A claims that the appointment of Arbitrator is hit by the fact that he is a 'close family relative' of B, the definition of close family relationships is entirely different. The HC placed reliance on a few international sources to conclude that close family relations are limited to spouse, sibling, child, parent or a life partner i.e., relations by birth, marriage or adoption. Accordingly, the Delhi HC held that the Arbitrator is not a close family relation of B and is qualified to act as arbitrator in the matter.

Authors: Souvik Ganguly; Renjith Nair; Altamash Qureshi; Gayatri Ramchandran; Richa Phulwani; Niyati Bhogayta

Our co-ordinates:

Mumbai

506 Marathon Icon
Off Ganpatrao Kadam Marg
Lower Parel, Mumbai – 400013

Email: al@acuitylaw.co.in