

ACUITY **LAW**

**DISPUTES**  
**NEWSLETTER**

**July-September 2021**

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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, 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](http://acuitylaw.co.in) or write to us at [al@acuitylaw.co.in](mailto:al@acuitylaw.co.in).

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## INTRODUCTION

This newsletter covers key updates about developments in civil and arbitration disputes for the quarter July - September 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) EMERGENCY ARBITRATION AWARDS IN AN INDIA-SEATED ARBITRATION ARE ENFORCEABLE IN INDIA.

**Matter:** Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors.

**Order dated:** 6 August 2021.

#### Summary:

The main issue before the SC was whether the award of an emergency arbitrator is recognized under the (Indian) Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) and whether it is enforceable under Indian law. SC ruled that party autonomy is the guiding spirit in arbitration law, and if parties agree to institutional arbitration which provides for emergency arbitration, then the parties are bound by the emergency arbitrator’s award. SC noted that nothing prohibits contracting parties from agreeing to a provision providing for an award being made by an emergency arbitrator, and on the contrary, the Arbitration Act endorses the parties to choose governing institutional rules.

SC explained that the definition of ‘arbitration’ under the Arbitration Act means *any arbitration, whether or not administered by a permanent arbitral institution* which makes it clear that even interim orders that are passed by emergency arbitrators under the rules of a permanent arbitral institution would be included under the definition of arbitration. SC further delved into provisions of the Arbitration Act which provides for interim reliefs by the arbitral tribunal “*during the arbitral proceedings.*” SC held the expression “*during the arbitral proceedings*” would include emergency arbitration proceedings, as such proceedings only commence after receipt of notice of arbitration and therefore, an emergency arbitrator’s award, if provided for under institutional rules, would be covered by the Arbitration Act.

SC also noted that the order for enforcement of such emergency award would be final and non-appealable. However, it should be noted that the observations of the SC in the present matter were with regards to an India-seated arbitration. For more information about the SC’s order, please read our article available [here](#).

### 2) SC RECALLS EXTENSION OF LIMITATION PERIOD ORDER.

**Matter:** In Re: Cognizance of extension of limitation

**Order Dated:** 23 September 2021

#### Summary:

Pursuant to the COVID-19 outbreak in India, the SC *vide* order dated 23 March 2020 and then again on 27 April 2021 extended the period of limitation within which one could file cases under the laws of India. Now that the COVID-19 pandemic in India is on the decline and there is normalcy being restored, the SC has recalled its earlier order and passed the following directions *vide* a fresh order dated 23 September 2021:

- a. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15 March 2020 till 02 October 2021 shall stand excluded;
- b. In cases where the limitation would have expired during the period between 15 March 2020 till 02 October 2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 (ninety) days from 03 October 2021. In the event the actual balance period of limitation remaining, with effect from 03 October 2021, is greater than 90 (ninety) days, that longer period shall apply; and

- c. The period from 15 March 2020 till 02 October 2021 shall stand excluded in computing the periods prescribed under any law, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

### 3) COURTS CAN CONTINUE ADJUDICATION OF ONGOING APPLICATION SEEKING INTERIM RELIEFS EVEN POST THE CONSTITUTION OF AN ARBITRAL TRIBUNAL.

**Matter:** Arcelor Mittal Nippon Steel India Ltd. v Essar Bulk Terminal Ltd.

**Date:** 14 September 2021

#### **Summary:**

In the present case, Arcelor Mittal Nippon Steel India Ltd. (“AMNS”) and Essar Bulk Terminal Ltd. (“Essar”) had entered into an agreement and subsequently due to some disputes arising between them, both sought interim relief under the Arbitration Act before the Commercial Courts in Surat. The Commercial Court heard the applications and reserved it for orders for a future date. While the orders were still reserved before the Commercial Courts, the Gujarat High Court, on an application from AMNS, constituted an arbitral tribunal to resolve the main dispute. AMNS filed an interim application before the Commercial Court praying that the interim relief applications filed by the parties be also referred to the newly appointed arbitral tribunal. However, the Commercial Courts dismissed this application. The Commercial Court’s order was challenged by AMNS before the Gujarat High Court. However, the same was dismissed with the Gujarat High Court holding that the Commercial Court should be permitted to pronounce the order on both the interim relief applications, and consequently AMNS approached the SC challenging the Gujarat High Court’s order.

The issues for consideration before the SC was whether the Commercial Court has the power to entertain an application under Arbitration Act once the arbitral tribunal had been constituted. SC held that even after the constitution of an arbitral tribunal, the Commercial Court is not denuded of the power to grant interim relief under the Arbitration Act. SC opined that the expression “entertain” means considering the issues raised by application of mind. The Commercial Court entertains a case when it takes a matter up for consideration. The process of consideration could continue till the pronouncement of judgement. Once an arbitral tribunal is constituted, the Commercial Court cannot take up an application for granting interim reliefs for consideration, unless it can be shown that remedy of interim reliefs from the arbitral tribunal is inefficacious. However, once an application is entertained i.e., it is taken up for consideration by the Commercial Court, and the Commercial Court has applied its mind, then it can certainly proceed to adjudicate the application. SC held that the Gujarat High Court rightly directed the Commercial Court to proceed to complete the adjudication on the interim relief applications.

#### **ORDERS PASSED BY THE HIGH COURTS (“HC”)**

### 4) BANKS CANNOT FORCE A MANDATORY CLAIM PERIOD OF ONE YEAR FOR A BANK GUARANTEE.

**Matter:** Larsen & Toubro Ltd. & Anr. v. Punjab National Bank & Anr.

**Order dated:** 28 July 2021

#### **Summary:**

Larsen & Toubro Ltd (“L&T”), a construction company in India, would routinely submit performance bank guarantees/ advance bank guarantees while bidding for government contracts and would also submit bid bonds/ bid security in the form of bank guarantees. Punjab National Bank (“PNB”) compelled L&T to keep the claim period under the bank guarantees alive for a minimum period of one year, regardless of whether L&T required the bank guarantees for a shorter period. The fallout of this for L&T was that it incurred unnecessary commission charges on the bank guarantees for the extended period. PNB had based its demand for a mandatory and an unalterable claim period of a minimum twelve months on its interpretation of Section 28 of the Indian Contract Act, 1872 (“Contract Act”) that any claim period below twelve months would render the claim period void. Aggrieved by this, L&T filed a writ petition challenging PNB’s interpretation of the Contract Act.

The Delhi HC noted that earlier, the beneficiary of the bank guarantee i.e., creditor would have time to approach the appropriate court for enforcement of their rights under the bank guarantee within 3 (three) years for private parties and 30 (thirty) years for government parties. However, the HC observed that an expert committee constituted in 2013 had recommended that the said

period be reduced to one year for enforcing the rights under the bank guarantee after happening of a specified event. Thereafter, an exception 3 to Section 28 of the Contract Act was added in 2013, which allows banks and financial institutions to incorporate clauses providing for extinguishment of the rights of the beneficiary, or discharge of bank's liability on the expiry of a specified period, thereby curtailing the limitation period for a beneficiary to enforce his claim before a court of law.

The Court held that the narration of the historical facts leading to the present Section 28 of the Contract Act clearly demonstrates that exception 3 to section 28 of the Contract Act deals with the rights of a creditor to enforce his rights under the bank guarantee after the occurrence of a specified event and it does not in any manner deal with the claim period within which the beneficiary is entitled to lodge his claim with the bank/guarantor. The Delhi HC held that PNB had erred in interpreting the scope of Section 28 of the Contract Act, and the law does not mandate a claim period of 12 (twelve) months in the bank guarantee.

**5) CHOICE OF A VENUE IN AN ARBITRATION AGREEMENT IS ALSO CHOICE OF THE ARBITRAL SEAT IN ABSENCE OF A CONTRARY INDICATION.**

**Matter:** S.P. Singla Constructions Pvt. Ltd v. Construction and Design Services, Uttar Pradesh Jal Nigam

**Order dated:** 23 September 2021

**Summary:**

A dispute arose between the parties leading to invoking of the arbitration clause which provided for the proceedings to be conducted in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution ("ICADR"), New Delhi and the venue of such arbitration to be Lucknow. The other party took a stand that the invocation of arbitration clause is untenable as there is no dispute between the parties. Accordingly, an application was filed before Delhi HC seeking appointment of the arbitrator.

The issue before the Delhi HC was whether the seat of arbitration shall be New Delhi as per ICADR or Lucknow as per the agreement. The Delhi HC held that if the arbitration agreement provides that arbitration proceedings "shall be held" at a particular venue, it would indicate that arbitration proceedings would be anchored at such venue, and therefore, the choice of venue is also the choice of the seat of arbitration. The HC reiterated that once the parties designate the seat of arbitration, only the courts governing the seat will have exclusive jurisdiction to govern such arbitration proceeding and jurisdiction of all other courts stand ousted. Accordingly, Delhi HC stated that the seat of arbitration will be determined according to the arbitration agreement between the parties i.e., Lucknow, and the ICADR will be applied only after the arbitration has begun before appropriate jurisdiction. Therefore, it was held that only the courts in Lucknow would have jurisdiction to appoint an arbitrator and Delhi HC had no jurisdiction to entertain the petition, which was dismissed with liberty to the parties to approach the Court at Lucknow.

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