

ADR Weekly

August 26 - 30 2024

National

- **Supreme Court Reserves Verdict on Arbitrator Nomination by Ineligible Persons:** On August 30, 2024, the Supreme Court reserved its judgement on whether an individual who is ineligible to act as an arbitrator can nominate another person for the role. The five-judge constitution bench, led by Chief Justice D Y Chandrachud, emphasised the importance of maintaining the integrity and strength of arbitration as a dispute resolution mechanism. The court acknowledged the conflicting rulings from 2017 and 2020 on this issue and decided that a larger bench was necessary to provide a definitive resolution. The court's decision will address these contradictions and clarify the law regarding arbitrator appointment. The bench had previously highlighted the importance of maintaining fairness in arbitration, especially in cases involving government entities and public sector undertakings (PSUs). It stressed that the government's focus should extend beyond merely securing favourable outcomes, aiming instead to preserve the integrity of the arbitration process. The court cautioned PSUs against attempting to "rig" the arbitration process, as this could undermine investor confidence, both domestic and international, which is crucial for economic growth. [Central Organisation for Railway Electrification vs M/s ECI SPIC SMO MCML (JV) A Joint Venture Company, Civil Appeal Nos. 9486 - 9487/2019]
- **Rajasthan High Court Upholds Independent Arbitrator Appointment, Rejects RIICO's Estoppel Argument:** The Rajasthan High Court ruled that courts are not bound to appoint an arbitrator named in an arbitration agreement, emphasising the need for an independent and impartial arbitrator. Justice Sudesh Bansal cited Supreme Court rulings in *TRF Ltd. v. Energo Engineering Projects Ltd.* and *Perkins Eastman Architects DPC v. HSCC (India) Ltd.* to support this decision. In a dispute between M/s Shakti Foundation and RIICO over a cancelled plot allotment and security deposit deductions, RIICO argued that the applicant was estopped from raising the dispute after accepting a refund without protest. The Court rejected this, finding no evidence that the refund was accepted as a final settlement and reaffirming that estoppel should not prevent disputes from being contested, even if a no-claim certificate was signed.



The Court allowed the arbitration application, enabling the dispute to proceed through arbitration. [*M/s Shakti Foundation vs The Chairman, Rajasthan State Industrial Development And Investment Corporation & Anr.*, S.B. Arbitration Application No. 51/2023].

- **Delhi High Court Upholds Limited Court Intervention in Arbitral Awards:** The Delhi High Court, in a ruling by a division bench of Justice Vibhu Bakhru and Justice Tara Vitasta Ganju, reaffirmed that an Arbitral Tribunal's decisions are final and can only be interfered with under Section 34 of the Arbitration and Conciliation Act, 1996 if they are perverse or implausible. The case involved a dispute between Delhi Skills Mission Society (Appellant) and Samuel Foundation Charitable India Trust (Respondent) over training costs under a vocational training agreement. The Appellant challenged the arbitral award and subsequent dismissal by the Commercial Court, arguing that the Arbitral Tribunal rewrote the contract and overlooked breaches related to biometric attendance records. However, the High Court dismissed the appeal, emphasising that while accurate attendance is important, it is not the essence of the Agreement. The court held that the Tribunal's decision was reasonable and within its purview, limiting judicial intervention to ensuring that the decision was not irrational or perverse. The appeal was thereby dismissed. [*Delhi Skills Mission Society vs Samuel Foundation Charitable India Trust*, FAO (COMM) 73/2024, CMs Nos. 23698/2024, 23699/2024, 23700/2024 and 23701/2024]
- **The Delhi HC holds that the court acquires jurisdiction under Section 11(6) of Arbitration and Conciliation Act immediately upon default of pre-arbitral or arbitral procedure:** The Delhi HC bench of Justice C. Hari Shankar has held that court acquires jurisdiction under Section 11(6) of the Arbitration and Conciliation Act, 1996 immediately on the default, of either party, in adhering to the pre-arbitral or arbitral procedure envisaged in the contract. Section 11(6) provides that if a party fails to appoint an arbitrator, or if the two appointed arbitrators fail to agree on the third arbitrator, or if the parties or arbitrators do not agree on the procedure for appointing the arbitrator(s), a party may request the Chief Justice or a designated person or institution to appoint an arbitrator. [*M/S Bksons Infrastructure Pvt. Lt vs Managing Director, National Highways And Infrastructure Development Corporation*, ARB.P. 498/2024]
- **SC emphasises the duty of every court and arbitral tribunal to examine the specific provisions of the contract between parties:** The Supreme Court recently emphasised that the courts and arbitral tribunals have the duty to examine the contract clauses in proceedings concerning arbitration. While upholding Calcutta HC's decision to set aside the arbitrator's decision to award the amount for loss due to idle machinery and labour despite it being prohibited under the contract, the Court said : "In fact, High Court did what the Arbitrator should have done. Examine what the contract provides. This is not even a matter of interpretation. It is the duty of every Arbitral Tribunal and Court alike and without exception, for contract is the foundation of the legal relationship...The Arbitrator did not even refer to the contractual provisions and the District Court dismissed the objections under Section 34 with a standard phrase as extracted hereinabove."



The bench of Justice Pamidighantam Sri Narasimha and Justice Pankaj Mithal also observed that under Section 31(7) of the Arbitration and Conciliation Act, 1996, the Arbitrator has the authority to grant interest for the pre-reference period unless the contract prohibited it. [Pam Developments Private Limited vs State of West Bengal & Anr., Civil Appeal Nos. 9781-9782 of 2024 @ SLP (C) Nos. 8128 - 8129 of 2021]

- **Calcutta HC holds that a Section 34 challenge would not warrant merit if the arbitrator's award is well-reasoned and based on evidence:** The Calcutta HC bench of Justice Sabyasachi Bhattacharyya has held that if an Arbitrator's judgement is well-reasoned and backed by substantial evidence, there are no grounds to challenge it under Section 34 of the Arbitration and Conciliation Act, 1996. [Damodar Valley Corporation vs BLA Projects Pvt. Ltd., AP-COM No. 231 of 2024]
- **Madhya Pradesh HC holds that a state that is not part of an agreement cannot file an application under Section 16 of the Arbitration and Conciliation Act:** The Madhya Pradesh HC bench of Chief Justice Sanjeev Sachdeva and Justice Rajendra Kumar Vani has held that an arbitration agreement entered into between the Ministry of Road Transport and Highways, Government of India, and a private company does not involve or implicate the State Government in any legal capacity. The bench held that such an agreement is exclusively between the central government ministry and the concerned company, thereby excluding any role or involvement of the State Government. As a result, the bench held that the State Government cannot be considered a party to the arbitration agreement or the related arbitral proceedings. [The State Of Madhya Pradesh And Others vs T.R.G. Industries Private Limited A Company Registered Under The Companies Act 1956 And Others, Writ Petition No. 12871 of 2024]
- **Delhi HC holds that an arbitration contract would be invalid if it does not provide for the contractor to select an arbitrator from the Railway's panel:** The Delhi HC bench of Justice C. Hari Shankar has held that an arbitration clause is invalid if it does not allow the contractor to select an arbitrator from a panel provided by the Railway. The HC noted that there was a significant distinction between the clause and the arbitration clause previously considered by the Supreme Court in *Central Organization for Railway Electrification vs ECI-SPIC-SMO-MCML (JV)*. The clause in CORE, detailed in Clause 64(3)(b) of the General Conditions of Contract, required the Railway to provide a panel of at least four retired Railway officers for arbitration. The HC noted that the clause did not provide for any choice by the Railway to the contractor regarding arbitrators which differs from the CORE clause where the contractor could choose from a panel provided by the Railway. Clause 26.3 of the General Conditions of Contract allowed the Respondent to unilaterally appoint an arbitrator from its panel which rendered it invalid under the Supreme Court's rulings. The HC held that it could not modify or rewrite the arbitration clause to bring it into conformity with the law. [M/s Kamladitya Construction Pvt Ltd vs Rail Land Development Authority, ARB.P. 1223/2023]



- Calcutta HC holds that higher court fees under Entry No. 1(10) would not be applicable, and instead, a court fee of Rs. 120 would be applicable to Section 34 Applications:** The Calcutta HC bench of Justice Sabyasachi Bhattacharyya has held that the principal application under Section 34 of the Arbitration and Conciliation Act, 1996, challenging an arbitral award, falls under Entry No. 2(c) of Schedule II of the Court Fees Act. This entry is the residuary provision that prescribes a court fee of Rs. 120 for original applications before the HC, where no other specific provision in Schedule II applies. The matter pertained to an objection raised by SREI Equipment Finance Limited (Respondent) regarding the application filed under Section 34 of the Arbitration and Conciliation Act, 1996 by Sajarul Rahaman (Petitioner). The Respondent contended that the application was barred by limitation due to the insufficient court fees paid at the time of filing. [*Sajarul Rahaman And Anr vs Srei Equipment Finance Limited And Anr and Connected Matters*, AP-COM/304/2024]
- Himachal Pradesh HC holds that application under Section 151, CPC is not maintainable when Section 29A(4) Of Arbitration Act applies, incorrect quote of section not grounds for dismissal:** The Himachal Pradesh HC bench of Justice Rakesh Kainthla has held that an application under Section 151 of the CPC is not maintainable when a specific provision exists under Section 29A(4) of the Arbitration and Conciliation Act, 1996 for extending the time of arbitration proceedings. However, the bench also held that the application cannot be dismissed solely because it cited Section 151 CPC instead of Section 29A(4) of the Arbitration Act. [*Kamlu vs Collector, Land Acquisition NHA and ors.*, Arbitration Case No. 599 of 2023]
- Delhi HC holds that it is within the powers of the tribunal to deny pendente lite and pre-reference interest:** The Delhi HC bench of Justice Prateek Jalan has held that it is reasonable for an arbitrator to deny pre-reference and pendente lite interest when the applicant is partially responsible for delays in completing the project. The bench held that interpreting a contract and determining claims based on that interpretation fall within the arbitral tribunal's authority. [*Kunal Food Products Pvt. Ltd. vs Delhi Development Authority*, O.M.P. (COMM) 352/2024 & I.A. 36484/2024]
- Delhi HC upholds arbitral award against the Railways:** The Delhi HC division bench of Justice Rajiv Shakhder and Justice Tara Vitasta Ganju has held that when an arbitrator delivers an Arbitral Award, the assessment of the quality and quantity of evidence presented to her must be respected, and any reasonable conclusion drawn by the arbitrator based on the facts should be upheld. The bench held that that the Arbitral Tribunal is the master of evidence and a findings of fact arrived at by an arbitrator is on an appreciation of the evidence on record are not to be scrutinised as if the Court was sitting in appeal. [*Union Of India vs M/s Parishudh Machines Pvt. Ltd.*, FAO (COMM) 59/2021 and CM APPL. 25418/2023]



- **Delhi HC holds that discovery and inspections orders passed by the tribunal are not interim awards unless they resolve disputed issues:** The Delhi HC bench of Justice Anup Jairam Bhambhani has held that an order by arbitral tribunal addressing applications related to the discovery and inspection of documents does not constitute an interim award if it does not resolve a matter at issue between the parties. [*Aptec Advanced Protective Technologies Ag vs Union Of India & Anr., O.M.P. (COMM) 216/2020*]
- **Delhi HC holds that it is within the scope of an arbitrator's jurisdiction to deal with allegations of fraud and time-barred claims and not courts:** The Delhi HC bench of Justice C. Hari Shankar has held that issues such as allegations of fraud and claims that the applicant's claims are time-barred must be addressed by the arbitral tribunal rather than the court. [*Dr. Rahul Bhayana vs Dr. Rohit Bhayana & Anr., ARB.P. 809/2024*]
- **Delhi HC holds that excise duty claims are non-arbitrable only when they involve sovereign functions including determination of tax rate or liability:** The Delhi HC bench of Justice Prateek Jalan has held that a dispute regarding excise duty is only non-arbitrable when it involves a sovereign function, such as determining tax liability or the rate at which duty must be paid to revenue authorities. The bench clarified that this issue is separate from the dispute which concerns whether the claimant is obligated to pay the respondent for the goods supplied including excise duty at the rate specified in the invoices. [*Bharat Broadband Network Ltd. vs Paramount Communications Ltd., O.M.P. (COMM) 355/2024 & I.As. 36554/2024, I.A. 36555/2024*]



GLOBAL

- **Zee Entertainment, Culver Max Entertainment and Bangla Entertainment reach a comprehensive settlement to conclude all disputes related to Merger Co-operation Agreement & Scheme of Arrangement:** In January this year, Sony had pulled out from the proposed USD 10-billion merger with ZEE Entertainment Enterprises Ltd citing failure to meet certain "closing conditions" by the Indian firm. The settlement stems from a mutual understanding between the companies to independently pursue future growth opportunities with a renewed purpose and focus on the evolving media and entertainment landscape, signifying the definitive conclusion of all disputes, the two companies said in a joint statement. Zee Entertainment Enterprises Ltd and Culver Max Entertainment Pvt Ltd (CMEPL) have arrived at a comprehensive non-cash settlement, amicably resolving all disputes related to the merger cooperation agreement and the composite scheme of arrangement. [[Press Release](#)]
- **A global survey has discovered that international commercial mediation has garnered the highest satisfaction levels across dispute resolution mechanisms:** The Singapore International Dispute Resolution Academy (SIDRA) at Singapore Management University (SMU) Yong Pung How School of Law (YPHSL) today launched the SIDRA International Dispute Resolution Survey (SIDRA Survey) 2024 Final Report. The 2024 Final Report presents some insightful findings on user satisfaction levels across various dispute resolution mechanisms, indicating a clear preference for mediation over arbitration and litigation. It found that users of International Commercial Mediation experienced the highest level of satisfaction in costs (75%) and speed (83%). In comparison, respondents were less satisfied with International Commercial Arbitration's costs (30%) and speed (42%), as were users of International Commercial Litigation (45% satisfied with costs, 36% satisfied with speed). [[Press Release](#) and [Final Report](#)]
- **Smurfit Westrock Awarded \$469M by Arbitrators in Venezuela Dispute:** Smurfit Westrock was awarded nearly half a billion dollars by a World Bank arbitration tribunal in a dispute with the Venezuelan government that led the company to pull out of the country six years ago. The Irish packaging giant Thursday said the World Bank's International Centre for Settlement of Investment Disputes granted its Smurfit Holdings BV unit compensation in excess of \$468.7 million, plus legal costs of \$4.5 million, plus interest from May 31 until the date of payment. [[Smurfit Holdings B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/18/49](#)].

