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EXTENT OF JUDICIAL INTERVENTION

Allowing an application to condone the delay in filing a set-aside application cannot be interfered with under Article 227 despite doubt if the original filing was *non-est*: Delhi High Court

10 December 2021 | Ashok Kumar Puri v. S Suncon Realtors (P) Ltd., 2021 SCC OnLine Del 5220 | CM (M) 610 of 2021 | Amit Bansal J | Delhi High Court | 2021 SCC OnLine Del 5220

A set-aside petition was filed beyond three months but within the 30 days discretionary period. The Commercial Court allowed the application for condonation of delay and imposed Rs. 5,000/- costs.

Even though the High Court felt there “may be some merit in the contentions” that the original filing itself was *non-est* because it lacked several important documents and formalities, it was not a case of exercise of jurisdiction under [Article 227 of the Constitution](#). The court said that the order was not passed without inherent jurisdiction.

Also, since [Section 8 CCA](#) bars revision (under [Section 115 CPC](#)) against interlocutory orders in commercial matters, the scope of interference under [Article 227](#) is also narrow.

Read the decision [here](#).

Categories: [Section 5 ACA](#) | [Extent of Judicial Intervention](#) | [Article 226 Constitution of India](#) | [Article 227 Constitution of India](#) | [Power of High Courts to Issue Certain Writs](#) | [Power of Superintendence Over All Courts by the High Court](#) | [Writ Petition](#) | [Writ Petition in Arbitration Matters](#) | [Judicial Review](#) | [Patent Lack of Inherent Jurisdiction](#) | [Certiorari](#) | [Bhaven Construction](#) | [Deep Industries](#) | [Mirajkar](#) | [Self Contained Code](#) | [Section 34 ACA](#) | [Application for Setting Aside Arbitral Award](#) | [Limitation](#) | [Limitation for Setting Aside](#) | [Limitation Under Section 34 ACA](#) | [Non Est Filing](#) | [Condonation of Delay](#)

APPOINTMENT, SUBSTITUTION AND TERMINATION OF MANDATE OF ARBITRATORS

Neither the Fifth nor the Seventh Schedule of ACA is exhaustive. A challenge can be maintained, and ineligibility could be urged beyond the enumerated items but only within the broad framework of the schedules: Madras High Court

02 December 2021 | Clarke Energy India (P) Ltd. v. SAS EPC Solution (P) Ltd. and another| Arb OP No. 196 & 197 of 2021 | Madras High Court | Senthikumar Ramamoorthy J | 2021 SCC OnLine Mad 6121

The Madras High Court has rejected a petition under [Sections 14 & 15 ACA](#) that sought termination of the arbitrator for *de jure* ineligibility on the ground of bias arising from the manner the tribunal fixed the fees (that is, not a bias of kind enumerated either in the Fifth or Seventh Schedule). The court found that a petition was maintainable but, on facts, not sustainable. In the facts, the court said, it was not possible to conclude that a reasonable and objective third party would infer that the arbitrator is biased against the petitioner.

The court has said that a challenge under [Sections 12 and 13 ACA](#) can be maintained on a criterion falling outside the [Fifth](#) and [Seventh](#) Schedules enumerated. However, the challenge should relate to the broad categories contained in those schedules:

- (a) The common thread running through both the [Fifth](#) and [Seventh Schedules](#) is conflict of interest. Accordingly, three broad categories are set out (relationship of arbitrator with parties, relationship of arbitrator and counsel, relationship of arbitrator with subject matter of dispute).
- (b) The criteria specified in the [Fifth](#) and [Seventh](#) Schedules are illustrative and not exhaustive.¹
- (c) The criteria are also objective; they can be established by evidence.
- (d) It would be "difficult, unpleasant and inappropriate" to mount a challenge (before the arbitral tribunal) based on any subjective criteria.²

In addition, the court has also said that [Section 12 \(5\) ACA](#) is only one example of *de jure* ineligibility under [Section 14 ACA](#). There could be several other examples, for instance, some form of serious cognitive impairment (whether on account of schizophrenia, Alzheimer's disease or the like).³

The court's next conclusion is that a reasonable apprehension of bias, in contrast to actual bias, even if established, does not constitute a legal disability in a formal, statutory sense.

The court has also observed that the expression *de jure* should be construed as extending beyond open-and-shut legal disability to take within its fold disability due to established loss of legitimacy. The burden of proof to establish this is very high.

As to matters relating to fees, the court concluded that:

- (a) The expression "sum in dispute" in the [Fourth Schedule](#) refers to the claim and counterclaim.

¹ *Ed. Note* : The interrelationship between the [Fifth](#) and the [Seventh Schedule](#) and when they could be invoked is explained, and Clarke should be read in light of *Bharat Broadband* (2019) 5 SCC 755

² *Ed. Note*: The judgment does not say what will happen if an unenumerated circumstance is 'objective'.

³ *Ed. Note*: The court also says in this context that less serious forms of cognitive impairment, such as bipolar disorder and the like, may, on the other hand, pose greater challenges. It added that an arbitrator's *de jure* ineligibility could be contended with a fair measure of justification in case of insolvency.

- (b) Irrespective of the total sum in dispute, the object of the [Fourth Schedule](#) is to cap the fees at Rs. 30,00,000/- per arbitrator, albeit subject to the qualification that a sole arbitrator may charge 25% in addition. The cap is not on the entire tribunal.

Read the decision [here](#).

Categories: [Section 12 ACA](#) | [Grounds for Challenge](#) | [Section 13 ACA](#) | [Challenge Procedure](#) | [Fifth Schedule](#) | [Seventh Schedule](#) | [Section 14 ACA](#) | [Failure or Impossibility to Act](#) | [Section 15 ACA](#) | [Termination of Mandate and Substitution of Arbitrator](#) | [Bharat Broadband](#) | [De Jure Ineligibility](#) | [Bias](#) | [Independence and Impartiality of Arbitrator](#) | [HRD Corporation](#) | [Arbitral Fees](#) | [Costs](#) | [Deposits](#) | [Fees](#) | [Fourth Schedule](#) | [Section 31 \(8\) ACA](#) | [Section 31A ACA](#) | [Section 38 \(1\) ACA](#) | [Section 38 ACA](#) | [Sum in Dispute](#) | [Cap on Arbitrator's Fees](#) | [Section 11 ACA](#) | [Appointment of Arbitrators](#)

The mandate of panel arbitrator terminated, and another outside DSIDC's panel appointed: Delhi High Court

10 December 2021 | Era Infra Engineering Limited v. Delhi State Industrial and Infrastructure Development Corporation Ltd. | OMP (T) (Comm.) 128 of 2021 | Suresh Kumar Kait J | Delhi High Court | 2021 SCC OnLine Del 5316

Invoking the *Perkins* rule, the Delhi High Court terminated the mandate of a sole arbitrator appointed by the respondent in 2017. The petitioner contended that it came to know later in 2018 that the arbitrator was on the panel of the respondent. The court noted that the “petitioner cited various reasons for not being able to pursue the case thereafter”.

An independent arbitrator was appointed, disregarding the panel of 11 names of the respondent.

Read the decision [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Section 12 ACA](#) | [Section 12 \(5\) ACA](#) | [Grounds for Challenge](#) | [Fifth Schedule](#) | [Seventh Schedule](#) | [Independence and Impartiality of Arbitrator](#) | [Section 14 ACA](#) | [Failure or Impossibility to Act](#) | [Section 15 ACA](#) | [Termination of Mandate and Substitution of Arbitrator](#) | [De Jure Ineligibility](#) | [Sole Arbitrator](#) | [Unilateral Appointment of Arbitrator](#) | [Party Appointed Arbitrator](#) | [Party Appointed Sole Arbitrator](#) | [Broad Based Panel](#) | [Perkins](#) | [TRF](#) | [Voestalpine](#) | [Bharat Broadband](#) | [HRD Corporation](#)

ARBITRABILITY, EXISTENCE & VALIDITY OF ARBITRATION AGREEMENTS

A clause providing arbitration “with respect to the interpretation of the contents of this Agreement” cannot be enforced if no question of interpretation arises. Law on arbitrability of fraud surveyed: Delhi High Court

06 December 2021 | Avantha Holdings Ltd. v. CG Power and Industrial Solutions Ltd. | Arb. P. No. 361 of 2021 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 5202

The arbitration clause provided for arbitration “with respect to the interpretation of the contents of this Agreement”.

The dispute between the parties was “essentially whether the Agreement is part of the fraudulent scheme to siphon funds from the respondent company”. One individual—Gautam Thapar—controlled both the petitioner and the respondent companies at the material time. Both companies contracted that the respondent would use the ‘Avantha’ brand for which 50% brand royalty (around 411 crores) was payable annually, remaining every quarter. Later, the petitioner wanted to arbitrate to settle the liability.

The first question was: did the dispute fall under the arbitration clause? The court answered, no, there was no dispute as to the interpretation. The respondent did not dispute the meaning of any clause and “has not set up a case that any of the clauses must be interpreted in a different manner”.

Given this conclusion, though, the court said, “it is not necessary to address the other questions”, however, “for the sake of completeness”, it addressed the other question: was the dispute arbitrable because it involved allegations of fraud? The court concluded that the disputes were arbitrable: It reasoned that:

- (a) It is clear (from the authorities) that allegations of fraud can be adjudicated in arbitration. If a trial court can adjudicate such disputes, there is no ground to hold that an arbitral tribunal cannot.
- (b) The fraud exception (to arbitrability) remains but a ghost of what was considered earlier. It is now settled that allegations of fraud are not *per se* non-arbitrable. Only the allegations of fraud that fall within the realm of public law and public law remedies cannot be made a subject matter of the arbitration.
- (c) However, fraud that vitiates the arbitration agreement would bear arbitrability.

The third question addressed was whether the court was required to examine if the agreement was invalid because of fraud: answering yes, but only on a prima facie basis, the court noted that in a few isolated cases, the court might be able to conclude without receiving any evidence that the contract is void. But here, the dispute was whether the consent to execute the brand license agreement was vitiated by fraud under [Section 17 of the Indian contract Act 1872](#) and voidable under [Section 19](#) of that enactment. This was a matter for the arbitrator.

Read the decision [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Section 11 \(6A\) ACA](#) | [Section 8 ACA](#) | [Power to Refer Parties to Arbitration](#) | [Prima Facie No Valid Arbitration Agreement Exists](#) | [Existence of Arbitration Agreement](#) | [Substantive Validity of Arbitration Agreement](#) | [Arbitrability](#) | [Test of Arbitrability](#) | [Nonarbitrability](#) | [Arbitrability of Fraud](#) | [Section 16 ACA](#) | [Competence of Arbitral](#)

[Tribunal to Rule on its Jurisdiction](#) | [Competence Competence](#) | [Jurisdiction of Arbitral Tribunal](#) | [Kompetenz Kompetenz](#) | [Who Decides Question](#) | [Validity](#) | [Booz Allen](#) | [Ayyasamy](#) | [Vidya Drolia](#)

A clause that says “dispute can also be decided under the provisions of the Indian Arbitration Act” is not an arbitration agreement: Delhi High Court

07 December 2021 | Sapna Gupta v. Ajay Kumar Gupta and others | OMP (I) (Comm.) 281 of 2021 | Sanjeev Narula J | Delhi High Court | 2021 SCC OnLine Del 5313

A clause in a partnership deed read as follows (broken for convenience into three sentences by the court):

- (a) First sentence: “Any other matter for which there is no provision in the Deed and a dispute relating to the affairs of the firm shall be mutually decided by the partners”.
- (b) Second sentence: “The provisions of the Indian Partnership Act, 1932 which are not inconsistent or repugnant to the provisions of this Deed shall apply to all matters not specifically mentioned herein”.
- (c) Third sentence: “However the dispute can also be decided under the provisions of the Indian Arbitration Act”.

This clause did not amount to an arbitration agreement within the meaning of [Section 7 \(5\) ACA](#) because:

- (a) The third part is, in essence, a proviso to the first part.
- (b) The first and third parts, when read together, imply that parties can resolve disputes mutually or if they so desire, can also take recourse to the “Indian Arbitration Act”.
- (c) Even if the clause is construed to be a case of inartistic drafting and benefit of the doubt given to the petitioner, on a plain reading, it manifests the requirement of a fresh consent for arbitration from the usage of the phrase “can also be decided”.

The court also refused to consider one other deed containing an arbitration clause as a surrounding circumstance, saying that one cannot consider the terms of other contracts, especially when the parties are different.

The court also rejected the argument, based on *Vidya Drolia*, that the matter should be left for the arbitral tribunal. The court said that there was *ex facie* no arbitration agreement.

Read the decision [here](#).

Categories: [Section 7 ACA](#) | [Section 7 \(5\) ACA](#) | [Arbitration Agreement](#) | [Arbitration Agreement in Writing](#) | [Existence of Arbitration Agreement](#) | [Form of Arbitration Agreement](#) | [Formal Validity of Arbitration Agreement](#) | [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Section 11 \(6A\) ACA](#) | [Existence of Arbitration Agreement](#) | [Formal Validity of Arbitration Agreement](#) | [Competence of Arbitral Tribunal to Rule on its Jurisdiction](#) | [Competence Competence](#) | [Jurisdiction of Arbitral Tribunal](#) | [Kompetenz Kompetenz](#) | [Who Decides Question](#) | [Vidya Drolia](#)

Question of incorporation of the arbitration agreement by reference, or if non-signatories were bound are matters for the arbitral tribunal: Madras High Court

07 December 2021 | Daimler Financial Services India Private Limited v. Rajasree Motors Private Limited | Arb. OP (Com. Div.) No. 226 of 2021 | Senthilkumar Ramamoorthy J | Madras High Court | citation not available

The court was considering a “suite of agreements” related to the loan facility given by the petitioner to the respondent. One agreement had an arbitration clause; the others did not.

Arbitration could proceed under all the agreements if either the arbitration clause one document was incorporated by reference into the others or by applying any of the legal bases available to bind non-signatories to arbitration.

In the court’s prima facie opinion, all agreements related to extending loan facilities, and it was “inappropriate” to decide in a [Section 11](#) petition if the arbitration clauses were incorporated by reference or if the circumstances nevertheless justify drawing non-signatories into the arbitration.

Read the decision [here](#).

Categories: [Section 7 ACA](#) | [Section 7 \(5\) ACA](#) | [Arbitration Agreement](#) | [Arbitration Agreement in Writing](#) | [Existence of Arbitration Agreement](#) | [Form of Arbitration Agreement](#) | [Formal Validity of Arbitration Agreement](#) | [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Section 11 \(6A\) ACA](#) | [Competence of Arbitral Tribunal to Rule on its Jurisdiction](#) | [Competence Competence](#) | [Jurisdiction of Arbitral Tribunal](#) | [Kompetenz Kompetenz](#) | [Who Decides Question](#) | [Vidya Drolia](#) | [Binding Non Signatory to Arbitration](#) | [Construction of Arbitration Agreement](#) | [Interpretation of Arbitration Agreement](#) | [Doctrine of Group of Companies](#) | [Incorporation](#) | [Incorporation by Reference](#) | [Incorporation of Arbitration Agreement](#) | [Composite Transaction](#) | [Joinder of Non Signatories](#) | [Necessary Party](#) | [Proper Party](#) | [Chloro Controls](#) | [MTNL](#)

INTERIM RELIEF BY COURTS AND TRIBUNALS

An ironclad case under Order 38 CPC is not necessary to make an interim order to secure the amount in dispute in arbitration. When the defence is prima facie untenable and the admission unequivocal, an order of deposit should be made: Bombay High Court

13 December 2021 | Ultra Deep Subsea Pte Ltd. v. Hindustan Oil Exploration Company Ltd. & another | COAPL No. 22272 of 2021 Arb. P. No. 361 of 2021 | BP Colabawalla J | Bombay High Court | 2021 SCC OnLine Bom 5481

Upholding its jurisdiction to grant interim relief in foreign seated arbitrations, the Bombay High Court has, after discussing the law on the issue, passed an order securing the amount in dispute in arbitration (approximately USD 6,212,683.67).

The court found out *prima facie* that there was no real dispute as to the amounts payable because not only there were several admissions, no dispute had been raised at any time before the petitioner's legal notice. The petitioner had chartered a vessel to the respondent, and the respondent had extended the time charter on ten occasions and never disputed the vessel's capability. Colabawalla J noted: "if there was any merit in this dispute, no prudent person would have continued to extend the Charter Party and continue to charter an incapable vessel or its crew, at least without informing the owner about the so-called inadequacies".

Surveying the law on court's power to secure the amount in dispute, Colabawalla J ruled that:

- (a) For considering interim measures, "the court would be guided by the principles which the Civil Courts ordinarily employ for considering grant or refusal of interim relief, particularly [Order 39 Rules 1](#) & [2](#) and [Order 38 Rule 5](#), CPC", but their texts do not unduly bind the court.
- (b) The court must have due regard to the underlying purpose of [Section 9](#), that is, to promote the efficacy of arbitration as a form of dispute resolution.
- (c) [Order 38 Rule 5 CPC](#) are not fetters upon the [Section 9](#) court's discretion. When the admission is clear and unequivocal, or there is no real dispute on the payable amounts, an order of deposit "may not only be made, but in the interest of justice, ought to be made". Where the defence raised is *prima facie* untenable, and the petitioner has a good chance of success, an order of deposit to secure the claim can and indeed should be made under [Section 9 ACA](#). [citing *Jagdish Ahuja* 2020 SCC OnLine Bom 849; *Valentine Maritime* 2021 SCC OnLine Bom 75; *Essar House* 2021 SCC OnLine Bom 149; *Kotak Mahindra* 2021 SCC OnLine Bom 305].

Referring to English authorities, the court also emphasised a clause of the charter party that required the respondent, even where an invoice is disputed, to pay first ("this clause is a salutary clause because it ensures ... proper cash flow for the owner ... and is in line with commercial common sense").

An argument that the [Section 9](#) remedy is not available in a foreign seated arbitration governed by foreign laws was emphatically rejected.

The court directed the respondent to deposit the amount or furnish a bank guarantee to the court's registry.

Read the decision [here](#).

Categories: [Section 9 ACA](#) | [Interim Measures by Court](#) | [Section 9 \(1\) \(ii\) \(b\) ACA](#) | [Securing the Amount in Dispute in Arbitration](#) | [Bank Guarantee](#) | [Conditions for Grant of Interim Measure](#) | [Scope of Section 9 ACA](#) | [Just and Convenient](#) | [Prima Facie Case](#) | [Balance of Convenience](#) | [Irreparable Loss](#) | [Admitted Liability](#) | [Order XXXVIII CPC](#) | [Order XXXIX CPC](#) | [Interim Mandatory Injunction](#) | [Mandatory Orders](#) | [Attachment Before Award](#) | [Applicability of Code of Civil Procedure](#) | [Jetpur Somnath](#) | [NHAI v. PNB](#) | [Valentine Maritime](#) | [Adhunik Steels](#) | [Section 2 \(2\) ACA](#) | [Agreement to the Contrary](#) | [Interim Measures in Foreign Seated Arbitration](#) | [Jurisdiction](#) | [Jurisdiction in Foreign Seated Arbitration](#) | [Part I](#) | [Applicability of Part I](#)

SEAT AND VENUE OF ARBITRATION

Delhi is the juridical seat of arbitration, and Ranchi is the convenient venue because courts of Delhi have exclusive jurisdiction: Delhi High Court

06 December 2021 | Cravants Media Private Limited v. Jharkhand State Co-operative Milk Producers Federation Ltd. | Arb. P. 915 of 2021 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 5350

Article 16 of the parties contract was entitled “Dispute Resolution and Governing Law”. Article 16..2 stated that the “venue of arbitration shall be Ranchi”. Article 16.5 said that “any disputes arising out of this Agreement shall be subject to the sole and exclusive jurisdiction of courts of Delhi”.

The question was if the Delhi High Court was the seat-court and had the jurisdiction to appoint an arbitrator? The court answered yes, and said that Ranchi was only the convenient venue. It read both clauses together and noted that Clause 16.2 uses the term “venue” and not “place”.

It rejected the argument that the exclusive jurisdiction clause was restricted to civil proceedings other than arbitration. The placement of that clause in the section relating to dispute resolution, the court reasoned, indicated a contrary intention.

Read the judgment [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Section 20 ACA](#) | [Place](#) | [Place of Arbitration](#) | [Seat](#) | [Seat of Arbitration](#) | [Venue](#) | [Venue of Arbitration](#) | [Exclusive Jurisdiction](#) | [Choice of Seat](#) | [Designation of Arbitral Seat](#) | [Tests for Determination of Seat](#) | [BGS Soma](#)

Though the “venue” of arbitration is Gurugram, the clause vesting jurisdiction in the Delhi High to appoint an arbitrator is enforceable: Delhi High Court

13 December 2021 | Arjun Sethi v. All About Outdoor Pvt. Ltd. | Arb. P. 1056 of 2021 | Sanjeev Narula J | Delhi High Court | 2021 SCC OnLine Del 5343

Before it, the court had an arbitration clause under which the venue of arbitration was Gurugram, and courts in Gurugram had exclusive jurisdiction. However, the parties were to apply to the Delhi High Court for the appointment of a sole arbitrator.

Upholding its jurisdiction, the Delhi High court said that there was no justifiable reason to reject the petition for the appointment:

- (a) The clause is unusual because the venue is Gurugram, but the Delhi High Court is the appointing authority. An identical clause was considered in *Cars24 Services* 2020 SCC Online 1720, where the court upheld party autonomy to select the appointing court.⁴

⁴ [Ed. Note: The court emphasises the venue clause versus the appointing clause in its reasoning. However, it seems conscious that the seat of arbitration was also Gurugram (because courts there had exclusive jurisdiction as well). The court also notes that Cars24 Services had an identical clause. In that case, the seat was Delhi, but the appointing authority was a court at Haryana; so, the Delhi High Court enforced the clause and declined jurisdiction.]

- (b) This case has one distinction from *Cars24* because a [Section 9 ACA](#) application had been filed in Gurugram. But this factor too was considered in *Orix Leasing Arb. Pe. 637* of 2019 decided on 23 November 2021 (the Chief Justice of the Bombay High Court was the appointing authority, Delhi was the venue of arbitration, and an application for interim relief had been filed earlier in a Delhi district court. However, the Delhi High Court refused to appoint an arbitrator for lack of jurisdiction).
- (c) Also, it is common ground that [Section 42 ACA](#) would not apply, and all proceedings would be at Gurugram.

Read the decision [here](#).

Categories: [Section 11 ACA](#) | [Appointment of Arbitrators](#) | [Appointing Authority](#) | [Party Autonomy](#) | [Party Autonomy to Select Appointing Authority](#) | [Section 20 ACA](#) | [Place](#) | [Place of Arbitration](#) | [Seat](#) | [Seat of Arbitration](#) | [Venue](#) | [Venue of Arbitration](#) | [Exclusive Jurisdiction](#) | [Choice of Seat](#) | [Designation of Arbitral Seat](#) | [Tests for Determination of Seat](#) | [BGS Soma](#)

SETTING ASIDE ARBITRAL AWARDS

An arbitrator cannot make an interim award on disputed ‘admission’: Delhi High Court

03 December 2021 | Vijay Shukla and others v. Career Launcher Infrastructure (P) Ltd. & connected matters | Arb. A. (Comm.) 51 of 2021 & connected matters | Suresh Kumar Kait J | Delhi High Court | 2021 SCC OnLine Del 5176

The Delhi High Court has set aside an interim award made by an arbitral tribunal noting that while the power of the arbitral tribunal to pass interim awards based on admissions by a party is undisputed; the admission must be “specific” and “categorical”.

In this case, not only was the ‘admission’ disputed, but the tribunal has also considered the document ‘piecemeal’.

In addition, the court also ruled that the tribunal's directions to make certain payments jointly and severally could not have been passed without first fixing the specific liability.

Read the decision [here](#).

Categories: [Section 34 ACA](#) | [Application to Set Aside Arbitral Awards](#) | [Setting Aside Arbitral Award](#) | [Section 31 \(6\) ACA](#) | [Interim Award](#) | [Scope of Interim Award](#) | [Admitted Liability](#) | [Admission](#)

Disputes under three contracts cannot be consolidated without parties’ agreement, though the same tribunal could decide. An order under Section 16 that decides an issue finally at the interlocutory stage can be challenged in set-aside proceedings: Delhi High Court

07 December 2021 | Delhi Transport Infrastructure Development v. AOM Advertising Pvt. Ltd. | OMP (Comm.) 291 of 2021 | C Hari Shankar J | Delhi High Court | 2021 SCC OnLine Del 5300

Following Supreme Court's *Duro Felguera* (2017) 9 SCC 729, the Delhi High Court has said that, in the absence of any agreement by the parties, disputes arising under three agreements had to be arbitrated separately though they could be decided by one arbitral tribunal.

Accordingly, the court allowed an application under [Section 34 ACA](#) and set aside the tribunal's order rejecting a challenge made under [Section 16 ACA](#) to the consolidation.

Following Supreme Court's *India Farmers Fertilizer Co-operative Ltd. (IFFCO)* (2018) 2 SCC 534, the court also rejected an objection that the set-aside application was not maintainable. It noted that the arbitral tribunal's order was final on the issue of consolidation of proceedings and, therefore, was an interim award amenable to challenge under [Section 34 ACA](#).

Read the decision [here](#).

Categories: [Section 34 ACA](#) | [Section 31 \(6\) ACA](#) | [Application to Set Aside Arbitral Awards](#) | [Setting Aside Arbitral Award](#) | [Consolidation](#) | [Form and Contents of Arbitral Award](#) | [IFFCO](#) | [Consolidation of Claims](#) | [Joinder of Claims](#) | [Composite Reference](#) | [Composite Adjudication](#) | [Multi-Contract Dispute](#) | [Parallel Arbitral Hearings](#) | [Parallel Arbitral Proceedings](#) | [Parallel Arbitrations](#) | [Interim Award](#)

Part-payment of an invoice does not extend the limitation period towards other unpaid invoices if the payments had always been made against specific invoices rather than on a running account basis: Delhi High Court

07 December 2021 | Marsons Electrical Industries v. Fedders Lloyd Corporation Ltd. | OMP (Comm.) No. 2/2020 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 5238

The High Court of Delhi has ruled, considering an award that had rejected some claims as time-barred, that where the buyer used to make payments against specific invoices, the period of limitation would not stand extended because of part payment in respect of any other invoice. It also said that the payments could not be considered a running account.

Moreover, it added, the tribunal's decision on facts was final.

Considering rejection of another claim towards loss of profit, business opportunity, goodwill, etcetera, the court said that the award could not be faulted because there was no material to substantiate the claim. On this point, the court was "of the view that ... the award of damages [if had been made] without the claimant establishing the same by cogent evidence would be patently illegal and also fall foul of the Public Policy of India".

Read the decision [here](#).

Categories: [Section 34 ACA](#) | [Application for Setting Aside Arbitral Award](#) | [Section 34 \(2A\) ACA](#) | [Patent Illegality](#) | [Section 34 \(2\) \(b\) \(ii\) ACA](#) | [Public Policy](#) | [Public Policy of India](#) | [Fundamental Policy of Indian Law](#) | [Limitation](#) | [Time Barred Claim](#) | [Accrual of Right to Apply](#) | [Running Account](#) | [Reappraisal of Evidence](#) | [Revaluation of Evidence](#) | [Arbitrators Interpretation of Contract](#) | [Merits Based Review](#) | [Review on the Merits of the Dispute](#) | [Plausible View](#) | [Damages](#) | [Proof of Damages](#) | [Associate Builders](#) | [Ssangyong](#) | [Gemini Bay](#)

What does the phrase "about 1000kg/day" mean? The arbitrator ruled the quantity referred is not capped. The High Court refused to interfere in the set-aside proceedings: Delhi High Court

13 December 2021 | SMS Water Grace BMW Pvt. Ltd. v. Govt. of NCT of Delhi | OMP (Comm.) No. 537 of 2020 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 5302

The petitioner had to collect and dispose of biomedical waste from all health care establishments identified by the Delhi government. The disputed clause read:

"The contractor shall collect, transport, treat and dispose of all Biomedical waste (about 1000 kg/day) from all health care establishments ... free of charge during the contract period."

The tribunal looked at the "surrounding circumstances" to determine parties' intention and ruled that the clause did not cap the maximum biomedical waste the petitioner was obligated to handle.

The court noted that an agreement had to be read as a whole, and there was no other provision in the agreement to support the petitioner's interpretation. It agreed with the arbitrator's view but added that its agreement was not relevant as the scope of examination in set aside proceedings is limited to ascertain whether the award is vitiated by patent illegality or public policy of India, neither of which applied in the case. The court reiterated that the arbitral tribunal is the final authority to interpret the contract.

The authorities referred by the court include *MSK Projects* (2011) 10 SCC 573, where the Supreme Court has explained the difference between an error within jurisdiction (error of construction) that does not warrant any interference and a jurisdictional error, that is when the arbitrator deals with matters outside.

Read the decision [here](#).

Categories: [Section 34 ACA](#) | [Application for Setting Aside Arbitral Award](#) | [Section 34 \(2A\) ACA](#) | [Patent Illegality](#) | [Section 34 \(2\) \(b\) \(ii\) ACA](#) | [Public Policy](#) | [Public Policy of India](#) | [Fundamental Policy of Indian Law](#) | [Reappreciation of Evidence](#) | [Revaluation of Evidence](#) | [Arbitrators Interpretation of Contract](#) | [Merits Based Review](#) | [Review on the Merits of the Dispute](#) | [Plausible View](#) | [Error Within Jurisdiction](#) | [Jurisdictional Error](#) | [Associate Builders](#) | [Ssangyong](#)

ARBITRATION APPEALS

The arbitrator's interim order interfering with the commercial wisdom of a party to not renew a contractual arrangement is erroneous: Delhi High Court

06 December 2021 | Honda Cars India Ltd. v. Pothen Vehicles and Service Pvt. Ltd. | Arb. A (Comm) 73/2021 | Sanjeev Narula J | Delhi High Court | 2021 SCC OnLine Del 5341

The High Court of Delhi has ruled that once the arbitrator rejected the prayer to direct continuation of the dealership in an application for interim relief, it could not have required Honda to continue to supply spare parts and software to service the customers' cars even for a limited time.

It found the direction contrary to contract an order compelling Honda to adopt an arrangement contrary to their business model. The court further reasoned that the clause in the contract under which Honda could allow a dealer to extend the service facilities to customers could not be the basis of such a direction. Moreover, apart from being discretionary, that clause was limited to 6 months, which had already lapsed.

What further weighed with the court is that the petitioner was no longer the authorized dealer, and any car servicing done by it would be unfair to the customers and violate the warranty terms.

Read the decision [here](#).

Categories: [Section 37 ACA](#) | [Appealable Orders](#) | [Section 9 ACA](#) | [Interim Measures by Court](#) | [Prima Facie Case](#) | [Balance of Convenience](#) | [Irreparable Loss](#) | [Extra Contractual Relief](#)

An arbitral tribunal is the final adjudicator of interim relief, and the scope of interfering with the merits of its interim relief order is as limited as interfering with an award: Delhi High Court

07 December 2021 | Spml Infra Limited v. Hitachi India (P) Ltd., | Arb. A (Comm.) 75 of 2021 | Vibhu Bakhru J | Delhi High Court | 2021 SCC OnLine Del 5221

The Delhi High Court has, in its appellate jurisdiction under [Section 37 ACA](#), without commenting on the merits, refused to interfere with an arbitral tribunal's order directing the appellant to secure the amount in dispute in arbitration.

The tribunal had found *prima facie* that a sum of Rs. 1,51,40,981/- (prayer was for Rs. 3,40,66,948) was admittedly outstanding and payable. It directed the appellant to furnish a bank guarantee for that sum. The order was challenged mainly on the ground that it was not per [Order XXXVIII, Rule 5 of the Civil Procedure Code, 1908](#).

Justice Bakhru discussed the nature of the court's power and the "materially similar" power under [Section 17 ACA](#). He also cited certain passages from authorities to the effect that the court should not find itself unduly bound by the text of CPC but is to follow the underlying principles.

He has also discussed the limited scope of examination under [Section 37 ACA](#) and noted that unless the decision of the forum chosen by the parties is patently illegal, the court will not interfere with such discretion. He has also pointed out that interfering with the merits of a tribunal's interim order would be the same as the scope of interference on merits of an arbitral award because an interim relief is in aid of the final relief.

He noted that the arbitral tribunal is the final adjudicator of such relief.

An argument that the respondent had waived its prayer for securing its claims in other proceedings was also rejected.

Read the decision [here](#).

Categories: [Section 37 ACA](#) | [Appealable Orders](#) | [Section 37 \(2\) \(b\) ACA](#) | [Scope of Appeal Under Section 37 ACA](#) | [Scope of Appeal Under Section 37 \(2\) \(b\) ACA](#) | [Patent Illegality](#) | [Jurisdiction of Appellate Court](#) | [Power of Appellate Court](#) | [Wander v. Antox](#) | [Section 9 ACA](#) | [Interim Measures by Court](#) | [Section 9 \(1\) \(ii\) \(b\) ACA](#) | [Securing the Amount in Dispute in Arbitration](#) | [Bank Guarantee](#) | [Conditions for Grant of Interim Measure](#) | [Scope of Section 9 ACA](#) | [Just and Convenient](#) | [Prima Facie Case](#) | [Balance of Convenience](#) | [Irreparable Loss](#) | [Admitted Liability](#) | [Order XXXVIII CPC](#) | [Order XXXIX CPC](#) | [Interim Mandatory Injunction](#) | [Mandatory Orders](#) | [Attachment Before Award](#) | [Applicability of Code of Civil Procedure](#) | [NHAI v. PNB](#) | [Jetpur Somnath](#) | [Valentine Maritime](#) | [Adhunik Steels](#)

TIME LIMITATION

In filing a set-aside application, the benefit of the period when the court is closed can be obtained only if the period of three months, and *not* the extendable period of 30 days, has expired during the closure: Himachal Pradesh High Court

03 December 2021 | State of HP v. Pankaj | Arbitration Appeal No. 03 of 2021 & other similar matters decided on 13-14 December 2021 | Ajay Mohan Goel J | Himachal Pradesh High Court | 2021 SCC OnLine HP 8261

[Section 4 of the Limitation Act](#) relaxes the limitation if the “prescribed period” for filing any suit, appeal or application expires when the court is closed. The case can then be filed on the day the court reopens. [Section 34 \(3\) ACA](#) sets the limitation period to file a set-aside application. It is three months and, at the court's discretion, another 30 days.

What is the prescribed period under [Section 34 \(3\) ACA](#) for [Section 4 Limitation Act](#)?

The question was before the court because the three-month period had expired before the winter vacation of the court. The set-aside application was filed the day the court reopened. Following *Assam Urban Water Supply* (2012) 2 SCC 624, the set-aside court dismissed the application as limitation barred.

Read the decision [here](#).

Categories: [Section 34 ACA](#) | [Application for Setting Aside Arbitral Award](#) | [Limitation](#) | [Limitation for Setting Aside](#) | [Limitation Under Section 34 Section](#) | [Section 4 Limitation Act](#) | [Expiry of Prescribed Period When Court is Closed](#) | [Section 3 Limitation Act](#) | [Prescribed Period](#) | [Extension of Prescribed Period](#) | [Section 29 Limitation Act](#) | [Condonation of Delay](#)

ENFORCEMENT AND EXECUTION OF FOREIGN AWARD

Foreign Awards must be enforced in a time-bound manner for India to be regarded as an equal partner in international commerce: Kerala High Court

09 December 2021 | International Nut Alliance LLC v. Johns Cashew Company | Arb. A. No. 25 of 2019 | PB Suresh Kumar and CS Sudha JJ | Kerala High Court | 2021 SCC OnLine Ker 500

The appellate bench of the Kerala High Court has reversed an order refusing to enforce a foreign award made by a single judge.

The appellant's enforcement petition was resisted on several pleas, and mainly that the making of the award was induced or affected by fraud because, without John Cashew's knowledge, the appellant scored off CENTA and wrote AFI, that is, Association of Food Industries Inc. (New York-based association which conducted the arbitration). The single judge refused enforcement.

Overturning that decision, emphasizing the need for enforcement for foreign arbitral awards in a time-bound manner for India to be regarded as an equal partner in international commerce, and directing enforcement to proceed with "utmost expedition", the appellate court has ruled as follows:

On the meaning of "the making of the award was induced or affected by fraud" under Explanation I to [Section 48 \(2\) \(b\) ACA](#), the court said:

- (a) The fraud alleged should have a bearing on the making of the award. It would have been different had the expression been "the award was induced or affected".
- (b) AFI is not attributed any role in the alleged falsification. Therefore, there is no material that the making of the award is induced or affected by fraud.
- (c) If the case advanced is accepted, the consequence would be that the enforcing court would be required to decide the genuineness of the document. But that is a question for the tribunal.

On the contention, if the tribunal had jurisdiction, the court said the objection was not available at the enforcement stage in this case because:

- (a) The respondent had the remedy to apply to the seat-court (USA) to stay the arbitration because there was no valid agreement. It did not.
- (b) The tribunal had the competence to decide on the issue. It made a finding in its communication with the respondent at the start.
- (c) The award was not challenged in the seat court.

On the contention that no opportunity was given to challenge the composition of the tribunal and the arbitral proceedings was not following the rules of the AFI:

- (a) The good faith principle applied in New York Convention signatory countries requires a party in arbitral proceedings to take all procedural pleas in the arbitral proceedings itself.
- (b) Procedural pleas taken at the enforcement stage of arbitral awards are presumed to have been raised without good faith.

On whether the award was against the most basic notions of justice because AFI had accepted the AFI clause was based on correspondence between the appellant and the appellant's broker (without John Cashew's knowledge, referencing the need of a revised contract to reflect AFI):

- (a) Arbitral institutions transact business in arbitral tribunals abroad at much more ease.
- (b) At the most, such a decision can be regarded only as an incorrect decision on facts and is not a ground to object to the enforcement, especially since it is in relation to a procedural matter.
- (c) The case on hand is one in which this Court is bound to enforce the foreign arbitral award even if there is any ground in favour of the respondent in terms of [Section 48 ACA](#).

On whether the respondent did not have an adequate opportunity because it was notified late by AFI of its right to seek a stay:

- (a) This was a procedural matter, and the respondent is not entitled to raise it in enforcement, especially when they had the opportunity to raise the same in the course of the arbitration proceedings and had chosen not to do so.

On whether *Chloro Controls* is an authority for the proposition that the tribunal's competence can be made the subject of enforcement action, the court said no.

Read the judgment [here](#).

Categories: [Section 48 ACA](#) | [Conditions for Enforcement of Foreign Awards](#) | [Section 48 \(2\) \(b\) ACA](#) | [Recognition and Enforcement of Foreign Award](#) | [Enforcement](#) | [Part II](#) | [Enforcement of Arbitral Awards](#) | [Section 49 ACA](#) | [Enforcement of Foreign Awards](#) | [New York Convention Awards](#) | [Challenge to Foreign Award](#) | [Public Policy](#) | [Public Policy of India](#) | [Most Basic Notions of Morality or Justice](#) | [Fraud in the Making of the Award](#) | [Merits Based Review](#) | [Review on the Merits of the Dispute](#) | [Competence](#) | [Kompetenz](#) | [Revaluation of Evidence](#) | [Arbitrators Interpretation of Contract](#) | [FEMA](#) | [Put Option](#) | [SCRA](#) | [When Foreign Award Binding](#) | [Illegality of Contract](#) | [Good Faith](#) | [Cruz City](#) | [Gemini Bay](#) | [Ssangyong](#) | [Vijay Karia](#)

STATUTORY ARBITRATIONS

Claims already decided by an arbitrator appointed by writ court could not be referred to the Madhya Pradesh statutory tribunal asserting that only the latter had jurisdiction to decide such claims: Supreme Court of India

03 December 2021 | MP Housing and Infrastructure Development Board and another v. KP Dwivedi | Civil Appeal 6768 of 2021 & connected matters | MR Shah & BV Nagarathna JJ | Supreme Court of India | 2021 SCC OnLine SC 1171

The Supreme Court has ruled that the respondent could not have referred to the MP Arbitration Tribunal the same claims decided by an arbitrator (appointed by the court in a writ petition) on the premise that the dispute was a works contract over which only that Tribunal had jurisdiction.

The court noted that the arbitrator—the Housing Commissioner—was appointed by a writ court with the parties' consent. His award had attained finality, thus issue estoppel and cause of action estoppel applied. Also, an award or an order that (a party thinks) is nullity cannot be ignored unless an appellate court interferes with it.

Read the decision [here](#).

Categories: [Statutory Arbitrations](#) | [Madhya Pradesh Madhyastham Adhikaran Adhiniyam](#) | [Reference](#) | [Reference Order](#) | [Estoppel](#) | [Issue Estoppel](#) | [Cause of Action Estoppel](#) | [Extent of Judicial Intervention](#) | [Forum Shopping](#)

Conciliation and arbitration are fundamentally different—only the latter is adjudicatory. The MSMED Council cannot direct payment if a party fails to appear in conciliation. At best, conciliation gets terminated to be followed by arbitration: Supreme Court of India

15 December 2021 | Jharkhand Urja Vikas Nigam Limited v. State of Rajasthan | Civil Appeal 2899 of 2021 | Indira Banerjee & Subhash Reddy JJ | Supreme Court of India | 2021 SCC OnLine SC 1257

Dealing with a matter under the MSMED Act, the Supreme Court has highlighted the difference between conciliation and arbitration.

The Micro and Small Enterprises Facilitation Council had passed an order directing payment of the alleged due amount when the appellant failed to appear in the conciliation proceedings. The High Court dismissed the writ petition filed against that order, and the appellate bench affirmed the dismissal.

The Supreme Court noted the scheme of the MSMED Act and observed that in any reference made to it, the MSMED Council is obliged to conduct conciliation under [Sections 65](#) to [Section 81](#). If conciliation fails and stands terminated, the dispute between the parties can be resolved by arbitration. The Council is empowered either to take up arbitration under the ACA on its own or to refer the arbitration proceedings to any institution as specified.

Thus, the court concluded, the Facilitation Council could, at best, have recorded the failure of conciliation and proceeded to initiate arbitration. Accordingly, its order directing payment was nullity and ran contrary to the MSMED Act and the ACA.

The court also rejected the objection that the remedy was to apply for setting aside. Instead, it said there is no arbitral award in law, and [Section 34 ACA](#) would not apply.

Perhaps referring to the fact that adjudication had been made in effect, the court also noted that

conciliation and arbitration proceedings could not be clubbed under the enactment.

Lastly, the court said that it was open for the Council to either take up the dispute for arbitration under ACA on its own or refer to any institution or centre providing alternate dispute resolution services.

Read the decision [here](#).

Categories: [Arbitration Under MSMED Act](#) | [Conciliation Under MSMED Act](#) | [MSMED Act](#) | [Article 226 Constitution of India](#) | [Article 227 Constitution of India](#) | [Power of High Courts to Issue Certain Writs](#) | [Power of Superintendence Over All Courts by the High Court](#) | [Writ Petition](#) | [Writ Petition in Arbitration Matters](#) | [Judicial Review](#)