

This Fortnight in Arbitration

Volume 1 | Issue 6

16 May 2021 to 31 May 2021

What's inside?

- (1) The scope of the court's appellate powers under Section 37 (2) (a) ACA? **(Delhi High Court)**
- (2) "Special equities" refer to special circumstances which result in irretrievable injustice **(Delhi High Court)**
- (3) Award set aside because of lack of proper notice of constitution of the tribunal **(Delhi High Court)**
- (4) Where acceptance of liability is a precondition to arbitrate, the bar will not apply if liability is neither accepted nor denied **(Delhi High Court)**
- (5) Courts cannot give final relief in Section 9 proceedings; Scope of interim relief sought cannot be expanded on appeal **(Delhi High Court)**
- (6) Equitable set-off rightly not applied by the tribunal **(Delhi High Court)**

Authors: Avantika Verma, Kriti & Kushager Relhan

Editors: Prashant Mishra & Samarth Madan

(1)

The scope of the court's appellate powers under Section 37 (2) (a) ACA? (Delhi High Court)

18 May 2021 | Raghuvir Buildcon Private Ltd. v. IRCON International Limited | Arb. A. (COMM) 15 of 2021 | C Hari Shankar J

On the respondent's application under [Section 16 ACA](#), the arbitrator ruled that some issues were outside the scope of the reference: some arose after the reference, and others were "excepted matter."

In the appeal, a single judge rejected the argument that the court's jurisdiction under [Section 37 \(2\) \(a\) ACA](#) (the appealing provision) is wider than [Section 34 ACA](#):

- (a) Under [Section 37 \(2\)](#), an order by the tribunal "indisputably interlocutory in nature" can be appealed. A final ruling could be assailed in set-aside proceedings [citing *Indian Farmers Fertiliser Cooperative Ltd. v. Bhadra Products*, (2018) 2 SCC 534]. The scope of interference against interlocutory orders is classically more circumscribed than against a final decision. *
- (b) Besides, [Section 37 ACA](#) is subject to the discipline of [Section 5 ACA](#). The object of the ACA is to minimise the supervisory role of courts. An appeal against the tribunal's decision is not akin to an appeal under the Code of Civil Procedure, 1908. It is a *sui generis* appeal in which interference by the court must be cautious and circumspect.
- (c) There is no substantial difference between the principles that must be applied in a set-aside proceeding and appeal. Hence, the court would only examine if there is patent illegality or perversity or if the decision is unconscionable.

Liberty was given to raise the issue of "excepted matter" again "only as the impugned

order has been passed at the interlocutory stage."

* Editor's note: It is not true that [Section 37 \(2\) \(b\)](#) permits appeals only against 'interlocutory' (as opposed to final) orders of the tribunal. The court's cited authority, *Indian Farmers*, is on a different point. [Section 37 \(2\) \(b\) ACA](#) permits appeal against an order accepting the plea that the tribunal does not have jurisdiction (as provided by [Section 16 \(2\) ACA](#)) or a plea that the tribunal is exceeding the scope of its authority (as provided by [Section 16 \(3\) ACA](#)). The arbitrator had ruled that a claim was time-barred. If this was a question of jurisdiction, the order was appealable. The Supreme Court said that a decision on the point of limitation does not go to jurisdiction. It was an interim award that could be challenged in set-aside proceedings.

Access the judgment [here](#).

Categories: [Section 16 ACA](#) | [Section 16 \(2\) ACA](#) | [Section 16 \(3\) ACA](#) | [Section 37 ACA](#) | [Section 37 \(2\) \(a\) ACA](#) | [Section 37 \(2\) \(b\) ACA](#) | [Jurisdiction](#) | [Competence of Arbitral Tribunal to Rule on its Jurisdiction](#) | [Competence](#) | [Kompetenz](#) | [Appealable Orders](#) | [Scope of Section 37 \(2\) ACA](#)

(2)

"Special equities" refer to special circumstances which result in irretrievable injustice (Delhi High Court)

19 May 2021 | Kuber Enterprises v. Doosan Power Systems India Private Ltd. | OMP (I) (COMM) 158 of 2021 | Vibhu Bakhru J

Kuber applied to the court under [Section 9 ACA](#) asking for an injunction against the invocation of a bank guarantee. Its case rested on "special equities", which it suggested had arisen in its favour because the respondent did not join the pre-arbitration dispute resolution process.

Rejecting the application, the court ruled that the expression "special equities" is not nebulous. It means peculiar or special circumstances which result in irretrievable injustice. These must be specially pleaded.

Also, mere contractual disputes do not give rise to “special equities.”

Access the judgement [here](#).

Categories: [Section 9 ACA](#) | [Interim Measures by Court](#) | [Bank Guarantee](#) | [Injunction Against Bank Guarantee](#) | [Special Equities](#)

(3)

Award set aside because for lack of proper notice of constitution of the tribunal (Delhi High Court)

19 May 2021 | Ram Nanda and Co. & others v. Sanjay Saigal | OMP (COMM) 156 of 2021 | Vibhu Bakhru J

The notice for the appointment of the arbitrator was returned with the remarks “left.” *Held*, this was not due notice of the constitution of the arbitral tribunal as required by the bye-laws of the Delhi Stock Exchange under which the arbitration was held.

Hence, the award was set aside under [Section 34 \(2\)\(a\)\(iii\) ACA](#).

Access the judgement [here](#).

Categories: [Section 34 ACA](#) | [Application for Setting Aside Arbitral Award](#) | [Section 34 \(2\)\(a\)\(iii\) ACA](#) | [Proper Notice](#)

(4)

Where acceptance of liability is a precondition to arbitrate, the bar will not apply if liability is neither accepted nor denied (Delhi High Court)

24 May 2021 | Geo Chem Laboratories Private Ltd. v. United India Insurance Company Ltd. | Arb. P. No. 479 of 2020 | Sanjeev Narula J

The arbitration agreement under the insurance policy (professional indemnity) was typically tightly worded. Only a dispute on the quantum was arbitrable. No dispute could be referred to arbitration if the liability was disputed or not accepted.

But the facts were unique. United, the insurance company, was neither accepting liability nor denying it. When Geo Chem invoked the policy, instead of processing the claim, United cancelled it. A writ court set aside the cancellation and directed United to give Geo a

fair hearing. Here, United took another path and appointed a surveyor for the assessment of loss. The surveyor’s final report lingered on despite the court’s direction to complete the process. Both sides blamed each other for the delay.

The court decided to hear the matter and ruled that the bar set out under the arbitration agreement was inapplicable, and the dispute had to be referred to an arbitrator. Also, it was for the arbitrator to decide—and not for the court to conduct a mini or roving trial—if the facts constituted deemed admission of liability by United.

Access the judgment [here](#).

Categories: [Section 11 ACA](#) | [Section 11\(6\) ACA](#) | [Arbitrability](#) | [Section 9 ACA](#) | [Competence Competence](#) | [Arbitrable Dispute](#) | [Deemed Admission of Liability](#) | [Kompetenz Kompetenz](#) | [Competence of Arbitral Tribunal to Rule on its Jurisdiction](#) | [Admitted Liability](#)

(5)

Courts cannot give final relief in section 9 proceedings; Scope of interim relief sought cannot be expanded on appeal (Delhi High Court)

24 May 2021 | Janta Associates and Co. Ltd. v. Indian Oil Foundation & another | FAO(OS) (COMM) 76 of 2021 | Rajiv Sahai Endlaw & Amit Bansal JJ

The Delhi High Court dismissed a [Section 37](#) appeal against a [Section 9](#) order in which the prayer for payment of a sum was rejected. The Delhi High Court held that:

A 2-judge bench of the court, affirming the single judge’s decision, has ruled that [Section 9 ACA](#) does not empower the court to grant final relief even if liability is admitted by the opposite party. [Section 9 ACA](#) permits only to grant interim preservative measures. [Section 9 ACA](#) has to be read along with [Section 5 ACA](#), which was incorporated to curb the tendency of the courts to adjudicate except to the extent expressly permitted by the ACA.

The question if the court can grant under [Section 9\(ii\)\(b\)](#) order in the nature of attachment before award, on principles other than [Order XXXVIII Rule 5 of CPC](#), was not examined because there was no pleading.

Access the judgment [here](#).

Categories: [Section 5 ACA](#) | [Extent of Judicial Intervention](#) | [Section 9 ACA](#) | [Interim Measures by Court](#) | [Section 37 ACA](#) | [Admitted Liability](#) | [Attachment Before Award](#)

(6)

Equitable set-off rightly not applied by the tribunal (Delhi High Court)

28 May 2021 | Steel Authority of India Ltd. v. M/S Jaldhi Overseas PTE Ltd. | Vibhu Bakhrui J | 2021 SCC OnLine Del 2642

SAIL withheld payment of an admitted liability (USD 515,739) claiming equitable set-off because it had a claim of damages against Jaldhi in respect of another contract. In an Indian seated international commercial arbitration, the tribunal determined that SAIL was not entitled to apply set-off. Bakhrui J upheld the award. He reasoned that equitable set-off:

- (a) Applied when all cross demands arise out of the same transaction, but here there was no connection between the two contracts
- (b) Is not allowed when a protracted enquiry is needed to determine the sue due. Here, SAIL's claim of damages under the prior contract was disputed.
- (c) Was a matter of discretion and not a matter of right.

The court also said that though it examined the merits, there was no requirement to do so.

It also rejected SAIL's argument that no evidence was led by Jaldhi ruling that the argument could not be run at this stage, and Jaldhi's claim was based on SAIL's admission. So, the onus to prove an entitlement to withhold the sum was on SAIL.

Finally applying precedent, the court also upheld a grant by the tribunal of 12 % per annum compound interest with quarterly rests. It found that SAIL had not contested the reasonableness of the interest rate before the tribunal. It also rejected the argument that the tribunal should have independently examined it ("... there was no requirement for the Arbitral Tribunal to examine a non-existent issue.")

Access the judgement [here](#).

Categories: [Section 34 ACA](#) | [Application for Setting Aside Arbitral Awards](#) | [Public Policy](#) | [Patent Illegality](#) | [Fundamental Policy of Indian law](#) | [Compound Interest](#) | [Admitted Liability](#) | [Vedanta](#) | [Ssangyong](#)

National Forum for Research in Arbitration Law is a forum for writing and research. Our Fortnightly Highlights offer a glimpse of the latest developments--cases, legislative or policy. The material is meticulously analysed, written and finalised over two weeks to present to the reader the most accurate gist.

While Biweekly Highlights are written in-house, original contributions analysing an issue relevant to the understanding or developing arbitration law are welcome either as an article, a blog post, or a case-comment. Visit our website www.nfral.in for details.

The Highlights are descriptive and meant for general information for the professional fraternity, students and academia. For any legal advice on any case, please contact your counsel.

Write to editor@nfral.in for any feedback.

