DIAC
Delhi International Arbitration Centre

NEWSLETTER

Delhi International Arbitration Centre

"Footprints towards excellence"

JULY, 2019 **Issue-II**

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JULY - 2019

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MESSAGE FROM THE PATRON IN CHIEF

Justice Dhirubhai Naranbhai Patel
Chief Justice
High Court of Delhi

Delhi International Arbitration Centre (DIAC), since its inception in the year 2009, has made tremendous progress in earning itself the credit of being a leading institutional arbitration service provider. With the privilege of being the first ever High Court annexed facilitation, DIAC ensures confidence reposed by the disputants in it with over 2510 referrals out of which 1328 cases have already been disposed off. The arbitral process is governed and guided by a set of comprehensive rules which are revised from time to time to meet with the evolving domestic and international legal framework.

DIAC maintains an extensive panel of 420 Arbitrators with expertise in diverse discipline. It has sound infrastructure with 9 well equipped hearing rooms abreast with modern technological facilities which offer a swift and hassle free experience to the Arbitrators and parties.

I also take this opportunity to congratulate the Arbitration Committee of Delhi High Court for the endeavor to bring out a Newsletter in order to keep the reader updated with the latest news and judicial pronouncements in the realm of domestic and international jurisdiction.

I wish DIAC all the success!!!

(Dhirubhai Naranbhai Patel)

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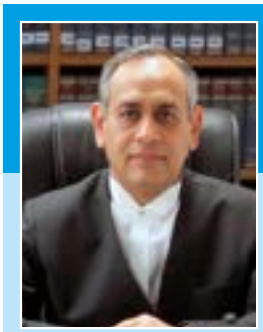

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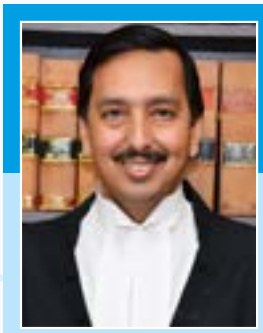

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RECENT JUDICIAL PRONOUNCEMENTS IN ARBITRATION

SUPREME COURT OF INDIA

The Government of Haryana PWD Haryana (B and R) Branch (Appellant) v. G.F. Toll Road Pvt. Ltd. & Ors. (Respondents) [2019 SCC OnLine SC 2]

Civil Appeal No. 27 of 2019 of 2019; decided on 03.01.2019

Former Employee of a party not barred to be nominated as an Arbitrator

As per the Arbitration Clause in the Works Contract Agreement between the parties, a Board of three Arbitrators was to be constituted to adjudicate disputes. Appellant nominated one of its retired employees as an Arbitrator. Respondent no.1 challenged the nomination by raising doubts as to his independence and impartiality in dispute resolution. The objections were found to be untenable and hence, dismissed successively by the Order of Arbitral Tribunal and then, that of Punjab and Haryana High Court. This Order of the High Court was challenged before the Supreme Court of India. The Court observed that the present case was governed by the pre-amended Arbitration and Conciliation Act, 1996 which provided for disqualification of a former employee as an Arbitrator, only when there were justifiable doubts as to his independence and impartiality. The position as per the Arbitration and Conciliation (Amendment) Act, 2015 was also discussed, which inserted the Fifth Schedule to the 1996 Act, incorporating grounds for determination of circumstances giving rise to justifiable doubts as to independence and impartiality of an Arbitrator. Interpreting Entry 1 of the Fifth Schedule, it was held that only the current employee of any of the parties would be disqualified, if so nominated. It was further held that *the word "other" (as used in Entry 1) cannot be used to widen the scope of the entry to include past/former employees*. The Supreme Court set-aside the judgment of the Punjab and Haryana High Court holding the objections of apprehension of bias against the nominee Arbitrator to be unjustified.

MMTC Ltd. (Appellant) v. Vedanta Ltd. (Respondent) [2019 SCC OnLine SC 220]

Civil Appeal No. 1862 of 2014; decided on 18.02.2019

Supreme Court not to readily disturb the concurrent findings where the Award is confirmed under Section 34 and 37

The Respondent, a manufacturer of Cast Copper Rods engaged the services of the Appellant as a consignment agent for storage, handling and marketing of the copper rods produced by the Respondent. The agreement between the parties contained an Arbitration Clause. Amendments were made to the agreement by way of a subsequent Memorandum of Understanding, which provided that the Appellant could supply goods to customers against a letter of credit, while maintaining that it was the "*total responsibility*" of the Appellant "*to ensure the bona fides of the letter of credit furnished and that the principal and interest were paid on the due date for the supplies made against the letter of credit*." The disputes between the parties arose when the Appellant supplied the goods manufactured by the Respondent to M/s Hindustan Transmission Products Ltd. (HTPL). The said Company did not pay for the supplied goods to the Appellant which in turn failed to pay the Respondent. The dispute was referred to a three-member arbitral tribunal which passed an award in favour of the Respondent and directed the Appellant to pay for the goods sold. The said award was confirmed by a Single Judge and subsequently by a Division Bench of Bombay High Court. This decision was eventually challenged before the Supreme Court. The main ground raised before the Supreme Court concerned the *arbitrability of the dispute under the arbitration clause,* that is, the direct agreement between the Respondent and HTPL, being a customer arranged by the Respondent, would not be binding on the Appellant and therefore, could not be subjected to arbitration. Noting that "*the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided Under Section 34(2)(b)(ii), i.e. if the award is against the public policy of India",* the Court observed that its approach in such cases *"must be extremely cautious and slow to disturb such concurrent findings."* The Court noted that the Forums below reasonably construed the agreement between the parties to find that that the agreement between the parties did not make out any distinction between the type of customers and the supplies to HTPL were not made in furtherance of any independent understanding between the Appellant and the Respondent. With the observations made above, the Supreme Court affirmed the decision of the Division bench of High Court of Judicature at Bombay holding Appellant liable to make payment to Respondent of goods supplied by itself to HTPL.

Jaiprakash Associates Ltd. (JAL) (Appellant) v. Tehri Hydro Development Corporation India Ltd. (THDC) (Respondent) [2019 SCC OnLine SC 143]

Civil Appeal No. 1539 of 2019; decided on 07.02.2019

A judgment of a Division Bench of Delhi High Court was challenged before the Supreme Court on the question of the power of the Arbitrators to grant interest as per the terms contained in agreement between the parties. The Arbitral Tribunal as well as Single Judge of the High Court followed by the Division Bench interpreted the applicable relevant clauses to mean that no interest would be payable to the Contractor (Appellant) on the money due to him by the Engineer-in-charge (Respondent). The interpretation adopted was in consonance with the construction of clauses between the same parties in *Tehri Hydro Development Corporation (THDC) Ltd. v. Jai Prakash Associates Ltd. (2012) 12 SCC 10*. The Arbitral Tribunal, nonetheless, proceeded to award interest, relying upon the law laid down in *Board of Trustees for the Port of Calcutta v. Engineers-De-Space Age (1996) 1 SCC 516*. The High Court differed from the view taken by Arbitral Tribunal, noting that the Arbitrator does not get the jurisdiction to award interest, if the interest is prohibited as per the express terms of the contract between the parties. The Supreme Court summed up the principles deduced from various judgments on the issue, drawing a distinction between the legal position under the 1940 Act and the 1996 Act, also in terms of the interest for pre-reference, pendente lite and post

Arbitral Tribunal cannot award interest if the same is barred by an agreement between the parties

Award. The Court discussed the judgment of the Constitution Bench in *Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C. Roy (1992) 1 SCC 508,* which construed the provisions of 1940 Act to hold that an Arbitrator is empowered to award interest *"for pre-reference, pendente lite and post award period"*, *in accordance with the general law of the land and the agreement*. The Supreme Court noted that this legal position was reiterated in *Sree Kamatchi Amman Construction v. Divisional Railway Manager (Works), Plaghat & Ors (2010) 8 SCC 767, Union of India Bright Power Projects (India) Private Limited (2015) 9 SCC 695 and Sri Chittaranjan Maity v. Union of India (2017) 9 SCC 611* and reemphasized in the case of *Reliance Cellulose Products Limited v. Oil and Natural Gas Corporation Limited (2018) 9 SCC 266* wherein the distinction between the 1940 and the 1996 Act was also drawn, while following the principles of interpretation of relevant provisions of 1940 Act laid down in *G.C. Roy* case. In *Reliance case*, the Court also laid down the test of *"strict construction"* applicable to clauses of the agreement which clearly and expressly bar the award of *pre-reference* and/or *pendente lite* interest, ruling that *clauses which do not refer to claims before the Arbitrators or disputes between parties and clearly bar payment of interest, cannot stand in the way of an Arbitrator awarding pre-reference or pendente lite interest*. Drawing distinction with the position in the 1996 Act, the Court noted that Section 31(7) of the 1996 Act sanctifies *agreement between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered*. This paradigm shift in the legal position was recognized in the *Sayeed Ahmed and Company v. State of Uttar Pradesh & Ors. (2009) 12 SCC 26* which has since been consistently followed in number of cases thereafter. The Court also noted that the relevant clause in *State of U.P. v. Harish Chandra & Co. (1999) 1 SCC 63* was restrictively worded and thus, the construction therein was not applicable to *Tehri Hydro* case. The Supreme Court noted that the present case was governed by the 1996 Act and accordingly, the Arbitral Tribunal has no power to award interest in view of the express bar contained in the relevant Arbitration Clause in the agreement between the parties. The Supreme Court, thus, upheld the conclusions of the Delhi High Court and quashed the award, limited to the interest, passed by Arbitral Tribunal.

Giriraj Garg (Appellant) v. Coal India Ltd. & Ors. (Respondents) [2019 SCC OnLine SC 212]

Civil Appeal No. 1695 of 2019; decided on 15.02.2019

General reference to Arbitration Clause in Standard Form Contract sufficient to imply its incorporation in individual transactions

An application under Section 11 of the Arbitration and Conciliation Act, 1996 filed by the Appellant seeking appointment of an independent Arbitrator was dismissed by a Single Judge of the Jharkhand High Court. The ground cited was that the arbitration clause, as contained in 2007 Coal Distribution Scheme, could not be *incorporated by reference* to individual sale orders relating to different transactions between the parties under the said Scheme. This order was challenged in the Supreme Court. The Court noted that the *Principle of Incorporation by Reference of an Arbitration Clause* found Statutory Recognition in Section 7(5) of the 1996 Act, which is *pari materia* to Section 6(2) of the English Arbitration Act, 1996 and closely replicates Article 7(2) of UNCITRAL Model Law, 1996. The Court considered the broad distinction between '*single contract case'* and '*two contract case'*, as laid down in a judgment by Queen's Bench Division in *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL [2010] EWHC 29 (Comm.)* , affirmed in *SEA2011 Inc. v. ICT Ltd. [2018] EWHC 520 (Comm.)*. The Court also referred to *Alimenta SA v. National Agriculture Co-op Marketing Federation of India Ltd. (1987) 1 SCC 615,* wherein this principle was first recognised to be applicable to Indian Law. It noted that the scope and intent of the *Doctrine of Incorporation by Reference* was further explained in *M.R. Engineers & Contracts Pvt. Ltd. v. Som Datt Builders Ltd. (2009) 7 SCC 696.* The Court further noted that the application of this Doctrine was later expanded by the Supreme Court in *Inox Wind Ltd. Thermocables Ltd. (2018) 2 SCC 519,* by holding that "*even a general reference to a standard form contract of one party, along with those of trade associations, and professional bodies would be sufficient to incorporate the arbitration clause"*

The Supreme Court held that the one of the clauses of Standard Terms and Conditions at the end of the sale order made mention of Standard Form Document containing an arbitration clause and thus, fell under '*single contract case'*. The Appeal was, thus, allowed and an Arbitrator was appointed to adjudicate the disputes between the parties.

LMJ International Ltd. & Ors. (Petitioners) v. Sleepwell Industries Co. Ltd. (Respondent) [2019 SCC OnLine SC 242]

Special Leave Petition (Civil) No. 540 of 2018 and Special Leave Petition (Civil) No. 5493 of 2019; decided on 20.02.2019

Both maintainability as well as enforceability of a Foreign Award to be considered at threshold by Executing Court

The Respondent herein filed two Execution Petitions before a Single Judge of the Calcutta High Court (Executing Court) for enforcement of two Foreign Arbitral Awards. Objections regarding maintainability of the execution petitions were dismissed by the Executing Court in its common Order, noting that the Court must record satisfaction about enforceability of the Foreign Award, upon which the Award shall be deemed to be a decree of the Court. The Court further observed that *the objections raised by the petitioner were in a quagmire of despondency and a desperate attempt to resist the enforceability of an enforceable award rather than being any real challenge thrown towards the maintainability of the said petition*. Subsequently, Special Leave Petitions filed by Respondents challenging Order of the Executing Court were also dismissed.

Thereafter, the Petitioners filed objections before the Executing Court regarding the enforceability of Foreign Awards. These objections were also dismissed by the Court noting that the challenge was not maintainable after the rejection of the objections in the first round had attained finality and held the objections to be hit by the principles of *res judicata*. The Court further opined that the objections were an attempt to have a re-look at the Foreign Awards, which could not be countenanced in view of the limited jurisdiction under Section 48 of the Arbitration and Conciliation Act, 1996. The petitioners assailed the said Order of the Executing Court before the Supreme Court. The Supreme Court noted that the grounds raised by the Petitioners regarding maintainability of the execution case were *intrinsically linked* to the question of enforceability as well. The Court was of the opinion that scheme of Section 48 does not envisage piecemeal consideration of the issue of maintainability and enforceability of the execution case concerning the Foreign Awards. The legislative intent constricted the scope of interference by courts in relation to execution of Foreign Awards, holding, thus, that the concept of maintainability and enforceability expectedly must be considered at the threshold by the Court. The Special Leave Petitions were dismissed with exemplary costs of Rs. 20 lakhs to be paid by the Petitioners to the Respondent.

M/S Icomm Tele Ltd. (Appellant) v. Punjab State Water Supply & Sewerage Board & Anr. (Respondents) [2019 SCC OnLine SC 361]

Civil Appeal No. 2713 of 2019; decided on 11.03.2019

Supreme Court struck down pre-deposit condition on the amount claimed by the party invoking Arbitration

A detailed Arbitration Clause was contained in the notice inviting tender, against which a formal contract was entered into between the Appellant and an Executive Engineer of Respondent. The Arbitration Clause required any party invoking arbitration to furnish a *"deposit-at-call"* for 10% of the amount claimed, in a scheduled bank in the name of the Arbitrator till the pronouncement of the Award. As per the Arbitration Clause, the said *"deposit-at-call"* was to be refunded to the Claimant in proportion to the amount awarded with respect to the amount claimed and the balance would be paid to the other party. The validity of condition of 10% deposit was challenged by the appellant in a Writ Petition filed in the Punjab and Haryana High Court, which was dismissed. The Appellant then preferred an Appeal before the Supreme Court to decide whether the said condition was arbitrary and violative of Article 14 of the Constitution. The Court observed that the concept of *unequal bargaining power* has no application in the case of commercial contracts and thus, the principle contained in *Central Inland Water Corpn. v. Brojo Nath Ganguly (1986) 3 SCC 156* would not apply. The Court held that a frivolous claim could be dismissed upon imposition of exemplary costs and thus, the *"deposit-at-call"* was without any *direct nexus* to the filing of frivolous claims, as the deposit was required to be made at the threshold without any determination of the claim being frivolous. The Court observed that the arrangement of refund as contemplated in the Arbitration Clause was *excessive, disproportionate and wholly unjust*. The Court also observed that any requirement of pre-deposit would discourage the arbitration as an alternative dispute resolution process and would, in turn, be contrary to the object of de clogging the court system, rendering the arbitral process ineffective and expensive. The sub-clause containing the requirement of pre-deposit was, thus, struck down and the Appeal was allowed.

Union of India (Appellant) v. Parmar Construction Company (Respondent) [2019 SCC OnLine SC 442]

Civil Appeal No. 3303 of 2019; decided on 29.03.2019

Parties must adhere to the procedure prescribed in the Arbitration Agreement before resorting to Section 11 of the 1996 Act

Disputes arose between the Appellant and the Respondent due to delayed completion of construction works projects and escalated prices. Arbitration was invoked by the Respondent, which was declined by the Appellant on the premise that "No Due Certificate" was already signed. They argued that this meant that no dispute between the parties could be sent to arbitration. Consequently, Respondent approached the Rajasthan High Court seeking appointment of an Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996. The High Court appointed a Sole Arbitrator to adjudicate the disputes between the parties. Instant batch of Appeals were filed challenging the said appointment in respective petitions. The Supreme Court noted that the *request for referring the disputes to Arbitration was received by the Appellant much prior to the enforcement of Amendment Act, 2015*. It ruled that hence, the said Amendment Act, in terms of conjoint reading of Section 21 with Section 26, would not apply to this case. The Court further observed that "*No Dues/No Claims/Discharge Vouchers*" were to be furnished in advance for release of payments against admitted bills and thus, the tender of *"No Due Certificate"* could be said to be voluntary, resulting in discharge of the 'contract by accord'. The Court, thus, held that arbitral dispute subsists despite furnishing the Discharge Vouchers. The Court also emphasized that the procedure, as agreed by the parties as prescribed in the agreement, to settle differences, must be adhered to. It is imperative to ensure that the *remedies provided under the Arbitration Agreement are exhausted before* resorting to appoint an independent Arbitrator under Section 11(6) of the Act. The orders passed by the High Court were accordingly quashed and set-aside. Appellant was directed to appoint an Arbitrator in terms of relevant clause of General Conditions of Contract for adjudication of disputes between the parties.

Garware Wall Ropes Ltd. (Appellant) v. Coastal Marine Constructions & Engineering Ltd. (Respondent) [2019 SCC OnLine SC 515]

Civil Appeal No. 3631 of 2019; decided on 10.04.2019

Arbitration Clause contained in an Unstamped Instrument cannot be invoked

The Supreme Court in this case ruled on the issue of *the effect of an arbitration clause contained in a contract which requires to be stamped, particularly, subsequent to the introduction of Section 11(6A) of the Arbitration and Conciliation (Amendment) Act, 2015*. Section 11(6A) provides that the Court must confine to examination of existence of an arbitration agreement while considering the application under sub-section (4), sub-section (5) or sub-section (6) of Section 11. The Court took support from the law laid down by it in a Seven Judge Bench of the Court in *SBP & Co. v. Patel Engineering Ltd. (2005) 8 SCC 618* which held that the power to appoint an Arbitrator under Section 11 is judicial and not administrative and thus, the designated Judge would be within his jurisdiction to decide certain preliminary aspects as part of consideration of application under Section 11. The exposition was further enunciated in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. (2009) 1 SCC 267*setting out the categories of preliminary aspects, which the designated Judge was bound to decide or chose to decide or should leave for Arbitral Tribunal to decide. The Court also took note of its decision in *Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre (2005) 7 SCC 234*which ruled that the designated Judge only required to have a prima facie look at the disputes. The developments also paved the way for Law Commission of India to recommend introduction of sub-section 6A to Section 11 of the Arbitration and Conciliation Act, 1996 (Report No. 246). Placing reliance on its ruling in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd. (2011) 14 SCC 66,* the Court held that the designated Judge, while considering an application under Section 11(4) to 11(6) *"is enjoined by the provisions of the Indian Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Indian Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent existence".* The Court further noted that different consequences ensue in case of an arbitration clause in an unregistered (compulsorily registrable) agreementwhere such a clause constitutes an independent agreement and could be acted upon, with regard to the proviso to Section 49 of the Registration Act read with Section 16(1)(a) of the Act. The Court held that the law laid down in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.* continues to apply even after the amendment of Section 11(6A). The Court harmonized the relevant provisions of Maharashtra Stamp Act with Section 11 of the Arbitration and Conciliation Act, 1996 and directed the Bombay High Court to impound the unstamped instrument and handover to the competent authority under the Maharashtra Stamp Act to decide the payment of duty and penalty in less than 45 days from the receipt, subsequent to which the High Court would proceed to dispose of the application under Section 11.

Bharat Broadband Network Ltd. (Appellant) v. United Telecoms Ltd. (Respondent) [2019 SCC OnLine SC 547]

Civil Appeal No 3972 of 2019; decided on 16.04.2019

Mandate of Arbitrator hit by Section 12(5) automatically terminates

A Sole Arbitrator was appointed by the Chairman and Managing Director (CMD) of the Appellant to adjudicate the disputes with the Respondent. As per the Arbitration Clause, the disputes under the agreement between the parties were to be referred to the sole arbitration of CMD of the Appellant or one performing his functions or by one he so appoints, in case of his inability or non willingness to so act. The appointment of Arbitrator was challenged by the Appellant itself, in view of judgment pronounced in *TRF ltd. v. Energy Engineering Projects Ltd.(2017) 8 SCC 377*, which was dismissed by the Sole Arbitrator. A Petition against this Order filed in the Delhi High Court which was also dismissed for the reason that a party appointing an Arbitrator is estopped from challenging its appointment, all the more when the opposite party has conceded to the appointment and filed pleadings without expressing reservations, which amounted to waiver of the applicability of Section 12(5) of the Arbitration and Conciliation Act, 1996. The Supreme Court discussed in detail the law with respect to interpretation of Section 12(5) as laid down in three judgments: *HRD Corporation v. GAIL (India) Ltd. (2018) 12 SCC 471, Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd. (2017) 4 SCC 665, and TRF Ltd. v. Energy Engineering Projects Ltd.(2017) 8 SCC 377.* The Court held that the appointment of an Arbitrator may be challenged under Section 12(1) to Section 12(4) in case justifiable doubts as to his/her independence or impartiality have arisen, as per the procedure set out in Section 13 of the Act. The Arbitral Tribunal must first decide on the challenge in such an eventuality and continue with the proceedings to make an Award in case the proceedings are not successful. This Award can then be challenged by way of an application under Section 34 of the Act. The Court noted that Section 12(5) relates to ineligibility of a person to act as an Arbitrator, in case the ground falls under the one of the specified categories under the Seventh Schedule. This ineligibility can only be cured by resorting to its proviso that the requirement may be waived by the parties by an express agreement in writing, subsequent to the disputes having arisen between the parties. The mandate of such an ineligible Arbitrator, who has become *de jure* unable to perform his functions automatically terminates, only to be substituted by another Arbitrator. The Court further held that a party needs to apply to the court for termination of its mandate, only in an eventuality of there being a controversy concerning ineligibility of an Arbitrator. The Court held that the Managing Director of the Appellant was ineligible to act as an Arbitrator, noting that there was no express agreement between the parties waiving the applicability of Section 12(5). The Appeal was, thus, allowed by the Supreme Court with direction to the Delhi High Court to appoint a substitute Arbitrator with the consent of both the parties.

Union of India (Plaintiff) v. Khaitan Holdings (Mauritius) Ltd. & Ors. (Defendants) [2019 SCC OnLine Del 6755]

C.S. (OS) 46/2019; decided on 29.01.2019

Interference by domestic courts in arbitration proceedings commenced under BIT is permissible only in compelling circumstances

Plaintiff and Government of Republic of Mauritius entered into an agreement for the Promotion and Protection of Investments (hereinafter called BIT). Unified Access Services Licenses awarded to an Indian Company by Plaintiff were subsequently cancelled by the Supreme Court of India in *Centre for Public Interest litigation v. Union of India (2012) 3 SCC 1*. Subsequently, Defendant no.1, a Mauritius based Company acquired substantial interest in the said Indian Company. Defendant no.1 invoked Arbitration, seeking restitution against the loss suffered due to cancellation of licenses, alleging violation of BIT by the Plaintiff. An Arbitral Tribunal was constituted under the BIT as per the UNCITRAL Rules. Plaintiff filed a suit in Delhi High Court to restrain the Defendant no.1 from taking recourse to arbitral proceedings under the BIT Agreement alleging that Defendant no.1 was primarily controlled by Indian citizens and the judgment of the Supreme Court did not amount to expropriation. An application under Order XXXIX Rule 1 and 2 CPC was filed in the said suit by the Plaintiff, seeking an anti-arbitration injunction against the arbitral proceedings already initiated under the aegis of the Permanent Court of Arbitration. While considering the application, the Court noted that "*Interference by domestic courts in arbitration proceedings that may be commenced under BITs is permissible but only in 'compelling circumstances', in rare cases'. Courts are hesitant to interfere in the arbitral process once the Tribunal is constituted and is seized of the dispute"*. The Court relied upon the judgment of *Union of India v. Vodafone group 2018 SCC OnLine Del 8842* wherein it was held that *"arbitration proceedings under BITs are not governed by the Arbitration and Conciliation Act, 1996 as they are not commercial arbitrations."* The Court observed that the *"Plaintiff is not estopped from invoking the jurisdiction of this Court either by acquiescence or lack of jurisdiction."* The Court further noted that the Tribunal was governed by principle of *kompetenz-kompetenz* by virtue of Article 21 of UNCITRAL Rules. The Court held that the grounds raised by the Plaintiff to seek anti-arbitration injunction were within the domain of adjudication by Arbitral Tribunal and thus, it was not for the Court to adjudicate on those issues. The Court further noted that the proceedings initiated in the Court *"cannot be termed as being oppressive, vexatious or an abuse of process at this premature stage"*. The Court dismissed the application under Order XXXIX Rule 1 and 2 CPC seeking anti-arbitration injunction under the BIT.

M/s Cinevistaas Ltd. (Petitioner) v. M/s Prasar Bharti (Respondent) [2019 SCC OnLine Del 7071]

O.M.P. (COMM.) 31/2017; decided on 12.02.2019

Rejection of additional/amended Claims by Tribunal constitutes "interlocutory judgment" and can be challenged under Section 34 of the Arbitration and Conciliation Act, 1996

A Petition under Section 34 of the Arbitration and Conciliation Act, 1996, challenging an Order passed by the Arbitral Tribunal was under consideration before the Delhi High Court. The impugned order of the Tribunal had rejected the prayer of Claimant-Petitioner seeking amendment of Statement of Claim filed during the arbitration proceedings. The Petitioner sought to correct errors in the quantification and relevant details in two of the claims in the application. The Court considered the nature of amendments sought by the Petitioner and noted that the additional/amended claims sought to be raised by way of Petition under Section 34, were already contained as part of the Notice invoking arbitration as well as, in the petition under Section 11 filed for Appointment of Arbitrator and thus, the claims were not time barred by limitation. The Court also considered that the rejection of proposed amendments implied final adjudication concerning the newly claimed amounts and thus, constituted *"interlocutory judgment"*, as that involved rejection of a substantive claim of Petitioner. The Court took support of the test laid down in *Shah Babulal Khimji v. Jayaben D. Kania & Anr. (1981) 4 SCC 8* and *Indian Farmers Fertilizer Co-Operative Limited v. Bhadra Products, 2018 (1) Arb. LR 271 (SC)* and directed the Arbitral Tribunal to take the amended claim petition on record for its adjudication in accordance with law.

Trammo AG (Decree Holder) v. MMTC Ltd. (Judgment Debtor) [2019 SCC OnLine Del 7337]

Ex.P. No. 164/2015; decided on 27.02.2019

The primary issue in this Execution Petition was to decide the reference date for applicability and calculation of the foreign exchange rate with respect to the sum awarded in the Arbitral Award. The Execution Petition was filed pursuant to dismissal of a petition under Section 34 of the Arbitration and Conciliation Act, 1996. The judgment rendered in the petition under Section 34 was appealed before the Division Bench of the Delhi High Court, which also met the same fate. A Special Leave Petition followed by a Review Petition were preferred before the Supreme Court, both of which were dismissed. The Arbitral Award, thus, achieved finality and became the subject matter for enforceability in the Execution Petition. The Executing Court squarely relied on the judgment of Supreme Court in *Forasol v. Oil and Natural Gas Commission 1984 (supp.) SCC 263* wherein the Supreme Court enumerated various reference dates, which could be considered as

The date of Award determines the foreign exchange rate for enforceability of the Arbitral Award

the *proper date* for fixing the rate of exchange and held that "*in case of an award which directs the payment of sum in foreign currency the proper date for conversion of foreign currency would be the date of the award.*" The Court also noted the distinction between the relevant enforcement provisions of the English Arbitration Act, 1950 and the Indian Arbitration Act, 1940, thereby rejecting the applicability of ruling in *Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc., (1973) 3 All ER 498* in the context. The Court further observed that the legal principles laid down in *Forasol v. Oil and Natural Gas Commission* have also been followed in *Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644, Meenakshi Saxena v. ECGC Ltd. (2018) 7 SCC 479 and in Royal Construction Company Pvt. Ltd. v. National Projects Construction, EFA(OS) 19/2017.* The Court ruled that the Arbitral Award ought to prescribe the rate of conversion but in case it is not given, the Court has to determine the rate of conversion although the Arbitral Award would still remain valid. The Court held that *"it is an essential good practice for awards to specify the rate of conversion applicable, unless there are extenuating circumstances. Both the parties would then be aware of their respective liabilities or entitlements and the same would be crystallized on that date. A party which chooses to challenge the award would be aware of the risks fraught in the said challenge and the successful party in compensated by means of interest, if awarded."*

Samyak Projects (P) Ltd. (Appellant) v. Ansal Housing & Construction Ltd. (Respondent) [2019 SCC OnLine Del 7067]

FAO (OS) 33/2019; decided on 13.02.2019

Arbitration Clause contained in an agreement cannot survive if parties cancel the agreement

The parties entered into a Memorandum of Understanding (MoU), which was subsequently cancelled by a Deed of Cancellation. MoU contained an Arbitration Agreement. Upon breach of terms of Deed of Cancellation, a Summary Suit for Recovery of money was filed by the Respondent before a Single Judge of Delhi High Court. In response, an application under Section 8 of the Arbitration and Conciliation Act, 1996 was filed by the Appellant. The issue adjudicated by a Single Judge was whether Arbitration Clause as contained in MoU survives with the Deed of Cancellation as well. The observation of the Single Judge that *"the facts and circumstances of the present case thus do not make out a case of survival of the arbitration clause in the MoU"* was challenged before a Division Bench. The Division Bench relied upon the decision of the Supreme Court in *Magma Leasing & Finance Ltd. v. Potluri Madhavilata & Anr. (2009)10SCC103* which, in turn, referred to the judgment of the House of Lords in *Haymen v. Darwins Ltd., [1942 AC 356]* and also to observations in *Union of India v. Kishori Lal & Bros. AIR 1959 SC 1362*. The Division Bench also took support of decision of Division Bench in *Young Achievers v. IMS Learning Resources Pvt. Ltd. (2012) 191 DLT 378(DB)* which was upheld by the Supreme Court. The Division Bench upheld the decision of the Single Judge with the observation that *"the principle laid down is that if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it."* and that "*where a contract containing an arbitration clause is substituted by another clause, the arbitration clause perishes with the original contract unless there is anything in the new contract to show that the parties intended the arbitration clause in the original contract to survive."*

Damont Developers Pvt. Ltd. (Petitioner) v. BRYS Hotels Pvt. Ltd. (Respondent) [2019 SCC Online 7478]

ARB.P. 837/2018; decided on 07.03.2019

Arbitration Agreement contained in an unregistered but compulsorily registerable document can be acted upon

A Petition was filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator, in terms of the arbitration agreement between the parties, as contained in Clause 10(e) of the Memorandum of Understanding (MoU). The validity of arbitration agreement became the bone of contention between the parties. It was contended by the Respondent that the MoU was a compulsorily registerable document, which was neither registered nor stamped and thus, could not be acted upon. The Court observed that Section 11(6A) requires the Court to confine itself only to the existence of an Arbitration Agreement. The Court further relied upon the Judgment of the Supreme Court in *SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd. (2011) 14 SCC 66* and *Duro Felguera, S.A. v. Gannagavaram Port Ltd. (2017) 9 SCC 729* to hold that *"An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the proviso to Section 49 of the Registration Act read with Section 16(1)(a) of the Act, an arbitration agreement in an unregistered but compulsorily registerable document can be acted upon and enforced for the purpose of dispute resolution by arbitration."* The Court also considered the ruling of Supreme Court in *Sandeep Soni v. Sanjay Roy (2018) SCC OnLine Del 11169* to hold that *"The petitioner has validly invoked the arbitration vide notice dated 27th September, 2018. Under Section 11(6A) of the Arbitration and Conciliation Act, this Court has to confine only to the existence of an arbitration agreement and all other objections including the objection as to insufficient stamping have to be considered by the arbitrator."* The Court allowed the Petition and appointed a Sole Arbitrator to adjudicate disputes between the parties.

Himachal Sorang Power Pvt. Ltd. & Anr. (Plaintiffs) V. NCC Infrastructure Holdings Ltd. (Defendant) [2019 SCC OnLine Del 7575]

CS (COMM) 12/2019; decided on 13.03.2019

An Interlocutory Application was filed by the Plaintiffs, praying that an injunction be issued to resist second Arbitration proceedings commenced by the Defendant. The Arbitration action was initiated to claim incentive payments arising out of Securities Purchase Agreement (SPA) executed between the parties, which was also the subject matter of the earlier arbitration proceedings. It was argued that all the disputes between the parties have already been adjudicated by virtue of an earlier Arbitration Award and thus, barred by principles of *res judicata, waiver and abandonment*. It was also submitted that the Arbitration Agreement had since become *"inoperative or incapable of being performed"*. The Court held that the Claim is not hit by the doctrine of *res judicata* as the issue pertaining to incentive payment was not determined by the first Arbitral Tribunal. The Court also rejected the plea that the Respondents were estopped from raising the Claim of incentive payments in the second Arbitration Proceedings. The Court observed that "*the width and amplitude available to the Court in an anti-arbitration agreement is much narrower as against where an anti-suit injunction is sought in a matter before it.*" The Court referred to the judgment of the High Court of Justice Queen's Bench Division Commercial Court in the matter

Court encapsulates parameters for grant of anti-arbitration injunctions

of *Nomihold Securities Inc and Mobile Telesystems Finance SA, [2012] EWHC 130 (Comm.)* and *Amtrust Europe Limited v. Trust Risk Group SpA, [2015] EWHC 1927 (Comm.)*. The Court held that the applicability of ground of *constructive res judicata* could not be decided, as that involved mixed questions of fact and law, which rather required trial. It remained disinclined to accept the pleas of *waiver or abandonment*. The Court also rejected the submission that the Arbitration Agreement which subsisted between the parties had become inoperative or incapable of being performed or had been rendered null and void. It held that the second Arbitral Tribunal could well adjudicate upon the legal pleas raised, thus, declined the grant of anti-arbitration injunction. The Court also encapsulated the following parameters for grant of anti-arbitration injunctions:

i) The principles governing anti-suit injunction are not identical to those that govern an anti-arbitration injunction.

ii) Court's are slow in granting an anti-arbitration injunction unless it comes to the conclusion that the proceeding initiated is vexatious and/ or oppressive.

iii) The Court which has supervisory jurisdiction or even personal jurisdiction over parties has the power to disallow commencement of fresh proceedings on the ground of res judicata or constructive res judicata. If persuaded to do so the Court could hold such proceeding to be vexatious and/ or oppressive. This bar could obtain in respect of an issue of law or fact or even a mixed question of law and fact.

iv) The fact that in the assessment of the Court a trial would be required would be a factor which would weigh against grant of anti-arbitration injunction.

v) The aggrieved should be encouraged to approach either the Arbitral Tribunal or the Court which has the supervisory jurisdiction in the matter. An endeavour should be made to support and aid arbitration rather than allow parties to move away from the chosen adjudicatory process.

vi) The arbitral tribunal could adopt a procedure to deal with re-arbitration complaint (depending on the rules or procedure which govern the proceeding) as a preliminary issue.

The Interlocutory Application filed by the plaintiff was accordingly dismissed. The Appeal challenging the said order was also dismissed by a Division Bench of the Delhi High Court.

Daiichi Sankyo Company Limited (Decree Holder) v. Malvinder Mohan Singh & Ors. (Judgment Debtors) [2019 SCC OnLine Del 7836]

OMP (EFA) (COMM) No. 6/2016; Decided on 29.03.2019

The issue pertained to exemption of periodical payment received by Judgment Debtor no.1, from attachment and sale in execution of a Foreign Arbitral Award, within the ambit of Clause (g) of Proviso to Section 60(1) of the Code of Civil Procedure, 1908. Judgment Debtor no.1 entered into an Employment Agreement with Ranbaxy Laboratory Ltd.(RLL) while being employed with it. He resigned as the Managing Director and CEO of RLL in the year 2009. Proviso to Section 60(1) CPC enlists particulars of property which are not liable to attachment and sale in execution of decree. The Court applied the *Doctrine of Dynamic Interpretation or Updating Construction* to the expression *"of any other employer"* to hold that the protection from attachment granted under Clause (g) is extendable to the employees of private employers as well. Having held that,

Periodical payments not having attributes of pension, not exempted from attachment and Sale in Execution of Arbitral Award

the Court observed that the employer extended the retiral benefits to Judgment Debtor no.1 in terms of Employment Agreement, relaxing the eligibility criteria otherwise applicable in terms of Personnel Policy of RLL, undertaking to pass necessary resolutions and take other requisite actions. Judgment Debtor no.1, however, did not place on record any such resolution of documentary arrangement for giving effect to clause 7.1 D of the Employment Agreement. The Court also noted that the Employment Agreement made an exception to the pension scheme in case of Judgment Debtor no.1, which was otherwise applicable to the employees of RLL, thus, the periodical amount received did not have the attributes of pension. The Court also took note of the Explanation 1 to Section 60(1) of the Code to state that the exemption from attachment is available only till the pension is received by an Employee. To fortify this view, the Court also relied on the Division Bench of *Sind Chief Court* in the matter of *Hassomal Sagumal v. Diaromal Laloomal AIR 1942 Sind 19*. The plea raised by the Judgment Debtor no.1 was, accordingly, rejected holding that the periodical amount received by him from RLL in his bank account do not have attributes of pension and was not exempt from attachment, once actually received by Judgment Debtor No.1 in his bank account.

Mabuhay Holdings Corporation (Petitioner) v. Sembcorp Logistics Limited (Respondent)

Supreme Court of Philippines; decided on 05.12.2018

Disputes between the parties concerning a Shareholders' Agreement were adjudicated by an Arbitral Tribunal in a Singapore seated arbitration under the New York Convention. The Arbitral Award was passed in favour of the Respondent with a direction to the Petitioner to pay certain sum along with interest to the Respondent in terms of the Arbitral Award. An application for enforcement of Award was filed by the Respondent before the Regional Trial Court (RTC) in Philippines which was objected by the Petitioner on the grounds that *(i) the award deals with a conflict not falling within the terms of the submissions to arbitration; (ii) the composition of the arbitral authority was not in accordance with the agreement of the parties; and (iii) recognition or enforcement of the award would be contrary to the public policy of the Philippines*. The RCT accepted the objections and dismissed the enforcement holding that the obligation is converted into an intra-corporate dispute on account of merger of the parties, hence, it is excluded from arbitration as per the arbitration agreement. The said decision was challenged before the Court of Appeals by the Respondent. The Court of Appeals reversed the ruling of the RTC holding that the contrary findings of RTC constituted an attack on the merits of the Final Award. The decision of Court of Appeals was assailed before the Supreme Court. The Supreme Court delved into the issues raised by the Petitioner and gave its findings thereon.

> Narrow and restrictive approach adopted in defining public policy as a ground for challenging the Award

The Court rejected the ground that the composition of Arbitral Tribunal was not in terms of the agreement between the parties which stipulated that the Arbitrator must have *expertise in the matter at issue*. It noted that there is no specification about exclusion of Foreign Arbitrators on account of lack of knowledge of the substantive law of the contract. The Court held that the Tribunal had already opined about the dispute, not being an intra-corporate controversy and thus, was not excluded from the scope of arbitrable disputes. It found no factual basis to disturb the determination of facts by the Arbitral Tribunal.

Regarding the public policy exception the Court noted that it is *"a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundaments on which it is based."* The Court adopted a restrictive approach and rejected the arguments of the Petitioner that the Foreign Arbitral Award, incompatible with the domestic laws, cannot be enforced. It observed that *"Mere errors in the interpretations of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground. The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against Our State's fundamental tenets of justice and morality, or would blatantly be injurious to the public, or the interests of the society."* The Petition was accordingly dismissed.

Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. [Claimants] v. Romania [Respondent] (ICSID Case No. ARB/15/31)

International Centre for Settlement of Investment Disputes; order dated 07.12.2018

Arbitral Tribunal partly allowed intervention application of third party in investment disputes

Certain investments in Mining Projects were made by Canadian Companies, through their Romanian subsidiary, the Claimants herein. Arbitration was invoked by the Claimants against the Respondent concerning violations of *Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the "Canada-Romania BIT" or the "BIT")* and the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the "UK-Romania BIT")*. During the pendency of Arbitration Proceedings, an Application was filed by three Non-Governmental Organizations (NGOs) with the prayer to allow them to *submit their Submissions, and to permit them to attend and participate in any oral hearing held in this proceeding and respond to any questions of the Tribunal*. The Applicants cited reasons primarily concerning hazardous impact of the mining project on the local and national eco-system. Claimants opposed the application while the Respondent supported the same. The application had to be decided as per conditions mentioned in Part III(4), Annex C of the BIT and Rule 37(2) of the ICSID Arbitration Rules. The application was assessed by the Tribunal on the following conditions, in terms of the above cited Rules:-

(i) *Assisting the Tribunal* – the Tribunal accepted that the Applicants have particular knowledge of the factual issues involved but may not offer expertise on the legal issues involved. The Tribunal also considered that the testimonies sought to be admitted trough submissions would not be evaluated as "witness statement".

(ii) *Addressing a matter within the scope of the dispute* – the Tribunal considered that the legal issues involved in the dispute were already addressed by the concerned parties.

(iii) *Significant interest in the arbitration* – the Tribunal opined that the Applicants have not proven *"more than 'a general' interest in the proceeding"*

(iv) *The Public interest* – the tribunal accepted the existence of "a public interest" in the subject matter of the arbitration.

The Arbitral Tribunal, accordingly, partly granted the application permitting the Applicants to file submissions relating to *factual issues* within their specific knowledge, thereby excluding the legal matters and reference or reliance on any testimony. The Tribunal considered that the restrictions imposed on the Applicants would ensure that neither party is *burdened or unfairly prejudiced*. The Tribunal also considered that the non-disputing parties may only observe the hearing without any right of participation.

Sonact Group Limited (Claimant) v. Premuda SPA (Defendant) – [2018] EWHC 3820 (Comm.)

High Court of Justice, Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court; decided on 12.12.2018

Arbitration Clause contained in the Principal Agreement also applies to settlement under the agreement

The parties entered into a charterparty agreement which included an Arbitration Clause. Demurrage and heating costs, which were claimed by the Defendant-Owner, when the dispute arose. The costs claimed were negotiated between the parties by an exchange of e-mails, in which the Claimant-Charterer agreed to pay the settled amount to the Defendant. The Claimant, however, failed to make the payment of the settled amount prompting Defendant to invoke the arbitration. The jurisdiction of the Arbitral Tribunal was challenged by Claimant on the ground that the Arbitrators lacked the *substantive jurisdiction to determine the claim for the settlement sum*. Another ground taken was that the appointment of three Arbitrators was under the charterparty agreement, which is distinct from settlement agreement that did not contain any Arbitration Clause. The Court agreed with the views of the Arbitrators that the parties very much intended that the English law and the Arbitration Clause contained in the charterparty agreement, continue to apply in the event of non-payment of the settlement amount. The Court also endorsed the view that the failure to pay an agreed sum is also rather a dispute in connection with the transaction in reference between the parties and thus, arbitrable by the Arbitrators appointed as per the underlying main agreement. The Application challenging the jurisdiction of the Arbitral Tribunal over the settlement agreement was, thus, accordingly dismissed.

Amy Skuse (Plaintiff) v. Pfizer, INC. & Ors. (Defendants) – 457 N.J. Super. 539 (2019)

Superior Court of New Jersey, Appellate Division; decided on 16.01.2019

The Plaintiff filed a complaint against the Defendant No.1, her former employer in the Law Division. The Plaintiff, a practicing Buddhist, alleged religious discrimination as company policy required her to receive a yellow fever vaccine and her religious beliefs did not allow her to receive injections containing animal protein. The Training Module, e-mailed by the Defendant to its employees, contained description of its mandatory arbitration policy. The Module provided that if an employee did not acknowledge the policy with click of an electric button and continue to work for the Company for more than 60 days, then that employee was deemed to be bound by the arbitration policy. The employees were not required to sign the conveying agreement nor were they asked to memorialize their express agreement to the policy. An ultimatum was given to the plaintiff to receive the vaccination within 30 days or else she would be terminated. Various requests of the plaintiff for an accommodation from the vaccination were declined by the defendant and finally her employment was terminated. A lawsuit was filed by the Plaintiff challenging her termination. In response, defendants filed a motion seeking to dismiss the lawsuit and compel Arbitration. In the lawsuit, the Trial Court observed that continued employment of plaintiff for over 60 days, implied her intent to be bound by the agreement. The complaint of the plaintiff was dismissed and the she was directed to proceed with arbitration. The decision of Trial Court was appealed against before the Superior Court.

Superior Court reverses judgment of Trial Court compelling arbitration in a lawsuit filed on ground of religious discrimination

The key issue in the appeal was whether a valid Arbitration Agreement was entered between the parties. The Court recognized the legislative policy preferring arbitration as a Dispute Resolution Mechanism. The Court further acknowledged that an Arbitration Agreement also need be subjected to the contract law principles, for it to become legally enforceable. The Court noted that mutual assent to the material terms of the Arbitration Agreement were imperative to compel the parties for arbitration by the Court. The Court also noted that any contractual arbitration implicit relinquishment of an important right of a party to litigate the subject claim in a lawsuit. The Court laid reliance on the principles laid down in *Leodori v. CIGNA Corp., 175 N.J. 293, 303, 814 A.2d 1098 (2003)* in the year 2003 wherein the court ruled *"an arbitration provision cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement or it"*. The Court further instructed in the said matter that *"a waiver-of-rights provision must reflect that an employee has agreed clearly and unambiguously to arbitrate the disputed claim"* which may "*result only from an explicit affirmative agreement that unmistakably reflects the employee's assent."* The Court applied these settled legal principles to the facts of the case. The Court noted that the defendant has used an "*electronically transmitted training module"* to communicate and to get the assent to its non-negotiable mandatory Arbitration Policy. The Court observed that the entire process is called *"a training activity"* and also noticed the absence of word *"agree" or "agreement"* in the final *clickbox* emphasizing that such vital communications, to reflect the mutuality of an agreement, cannot be left to be so loosely worded. The Court also noted that the 60 days provision was rather an attempt by the Defendant to bypass the settled legal requirement and could not be accepted. The Court concluded that *wording and method of **Pfizer's** training module is inadequate to substantiate an employee's knowing and unmistakable assent to arbitrate and waive his or her rights of access to the courts. The trial court's decision validating the company's "acknowledgment" process is accordingly reversed.*

[Everest Estate LLC and others v. Russian Federation (Case No. 796/165/2018) – Ukrainian Supreme Court]*; decided on 25.01.2019

Civil Appeal No. 1539 of 2019; decided on 07.02.2019

Ukrainian Supreme Court allowed enforcement of Foreign Award under Ukraine-Russia BIT

A number of Companies owned by Ukrainian nationals launched Investor State Arbitration against Russian Federation under the *Ukraine-Russia Bilateral Investment Treaty (BIT)* with Institute of the Chamber of Commerce in Stockholm. Arbitral Tribunal ruled Russia to be in breach of BIT. The Ukrainian Claimants applied for enforcement of Arbitral Award with the Court of Appeal in Kyiv while Russia sought to set-aside the Arbitral Award. The Petition for enforcement of Award under the New York Convention was allowed by the Court of Appeal which was challenged before the Ukrainian Supreme Court. The three major arguments as raised by Russian Federation were: (i) Ukrainian judiciary failed to comply with the notification requirements under The Hague Convention and thus, *Russia could not be considered as having being properly informed of the proceedings in the Ukrainian Courts*. (ii) Russia and its assets in Ukraine are covered by Sovereign Immunity *due to customary international law as codified in Article 5 of the State Immunity Convention* (iii) Ukrainian Banks could not be considered property of Russia as they were only direct majority shareholders in those banks. The Appeals were dismissed by the Supreme Court ruling that there were no grounds to refuse recognition and enforcement of Arbitral award in Ukraine. The Court relied on *Article V of Kiev Agreement on Settling Disputes Related to Commercial Activities* to conclude that a simple procedure for notification by post would suffice to meet the obligation of due notification. The Court further concluded that the Sovereign Immunity is not an obligation but a right which would be waived by the State, in reference with Article 79 of LUIP and Article 19 of the State Immunity Convention. The Court further noted that Russia rather consented to waive its Sovereign Immunity rights, by agreeing to arbitrate. The Supreme Court also held that it had jurisdiction to consider the application for recognition and enforcement of Foreign Arbitral Award against a debtor who was neither physically present in Ukraine nor its assets located in Ukraine. The Court observed that *it was enough to show that the debtor has some assets in Ukraine rather than any assets which could be collected*. The Court held that the arbitration agreement incorporated in Article 9 of the *Ukraine-Russia BIT was valid*. The Court ruled that Russia was liable with all its properties for its obligations. The Court also lifted the "*Corporate Veil*" and found after an analysis of the Corporate Structure of the Ukrainian Banks that those were directly or indirectly wholly owned by the Russian Banks. The Court also rejected the public policy ground for denying enforcement of the Award while deciding the issue, noting that the public policy of the enforcing country should be applied in such a case. The petition seeking enforcement of Foreign Arbitral Award by Ukrainian Companies against Russian Federation was, thus, allowed.

* Source: Article published on 19/02/2019 by Thomson Reuters on their Official Website as the judgment is available only in Ukrainian

Aqaba Container Terminal (PVT) [Claimant] Co. v. Soletanche Bachy France SAS [Defendant] – [2019] EWHC 471 (Comm.)

High Court of Justice, Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court; decided on 01.03.2019

The Claimant, a Jordanian Company entered into a "Construction Contract" with the Defendant, a French Company to carry out certain works. The Arbitration Agreement between the parties provided for resolution of disputes by three Arbitrators under the Rules of International Chambers of Commerce with London as the place of arbitration. Arbitration was invoked by the Defendant when the Claimant terminated the Construction Contract. The Arbitral Tribunal pronounced the Award in favour of the Claimant holding that the Contract was validly terminated by the Claimant and directed the Defendant to pay damages and costs. After passing of the Award, the Defendant commenced proceedings against the Claimant before the Economic Chamber at the Amman Court of First Instance in Jordan raising *"the plea of unconstitutionality of Article (17) of ASEZ Law"*, which would render the Concession Agreement invalid and eventually anull the Construction Contract between the parties. The Defendant chose not to make any reference of the Arbitral Award in the Jordanian proceedings. The Claimant, in response, filed the proceedings in London with the prayer to restrain the defendant from obtaining a declaration as to invalidation of the Construction Contract and to require the Defendant to take all steps to discontinue the process for such Declaration. The Court noted that the question of nullity of Construction Contract, as a consequence of invalidity of Article (17), challenged in the Jordanian proceedings is arbitable. The Court also noted that the defendant itself entered into the arbitration agreement and thus, in a manner contracted not to file a civil claim. The Court disagreed with the argument raised by the Defendant that he would be prevented to advance his constitutional right noting that *"if the result of agreeing not to bring a civil claim to invalidate the contract is that it is not possible to reach the benches of a constitutional court then that is the result of the agreement that Soletanche made, not of the injunction."* The Court exercised its discretionary powers to grant an anti-suit injunction against the Defendant.

England High Court grants permanent anti-suit injunction against proceedings in Jordan

Lamps Plus, Inc., ET AL. (Petitioner) v. Varela (Respondent) [2019 WL 1780275]

Supreme Court of the United States; decided on 24.04.2019

The Petitioner Company was sued by its employee for compromising his tax details to a hacker, who impersonated himself as another employee of the Petitioner. Tax information of 1300 employees of Petitioner was disclosed. A class arbitration was thus, requested and authorized on behalf of Respondent by Federal District Courts in California. United States Court of Appeals for the Ninth Circuit affirmed the decision which was again challenged before the Supreme Court of United States. The opinion of the Court was delivered by Chief Justice. Drawing support from *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U. S. 662 and Epic Systems Corp. v. Lewis, 584U. S. (2018),* the Court noted that arbitration on a class wide basis cannot be compelled when the agreement is silent to that effect. The Court noted that the Federal Arbitration Act had a foundational principle that "*Arbitration is strictly a matter of concept,"* thus, the basic task for the Arbitrators and Courts is only to give effect to intent of the parties. The Court also recognized the difference between individual arbitration and class arbitration noting that class arbitration undermines usually the benefits of private dispute resolution, making the arbitral process longer, formal and costly. Thus, Courts may be slower to infer the concept of class arbitration incase it is not explicit in the arbitration agreement. The Court ruled that the silence in the agreement, as held in the case of *Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp., 559 U. S. 662 (2010),* has been put at par with ambiguity in the Arbitration Agreement to infer that the parties agreed for class arbitration. The Court rejected the applicability of doctrine known as *contra proferentem,* as a default rule based on *public policy considerations* which lays down that *ambiguity in a contract should be construed against the drafter*. It held that this doctrine can be used only as a last resort and held it to be wholly inconsistent with the principle of consent valued dearly in arbitration cases. The Court thus, ruled that *"Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis. The doctrine of contra proferentem cannot substitute for the requisite affirmative "contractual basis for concluding that the part[ies] agreed to [class arbitration]."* The judgment of the Court of Appeals for the Ninth Circuit was accordingly reversed and the case was remanded back for further proceedings.

> Class Arbitration cannot be inferred from an Arbitration Agreement unless explicit

NEWS & UPDATES

AUSTRALIA AND HONG KONG SIGN FREE TRADE AGREEMENT AND INVESTMENT AGREEMENT

Australia and Hong Kong signed the Free Trade Agreement and Investment Agreement on 26th March, 2019. It aims at creating more business opportunities and enhancing trade and investment flows between the two markets. It is significant to note that the Investment Protection Agreement prohibit claims with respect to certain aspects of Public Healthcare System, taxation and tobacco control measures. The Agreement includes a separate chapter for settlement of Investor-State disputes allowing investors to submit the Claims under the UNCITRAL Arbitration Rules or any other institution to which the parties may agree.

DATA PROTECTION IN INTERNATIONAL ARBITRATION

In order to combat one of the most challenging issues of data protection in International Arbitration, the International Council for Commercial Arbitration (ICCA) and International Bar Association (IBA) have jointly established a Task Force on Data Protection. The Task Force shall receive inputs from various Arbitral Institutions to produce a guide which would identify the relevant aspects of data protection, the regulations applicable and the obligations to be fulfilled there under, comprehensively guiding on the impact of data protection principles on the International Arbitration Proceedings.

HONG KONG SAR GOVERNMENT AND CHINA'S SUPREME PEOPLE'S COURT SIGN MUTUAL ASSISTANCE ARRANGEMENT FOR INTERIM RELIEF PROTECTION

Under the arrangement, the parties have an option to choose to arbitrate in Hong Kong with the assurance of possibility of applying for interim relief in Mainland Chinese Courts. Even prior to the arrangement, Hong Kong Courts had the competence to grant interim relief in arbitration seated outside Hong Kong. The arrangement does not extend to 'ad hoc' arbitrations and applies only to institutional arbitrations established or headquartered in Hong Kong Special Administrative Region. The arrangement may also apply retrospectively to the arbitrations commenced before the date on which the arrangement comes into force. The arrangement, however, has not yet come into force.

KEY AMENDMENTS MADE IN NEW ZEALAND ARBITRATION ACT, 1996

Certain key amendments have been made to the New Zealand Arbitration Act, 1996 with the objective to enhance the attractiveness of New Zealand as an arbitral hub. The intent of the Parliament behind making amendments has been to impart finality and cost effectiveness to the determination of disputes by arbitration. A new provision has been inserted providing that failure of the parties to challenge the jurisdictional decision of the arbitral tribunal *in a timely manner* would operate as a waiver of right of party to later object to the decision of the Tribunal. Further, the Arbitral Awards may now be set aside only by way of an application referred to the High Court in certain circumstances. The mechanism of appointment of Arbitrator, commonly known as *quick draw procedure,* has been done away with. A party, as per the new amendment, may now request the Arbitrators and Mediators Institute of New Zealand to take steps for appointment of the Arbitrator in case parties fail to do so.

RUSSIA AMENDS ITS EXISTING FEDERAL LAW ON ARBITRATION

Russia recently introduced several amendments to the existing Federal Law *"On Arbitration (Arbitration Proceedings) in the Russian Federation"* to fill the loopholes identified upon the implementation of 2016 Russian Arbitration Reforms. The amendment has introduced several changes to the "Permanent Arbitration Institution (PAI)" application process. The accredited PAI Institutes are better placed to administer services qua international disputes and certain corporate disputes. The Hong Kong International Arbitration Centre has already received formal PAI approval, becoming the first foreign arbitration institution operating in Russia, to have achieved so.

STAY ON APPOINTMENT OF CUSTODIAN OF NEW DELHI INTERNATIONAL ARBITRATION CENTRE VACATED

Allowing a Review Petition, a Division Bench of Delhi High Court has vacated the stay on an order issued by the Deputy Secretary, Government of India, appointing a Custodian of the undertakings of the International Centre for Alternative dispute Resolution (ICADR). The authorities were permitted to take action in accordance with the aforesaid order subject to the final decision of the Writ Petition. Placing reliance on the judgment of Supreme Court in the case of *Krishna Kumar Singh & Ors. v. State of Bihar & Ors. [(2017) 3 SCC 1],* the Court observed that "*we are of the considered view that now in the light of these materials that have come on record, it can be said that the satisfaction arrived at for promulgating the ordinance are based on certain relevant material and, therefore, prima facie judicial review of the order may be beyond the jurisdiction of the Court.*" The Court directed that all the pending arbitration cases with ICADR would be permitted to be carried out in the same manner as they were being done prior to the issuance of the Ordinance.

JAPAN REQUESTS FOR ARBITRATION TO SOLVE COMPENSATION ISSUES

Japan sought to form a three member Arbitration Board to solve disputes over compensation issues involving Korean Laborers having been made to work during Japan's colonial rule over the Korean Peninsula, between 1910 and 1945. Japan alleges violation of 1965 Bilateral Pact by South Korea which declared that the compensation issues had been settled finally. Government of South Korea has yet not acceded to the request, citing independence of judiciary considering that the Supreme Court of South Korea ordered Japanese firms to pay compensation to the South Korean Plaintiffs including seizure of assets of Japanese firms in South Korean Peninsula.

SURPRISE BILLING LEGISLATION PROPOSES TO USE ARBITRATION AS A BINDING APPROACH

Surprise Billing Legislation has been passed in the states of Washington and Texas which proposed to use Arbitration as a binding approach when insurer and provider cannot settle for a particular price for the services covered under the policy. The basic aim of the legislation is to prevent patients from getting disproportionately billed while receiving medical services from out of network hospitals or being treated by an out of network provider.

DELHI DISTRICT COURT LAUNCHES E-FILING FACILITY FOR ARBITRATION MATTERS

In yet another step towards encompassing the Information Technology in the judicial system, the District Court of Delhi launched an e-filing facility on 24.05.2019. The facility shall however, remain on a test run for some time and is presently limited to arbitration matters only. The facility will help the lawyers and litigants to file their cases online on a new website especially created for the purpose. At present, e-filing of cases will not exempt the filing of hard copies. Special training will also be provided to the lawyers for making the best use of the facility.