DIAC

Delhi International Arbitration Centre

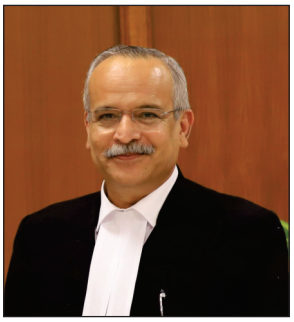
# NEWSLETTER

ISSUE III

IN THIS ISSUE:



## PATRON-IN-CHIEF, DIAC



Hon'ble Mr. Justice Satish Chandra Sharma,
Chief Justice, High Court of Delhi

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Hon'ble Mr. Justice Vibhu Bakhru,
Judge High Court Of Delhi

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Ever since its inception in the year 2009, Delhi International Arbitration Centre has continued to evolve, and has emerged as one of the most preferred Arbitral Institution. The Centre has risen to prominence and has rightfully claimed its position amongst the top Arbitral Institutions in the country, and is also one of the busiest Arbitral Institution in the world. Trust deposed in the Centre finds its strongest articulation in the number of references made to the centre. With ever-increasing arbitrations, the Centre has been strengthening itself from time to time in terms of the infrastructure and human resource. A total number of about 5700 references have been made to the Centre since its inception.

Intensifying its efforts to strengthen its operations as well to to cater the ever growing numbers of arbitrations, the Centre is moving to its new edifice S-Block, Dr. Zakir Hussain Marg, High Court of Delhi, a facility bedecked & equipped with all modern amenities, requisite for hosting seamless arbitration proceedings.

Despite all push backs, crippling lockdowns and cascading delays the Centre had been able to successfully transition it to virtual & hybrid hearings. During the lockdowns in the year 2020 and 2021, a total no. of 2905 virtual hearings (including hybrid hearings) were hosted by the Centre. Serving the arbitration community efficiently & meaningfully has always been the central tenet of Delhi International Arbitration Centre.

DIAC has very recently partnered with National Law University, Delhi, in designing an online diploma course on Law of Arbitration, in its endeavour to contribute towards benefitting the aspirants academically. No stranger to touching new highs, DIAC looks forward for accelerated growth.

DELHI ARBITRATION WEEKEND

# DELHI ARBITRATION WEEKEND, 2023

DIAC is pleased to announce the first-ever edition of Delhi Arbitration Weekend ("DAW"), to be held from 16th to 19th February 2023, at our new edifice i.e., S block, Dr. Zakir Husain Marg New Delhi.

The conference is designed to bring together several experts in Arbitration from around the globe to engage in panel discussions and interactive sessions, focusing on recent trends and concerns. The event will address major developments, and challenges in International and Domestic Arbitration.

DAW endeavors to be a forum for dialogue from the world's leading Arbitration Practitioners, Senior Advocates, International Arbitrators, Managing Partners and key representatives of leading International and Indian firms, Hon'ble Judges of the Supreme Court and High Courts, their views on the issues and developments in the field of International Arbitration.

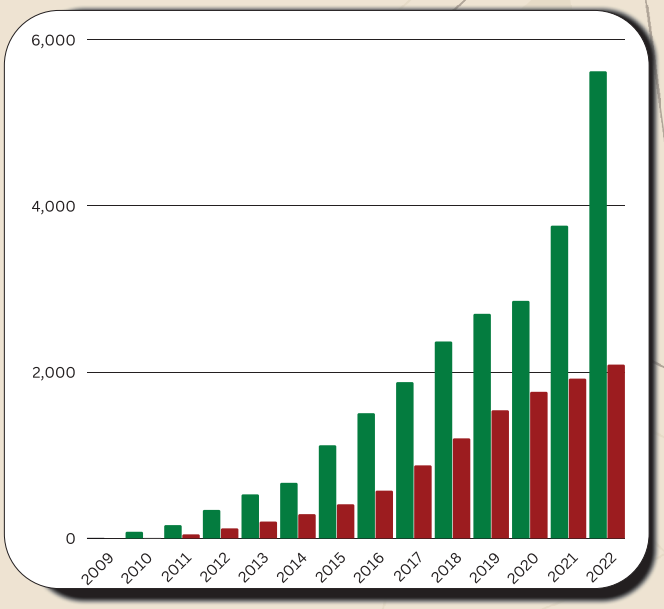
The Conference has been conceptualized to carry forward DIAC's vision to inculcate the globally acknowledged Arbitration Practices and continue constantly evolving as a leading Arbitral Institution of the world for International Commercial Arbitration.

# DIAC CASE STATISTICS AT A GLANCE

## DIAC Case Disposal Report

Progressive Total References

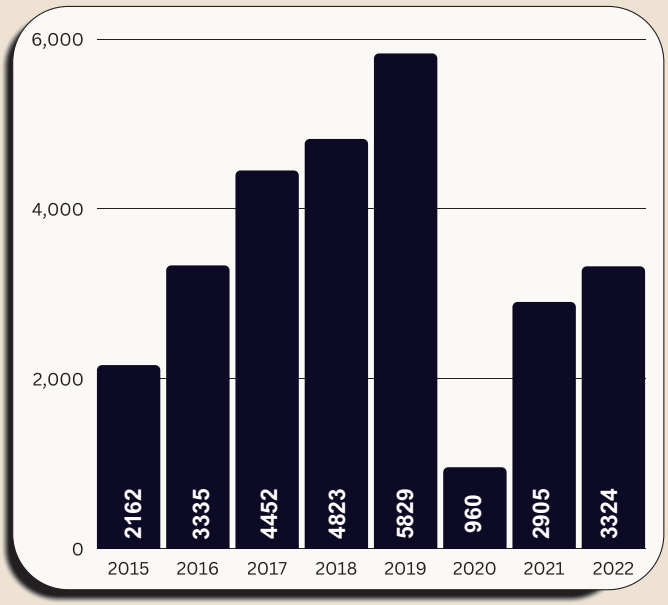
Progressive Total Disposal




**as on till 30.10.2022***

## Case Hearings in DIAC 2009-2022

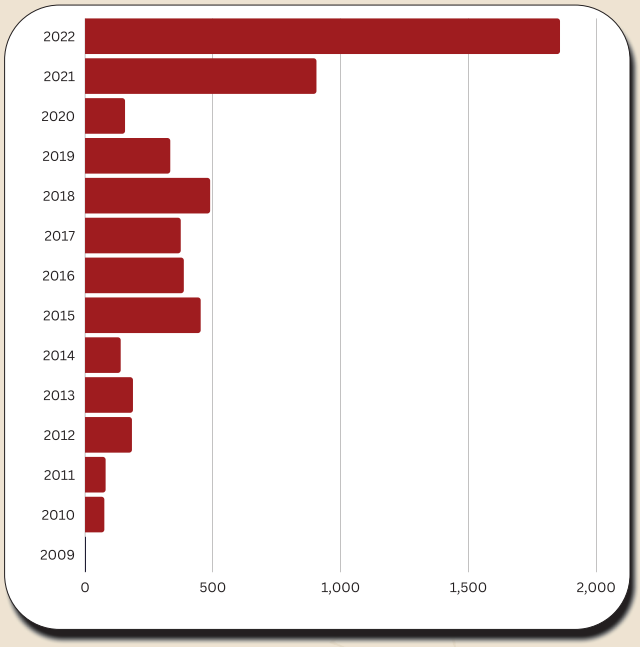
Yearwise Hearings




**as on till 30.11.2022***

## Case References in DIAC 2009-2022

Yearwise References




**as on till 30.10.2022***

# JUDGMENTS BY SUPREME COURT OF INDIA

## Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV. (2022) SCC OnLineSC 1122[1]

*'(Arbitral tribunal cannot unilaterally determine/alter its fees – in the absence of fee determination by the parties, fourth schedule would operate as model fee)*

The Supreme Court considered a batch of five petitions which raised the following divergent issues:

(I) The power of the arbitral tribunal to unilaterally determine or alter the arbitration fee to be paid by the parties;
(ii) Fixation of fee in ad-hoc arbitrations;
(iii) The "sum in dispute" in an arbitration whether refers to the claim and counter-claim separately or cumulatively;
(iv) The ceiling on the maximum fee payable to the arbitral tribunal under the Fourth Schedule of the Arbitration and Conciliation Act, 1996; and
(v) The ceiling is applicable whether to an individual arbitrator or the arbitral tribunal as a whole.

**(I) Arbitration Fees**

The Court deprecated the practice of unilateral determination of fee by the arbitrators, and found it to be violative of the principle of Party Autonomy and the Doctrine of Prohibition of in Rem Suam decisions. The Court noted that as regards fee, the arbitral tribunal and the parties are in a separate contractual relationship which does not form part of the dispute in question. Thus, a decision by the tribunal determining its own fee without being ad idem with the parties would be prohibited as per the said doctrine.

*What if any demand for unreasonable fee is made by the arbitrator?*

If at any stage, the arbitrator demands any unreasonable fee, without consent of the parties, the same would be unenforceable and if the award is withheld, the party would be free to approach the Court under Section 39(2) of the Arbitration and Conciliation Act, 1996, for release of the award. The court, at this stage, can consider the reasonableness of the fee/payment demanded by the tribunal.

**(ii) Ad-hoc Arbitrations**

The Court noted that the fees specified in the Fourth schedule is the model fees and must be resorted to when the parties or the tribunal are unable to reach a consensus. In such circumstances, the Court held, it would be open to the tribunal to charge the fees as stipulated in the Fourth Schedule and it would be binding on all. The fees stipulated in Fourth Schedule can be changed only by mutual consent and not otherwise.

**(iii) Claim and Counter-claim to be assessed separately**

The Court examined the UNCITRAL Model Rules, the scheme of the Arbitration and Conciliation Act, 1996 and the Code of Civil Procedure, 1908 to hold that a claim and counter-claim are two distinct and independent proceedings. There is no dependence of one over the other and even if a claim ceases to survive, the counter-claim may continue to survive as an independent proceeding. Thus, the Court held that for the purpose of deciding the "sum in dispute", the claim and counter-claim have to be assessed separately and the arbitrators would be entitled to charge separate fee for each of them.

**(iv) Highest fee payable under the Fourth Schedule**

The Court examined the discrepancy that arose due to the placement of a comma in the entry at serial No.6 of the Fourth Schedule in the Hindi version of the Arbitration and Conciliation Act, 1996, and the absence thereof in the English version. In short, the English version conveys that the maximum fees payable would be the base amount (Rs. 19,87,500/-) plus the variable amount (i.e. 0.5% of the sum over and above Rs. 20,00,00,000/- subject to a maximum of Rs. 30,00,000/-). The absence of comma signifies that the cap of Rs. 30,00,000/- applies to the variable component only i.e. over and above the base component of Rs. 19,87,500/-. Thus calculated, the maximum fee would be Rs. 19,87,500/- plus 30,00,000/- i.e., Rs. 49,87,500/-.

*Continued on the next page*

[1]Decided on 30.08.2022
[2]"*In rem suam*" decisions refer to decisions taken by an interested party in its own cause.
[3]The doctrine of prohibition of '*In rem suam*'.

The other view, emanating from the Hindi version of the Act, was that the ceiling of Rs. 30,00,000/- would apply on the total amount i.e., base amount plus variable amount. The Court noted that Article 348(1)(b)(ii) of the Constitution gives a clear precedence to the English version of the authoritative texts. However, applying the principles of interpretation, the Court was of the view that a literal construction of the Fourth Schedule would mean that the fee cap of Rs. 30,00,000/- would govern the variable component only however, and the same would be contrary to the legislative intent behind the enactment of the Fourth Schedule, which was meant to prevent the charging of exorbitant fee by the arbitrators. The Court accordingly held that the ceiling of Rs. 30,00,000/- in the entry at serial No.6 of the Fourth Schedule is applicable to the sum of the base amount and variable amount and not just the variable amount.

**(v) Ceiling applicable to individual arbitrator and not to Tribunal as a whole**

The Court also held that the ceiling, as stated above, would be applicable to the individual arbitrator and not to the tribunal as a whole. Thus, if a tribunal is composed of 3 arbitrators, the maximum fee payable to each arbitrator would be Rs. 30,00,000/-.

## Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Ors. (2022) 8 SCC 1[4]

*(Group of Companies Doctrine - maladies in interpretation, applicability and invocation in the context of Indian jurisprudence)*

In this case, the Supreme Court examined whether the foundational principles of party autonomy in Arbitration Law and corporate personality in Company Law have been adequately safeguarded in applying the Group of Companies doctrine, in the Indian context.

In the present case, Cox and Kings (petitioner) entered into a series of agreements with SAP India (respondent No.1), a wholly owned subsidiary of respondent No.2, a foreign entity. When disputes arose between the parties, the petitioner filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 praying for the constitution of an arbitral tribunal. Dealing with the said application, the Court was confronted with the issue of whether respondent No.2, the foreign holding company of respondent No.1, could be roped into the present arbitration by applying the Group of Companies Doctrine?

Generally, arbitration involves parties who have explicitly entered into an arbitration agreement, or parties with successor interests, claiming under them. However, in certain circumstances, even third parties may be bound by an arbitration agreement. This may be possible by application of the Group of Companies doctrine While considering the issue at hand, the Court relied upon the decision in *Chloro Controls India Pvt. Ltd. vs Severn Trent Water Purification Inc.,* wherein the doctrine was articulated and applied in India. The Court noted that although arbitration could be possible between a signatory to an arbitration agreement and a third party, however, to proceed with such arbitration, there must exist a legal relationship between the non-signatory and the party to the arbitration agreement. The Court further observed that heavy onus lies upon that party to show that, in fact and in law, it is claiming through or under the signatory party, as contemplated under section 45 of the Act. The Group of Companies doctrine was accepted in that case as a sufficient basis to establish the said legal relationship.

However, the Court noted certain anomalies in the existing legal position on this issue. On the one hand the Court had reduced the threshold of arbitration being a consensual affair while on the other the Group of Companies doctrine transposed requirements under the contract law to bind a party to an arbitration. Upon a comprehensive analysis of precedents, including *Vidya Drolia v. Durga Trading Corporation,* the Court was of the view that the ambit of the phrase 'claiming through or under' in Section 8 has not been examined thus far. Referring to the present legal position, which states that the referral Courts are only required to look into the *prima facie* existence of an arbitration agreement, the Court highlighted that the scope of judicial intervention while examining the argument of Group of Companies doctrine at the referral stage has not been examined so far.

Taking note of the aforesaid anomalies, the Court observed that the law laid down in *Chloro Controls* Case and the cases following it, appears to be based more on economics and convenience, rather than law, which may not be a correct approach. Doubting the correctness of the same, the matter has been referred to a larger bench for a clear exposition of law on the application of the Group of Companies doctrine.

[4]Decided on 06.05.2022

## BBR (INDIA) PRIVATE LIMITED v. S.P. SINGLA CONSTRUCTIONS PRIVATE LIMITED (2022) SCC OnLine SC 642[5]

*(The judgment drew a distinction between "the seat" and "the Venue" stating that the venue of Arbitration can be changed for the convenience of the parties, however, the Seat once fixed shall remain unchanged and static.)*

The parties had entered into a contract with an arbitration clause for the resolution of disputes. As disputes arose between the Parties, it emerged that the arbitration clause in the contract did not mention the seat or venue of arbitration. The first Arbitrator nominated Panchkula as the seat of arbitration. However, he recused himself from the proceedings and another arbitrator Mr. Justice (Retd.) T.S. Doabia took over as the Sole Arbitrator in the case. Pertinently, the order by which the sole Arbitrator gave his consent, mentioned Delhi as the venue of Arbitration. On 29th January 2016, the award was pronounced in Delhi.

Thereafter, the Appellant and the respondent initiated two proceedings. The Appellant filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 before the Delhi High Court, and the respondent filed an application for interim orders under Section 9 before the Ld. Additional District Judge (ADJ), Panchkula. The Petition filed by the respondent was dismissed by the Ld. ADJ, on the ground of lack of territorial jurisdiction stating that the jurisdiction vested solely with the Delhi High Court. On being challenged, the order passed by Ld. ADJ was set aside by the Punjab and Haryana High Court, observing that the Delhi High Court does not have jurisdiction to entertain the application under Section 34. Since, the parties invoked the jurisdiction of two different courts, the question of 'jurisdictional seat of arbitration' assumed importance.

The issue that arose before the Supreme Court in this case was whether the 'jurisdictional seat of arbitration', as fixed by the first Arbitrator, would shift from Panchkula to Delhi by a procedural order of the new Arbitrator nominating Delhi as the venue of arbitration.

The Court held that as the seat of arbitration was not decided by the parties, Section 20(2) of the Arbitration and Conciliation Act, 1996 would apply. Thus, the place or venue fixed for arbitration, as per Section 20(2) will be the jurisdictional 'seat' and the Courts having jurisdiction over the jurisdictional 'seat' would have exclusive jurisdiction. However, this principle has an exception which would apply when the parties by mutual consent agree to a change of the jurisdictional 'seat', and such consent is express, understood and agreed by the Parties. Therefore, the appointment of a new arbitrator who holds the arbitration proceedings at a different location would not ipso facto change the jurisdictional 'seat', already fixed by the earlier or first arbitrator. The place of arbitration in such an event should be treated as a venue where arbitration proceedings are held.

The Court, while applying the aforesaid principle, dismissed the appeal and held that the Courts having jurisdiction over Panchkula shall have the exclusive jurisdiction as the jurisdictional seat was Panchkula.

## Oil & Natural Gas Corporation Limited v. M/S Discovery Enterprises Private Limited (2022) 8 SCC 42[7]

*(Application for discovery and inspection to prove the applicability of group of companies doctrine ought to be decided prior to deletion of a party from the array)*

ONGC had awarded a contract to Discovery Enterprises Private Limited (DEPL), a unit of the Jindal Group of Companies, for certain services relating to vessels. As disputes arose between the parties, ONGC invoked the arbitration clause and arrayed DEPL and Jindal Drilling and Industries Limited (JDIL) as parties. JDIL took exception to its involvement in the arbitration stating that it was not a signatory to the arbitration agreement and thus, it could not be joined as a Party to the proceedings. Accordingly, it filed an application under Section16 of the Arbitration and Conciliation Act, 1996, for deletion from the array of parties. on the contrary, ONGC stated that JDIL fell within the same group of companies and DEPL was an alter ego of JDIL. It further added that there was complete functional and economic unity between the two entities, and both were working under the "fraternal hood" of the same group. Additionally, ONGC moved an application for discovery and inspection, along with a defined list of documents to be examined, in order to demonstrate the application of the Group of Companies doctrine to JDIL.

The Tribunal chose to decide JDIL's application under section 16 first and left the Appellant's application for discovery and inspection open. While noting that JDIL was not a signatory to the contract, the Tribunal observed that JDIL could not be arrayed as a party in view of a plain reading of Section 7 of the Arbitration and Conciliation Act, 1996. The Bombay High Court dismissed the appeal against this order, thereby leading to the present case by way of a Special Leave Petition.

Apart from the correctness of the Tribunal's decision in deleting JDIL from the array of parties, the Court also considered whether the Tribunal was correct in adjudicating upon JDIL's Section 16 application under Section 16 before deciding the Petitioner's application for discovery and inspection.

[5]Decided on 18.05.2022

[6] Arbitration and Conciliation Act, 1996

While answering the issue, the Supreme Court placed reliance upon *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.&Ors.* to hold that binding non-signatories to an arbitration agreement would be determined by various factors, like mutual intent of the parties, relationship of a non-signatory to a signatory to the agreement; commonality of the subject matter, composite nature of the transaction and performance of the contract.

The Court noted that the Tribunal did not examine the question of applicability of the arbitration agreement to JDIL on facts or on law, in accordance with the factors laid down in *Chloro Controls case*. Instead, it simply deleted JDIL from the array of parties stating that it was not a signatory to the agreement. Moreover, ONGC's attempt at the joinder of JDIL to the proceedings was rejected without adjudication of its application for discovery and inspection of documents to prove the necessity of such joinder. The Court observed that the Tribunal's decision to defer the application filed by ONGC for discovery and inspection till the disposal of JDIL's application for its deletion was erroneous, as ONGC's application was intended to elicit essential facts to show that there existed functional, financial, and economic unity between the two companies. In other words, the application for discovery and inspection was intended to bring forth vital evidence before the Tribunal so as to bind JDIL to the agreement. The Tribunal, without giving an opportunity to bring such evidence on record, erroneously declared that the agreement would not be binding on JDIL.

## Amazon.com NV Investment Holdings LLC V. Future retail Ltd. and Ors. (2022) 1 SCC 209

*(An interim award by emergency arbitrator would be an order under section 17(1) of the Arbitration and Conciliation Act 1996, enforceable under section 17(2))*

Amazon, the Appellant in the captioned matter, had initiated proceedings under S. 17(2) of the Arbitration and Conciliation Act, 1996 before the Delhi High Court, to enforce the award/order passed by the Emergency Arbitrator against Respondent nos. 1-13 (also referred to as the Biyani Group, under the Arbitration rules of the Singapore International Arbitration Centre Rules.

Prior to the dispute, the parties had entered into certain agreements, with a stipulation that prohibited the respondents from entering into future contracts alienating or disturbing the subject matter of the agreement with certain "prohibited entities." The dispute between the parties arose when the Biyani Group entered into an amalgamation agreement with Mukesh Dhirubhai Ambani Group (for short, "Ambani Group"), whereby it conveyed its retail operations to the Ambani Group, thereby leading to the cessation of Future Retail Limited (FRL) (R-1) as an entity.

Resultantly, Amazon initiated the arbitration proceedings and sought interim emergency relief under SIAC Rules in the form of an injunction against the above-stated transaction. The Tribunal passed an interim award injuncting the Biyani Group from taking any steps in relation to the contested transaction.

Pursuant to the award, Amazon filed an application under Section 17(2) before the Delhi High Court to enforce the award. The Court gave effect to the award and restrained the Biyani Group from proceeding with the impugned transaction. Thereafter, the Ld. Single Judge, in a detailed judgment, opined that an emergency award would be classified as an order, as per Section 17(1) and the same would be enforceable. Subsequently, in appeal, the Division Bench of the Delhi High Court stayed the order of the Single Judge, thereby leading to these Special Leave Petitions before the Supreme Court.

The issues that arose for consideration before the Supreme Court were first, whether an interim award delivered by an Emergency Arbitrator under SIAC Rules is an order under Section 17(1) of the Act and second, whether the Single Judge's order under Section 17(2) of the Act, enforcing an award passed by the Emergency Arbitrator, is appealable.

Maintainability and enforcement of an award passed by the Emergency Arbitrator under the SIAC Rules are the primary issues in this case. Referring to a conjoint reading of Section 2(1)(a) coupled with Sections 2(6), 2(8), and Section 17(1) of the Act, the Court observed that party autonomy in choosing institutional arbitration governed by institutional rules and the purpose of interim relief under Section 17(1), signify that even interim orders of the Emergency Arbitrator would be within the ambit of the Arbitration Act. Accordingly, the Emergency Arbitrator's award/order would have an effect identical to that of an order of a properly constituted Arbitral Tribunal, under Section 17(1), which can be enforced under Section 17(2). Therefore, it can be said that an Emergency Arbitrator in such a case would be an Arbitrator for all intents and purposes.

While discussing the second issue, the court declared that no appeal would lie under Section 37 of the act against an order of enforcement of the Court under Section 17(2) of the Act. It was observed that Section 37 is clear in its import and deals with appeals solely from an order granting or refusing to grant any interim measures under Section 17(1)(i) and 17(1)(ii) of the Act. Thus, an order of enforcement under Section 17(2) of the Act was held to be on an altogether different footing.

[6]Decided on 27th April 2022
[7]*Discovery Enterprises Private Limited*
[8]*Jindal Drilling and Industries Limited*
[9]*(2013) 1 SSC 641*

## N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited & Ors. (2021) 4 SCC 37911[10]

*(Arbitration clause in an unstamped agreement could be acted upon once the deficiency is removed by payment of stamp duty)*

The Supreme Court in this case dealt with two pertinent issues touching upon first, the applicability of the Doctrine of Separability on an arbitration agreement forming part of an unstamped agreement which was required by the Maharashtra Stamp Act to be duly stamped, and second, the arbitrability of a dispute involving allegations of fraud.

The court traversed through a series of judgments to observe that Section16 of the Arbitration and Conciliation Act, 1996 in conjunction with settled precedent, provides for a separate and independent treatment of the arbitration clause in a contract. The court made specific reference to the case of *SMS Tea Estates (P) Ltd. V. Chandmari Tea Co. (P) Ltd.* wherein the Court had considered the collateral use of an unregistered or unstamped agreement, which is required by law to be registered/stamped. As regards the impact of non-registration of an otherwise compulsorily registrable instrument is concerned, Section 49 of the Registration Act, 1908 itself provides for a clear statutory position. It expressly states that such instruments, despite carrying the vice of non-registration, may be used for collateral purposes. Thus, the arbitration clause would survive even if the main agreement is unenforceable. As regards the second issue i.e. the effect of non-stamping of an instrument which was required by law to be stamped, the court in *SMS Tea Estates referred to Section 33* of the Stamp Act, and observed that the statutory provision does not permit any collateral usage of such an instrument and therefore, the non-stamping would vitiate the arbitration clause as well, along with the main agreement. Deviating from this position, the Court, in *N.N. Global, specifically referred to Section 34* of the Maharashtra Stamp Act, 1958 and noted that non-payment of stamp duty only operates as a deficiency, since the provision provides that an unstamped instrument could be acted upon once the duty is paid on it. The Court then noted that the arbitration agreement is independent of the main contract, and since Section 3 of the Maharashtra Stamp Act, 1958 does not subject an arbitration agreement to payment of stamp duty, it cannot be rendered unenforceable or invalid or non-existent merely because the main contract required the payment of stamp duty. The Doctrine of Separability would protect the arbitration agreement/clause. The decision in *SMS Tea Estates* has been held to have laid down incorrect law as regards the non-enforceability of an unstamped arbitration agreement.

Answering the issue of arbitrability of an allegation of fraud, the court traversing through various judgments, held that an allegation of civil fraud can be decided by the arbitral tribunal since the dispute arises between the parties inter-se and not in the realm of public law.

## JUDGMENTS BY HIGH COURT OF DELHI

## PCL Suncon v. National Highway Authority of India (2021) SCC OnLine Del 31312[12]

*(To quantify as an "award" it must finally decide a dispute in issue between the parties. An order of termination under section 32 of the Arbitration and Conciliation Act, 1996 does not constitute an "award" and thus, an application u/s 14 is maintainable)*

Upon invocation of arbitration agreement in this case, the parties nominated their respective arbitrators, who then nominated the Presiding Arbitrator. During the course of the arbitration proceedings, the Arbitrator appointed by the petitioner stopped participating in the proceedings and formally resigned as an arbitrator by writing a letter to the petitioner. Thereafter, the petitioner sought time to nominate another arbitrator. After lapse of a considerable time, when the petitioner nominated the substitute Arbitrator, it was informed that the proceedings have already been terminated owing to its failure to appoint the substitute Arbitrator in time. Thus, the Tribunal terminated the arbitration proceedings under Section 32(2)(c)of the Arbitration and Conciliation Act, 1996. Challenging the aforesaid order, the petitioner approached the Delhi High Court by filing an application under Section 14(1)(a) read with Section 15 of the Arbitration and Conciliation Act, 1996 for substitution of Arbitrator. The respondent NHAI contended that the petitioner could not move an application under Section 14 as the order of termination, being an award, could only be challenged under Section 34 of the Act.

[10]Decided on 06.08.2021

The basic issue that arose before the court was whether the order of termination passed by the tribunal amounts to an "award" within the meaning of the Arbitration and Conciliation Act, 1996 which could only be challenged under Section 34 thereof.

Referring to the plain meaning of Section 32, the Court noted that the Arbitration and Conciliation Act, 1996 distinguishes between an "order" and an "award". It held that an "award" must necessarily decide a dispute or issue between the parties, and any other order, including one of termination under Section 32 of the Act, would not amount to an award. Thus, as against an order of termination, without adjudication of any issues or lis between the parties, an application under Section 14 would be maintainable, and not under Section 34 as it is restricted to challenge against "awards".

In deciding so, the Court placed reliance upon *Lalitkumar Sanghavi (dead) through LRs v. Dharamdas V. Sanghavi and Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products*.

The court also considered the judgments of the Delhi High Court in *Angelique International Limited v. SSJV Projects Private Limited and in Joginder Singh Dahiya v. M.A. Tarde Thr. LRs*. However, the court found them to be inapplicable and to be running contrary to the decision of the Supreme Court in Lalitkumar Sanghavi and Indian Farmers.

## Vijay Kumar Munjal and Ors. v. Pawan Munjal and Ors. (2022) SCC OnLine Del 499[17]

*(An issue relating to the private rights of parties to an agreement, not affecting any third party, may be referred to arbitration, if a valid arbitration clause exists and the issues are not per se non-arbitrable)*

The Munjal Family, a renowned business family known by the business name "Hero", entered into a Family Settlement Agreement (FSA) and Trademarks and Name Agreement (TMNA) by dividing the family chain into four family groups (F1, F2, F3 and F4). As per the arrangement, various businesses of the Munjal family were divided amongst the family groups. The dispute arose when the respondents proposed to launch electric two-wheelers using the "Hero" mark, which was allegedly in violation of the FSA and TMNA. Since the agreements carried an arbitration clause, the petitioner moved the Delhi High Court for referral of dispute to arbitration.

The respondents objected to such referral citing the non-arbitrability of the dispute and bar of limitation. It was urged that questions relating to registration of trademarks and patents are per se non-arbitrable and must be referred to the designated authority in this regard i.e. the Registrar of Trade Marks. Examining a series of judgments on the point of non-arbitrability of certain disputes and applying the 'Fourfold Test' enunciated in *Vidya Drolia v. Durga Trading Corporation,* the Delhi High Court observed that the issue pertained to rights under the FSA and TMNA, and the determination of any issue arising under a private agreement between the parties does not affect the rights of any third person. Thus, the Court noted that the rights involved in the dispute were rights in personam, and not *in rem*. The Court further observed that the issue did not pertain to registration or rectification of any trademark and thus, the bar of *Vidya Drolia* would not apply.

Answering the issue of limitation, the Court held that the issue being a mixed question of law and fact, the amended Section 11(6A) of the A&C Act, 1996 coupled with the concept of Kompetenz-Kompetenz mandate that the same be left open to be decided by the Arbitral Tribunal. The mandate of the Referral Court is restricted to the examination of an arbitration clause, except in circumstances when "there is no vestige of doubt" that the claims are barred by law.

[12] Decided on 12.01.2021
[13] (2014) 7 SCC 255
[14] (2018) 2 SCC 534
[15] (2018) SCC OnLine Del 8287
[16] O.M.P. 370/2014

## Shanghai Electric Group Co. Ltd. vs Reliance Infrastructure Ltd. (2022) SCC OnLine Del 211221[19]

*(Applicability of Section 9 Arbitration and Conciliation Act, 1996 to international commercial arbitrations is not impliedly ousted, except in accordance with an express agreement to that effect)*

Petitioning under Section 9 of Arbitration and Conciliation Act, 1996, the petitioner herein sought injunctive reliefs, restraining the respondents from disposing of its assets through sale, transfer, encumbrances or otherwise, as well as certain interim measures to secure a sum of amount, payable by the respondents pursuant to a guarantee letter issued by them, in a foreign-seated arbitration going on between the parties at dispute.

The petitioner contended that the applicability of Section 9 extends to foreign-seated arbitration as well. Undoubtedly, in terms of proviso to Section2(2), such applicability of Section 9 can be excluded by the parties, but in the present matter, it cannot be said to have been 'impliedly' excluded as alleged by the respondent. To this poser of jurisdictional objections, the court noted that the proviso to Section 2(2) gives liberty to the parties to exclude the applicability of Section 9, however, unless such exclusion is explicitly demonstrated, Section 9 would be applicable to international commercial arbitrations even if the seat is outside India. Thus, unless an agreement to the effect of excluding Section 9 is convincingly found, the provision would be applicable.

[17] Decided on 17.02.2022
[18] FSA
[19] TMNA
[20] *Vidya Drolia v. Durga Trading Corporation, Booz Allen & Hamilton Inc. v. SBI Home Finance Limited*
[21] Decided on 19.07.2022