S&A Law Offices

INDIAN LEGAL IMPETUS

Newsletter

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Editorial

S & A Law Offices

Manoj K. Singh

Dear Friends,

We are elated to present to you February 2023, Edition of our monthly newsletter "Indian Legal Impetus" covering all the insights on recent developments, case laws, and issues relating to various disciplines of law. We sincerely hope that you will find this issue of Indian Legal Impetus informative and engaging.

To start off, the **first article** discusses the relevance of the Financial Model in Public Private Partnership projects in the computation of Claims under the Dispute Resolution Mechanism. The article is a comparative analysis of the United Kingdom, United States and Indian Jurisdiction to understand the significance of the Financial Model.

Further, the **second article** traces the issues with the taxability of vouchers under the GST regime and discusses how the court has defined and interpreted the same. The article presents how the High Court has clarified the taxability of semi-closed PPI transactions.

The **third article** in this edition speaks about the recent Singapore Court of Appeal decision in the case of Anupam Mittal v. West bridge Investment Holdings II. In this case, SGCA has taken a composite approach to decide on the issue of arbitrability of the subject matter at the pre-award stage. This article discusses the impact of this judgement on Indian parties.

Next in line is the **fourth article** that discusses the procedure and scope of amendment of the pleadings by the parties in arbitration proceedings. The article discusses the law and judicial pronouncements on the same.

The **fifth article** in line talks about whether the pre-arbitral dispute resolution process is excluded from the limitation period and it examines the interplay between the pre-arbitral dispute resolution steps and the invocation of arbitration proceedings. This article deals with specifically the scope and computation of the limitation period for invoking arbitration when the agreement between the parties contains a multi-tier dispute resolution process. The article describes the same through landmark judgements and discusses the concept of "breaking point".

Our **sixth article** discusses the ruling of the Hon'ble High Court of Telangana in the case of *M/s Srirasthu Shopping Mall v. Micro and Small Enterprises & Ors*, wherein the writ petition filed against the Award passed by the Facilitation Council was held maintainable considering the facts of the case.

The **seventh article** covers the issue of the enforcement of an Emergency Award in India when the proceedings are seated outside the Indian jurisdiction. The article delves into the Indian judiciary's view on Emergency Awards, provisions under the Arbitration and Conciliation Act, 1996 and the lacunae if a foreign seated Emergency Award is to be enforced in India.

The **last article** examines privilege to the communications marked as without prejudice.

We hope that our esteemed readers find this information useful, and it also enables them to understand and interpret the recent legal developments. We welcome all kinds of suggestions, opinions, queries, or comments from all our readers. Please feel to reach out to us with your valuable insights and thoughts at newsletter@sandalawoffices.com.

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COMPUTATION OF CLAIMS UNDER PPP PROJECTS BASED ON FINANCIAL MODEL UNDER VARIOUS JURISDICTIONS

(A COMPARATIVE ANALYSIS OF UK, US, AND INDIAN JURISDICTION)

- *Rahul Pandey and Akshay Kumar Singh*

Introduction

The beginning of Public Private Partnership ("PPP") can be traced back to the Roman Empire over two thousand years ago in Europe when postal stations were developed and maintained around a vast expanding highway system[1]. However, over the last two decades, there has been a dynamic shift towards PPP projects globally. Under PPP projects, the public sector (Government) and the private sector enter into a specific time-bound partnership for carrying out a project or service usually provided by the public sector.

One of the Conditions Precedents of PPP projects is the preparation and submission of a Financial Model. It amounts to creating a summary of a company's expenditures and revenues in a spreadsheet form that can be used to calculate the impact of a future event or decision on a project. Financial Model is prepared based on the details provided along with the bid documents. Financial Model is made to check the financial/economic viability of the project and for bidders to secure financing for the project. It has future projections and expected profit returns based on year-wise growth. It is on the basis of the financial model projections that lenders provide financing to a project.

Financial Model is used to evaluate disputes as it has future projections based on the project assessment and it also protects the Net Present Value of the project. Using the Financial Model assessment of claims is a practice followed under various jurisdictions.

Financial Model under European and United Kingdom jurisdiction

PPP projects have been prominent in the United Kingdom since the 16th Century, and they got a major push during the industrialization in the 19th Century with rapid urbanisation and the growth of a public network of transport. The United Kingdom's Private Finance Initiative started in 1992 has a major stake in the infrastructure sector till now. Financial Model is of key significance in the PPP projects undertaken in the UK jurisdiction. As per the Guidance Manual prepared by the European PPP Expertise Centre[2], Financial Model is one of the most important operational management tools for the Authority. *Financial Model is a **major tool for decision-making** for both the Authority and the private partner*, as per the manual. The Financial Model prepared is placed at the centre of the project and is used for various purposes throughout the Agreement period.

[1] *(Toolkit for Public-Private Partnerships in roads & highways, 2009)*

[2] *(European PPP Expertise Centre, 2014)*

Some of the various purposes the Financial Model is used for are:

a. To periodically calculate the payments due by the Authority to the private partner and estimate future payment commitments.
b. To in user-pay arrangements, periodically assess the long-term economic and financial sustainability of the contract.
c. To evaluate the impact of changes.
d. To facilitate the preparation of financial statements and monitor key financial indicators such as gearing, debt cover ratios and internal rate of return; and
e. To calculate the compensation sums due by the Authority in the event of an early contract termination.

As per the Standardisation of PFI Contracts Version 4[3] the Financial Model is a calculation of compensation payable to the Contractor on early termination will have reference to the amounts owed to its lenders under the financing documents. The financing documents must reflect the terms of the financial model agreed upon at Financial Close.

Financial Model under United States of America jurisdiction

The United States has seen public-private partnerships as early as the 1700s. However, the first State legislation related to PPP was in 1989 in California. Since then, there has been a substantial increase in public-private partnerships in the United States.[4]

Under the PPP project in the United States, compensation for loss of IRR for early terminations due to default will be calculated based on the approved Financial Model.[5] As per the Public-Private Partnership (P3) Procurement guidebook,[6] Financial Model provides critical information for the evaluation of the financial proposal and is used to price compensation payments required by the contract due to variation from base assumption and to make calculations such as for refinancing gains that are to be shared between the public agency and the concessionaire.

Financial Model under Indian jurisdiction

The origin of public-private partnerships in India can be traced back to the latter half of the 1800s with private sterling investing in Indian Railroads. In the year 1991, the Central Government decided to allow private participation in the power sector which was a crucial step towards public-private partnership. In the year 2006, a PPP cell was created in the DEA, which acts as the Secretariat for Public Private Partnership Appraisal Committee (PPPAC), Empowered Committee (EC), and Empowered Institution (EI) for the projects proposed for financial support through Viability Gap Fund (VGF). The PPP Cell is responsible for policy-level matters concerning PPPs, including Policies, Schemes, programmes, Model Concession Agreements and Capacity Building.

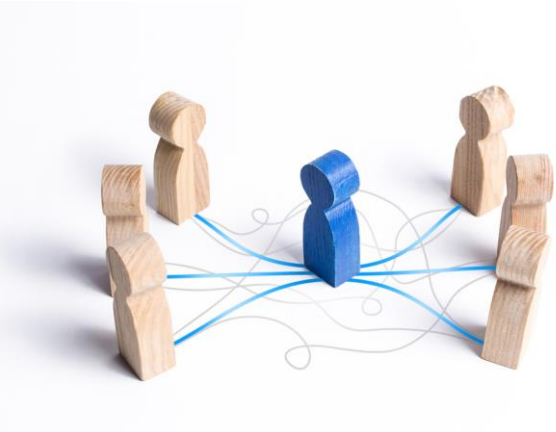
[3] *(Standardisation of PFI Contracts Version 4, 2007)*
[4] *(Esq., 2018)*
[5] *(Sarad, 2021)*
[6] *(Public-Private Partnership (P3) Procurement:, 2019)*

The PPP Cell is also responsible for matters and proposals relating to clearance by PPPAC, Scheme for Financial Support to PPPs in Infrastructure (VGF Scheme) and India Infrastructure Project Development Fund (IIPDF).[7]

As per the Public Auditing Guidelines issued by the Comptroller & Auditor General of India, 2009[8], auditing of PPP requires reviewing a financial model to test the feasibility and justifications for the grant of concessions, testing revenue generation using quantitative techniques. The Hon'ble Supreme Court of India in ***Soma Isolux NH One Tollway Private Limited Vs. Harish Kumar Puri & Ors***[9], in its judgement, has touched upon the relevance of the financial model in PPP projects and stated that *"All the financing agreement dealing with the administration occurred between lending institutions and the Petitioner as well as the financial model for the project has been submitted that their revenue and approval prior to the commencement of the project."*

Conclusion

Public Private Partnership agreements have been around for centuries and have gotten more sophisticated with time. Currently, most countries are heavily relying on PPP projects for public sector services and works. It is an efficient approach through which the services in the public sector can be improved and utilized better. But with the advancement of time, such PPP agreements have gotten more complex, involving various financial aspects to it. For the private sector, the objective for entering a PPP project is financial gain and revenue generation. Financial Model becomes a primary source for evaluating the economic feasibility of a project for the private sector and for the financing authorities. Developed and Developing nations have placed heavy reliance on the projections made in the financial model to value the project and to calculate compensation in cases of termination/default. Computation of claims based on financial model projections provides a reliable methodology which is used by the Authorities to ensure the compensation is equitable and justified.



[7] *Overview - public private partnerships in India. (n.d.). Retrieved February 16, 2023, from https://www.pppinindia.gov.in/overview.*

[8] *and Auditor General of India, C. (n.d.). Public private partnerships - comptroller and auditor general of India. https://cag.gov.in/. Retrieved February 16, 2023, from https://cag.gov.in/uploads/media/Public-Private-Partnerships-PPP-Infrastructure-Projects-Public-Auditing-Guidelines-2009-20200627161437.pdf.*

[9] *Soma Isolux NH One Tollway Private Limited v. Harish Kumar Puri and Ors. (Supreme Court of India April 17, 2014).*

TAXABILITY OF VOUCHERS UNDER GST – PERPLEXITY TO CLARITY

- *Megha Tewari and Prateek Sagar*

In common trade parlance, a voucher is a Prepaid Payment Instrument (PPI) accepted as consideration for the supply of goods and services. As per Black's Law Dictionary, a Voucher, when used in connection with the disbursement of money, is defined as *"a written or printed instrument in the nature of an account, receipt, or acquittance, that shows on its face the fact, authority and purpose of disbursement."* It appears that a voucher is a kind of redeemable transaction bond worth a particular monetary value and can only be used for specific goods, for which such a voucher is issued. Accordingly, a voucher is a mode of payment to procure goods or services (against which such voucher is issued), and thus, it can be said to be equivalent to money.

Owing to the increased competition in the retail sector, the issuance of vouchers has seen an uprising trend in the Indian market today, especially in the e-commerce space. PPIs can be broadly classified into three categories:

a. **Closed system payment instruments** which are issued by a company for facilitating the purchase of goods and services and do not permit cash withdrawal or redemption.
b. **Semi-closed system payment instruments** which can be used for the purchase of goods and services of clearly identified merchants having a specific contract with the issuer to accept such PPIs and do not permit cash withdrawal or redemption.
c. **Open system payment instruments** where PPIs can be used for the purchase of goods and services and also permit cash withdrawal at ATMs.

Usually, the vouchers that are issued by trade, are semi-closed or closed payment instruments. Once vouchers are issued and redeemed, they come under the lens of taxation, as tax authorities seek to treat vouchers as goods and levy tax. Under GST, there has been confusion arising over the taxability of transactions where PPI is used as a mode of payment for goods and services. Although the definition[1] and time of supply[2] for vouchers have been provided under the CGST Act[3], however, its classification as 'goods' or 'services', or simply 'money' and its taxability lacks clarity. The GST Department has always been inclined towards taxing vouchers at the time of issuance even though underlying goods or services for which such vouchers are issued, would also eventually suffer tax at the time of its supply. Such levy of tax at issuance of vouchers leads to double taxation, where first the vouchers would be taxed, and thereafter, the goods or services (for the same value as the voucher) against which such vouchers are issued, would be taxed.

[1] *Section 2(118) of CGST Act*
[2] *Section 12(4) of CGST Act*
[3] *The Central Goods and Services Tax Act, 2017*

There has been litigation around the taxability of vouchers, both under the pre-GST regime as well as the post-GST regime. During the erstwhile regime, the Bombay High Court[4] held that Sodexo meal vouchers are goods within the meaning of the Maharashtra Municipal Corporations Act, 1949, as against the Petitioner's contention that said meal vouchers are payment instructions or payment instruments issued under a payment system operated under the Payment and Settlement Systems Act, 2007, as per the authorization received from the Reserve Bank of India, as said vouchers are a medium to acquire any article for consumption, use or sale and the said vouchers are not capable of consumption, use or sale by themselves. This decision created lots of tension in the Industry but thankfully, the Supreme Court reversed the decision of the High Court in ***Sodexo SVC India Private Limited***[5] and held that Sodexo meal vouchers cannot be treated as 'goods' for the purpose of levy of Octroi or Local Body Tax. The Supreme Court held that such vouchers are merely 'payment instruments' and not 'goods' and they become taxable only when such vouchers are redeemed.

Thereafter, in the case of ***Kalyan Jewellers***[6], the Tamil Nadu Appellate Authority for Advance Ruling held that a voucher per se is neither goods nor service and is a means of payment of consideration. It held that any instrument recognized by the Reserve Bank of India and used as consideration to settle an application will qualify as money.

However, the Karnataka Appellate Authority for Advance in the case of ***M/s Premier Sales Promotion***[7] had a divergent view and held that vouchers are not 'money' but 'goods'.

But recently, the High Court of Karnataka[8], overturned the said decision of Karnataka AAAR in the writ petition filed by ***M/s Premier Sales Promotion Private Limited*** and held that semi-closed PPIs are merely instruments accepted as consideration for the supply of goods or services; and do not have any inherent value of their own. The Petitioner in the present case, procured gift vouchers, cash-back vouchers and e-vouchers from the issuer companies and supplied the same to its clients. The clients used the vouchers for their employees (giving them in the form of incentives) or customers for promotional schemes for use as consideration for the purchase of goods or services. The High Court analyzed the definition of 'Money' and 'Vouchers' as provided under the CGST Act and held that vouchers do not attract any tax since vouchers qualified as instruments, falling under the purview of 'money' and consequently excluded from the definition of 'goods' and 'service'.

Thus, it is seen that primarily Courts have held that vouchers per se are not taxable under GST, but it is the goods or services purchased against such vouchers, which are taxable.

While the aforesaid decision seeks to settle the dust around the relevant issue of taxability of semi-closed PPI transactions (which is the most common form of vouchers issued), the fate of other vouchers still remains in perplexity.

[4] *Writ Petition Nos. 5653 of 2010 and 7503 of 2013*
[5] *2015-TIOL-293-SC-MISC*
[6] *2021-VIL-20-AAAR*
[7] *2021-VIL-74-AAAR*
[8] *2023-VIL-67-KAR*

However, when the nature of vouchers remains the same, i.e., payment instrument, their taxability should also remain the same.

Conclusion:

Presently, the Industry is not paying tax on the issuance of the voucher, however the GST Department has also made its stance clear during objections raised on such non-payment of tax on PPIs, thus, the assessee carries a huge exposure burden on its shoulders. The decision in ***Premier Sales Promotion (supra 8)*** is a welcome step and would be beneficial to the trade at large, be it vouchers given to customers as part of promotional schemes or given to employees as a part of incentives.

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ANALYSIS OF THE JUDGEMENT OF SGCA IN THE CASE ANUPAM MITTAL V. WESTBRIDGE VENTURES INVESTMENT HOLDINGS

- *Aanchal Gupta*

Introduction

In its first landmark judgement of 2023, the Singapore Court of Appeal ("SGCA") was faced with the question of subject matter arbitrability at the pre-award stage where the arbitration proceeding was seated in Singapore. In the case of *Anupam Mittal v Westbridge Ventures II Investment Holdings*[1] ("*Mittal v Westbridge*"), the SGCA held that to decide the arbitrability of the subject matter of the dispute at the pre-award stage, both the law of the arbitration agreement and the law of the seat need to be considered. The case of BCY v. BCZ proved to be an authority, as the SGCA applied the three-stage test laid down here to determine the law applicable to the arbitration agreement.

The finding in Mittal v. Westbridge is a departure by the SGCA from the commonly adopted position of major jurisdictions where the law of the seat only determines arbitrability of the subject matter. SGCA adopted a "composite approach" based on the impact of foreign public policy on the arbitrability of disputes i.e. if a foreign arbitration agreement deems certain disputes to be non-arbitrable, then Singapore courts will not permit parties to arbitrate to promote international comity.

Background of the dispute

Anti-suit injunctions are the most common and key recourse taken by a party when a claim is filed in court instead of initiation of arbitration proceedings pursuant to an arbitration agreement. These applications seek to restrain the counterparty but are heavily contested. When the question of arbitrability of the subject matter of the dispute arises, how should the court proceed? Should the Court consider the issue of arbitrability under the law governing the arbitration agreement or the law of the seat of arbitration?

Mr Mittal ("the Appellant"), an Indian resident and a founder of People Interactive (India) Private Limited ("the Company"). Westbridge Ventures II Investment Holdings ("the Respondent"), a private equity fund incorporated in Mauritius, is an investor pursuant to which it had entered into a Shareholders' Agreement ("SHA").

Clause 20.1 of the SHA stated that the

> "SHA *and its performance shall be governed by and construed in all respects in accordance with the laws of the Republic of India*".

Further, Clause 20.2 provided that

> "*all such disputes that have not been satisfactorily resolved under Clause 20.1 above shall be referred to arbitration…and the place of the arbitration shall be Singapore.*"

[1] *(2023) SGCA 1.*

The capital table in the Company shows that the Appellant held 30.26% of the shares while the Respondent owned 44.38% i.e. majority of the shares. The SHA stated that if within 5 years from the closing date, an Initial Public Offering is not completed, then the Respondent could redeem its shares and, if necessary, "drag" all shareholders to sell their shares to a third-party. Pursuant to this clause, Westbridge sought to exit the company, but a dispute arose between the parties. As part of the disengagement process, the parties disagreed on several points including; a) the sale of the Company to an alleged competitor; and, b) Westbridge refusing the appointment of the Appellant as the Managing Director of the Company. The Appellant filed a case before the National Company Law Tribunal in India seeking remedies for corporate oppression ("the NCLT Proceedings"). The Respondent filed a permanent anti-suit injunction to restrain the Appellant to proceed with the NCLT proceedings or initiate any proceedings other than an arbitration proceeding according to the terms of the SHA. The Appellant argued that the dispute related to minority shareholder oppression and the same is non-arbitrable under the law governing the arbitration agreement i.e. Indian law. The General Division of the High Court granted the permanent anti-suit injunction as the Appellant breached the arbitration agreement by initiating the NCLT proceedings. The High Court took the stance since under the Singapore laws, disputes involving corporate oppression are arbitrable. The Appellant filed an appeal in the Singapore Court of Appeal against this judgement of the lower court stating that this issue should be decided according to the law governing the arbitration agreement and not the law of the seat.

Singapore Court of Appeal Judgement

The main concern with the SGCA was that there should be a consistent application of law when deciding the arbitrability of the subject matter whether on the pre-award stage or post-award stage. However, public policy plays an important role in determining the issues of arbitrability at every stage. Courts have recognised that even though the core of arbitration is party autonomy and mutual consent, jurisdictions have an interest since enforcement of the award may be sought in the court and the question of arbitrability may be determined differently in different stages and jurisdictions.

SGCA came to a middle ground and espoused a "composite approach" limited to the pre-award context and held while deciding the arbitrability of the award, the court must consider the arbitrability of the subject matter under both a) law of the arbitration agreement and; b) law of the seat of the proceedings. The rationale behind this is two-fold:

First, with the public interest point of view, States have the incentive to bar certain disputes from arbitration. The SGCA differentiated between Sections 11 and 31 of the International Arbitration Act, 1994 ("IAA") to hold that at a pre-award stage, the courts in Singapore may consider the public policy of other countries (and not just Singapore law) to decide if a dispute is arbitrable. Hints of the composite approach also lie in the UNCITRAL Model Law where the determinability of subject matter arbitrability of the pre-award and post-award stage is the same. The drafters did not include any article to that effect and thus drafters of Section 11 of the IAA cannot be constrained by such an intention.

Second, the source of the tribunal's jurisdiction comes from the agreement of the parties. The arbitration agreement determines what disputes the parties have agreed to arbitrate, what powers the tribunal hold while adjudicating the dispute, and, what rules are applicable to the procedure. The law of seat comes into play after the tribunal renders its award. However, at the time of enforceability or setting aside of the award, the court will apply the law of seat to determine the arbitrability of the subject matter. To bridge the gap between these different application, the court found a middle ground.

The court took this approach and proceeded to use the three-stage test laid down in ***BCY v BCZ***[2] ("BCY") and ***Sulamérica Cia Nacional de Seguros SA and others v. Enesa Engelharia SA and others*** ("Sulamérica") –

Stage 1 – Assessment of whether parties have chosen a law as the law of the arbitration agreement. The SGCA found that Indian law being "in all respects" the governing law of "the SHA and its performance" does not point expressly towards Indian law being the law of the arbitration agreement.

Stage 2 – In case the parties have failed to choose expressly, have they made an implied choice such as choice of law of the contract for determining the arbitrability of the subject matter. In applying this, the SCGA found that if Indian law is applied to determine arbitrability, then the intention of the parties to arbitrate all disputes including management disputes is frustrated considering that such disputes are not arbitrable under the Indian law. The SGCA held that in the instant case, the express choice of the parties to include management disputes was clearly visible.

Stage 3 – Further, if it is assessed that there is no express or implied choice of the parties, then the parameters of closest and most real connection to the arbitration agreement is tested. The SCGA held that the Singapore law has the closest and most real connection to the arbitration agreement and, therefore, it should be the law of the arbitration agreement, since the law of the seat will govern the procedure of the arbitration proceedings.

Mittal v. Westbridge was distinguished from ***BNA v. BNB***[3], a case in which SGCA paid attention to the mutual agreement and choice of the parties. In this case, the court held that the parties have the strong desire to cover all their disputes under the arbitration agreement, even the disputes "relating to the management of the company". The parties chose PRC law as the law of the arbitration agreement even though the arbitration agreement might be invalid under PRC law. It was their deliberate choice to pick Singapore-seated arbitration for disputes relating to the management of an Indian Company.

Analysis of the judgement vis-a-vis Indian parties

Despite numerous proceedings before courts and tribunals in the past decade, it is still not common practice for parties to state an express choice of law for their arbitration agreement. Given the extent the matter was pursued in Singapore courts, even the express choice of the parties to include the dispute of the management of the company within the scope of the arbitration agreement.

[2] *(2016) SGHC 249.*

[3] *(2019) SGCA 84.*

This decision travels outside of the precedent set in the national courts since they just apply the law of the seat at every stage to determine the arbitrability of the dispute referred to arbitration. SGCA along with this pro-arbitration approach issued a reminder to contracting parties that it "lies in the hands of the parties themselves and their legal advisors" to carefully negotiate and craft their arbitration agreement, so as to mitigate any issues from arising to frustrate the parties' desire to settle some or all of their disputes by arbitration. The contracting parties cannot leave it to the jurisdiction they choose to maintain the position of being arbitration friendly even though there is always a chance of challenge to the award and unenforceability in a foreign jurisdiction. This possibility was recognised by the court in Mittal v. Westbridge and it sought to render a decision stating that a cross-border dispute resolution process will always have such a risk and to avoid this the parties should develop a strategy for enforcement of the award when negotiating a dispute resolution mechanism.

The UK courts dealt with this issue in the case of ***Enka Insaat Ve Sanayi AS v. OOO "Insurance Company Chubb" & Ors.***[4], but a conclusive precedent was not set by the court. In this matter, the court held that the third test of the Sulamérica test would not be applicable if the law of the seat invalidates the arbitration agreement. The court left this exception open since the same was not in issue in the UK court.

Mittal v. Westbridge does not impact any domestic arbitration but has significant impact on Indian parties with agreement to arbitrate their dispute with Singapore as the seat.

In light of the Supreme Court judgement in ***PASL Wind Solutions Pvt Ltd v GE Power Conversion India Pvt Ltd.***[5], disputes involving Indian parties can be resolved through foreign arbitrations and hence, any arbitration where Indian parties choose the seat to be Singapore will have to face the consequence of their choice.

In the case of ***Reliance Industries v Union of India***[6], the court held that the substantive law of the contract is of prime importance to determine the issue of arbitrability rather than the law of the seat or of the arbitration agreement. Specifically, the court stated as below:

> ***"76.4.*** *The conclusion of the High Court that in the event, the award is sought to be enforced outside India, it would leave the Indian party remediless is without any basis as the parties have consensually provided that the arbitration agreement will be governed by the English law. Therefore, the remedy against the award will have to be sought in England, where the juridical seat is located. However, we accept the submission of the appellant that since the substantive law governing the contract is Indian law, even the courts in England, in case the arbitrability is challenged, will have to decide the issue by applying Indian law viz. the principle of public policy, etc. as it prevails in Indian law."*

[4] *(2020) UK SC 38.*

[5] *(2021) 7 SCC 1.*
[6] *(2014) 7 SCC 603.*

Further in the cases of ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Ors.***[7]***,*** and ***Government of India v Vedanta Limited***[8]***,*** the court took a different stance and held that the arbitrability of the subject matter would be decided by the law of the arbitration agreement.

> "*Where the law governing the conduct of the reference is different from the law governing the underlying arbitration agreement, the court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted*."

Therefore, the dialogue on this issue in India is still open and the law is not settled. There are about three options with the Indian court to take a stance; a) it can affirm the decision in the Reliance Industries case; b) apply the law of the seat to determine arbitrability; c) apply the law of the lex fori to determine arbitrability; or d) follow the newly minted "composite approach" as decided by the SGCA. In light of Mittal v Westbridge, Indian parties deciding on a Singapore seat should exercise caution while crafting an arbitration agreement. To begin, parties should specifically declare the applicable law to the arbitration agreement to avoid confusion about what a court may decide. Second, parties should ensure that any expected issues are arbitrable under both the law relevant to the arbitration agreement and the law of the seat. his would certainly save time and costs arising from applications and / or satellite litigation dealing with arbitrability of claims and which forum might be the appropriate forum to deal with the dispute between the parties.

In light of ***Mittal v Westbridge***, Indian parties agreeing on a Singapore seat should carefully consider two elements while negotiating an arbitration clause. One, parties should expressly stipulate the law applicable to the arbitration agreement to avoid uncertainty over what a tribunal / court might determine it to be. Two, parties should ensure that anticipated disputes that could arise are of a subject matter that is arbitrable both under the law applicable to the arbitration agreement and the law of the seat. This would certainly save time and costs arising from applications and / or satellite litigation dealing with arbitrability of claims and which forum might be the appropriate forum to deal with the dispute between the parties.

Conclusion

When contracting parties choose the law which will govern the arbitration agreement, the idea is to be choose a "pro-arbitration" jurisdiction since the choice of arbitration shows that the parties are inclined to resolve their dispute outside of the litigation system. The judgement of the Singapore Court of Appeal opens new doors as it takes a "composite approach" and deviates from the view taken by national courts before. The application of law of seat at the pre-award stage to determine arbitrability was put to a test and what remains to be seen is whether the other major arbitration hubs such as the United Kingdom, Hong Kong, Geneva and Paris also adopt a similar approach or whether a dichotomy will prevail. The significance is that the law of the arbitration agreement has grown in importance as it not only governs general issues of validity of the arbitration agreement, but also arbitrability of the dispute.

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[7] *(1998) 1 SCC 305.*
[8] *2020 SCC OnLine SC 765.*

AMENDMENT OF PLEADINGS IN ARBITRATION PROCEEDINGS

- *Anand Pratap Singh & Shikhar Agarwal*

Introduction

Order VI Rule 17 of Code of Civil Procedure, 1908 ("the Code") provides that the Court may, at any stage of the proceedings, allow either party to alter or amend its pleadings if the same is necessary to determine the real questions in controversy between the parties.

However, the proviso to Order VI Rule 17 of the Code prevents an application for amendment of pleadings from being allowed after the trial has commenced, unless the Court concludes that despite due diligence, the party could not have raised the issue before the commencement of the trial.

The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. It is couched in a mandatory form. The court's jurisdiction to allow application for amendment is taken away unless the parties establish that it could not have raised the issue before the commencement of the trial despite due diligence.

However, it cannot be denied that the aforesaid provision is one of the most misused provisions of the Code which drag the proceedings and cause a delay in the disposal of the cases. Therefore, in the year 1999, to avoid delay and to ensure expeditious disposal of the civil suits, on the recommendation of Justice Malimath Committee, Rule 17 from Order VI of the Code was deleted.

However, later in the year 2002, because of public uproar, Rule 17 of Order VI was restored with the insertion of the aforesaid embargo to curtail the absolute discretion of the Court to allow the amendment at any stage.

Based on the above, it is evident that the proviso appended to Order VI Rule 17 of the Code restricts the power of the Court by putting an embargo i.e., *(before the commencement of the trial)* on the exercise of its discretion to allow amendment at any stage.

Amendment of pleadings in the Arbitration and Conciliation Act, 1996 ("the Arbitration Act")

The provision for amendment of pleadings is widely used in Arbitration Proceedings and applications for amendment before the Arbitral Tribunal is not uncommon. However, in Arbitration Proceeding, the rules of procedure to be followed by an Arbitral Tribunal are flexible and can be agreed upon by the parties as provided under Section 19 of the Arbitration Act which reads as hereunder.

> *"19. Determination of Rules of procedure - (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872)."*

Further, the Hon'ble Supreme Court of India in ***Srei Infrastructure Finance Ltd. v. TUFF Drilling Pvt. Ltd*** [1], held that *Section 19 (1) of the Arbitration and Conciliation Act, 1996 ("the Arbitration Act"), provides that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908, but the said subsection does not prohibit the arbitral Tribunal from drawing sustenance from the fundamental principles underlined in the Civil Procedure Code, 1908*".

Thus, in light of the aforesaid judgment of the Hon'ble Supreme Court and the provision of the Arbitration Act, the Arbitral Tribunal is not bound to follow the provisions of Order 6 Rule 17 of the Code while considering an application for amendment of pleadings. Rather, the Arbitral Tribunal has to follow the provisions of the Arbitration Act relating to the amendment of pleadings as provided under Section 23(3) of the Arbitration Act.

Section 23 (3) of the Arbitration Act, provides that *unless otherwise agreed by the parties, either party may amend or supplement its claim or defence during the course of the arbitral proceedings unless the arbitral Tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it*.

No doubt, the Arbitral Tribunal has the jurisdiction to deal with and grant amendment of a statement of claim, counterclaim, counterstatement and other pleadings before the Tribunal.

However, that does not mean that in every case where such an application has been moved before the termination of the proceedings, the Tribunal is bound to grant the amendment. It would depend on the facts of each case as to whether, or not, the amendment should be allowed by the Tribunal.[2]

Pertinently, Section 23(3) of the Arbitration Act, itself provides that application for amendment may be refused, if there is a delay in making it. The Delhi High Court in the case of ***Bharat Aluminium Company Ltd. v. National Thermal Power Corporation***[3] held that "*the Legislature has used the words "having regard to the delay in making it", which means such delay which is unjustified and not sufficiently explained.*

It is important to highlight here that the words used in Section 23(3) of the Arbitration Act that *".... unless the tribunal considers it inappropriate to allow ... having regard to the delay in making it",* does not mean that delay is the sole ground for rejection of the application for amendment of the pleadings. Pertinently, Section 23(3) of the Arbitration Act does not limit the Arbitrator from taking into account other factors for rejecting an application for amendment of pleading although delay remains the foremost among such considerations.[4]

[1] *Srei Infrastructure Finance Ltd.* v. *TUFF Drilling Pvt. Ltd, 2018 (11) SCC 470*

[2] *Bharat Aluminium Company Ltd.* v. *National Thermal Power Corporation, Arb. P. 66/2014, Delhi High Court*

[3] *Bharat Aluminium Company Ltd.* v. *National Thermal Power Corporation, Arb. P. 66/2014, Delhi High Court*

[4] *Lindsay International Private Limited v IFGL Refractories Limited, I.A. No. G.A. 1 of 2021 in A.P. 33 Of 2021, High Court of Calcutta.*

The Hon'ble Bombay High Court, in the case of ***Patel Engineering Co. Ltd. v. B.T. Patil and Sons Belgaum (Construction) Pvt. Ltd.***,[5] interpreted Section 23 of the Arbitration Act and held that "*though the said provision permits the amendment of the statement of claim and defence, the said provision would not permit the learned arbitrator to travel beyond the scope of reference or permit the amendment of the claim and to seek adjudication without following mandatory procedure prescribed in the arbitration agreement required to be followed for referring the dispute to arbitration.*

Conclusion

As explained above, the proviso appended to Order VI Rule 17 of the Code, restricts the power of the Court by putting an embargo on the exercise of its discretion to allow amendment at any stage and prevent the Court from allowing an application for amendment of pleadings after the commencement of the trial.

However, no such restrictions exist in the Arbitration Act on the Arbitral Tribunal in the exercise of its absolute discretion to allow application for amendment of pleading at any stage including after the commencement of the trial.

To curtail the absolute discretion of the Arbitral Tribunal to allow amendment of pleading at any stage including after the commencement of the trial and to reduce delay in disposal of the Arbitral Proceeding, it is important to incorporate an embargo in the Arbitration Act, similar to an embargo that exists in Order VI Rule 17 of the Code.

Pertinently, mere rejection of the application for amendment of pleading on the ground of it being made belatedly or being made after the commencement of the trial does not lead to denial of the rights of the parties, it only means that such additional rights cannot form part of the ongoing arbitral proceedings and it will always be open for the parties to raise such issues in other appropriate proceedings.

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[5] *Patel Engineering Co. Ltd.* v. *B.T. Patil and Sons Belgaum (Construction) Pvt. Ltd.2016(3) ARBLR 162(Bom)*

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PRE-ARBITRAL DISPUTE RESOLUTION PROCESS - WHETHER EXCLUDED FROM THE LIMITATION PERIOD FOR INVOKING ARBITRATION?

-Ankur Mishra

Introduction

A multi-tier dispute resolution clause is a clause containing a sequentially arranged set of dispute resolution processes stipulating different dispute resolution methods if the dispute between the parties had not been resolved via a previously stipulated dispute resolution process.

Usually, but not necessarily, such clauses provide for the resolution of disputes via negotiation, conciliation, mediation etc. prior to reference to arbitration. Such clauses are eminently suitable from a commercial standpoint as they allow parties to benefit from the whole gamut of dispute resolution processes while at the same time reducing the incidences of invocation of costly and time-consuming arbitration proceedings.

However, when different dispute resolution processes are clubbed together, there is some confusion as to the computation of the limitation period for each subsequent dispute resolution method contemplated under a multi-tier dispute resolution clause. Simply put, the question is about the legal effect of the time spent on the previous tier of dispute resolution on the computation period for the subsequent dispute resolution procedure invoked by the parties.

Indian law does not provide for a separate scheme of limitation for multi-tier dispute resolution processes. Resultantly, each step of the multi-tier dispute resolution clause must be independently studied insofar as the bar of limitation under the Limitation Act, 1963 is concerned. Also, it is important to note the legal treatment of the time spent on one step of the multi-tier dispute resolution clause on the computation of the limitation period for another step of the multi-tier dispute resolution clause.

Two recent cases of the Hon'ble Delhi High Court have dealt with the issue of limitation for invocation of arbitration vis-à-vis the pre-reference procedure/remedies. In ***M/s Welspun Enterprises Ltd v. M/s NCC Ltd***[1] (hereinafter ***"Welspun"***), Hon'ble Delhi High Court had ruled that if the arbitration agreement requires the parties to exhaust the dispute resolution process as a pre-condition for invoking arbitration, the right of parties to refer the dispute to arbitration would arise only after the parties have exhausted the procedure. More recently, in ***Kiddle India v. National Thermal Power Corpn Ltd,***[2] the failure to approach the appointing authority within a period resulting in the bar of limitation was challenged.

[1] *M/s Welspun Enterprises Ltd v. M/s NCC Ltd, 2022 SCC OnLine Del 3296.*
[2] *Kiddle India Ltd v. National Themal Power Corpn Ltd, MANU/DE/0598/2023.*

The Hon'ble Delhi High Court had ruled that pursuant to the "breaking point," negotiation if any, would not defer the accrual of the cause of action.

The Limitation Period for Arbitral Proceedings

The computation of the limitation period is a mixed question of fact and law. However, at the outset, it is important to note that there exists a clear difference between the "cause of action" for prosecuting a claim and the "cause of action accruing" for invoking arbitration. The Hon'ble Supreme Court in ***Panchu Gopal Bose v. Board of Trustees for Port of Calcutta***[3] held that "the period of limitation for commencement of arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued." Section 43(1) of the Arbitration and Conciliation Act, 1996 ("**Act**") provides that the Limitation Act, 1963 shall apply to arbitration as it applies to proceedings in Court. Section 43(2) of the Act provides that for the purpose of the Limitation Act, 1963, the arbitration is deemed to have commenced on the date referred to in Section 21 of the Act. Under Section 21 of the Act, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the Respondent.

In this backdrop, the question that arises for consideration is whether a party is entitled to invoke arbitral proceedings before the completion of pre-reference processes. Subsequently, whether the time spent for complying with the pre-reference procedure is required to be excluded while calculating the period of limitation for referring the disputes to arbitration, and secondly, whether the period of limitation would commence after the procedure has been exhausted.

Cause of action for invocation of arbitration in multi-tier clause

Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Pertinently, mere failure or inaction to pay does not lead to interference in the existence of a Dispute.[4] Under Indian Law, the Limitation period to commence arbitration starts from the date when the Claimant first acquired either a right of action or a right to require that arbitration takes place upon the dispute concerned.

In the landmark judgment of ***Geo Miller & Co v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd***[5] ***(***hereinafter***, "Geo Miller")***, it was held by the Hon'ble Supreme Court that the right for reference to arbitration accrues when the differences between the parties to the arbitration agreement were evident and when the parties reach a 'breaking point,' that is when a settlement with or without conciliation is no longer possible.

[3] *Panchu Gopal Bose v. Board of Trustees for Port of Calcutta, (1988) 2 SCC 338.*

[4] *Major (Retd) Inder Singh Rekhi v. Delhi Development Authority, (1988 2 SCC 338.*

[5] *Geo Miller & Company Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd, (2020) 14 SCC 643.*

This "breaking point" would then be treated as the date on which the cause of action arises, for the purpose of limitation. In Geo Miller, the 'breaking point' i.e., the point when a reasonable party would abandon settlement efforts and contemplate referring the dispute to arbitration based on the specific pleadings and evidence qua the parties' bona fide negotiation history. The Court upon careful consideration must find out what was the "breaking point" at which any reasonable party would have abandoned efforts at arriving at a settlement.

In *Welspun*, the Hon'ble Delhi High Court ruled that the period of limitation for referring the dispute to arbitration cannot commence till the parties have exhausted the necessary pre-reference procedure. The right to refer the dispute to arbitration would arise only after the negotiation for an amicable settlement has failed and the parties have exhausted their endeavours to resolve the disputes through mediation/conciliation. What is however interesting is that the meaning of what constitutes a pre-reference procedure is not derived only from the dispute resolution clause and any dispute resolution process being undertaken would impact the cause of action for invoking arbitration. The Hon'ble Delhi High Court cited the judgment of ***TVC India Pvt Ltd v. ABN Amro Bank N.V***.[6] and ***National Highways Authority v. Progressive Construction Ltd.***[7] Thus, the period of limitation for referring the disputes to arbitration does not commence prior to the parties exhausting the agreed pre-reference procedures.

The Hon'ble Court also cited sub-section (3) of Section 12A of the Commercial Courts Act, 2015 which expressly provides that the period during which the parties remained occupied with the pre-institution mediation would not be computed for the purpose of limitation under the Limitation Act. In *Welspun*, the Hon'ble Delhi High Court ruled that it is only after the attempt to resolve the disputes by the Chief Executive failed on 21.12.2012 that the right to refer the dispute arose in favour of Welspun.

Non-exclusion of time spent in the pre-reference process for the cause of action for invoking arbitration.

In *Welspun*, the Hon'ble Delhi High Court ruled against the exclusion of time spent complying with the pre-reference procedure while calculating the period of limitation for referring the disputes to arbitration. This is consistent with the ruling of the Hon'ble Delhi High Court regarding the 'breaking point' being the cause of action for the commencement of the limitation period. The limitation would not commence till the right to refer the dispute to arbitration has arisen.[8] That once the 'breaking point' being the date on which any reasonable party would have abandoned the efforts at settlement, is determined, the cause of action would be deemed to arise from that date, for referring the dispute to arbitration.

[6] *TVC India Pvt Ltd v. ABN Amro Bank N.V, 2008 (1) Arb LR 579 Delhi.*
[7] *National Highways Authority v. Progressive Construction Ltd, 2014 SCC OnLine Del 3104.*
[8] *Delhi Jal Board v. Mohini Electricals Ltd, 2022 SCC OnLine Del 1869.*

The Hon'ble Delhi High Court referred to its decision in ***Alstom Systems India Pvt Ltd v. Zillion Infra projects Pvt Ltd***.[9], wherein the single judge bench of Hon'ble Delhi High Court ruled that Para 28 of Geo Miller clearly goes on to hold that, once the 'breaking point', being the date on which any reasonable party would have abandoned the efforts at settlement, is determined, the cause of action would be deemed to arise from that date, for referring the dispute to arbitration. Pertinently, the Hon'ble High Court of Madras has in ***Enexio Power Cooling Solutions India Pvt. Ltd v. Gita Power and Infrastructure Pvt. Ltd***[10], interpreted the ruling of Geo Miller qua exclusion of time spent from limitation as not providing any more than what is already permissible in law. The Hon'ble Madras High Court had interpreted the ruling of Geo Miller in conjunction with Section 18 of the Limitation Act, 1963 whereby acknowledgement of a jural relationship between the parties gives a fresh lease of time under the Limitation Act, 1963.

In effect, the ruling of the Hon'ble Delhi High Court in *Welspun* clarifies that the determination of the 'breaking point' as regards to Geo Miller leads to ascertaining the cause of action for the invocation of arbitration. What is implicit herein is that there is no cause of action for invoking arbitration prior to the extinguishment of pre-arbitral procedures stipulated in the Agreement.

The parties to the dispute may plead the entire negotiation history for the Court to determine the breaking point which would be deemed to be the date on which the cause of action arises between the parties for the purpose of limitation. The right to apply can be said to have accrued "only on the date of the last correspondence between the parties and the period of limitation commences from the date of the last communication between the parties".[11] Thus, it is essential to establish that the parties cannot resolve the dispute between them.[12]

Pre-Dispute Procedure as Condition Precedent

Interestingly, the ruling of Welspun can be read as being limited only to a such arbitration agreement which requires the parties to exhaust the dispute resolution process as a pre-condition for invoking arbitration. The characterization of whether a particular pre-dispute process is a Condition Precedent is a question of interpretation. The impact of the ruling of Welspun on the arbitration agreement which does not require the parties to exhaust the dispute resolution process as a pre-condition is unclear from the standpoint of limitation. It is not apparent from the ruling of Welspun as to whether the time spent in pre-reference dispute processes would be excluded from the limitation period for the invocation of arbitration in cases involving arbitration agreements wherein pre-reference dispute processes are not mandatory.

[9] *Alstom Systems India Pvt Ltd v. Zillion Infraprojects Pvt Ltd, OMP(COMM) No. 351/2021 decided on 31.01.2022.*
[10] *Enexio Power Cooling Solutions India Pvt. Ltd v. Gita Power and Infrastructure Pvt. Ltd (2021) 6 Mad LJ 545.*
[11] *Hari Shankar Singhania & Ors v. Gaur Hari Singhania & Ors, (2006) 4 SCC 658.*
[12] *Oriental Building and Furnishing Co. Ltd v. Union of India, AIR 1981 Del 293.*

Conclusion

The ruling of the Hon'ble Delhi High Court provides much greater clarity on the legal treatment accorded to the time spent in pre-arbitral dispute processes such as conciliation for the computation of the limitation period for invocation of arbitration. Based on the ruling of the Geo Miller, the Hon'ble Delhi High Court interpreted the pre-reference dispute processes agreed by the parties as Condition Precedent as delaying the cause of action for the commencement of the arbitration. The cause of action for the invocation of arbitration would require the completion of pre-reference dispute processes as the 'breaking point' as understood in Geo Miller. The parties are also required to plead the negotiation history and completion thereof in their pleadings as stated in Geo Miller case. Parties are thus required to prepare their pleadings and submissions accordingly to avoid the bar of limitation, especially in multi-tier dispute resolution clauses.

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ANALYSIS OF SRIRASTHU SHOPPING MALL V. MICRO AND SMALL ENTERPRISES & ORS. ON MAINTAINABILITY OF WRIT PETITIONS AGAINST AWARD PASSED UNDER MSMED ACT, 2006

- *Vidhi Agarwal and Shashank Saurabh*

Introduction

It is a trite position in law that writ petitions before High Court and Supreme Court are not maintainable in cases where an alternative and efficacious remedy exists.[1] A similar judicial consideration is required wherein the Facilitation Council under the Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act") passes an Arbitral Award under the procedure laid down therein and the same is under-challenge by way of a writ petition before the concerned High Court. In light of the aforesaid, several rulings in favour of the maintainability of writ petitions even though an alternative remedy of challenging the Arbitral Award under Section 34 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") exists. Following the above, the present article attempts to analyse the recent ruling in the ***M/s Srirasthu Shopping Mall v. Micro and Small Enterprises & Ors.***[2] by the Hon'ble High Court of Telangana wherein the writ petition against the Award passed by the Facilitation Council was held maintainable considering the facts of the case.

Relevant Provisions governing the proceedings under the MSMED Act, 2006 and Arbitration Act, 1996

Chapter V of the MSMED Act, 2006 (Section 15 to 25) provides for provisions about 'Delayed payments to Micro and Small Enterprises'. It provides that a reference[3] can be made to the Micro and Small Enterprises Facilitation Council ("Council") in relation to any dispute arising out of goods supplied or services rendered by the 'supplier' and the buyer fails to pay the unpaid amount.[4] Wherein a reference has been made in terms of Section 18(1) of the MSMED Act, 2006, the Council shall first attempt to resolve the dispute through conciliation[5] and only where the conciliation fails and stands terminated without any settlement between the parties, the Council shall proceed for Arbitration either by itself or through any institution or centre provided Alternative Dispute Resolution services.[6] Pertinently, such a reference is deemed to be a reference in terms of Section 7(1) of the Arbitration Act, 1996.[7]

[1] *Radha Krishan Industries v. State of Himachal Pradesh, (2021) 6 SCC 771*
[2] *W.P. No. 38797 of 2022 filed before the High Court of Telangana*
[3] *Section 18(1) of Micro, Small and Medium Enterprises Development Act, 2006*
[4] *Section 17 of Micro, Small and Medium Enterprises Development Act, 2006; Section 2(n) of Micro, Small and Medium Enterprises Development Act, 2006*
[5] *Section 18(2) of Micro, Small and Medium Enterprises Development Act, 2006*
[6] *Section 18(3) of Micro, Small and Medium Enterprises Development Act, 2006*
[7] *Section 18(3) of Micro, Small and Medium Enterprises Development Act, 2006*

Part III of the Arbitration Act, 1996 (Sections 61 to 81) stipulates the provisions governing Conciliation proceedings. Section 76 of the Arbitration Act lays down the modes for termination of conciliation proceedings. It can be done either by signing a settlement agreement by the parties, a written declaration by Conciliator that further efforts are not justified, written declaration by either or both parties stating the proceedings to have been terminated. Therefore, on a conjunctive reading of the relevant provisions of the MSMED Act, 2006 and the Arbitration Act, 1996 clarifies that even the Conciliation proceedings under the MSME Council stands terminated by any mode provided under Section 76 of the Arbitration Act, 1996.

Analysis of *Srirasthu Shopping Mall* v. *Micro and Small Enterprises & Ors.*

In the given case, an entity (herein, Respondent) being registered with the Ministry of Micro, Small and Medium Enterprises on 10.03.2021 supplied goods to the Shopping Mall (herein, Petitioner) for orders placed during 2019-20 and raised invoices, accordingly. Having received the goods, the Petitioner failed to clear the dues. Accordingly, a reference was made to the Council under MSMED Act, 2006.

Pursuant to the reference, the Council passed an Award dated 30.04.2022 holding the petitioner to pay the principal amount and interest with effect from the appointed day.

Aggrieved by the said Award, the petitioner filed a writ petition before the High Court of Telangana under Article 226 of the Constitution of India on the grounds that (a) That the Council did not follow the procedure laid down under Section 18(2) and 18(3) of the MSMED Act, 2006 and Section 65 to 81 of the Arbitration Act, 1996 and, (b) That the Respondent was not a 'supplier' in terms of Section 2(n) of the MSMED Act, 2006 as on the date when it entered into contract with the Petitioner for the present supply of goods.

On the other hand, the Respondent primarily contested the writ petition on the premise that the present petition was not maintainable in view of the availability of an alternative and efficacious remedy under Section 34 of the Arbitration Act, 1996.

On the aspect of maintainability, the High Court with reference to the judgements passed by the Hon'ble Supreme Court in ***Deep Industries Ltd.* v. *Oil and Natural Gas Corporation Ltd.***[8] and ***Punjab State Power Corporation Ltd.* v. *Emta Coal Ltd.***[9] and recent judgement by the Hon'ble High Court of Delhi in ***Surender Kumar Singhal & Ors.* v. *Arun Kumar Bhalotia & Ors.***[10] held that if the mandatory procedure laid down under Sections 18(2) and 18 (3) of the MSMED Act, 2006 and Section 65 to 81 of the Arbitration Act, 1996 is not followed by the Council while adjudicating the subject reference filed by any party and if there is any violation of the said procedure, the High Court can interfere with the Award by invoking its inherent jurisdiction under Article 226 of the Constitution of India.

[8] *(2019) SCC Online SC 1602*
[9] *SLP(C) No. 8482/2020 filed before the Supreme Court of India*
[10] *CM(M) 1272/2019 filed before the High Court of Delhi*

Following the above, the issue framed in the present case was if there existed any violation of mandatory procedure laid down under Sections 18(2) and 18(3) of the MSMED Act, 2006 and Sections 65 to 81 of the Arbitration Act, 1996 by the Council while passing an impugned award. The High Court observed that there was no mention in the impugned award that the Council followed the procedure laid down under Sections 65 to 81 of the Arbitration Act, 1996, especially, Section 76, i.e. Termination of Conciliation proceedings. Thus, it held that there was no compliance of the procedure laid down under Section 76 of the Arbitration Act, 1996 and hence, a violation of mandatory procedure provided under Section 18(2) of the MSMED Act, 2006.

As regards the second issue on the concept of 'supplier' and its applicability, the High Court followed the recent Apex Court ruling in ***Gujarat State Civil Supplies Corporation* v. *Mahakali Foods Pvt. Ltd. (Unit 2)***[11] and held that registration of the Respondent will operate prospectively but not retrospectively. Thus, the Respondent cannot submit a reference in terms of Section 18 (l) of the MSMED Act, 2006 for the supplies made before registration.

Therefore, in view of the contravention of the provisions under both the MSMED Act, 2006 and the Arbitration Act, 1996, the High Court held the present writ petition maintainable and accordingly, the impugned award was set aside.

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[11] *2022 SCC Online SC 1492*

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ENFORCEMENT OF FOREGIN-SEATED 'EMERGENCY AWARDS' IN INDIA: ENIGMA CONTINUES AND THE WAY FORWARD

- *Sahil Kumar Purvey*

Introduction

'The Arbitration and Conciliation Act, 1996', (the Act), is the cardinal law on arbitration and purported to expeditiously dissolve disputes with minimum judicial interference. The Act provides a timeline of maximum two years unless parties get the court's permission for further extension for the disposal of dispute since the appointment of the arbitral tribunal[1]. Despite such a provision, most cases fail to abide by the timeline and cause a setback to serving justice in cases where time has utmost significance. However, in urgent matters, a party can seek interim relief from the court prior to commencement of the arbitration proceeding[2] or from arbitral tribunal after the commencement of the arbitration proceeding[3]. The Act has no provision for interim relief without going to court or prior to the appointment of arbitral tribunal.

Therefore, the notion of 'Emergency Arbitration' has become popular among parties to arbitration.

'Emergency Arbitration' is an evolving practice, in which both parties agree to institutional arbitration, and an emergency arbitrator is appointed by the arbitral institution to deal with application for interim relief in aid of final relief, on a short notice due to lack of time or an urgency pertinent to the matter in dispute. Emergency arbitrator would grant any interim relief safeguarding the interest of applicant, if the applicant establishes that case is prima facie in his favor and denial of grant of interim relief would cause irreparable loss to him.

Time is the essence of 'Emergency Arbitration' therefore it has utmost significance in cases where urgency doesn't allow waiting for the constitution of an arbitral tribunal to substantially resolve the dispute. Many arbitration institutions have incorporated the rules on emergency arbitration. Countries like Singapore, Hong Kong, the United Kingdom, and others, have recognized 'Emergency Arbitration' and incorporated changes into their legal systems to enforce such 'Emergency Award' (Emergency award is award given in Emergency arbitration)[4].

[1] *The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), Section 23(4) and Section 29*
[2] *Id., Section 9*
[3] *Id., Section 17*

[4] *Ravi Shankar Prasad, "Report of the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India, (30th July, 2017)", page 76, (January 22, 2023, 09:52 PM), https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf*

The Act, however, neither acknowledges 'Emergency Arbitration/Award' nor incorporates any provision to enforce 'Emergency Award' despite the 246th Law Commission's report[5] recommending acknowledgement of the concept of 'Emergency Arbitration/Award' in the Act. Enforcement of arbitral award depends upon the seat of arbitration[6]. In ***Amazon.com Investment Holdings LLC v. Future Retail Limited & Others[7],*** (***'Amazon Case'***) the apex court held that the 'Emergency Award' pronounced in Indian-seated arbitration is enforceable. However, the law is not settled on whether the 'Emergency Award' pronounced in foreign-seated arbitration is enforceable or not. Therefore, this article seeks to analyze this question by discussing the reasoning of the apex court in ***'Amazon Case'.***

Enforcement of Emergency Award in Indian-Seated Arbitration

Part I of the Act deals with Indian-seated arbitrations. Therefore, it's necessary to analyze whether provisions under Part I of the Act contemplate 'Emergency Arbitration/Award' or not.

In ***'Amazon Case'*** the Apex court has held that the 'Emergency Award' pronounced in Indian-seated arbitration is enforceable as it is an interim award given under Section 17 of the Act. The issues for determination before the court were as follows.

Whether a party has the autonomy to opt for emergency arbitration?

The term 'Emergency Arbitration' is nowhere used in the Act. However, in most jurisdictions' exceptions have been allowed to the parties' discretion by adding the term "unless otherwise agreed by the parties". 'Emergency Arbitration' is a procedural aspect of arbitration and has developed through institutional arbitration. It is important to consider whether provisions of the Act allowing the party to submit their dispute to institutional arbitration also allows them to agree for 'Emergency Arbitration' or not. Relevant provisions are Section 2(6), 2(8) and 19(2) of the Act.

Section 2(6) of the Act allows parties to authorize any arbitral institution to determine the issue that has to be determined by them. If parties have authorized any institution to determine the issues, then according to Section 2(8) of the Act, parties can agree to abide by the rules of the institution including the rules pertaining to 'Emergency Arbitration'. Therefore, a combined reading of these provisions establishes that parties have the discretion to opt for 'Emergency Arbitration', which is evident from and in consonance with Section 19(2) of the Act that allows parties to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

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[5] *Id., page 77, (January 22, 2023, 08:41 PM), https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf*

[6] *Bharat Aluminum v. Kaiser Technical Services, (Civil Appeal No. 3678 of 2007), decided on 6th September, 2012 by the Supreme Court of India*

[7] *Amazon.com Investment Holdings LLC v. Future Retail Limited & Others, (Civil Appeal No. 4492-4497 of 2021), decided on 6th August, 2021 by the Supreme Court of India, Para 35-36*

Therefore, the Apex Court in ***'Amazon Case'*** reiterates that the party autonomy[8] is corner stone of arbitration, and submission of a dispute to 'Emergency Arbitration' is within all nooks & corners of the Act and doesn't bypass any compulsory statutory provision[9].

Whether 'Arbitral Tribunal' under the Act, includes 'Emergency Arbitrator'?

The Apex Court in ***'Amazon Case'*** held that 'Emergency Award' pronounced in Indian-seated arbitration is enforceable as an interim award given under Section 17 of the Act. However, Section 17 grants authority only to arbitral tribunal to pass any interim order. Section 17 of the Act reads as, *"A party may, apply to the arbitral tribunal … for an interim measure …. and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it."* Definition of 'Arbitral Tribunal' under Section 2(d) of Act does not include 'Emergency Arbitrator' in it. Section 2 (d) of Act reads as, *"Arbitral tribunal means a sole arbitrator or a panel of arbitrators."* Therefore, question arises whether 'Arbitral Tribunal' under the Act, includes 'Emergency Arbitrator' or not.

Section 2 of the Act, containing definitions of various terms opens with *"unless the context otherwise requires",* allows different interpretation of terms depending on the context. Combined reading of Section 2(6) and 2(8) of the Act establishes that parties have discretion to opt for 'Emergency Arbitration', laid down different contexts for interpretation of terms under Section 2 of the Act. Therefore, arbitral tribunal under Section 17 concerning institutional arbitration also includes 'Emergency Arbitrator' under the existing provisions of the Act.

Whether 'Emergency Arbitration' is part of arbitral proceedings?

An interim award under Section 17 of the Act would be granted only after the commencement of the arbitration proceeding. But the contention was raised that arbitral proceeding and hearing on application under Section 17 of the Act, starts only after the appointment of the arbitral tribunal. Therefore, no 'Emergency Award' can be granted without the appointment of arbitral tribunal. This interpretation may have been erroneous interpretation as the arbitral proceeding commences the moment one of the parties receives the request of referring the dispute to arbitration[10]. Similar provisions are contained in SIAC rules[11]. Further, the language of Section 17 does not limit or exclude the scope of 'Emergency Arbitration.

[8] *Antrix Corporation Ltd. V. Devas Multimedia Pvt. Ltd. (2014) 11 SCC 560*
[9] *Amazon.com Investment Holdings LLC v. Future Retail Limited & Others, (Civil Appeal No. 4492-4497 of 2021), decided on 6th August, 2021 by the Supreme Court of India, Para 17*
[10] *The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), Section 21*
[11] *SIAC Arbitration Rules, 3.2*

Therefore, 'Emergency Arbitration' is part of arbitration proceedings, which could take place between the serving of notice of arbitration and the appointment of the arbitral tribunal for substantial proceedings[12].

Whether the Court can interpret the statute according to the recommendation of the law commission report which legislation has already denied?

Yes, the court can interpret the Act according to the recommendation of 246th law commission report despite legislation has already denied to incorporate the recommendation of amending the term 'Arbitral Tribunal' which also includes 'Emergency Arbitrator'[13], because the said interpretation achieves the objective of the Act i.e., strengthening party autonomy and achieving expeditious relief in urgency. Further, the same recommendation was given by "Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India, 2017"[14].

Enforcement of Emergency Award in Foreign-Seated Arbitration

Sections 9, 27, 37(1)(b), and 37(3) of Part I and Part II of the Act deal with Foreign-seated arbitrations. Part II of the Act does not contain any similar provision to Section 17 under Part I of the Act for interim relief. Therefore, in foreign-seated arbitration, 'Emergency Arbitration' is not enforceable, but the party can approach the court to grant a similar remedy under Section 9 of the Act unless the parties have excluded the same under their agreement.

The Delhi high court in ***Raffles Design International India Private Limited & Others vs. Educomp Professional Education Limited & Others***[15], held that the emergency award of Singapore seated arbitration cannot be enforced under the Act. However, Court allowed the maintainability of the petition on grounds that Indian Courts can independently apply its mind and grant interim relief under Section 9 of the Act. The Delhi high court in ***Ashwani Minda & Others vs. U-Shin Ltd. & Others***[16]**,** didn't allow the petition because the parties had excluded the applicability of Part I of the Act, including Section 9 to their agreement. Further, the governing arbitration rule, in this case, was the Japan Commercial Arbitration Association Rules, which doesn't have a provision for the parties to approach the Courts for interim relief. Further, the 'doctrine of election' and 'balance of favor' are the major factors for declining the petition.

[12] Amazon.com Investment Holdings LLC v. Future Retail Limited & Others, (Civil Appeal No. 4492-4497 of 2021), decided on 6th August, 2021 by the Supreme Court of India, Para 12
[13] Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713
[14] Ravi Shankar Prasad, "Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India, (30th July, 2017)", page 77, (January 24, 2023, 09:52 PM), https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf

[15] Raffles Design International India Private Limited & Others vs. Educomp Professional Education Limited & Others, 2016 (6) ARBLR 426 (Delhi)
[16] Ashwani Minda & Others vs. U-Shin Ltd. & Others, MANU/DE/1348/2020

If after the grant of any 'Emergency Award', any party approaches the court for relief under Section 9, then the court can consider the content of 'Emergency Award' while granting relief under Section 9 and understood as an 'Indirect Option' to enforce the 'Emergency Award' in foreign-seated arbitration[17]. However, once arbitral proceedings commenced in foreign-seated arbitration, to get a remedy under Section 9 of the Act, one has to establish that the same remedy from the arbitral tribunal is inefficacious[18]. The efficacy of interim remedy by arbitral tribunal substantially depends upon its enforceability in India[19]. Therefore, recourse under Section 9 should be open to foreign-seated arbitration.

Part II of the Act contains provisions only for the enforcement of the final award, which is binding on parties[20]. Many arbitral institutions like "LCIA[21], SIAC[22], ICC[23], HKIAC[24], and SCC[25]" have recognized 'Emergency Award' as binding.

Another approach may be that 'Emergency Award' falls under the broader definition of Section 44 of the Act and could be enforced under Section 48 of the Act as this provision has not expressly barred the enforcement of 'Emergency Awards'. The court like New York District Court could apply the test that what amount of finality has been granted in the 'Emergency Award' for its enforcement[26].

Further, the amended provision of Section 2(2) of the Act also extends the application of Section 27 of the Act to foreign-seated arbitration. Section 27(5) penalizes persons which fail to comply with the order of the arbitral tribunal during arbitral proceedings. The court in every judgment as discussed above, missed to asses that the person denying enforcement of 'Emergency Award' should not be escaped and must be punished[27]. This would indirectly compel them to enforce the 'Emergency Award' in foreign-seated arbitration.

Conclusion

'Emergency Award' is the need of the hour. The confidentiality and efficiency back the importance of 'Emergency Awards' in every day changing dynamics of the economy.

[17] HSBC Pl Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd & Others, (*Arbitration Petition No. 1062/2012), decided on 22nd January, 2014 by the Bombay High Court*

[18] *The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), Section 9(3)*

[19] *Adimesh Lochan, Amazon V. Future – Indian Supreme Court Recognizes Emergency Awards under the A&C Act, The National Law Review, (January 23, 2023, 08:43 PM),* https://www.natlawreview.com/article/amazon-v-future-indian-supreme-court-recognizes-emergency-awards-under-ac-act

[20] *The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), Section 48*

[21] *LCIA Rules, Rule 9.9*

[22] *SIAC Rules, Schedule I, Para 12*

[23] *ICC Rules, Rule 29.2*

[24] *HKAIC Rules, Schedule V, Para 16*

[25] *SCC Rules, Article 9*

[26] *Yahoo! Inc. v. Microsoft Corporation, 983 F.Supp.2d 310*

[27] *Ashish Virmani, Rekindling the Debate on Enforcement of Foreign Seated Emergency Awards in India, Kluwer Arbitration Blog, (January 23, 2023, 09:52 PM),* http://arbitrationblog.kluwerarbitration.com/2021/10/03/rekindling-the-debate-on-enforcement-of-foreign-seated-emergency-awards-in-india/

The decision of the Apex Court in the ***Amazon Case*** clears the stand on the enforceability of the 'Emergency Award' in Indian-seated arbitration. It will boost institutional arbitration, which has also been the objective of the Amendment Act of 2019. It again reiterates that party autonomy is the cornerstone of Arbitration. The interpretation of a provision of the Act arrived at by the Apex Court in ***Amazon Case*** mostly relies on party autonomy. However, the extent of allowing party autonomy is questionable and should be ascertained on a case-to-case basis. Further, one of the objectives of the Act is that arbitration laws of India should be brought on par with the international level and should be in accordance with UNCITRAL Model Laws. Article 17H and 17I of the UNCITRAL Model Law recognizes and enforces interim award by foreign-seated arbitration. Therefore, the Indian legislature needs to amend statutes like Singapore and Hong Kong to incorporate provisions to enforce interim awards by foreign-seated arbitration.

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PRIVILEGE TO 'WITHOUT PREJUDICE' COMMUNICATIONS: INTERNATIONAL PERSPECTIVE

-Madhvi Vangani

Introduction

The term "without prejudice" plays an imperative role in commercial contracts, as it provides protection to the party from the admissions/contradictions made in the written correspondence in a manner that no rights or privileges are waived or lost.

The Black's Law Dictionary defines 'without prejudice' as:

> *"Where an offer or admission is made 'without prejudice', or a motion is denied or a bill in equity dismissed 'without prejudice', it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided.".*

In addition to the aforesaid definition another classic definition of the phrase 'without prejudice' is contained in the judgement of the Court of Appeal (UK) in Walker v. Wilsher[1] wherein Lindley, L.J. in his judgement defined the phrase as follows:

> *"What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."*

The term "without prejudice" is used extensively in business ecosystems as it allows parties to speak freely, and securely and ensures admissions made in pursuance will not be used against the author in a determinantal manner.

In India, the word 'without prejudice' derives its footing from Section 23 of the Indian Evidence Act, 1872 wherein, it is laid down that no admission is considered to be relevant if made either upon the express condition that the evidence of it is not to be given or the circumstances leading the court to believe that the parties agreed together that the evidence of such admission shall not be given.

The article discusses that the word "without prejudice" does not act carte blanche against all liabilities of the parties, as globally, the Courts have neither shied away from carving exceptions to this protection nor from extending the privilege in an implied manner wherever necessary.

[1] *(1889) 23 QBD 335*

Implications of expressed 'without prejudice.'

The courts have assumed wide discretion in analyzing the implications of expressed 'without prejudice.'

In the case of ***Chairman and MD, NTPC Ltd.*** **v.** ***Reshmi Constructions, Builders and Contractors***[2], the Hon'ble Supreme Court of India while determining the effect of correspondences marked as *'without prejudice'* held that.

> "*The implication of the term 'without prejudice' means (1) that the cause or the matter has not been decided on merits, (2) that fresh proceedings according to the law were not barred."*

The Hon'ble Court further went on to hold that:

> "*Even correspondence marked as without prejudice may have to be interpreted differently in different situations."*

The court in India and outside have continued to give the effect that "without prejudice" correspondence has to be evaluated on surrounding facts.

Implications of implied 'without prejudice.'

The House of Lords in the case of **Rush & Tompkins v. Freater London Council**[3] held that the nature of the communication is a relevant factor to examine the privilege and waiver. The plaintiff, in this case, was a construction business that had engaged in 'without prejudice' talks with the Respondent.

The dispute between the parties was founded on a common cause of action, it was extended to another party, who demanded disclosure of the substance of these conversations as well. They were thus protected by the 'without prejudice' privilege. It was also held that just labelling documents as 'without prejudice' is insufficient to draw protection, just as the lack of the word is insufficient to renounce such privilege.

Thereafter, the England and Wales High Court in an intriguing case, in ***Sternberg Reed Solicitors v Harrison***[4] made a unique distinction between communications expressly made on a "without prejudice" basis and those which are treated as "without prejudice" impliedly.

In the instant case, the arbitrator while resolving matters of costs, assumed that he had the discretion to take into evidence, "without prejudice" correspondence between the parties.

The Court went on to rule that the correspondence that the arbitrator took into account was implied "without prejudice" correspondence. Though, it was not labelled "without prejudice," but was produced as part of a compromise effort. Such letters, the court determined, could not be considered on substantive grounds but might be included when calculating costs.

The court held that the arbitrator committed an error of law, however, the letter impliedly "without prejudice" may not be granted protection, for all purposes and was admissible on the question of costs.

[2] *(2004) 2 SCC 663*
[3] *[1989] AC 1280.*
[4] *[2019] EWHC 2065 (Ch)*

The court's conclusion that correspondence made expressly "without prejudice" is not admissible on problems of costs is not unexpected, unless it is marked "without prejudice save as to costs" or the right to refer to the letter for that purpose is otherwise reserved.

In the author's opinion, the Indian Supreme court has recognized implied "without prejudice" in ***M/s Peacock Plywood Pvt. Ltd. v. The Oriental Insurance Co. Ltd***.[5] wherein it extended the privilege to entire correspondence even though each of the documents was not marked as "without prejudice". However, there are no instances wherein the courts have extended such partial protection. Although it is not uncommon that Arbitrators have extensive discretion when it comes to costs, the established English law principles on without prejudice privilege should have nonetheless restricted what evidence of the parties' correspondence is admissible by the Tribunal.

Conclusion

The courts internationally have not provided 'without prejudice' privilege to parties as an absolute cloak to hide any communication between parties.

However, in certain circumstances, the courts have extended the privilege to communication not marked as 'without prejudice' wherein the intent of the parties is reflected through surrounding circumstances.

The privilege by the courts, in either case, is not treated as carte blanche for parties to extort or gain unduly advantage, interestingly, in the case discussed above, the court managed to extend it to substantive issues and not cost. Although the development and clarity of the same are at the nascent stage the judgement provides an **overly** balancing approach by extending the limited privilege to impliedly 'without privilege' communication and leaves the wide decision-making powers to the wisdom of the Tribunal.

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[5] *(2006) 12 SCC 673*

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