



Arbitration Newsletter

March 2024

**The Delhi High Court Ruled That the Designation Of A Seat Is Akin To An Exclusive Jurisdiction Clause And The Parties To An Arbitration Agreement May Choose A Neutral Venue To Be Designated As The Seat. [My Preferred Transformation And Hospitality Pvt. Ltd. vs. Panchdeep Construction Limited (MANU/DE/1456/2024)]**

The High Court of Delhi ruled that the appointment of an arbitrator under section 11 of the Arbitration and Conciliation Act, 1996 and actions taken under Section 9 or Section 34 of the Arbitration Act are under the exclusive jurisdiction of the seat court as they are matters arising from the arbitration agreement. It was observed that, to exclude Section 11 proceedings from the seat Court's exclusive jurisdiction would go against both the idea of party autonomy and the availability of a neutral venue as the seat of arbitration.

To the extent that the Act allows the parties to choose a neutral seat for arbitration, it is observed by the Court that the appointment of the tribunal must also be made by such a neutral Court. Any other interpretation would denude the significance of the neutral venue, by permitting a party to approach any Court which answers to the definition of "Court" in terms of Section 2(1)(e) of the Act, for the primary and fundamental task of appointment of the arbitrator.

The Court, while deciding the conflict between the parties emphasized that in an agreement featuring distinct forum selection and seat clauses, the clause designating the seat takes precedence and assumes pre-eminence.

Consequently, the Hon'ble Bench of the Delhi High Court allowed the petition under section 11 of arbitration and conciliation act, and the dispute between the parties were referred to the arbitration.

Seat of arbitration is a location selected by the parties as the legal place of arbitration, which consequently determines the procedural framework of the arbitration.

The concept of neutral venue implies selecting a location that is neutral to both the parties and does not need to have any direct connection involved in the arbitration.

**Key Highlights of the Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996.**

1. Amendment to the Preamble and the short title of the Arbitration and Conciliation Act 1996 to omit references to the word 'Conciliation'.
2. Replacement of "Place" with "Seat" or "Venue" in the Act

- i. Section 20(3) is recommended to be amended by substituting the word “Place” with the word “Venue”;
- ii. Recommendations are given to amend Sections 2(2), 20(2), 28(1) and 31(4) by substituting the word “place” with the word “seat”.

**3. Amendment To the Definition Of 'Court' Having Regard to The Amendment Relating to The Seat of The Arbitration**

Insertion of new section 2A to provide a definition of Court in the following terms-

- i. Courts means the Court first and foremost having jurisdiction over the seat of the arbitration and only if such seat is not determined then having jurisdiction over the subject matter of the arbitration;
- ii. To make a consequential amendment to section 42;
- iii. To further incentivize institutional arbitration, it is proposed that for arbitrations having a Specified Value of Rs. 50 crores or higher, the Court under section 2(1)(e) will be the jurisdictional High Court, having original jurisdiction or jurisdiction to hear appeals from subordinate Courts over the seat of the arbitration and if no seat has been determined, then the Court having jurisdiction over the subject matter of arbitration;
- iv. It is proposed to provide in the definition that the Specified Value will be calculated on the basis of

principles specified in section 12 of the Commercial Courts Act, 2015.

**4. Administrative Assistance by Techno-Legal Utilities**

- i. Amendment to section 6 to include Techno Legal Utilities as a suitable institution to provide administrative assistance;
- ii. Insertion of new Section 6A – to provide for 'Techno-Legal Utilities', which provide techno-legal services to *ad hoc* as well as to institutional arbitrations. Techno Legal services include, but are not limited to, secure online platforms for efficient document sharing, technological support for transcription, recordings and virtual hearings and cybersecurity measures.
- iii. Insertion of new Section 6B for regulating the functioning of the Techno-Legal Utility and providing for such Techno-Legal Utilities to be serviced by a registry with properly delineated functions.

**5. Validation of Insufficiently Stamped or Not Duly Stamped Arbitration Agreement**

- i. To insert a new section 7A to provide that notwithstanding any judgment, decree or order of any Court or anything contained in the Indian Stamp Act, 1899, or any other law in force, an Arbitration Agreement not duly stamped or insufficiently stamped shall be admitted in evidence and shall be acted upon by any Court, an arbitral tribunal, or any other judicial authority for the purposes of the Act and the arbitral tribunal

shall direct a party to pay the requisite stamp duty at an appropriate stage.

- ii. To provide in section 9 of the Amending Act a validation clause to provide that section 7A in the principal Act shall be deemed always to have been in force at all material times with effect from 22nd August 1996 and accordingly no suit or other proceedings shall be initiated, maintained or continued in any Court, tribunal or other authority challenging the appointment of arbitrators or the conduct of proceedings or any action taken thereof on the ground that the arbitration agreement was not duly stamped or insufficiently stamped in accordance with the relevant provisions of the Indian Stamp Act 1899 or any other law for the time being in force.

#### **6. Timeline For Disposal of Applications Under Section 8**

It proposed to amend section 8 to provide that an application filed under subsection (1) shall be disposed of by the Court as expeditiously as possible and endeavor shall be made to dispose of the matter within a period of sixty days from the date of the application.

#### **7. Applications To the Court for Interim Measures of Protection Under Section 9 of the Act.**

- i. To substitute subsection (2) to provide that where, before the commencement of the arbitral proceedings, a party applies to a Court for any interim measure of protection under sub-section

(1), it shall also commence the arbitral proceedings within 30 days from the date of making such application to the Court;

- ii. To insert a new subsection (2A) to provide that where, before the commencement of the arbitral proceedings, a party applies to a Court for any interim measure of protection under sub-section (1), the Court, for the purposes of enabling the parties to approach the arbitral tribunal for adequate interim measures under section 17, may grant relief under sub-section (1) and shall further direct that if the arbitral proceedings are not commenced by the party within the period specified in sub-sec (2), the interim measure granted under the said sub-section shall stand vacated on the expiry of the said period;

#### **8. Appointment of Arbitrators - Amendments to Section 11 of the Act:**

- i. The Committee proposed to amend section 11 of the Act to make three significant changes in the appointment of arbitrators by inserting three new subsections (2A), (2B) and (2C).
- ii. It is recommended to insert a new sub-section (2A) to provide that the procedure for appointment of arbitrators shall offer equal rights to the parties to choose the arbitrators or the presiding arbitrator, as the case may be, and no party shall have the exclusive right to appoint a sole arbitrator or a presiding arbitrator;
- iii. To insert a new sub-section (2B) to the effect, that the procedure for appointment of arbitrators shall

offer equal right to parties to choose from a panel of arbitrators or presiding arbitrators, as the case may be, and no party shall have the exclusive right to insist that the other party appoint arbitrators from a panel offered by it for the appointment of an arbitrator or the presiding arbitrator.

**9. Challenge to An Arbitrator Under Section 13.**

It is proposed to omit subsection (5) of section 13 which provides for an appeal under section 34 of the Act and instead provide for an appeal under Section 37 against any order passed under Section 13 of the Act.

**10. Third-Party Funding: Requirement Of Disclosure Under the Proposed Section 18A**

It is proposed to insert a new section 18A where a party receiving funding for arbitration from any non-party shall disclose the identity of such non-party to the arbitral tribunal.

**11. Enforcement of Arbitral Awards Under Section 36.**

It is proposed to amend sub-section (3) of section 36 to insert two provisos before the second proviso to provide:

- i. that the Court may grant stay of the arbitral award upon deposit of 50% of the principal amount awarded and the furnishing of security for the remaining sum awarded, with interest accrued up to the date of furnishing security.
- ii. That in the event of deposit being made of such amount as directed by the Court, or in the event

of such higher amount at the option of the party making the deposit, further interest on the amount so deposited shall cease only in the event of unconditional withdrawal of the deposited amount by the other party.”

**12. Modifications to Provisions Regarding Appeals Under Section 37**

It is proposed to amend section 37 –

- i. To insert new sub section (1A) to provide that notwithstanding anything contained in any other law, an appeal under sub-section (1) shall be made within 60 days from the date of receipt of the order appealed against, but not thereafter;
- ii. To substitute sub section (2) to provide that an appeal shall also lie to a Court from an order of the arbitral tribunal –
  - a. Rejecting the challenge referred to in sub-section (4) of section 13;
  - b. Accepting or rejecting the plea referred to in subsection (2) or subsection (3) of section 16;
  - c. Granting or refusing to granting an interim measure under section 17;

The Expert committee on arbitration law was formed on June 12, 2023, to assess the functionality of the Arbitration Law in the country and propose reforms to the Arbitration & Conciliation Act, 1996.

- iii. To insert new sub section (1A) to provide that notwithstanding anything contained in any other law, an appeal under sub-section (2) shall be made

within 30 days, but not thereafter, from the date of receipt of the order appealed against.

**The Delhi High Court Held That Filing of Petition Under Section 34 Of the Act Without the Arbitral Award Is a Fatal Defect, Making It Non-Est. [Union of India Vs NCC Limited (MANU/DEOR/313929/2023)]**

The High Court of Delhi re-affirmed its principle laid down in the case of *Oil & Natural Gas Corporation Ltd. vs. Joint Venture of M/s Sai Rama Engineering Enterprises (SREE) & Ors. [FAO(OS)(COMM) 324/2019]*, that non-filing of the award constitutes a fatal defect. The High Court emphasized the necessity for an application under Section 34 of the Arbitration Act, to be accompanied by a copy of the challenged award, without which the grounds for setting aside the award cannot be appreciated.

The court while hearing the petition filed for setting aside the award by the arbitrator noticed the missing of the copy of awards which were challenged. The Court ruled that objections under Section 34 must be found on justiciable grounds specified by Section 34(2), and that the award of the arbitrator is the only source of information for determining these grounds. The objections are inexplicable due to the lack of the award, which makes the filing *non-est*.

Consequently, **the Petition missing the arbitral award was dismissed by the court.**

**The Supreme Court Held That the Limitation Act, 1963 Is Applicable to Proceedings Under Section 11(6) Of the Arbitration and Conciliation Act – [M/s Arif Azim Co. Ltd. vs. M/s Aptech Ltd. (2024 SCC OnLine SC 215)]**

The Apex Court while hearing a petition filed by a foreign base company who were operating franchise business in India held that no time limit has been prescribed in Section 11(6) for filing an application for appointment of an arbitrator. However, Section 43 stipulates that the Limitation Act would apply to arbitrations as it applies to proceedings in the court.

The Court explored the question as to when the right to apply under Section 11(6) would accrue to a party. It was opined that the limitation period can only commence “once a valid notice invoking arbitration has been sent by the Applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice.”

The Court then noted that it would fall within the residual provision of Article 137 of the Limitation Act. On the basis of this, the Court investigated

the question of when a party would become eligible to apply under Section 11(6). A proper notification for arbitration must be received before the statute of limitations can start, according to the opinion.

The Court divided the objections that could be made against an application under Section 11(6), stating that the question of limitation is a “jurisdictional issue/objection” rather than an “admissibility issue/objection.” The explanation of jurisdictional concerns included their relation to the arbitrators’ ability and authority to hear and determine a case.

The Court established the following **two-prong** approach to be used when addressing the question of limitation in connection with a petition under Section 11(6):

The "two-prong test" is a term commonly used in legal contexts to refer to a method or approach involving two distinct criteria or elements. It is not specific to a particular area of law, but rather a general concept that may be applied in various legal analyses. The two-prong test typically requires the satisfaction of two conditions or factors for a particular legal outcome or determination.

- ii. Whether the claims being arbitrated are ex-facie dead claims, making them barred by statute of limitations on the date the arbitration proceedings begin.

If the response to any of the questions contradicts the party requesting a referral of dispute to arbitration, a court may refuse to appoint an arbitral tribunal.

- i. Whether the Application filed under Section 11(6) of the Arbitration and Conciliation Act is barred by statute of limitations; and

