



Arbitration Newsletter

September 2024

Kamladityya Construction (P) Ltd. v. Rail Land Development Authority, 2024 SCC OnLine Del 5182 – Delhi HC deems that an Arbitration Clause will be deemed Invalid if the Contractor cannot select an Arbitrator from the provided pool – The Court ruled that in cases where the Rail Authority has a pool of Arbitrators that the Contractor is bound to appoint an Arbitrator from, and the Contractor is unable to do so, the Clause will be considered as invalid.

In this case, the Petitioner challenged the validity of an arbitration clause in a contract Awarded by the Indian Railways Stations Development Corporation Ltd (IRSDC), later novated to the Rail Land Development Authority (RLDA). The dispute arose when the Petitioner, alleging substantial unpaid dues, invoked Clause 26.3 of the contract, which allowed the Respondent to unilaterally appoint Arbitrators from a pre-approved panel.

The High Court focused on whether this clause was valid, especially in light of recent Supreme Court judgments. The Respondent relied on the Supreme Court's decision in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*, (2020) 14 SCC 712, which involved a similar arbitration clause. However, the High Court observed significant

differences between the clause in the current case and the one in *CORE*.

In *CORE*, Clause 64(3)(b) of the General Conditions of Contract required the Railway to offer a panel of at least four retired Railway officers as potential Arbitrators. The contractor could then select two names from this panel, and the General Manager would appoint one as the contractor's nominee, along with other Arbitrators to form a Tribunal. This system allowed for a level of choice and balance between the parties.

Conversely, Clause 26.3 in the present case did not provide such a mechanism. Instead, it allowed the Respondent to unilaterally appoint an Arbitrator from its panel, without offering any choices to the Petitioner. The High Court noted that this clause was incompatible with Section 12(5) of the Arbitration and Conciliation Act, 1996, which disqualifies anyone related to either party or the subject matter of the dispute from being appointed as an Arbitrator, unless both parties waive this disqualification in writing.

The High Court further relied on the Supreme Court's rulings in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, (2020) 20 SCC 760, (2019) 5 SCC 755, and *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377, which expanded the principle that a person disqualified under Section 12(5) cannot unilaterally appoint an

Arbitrator. These rulings effectively invalidated any clause that allowed one party to unilaterally appoint an Arbitrator, as such clauses are inherently biased and violate the principles of impartiality and fairness.

Given these legal precedents, the High Court found that Clause 26.3 of the contract was invalid and unenforceable. The Court emphasized that it could not rewrite or modify the arbitration clause to align it with current legal standards; the clause must either stand as it is or be struck down. Since the clause allowed for unilateral appointment by the Respondent, it was deemed incompatible with the law and therefore invalid.

As a result, the High Court exercised its jurisdiction under Section 11(6) of the Arbitration and Conciliation Act, 1996, to appoint an independent Arbitrator. An Arbitrator was appointed to arbitrate the disputes between the parties. The arbitration would proceed under the aegis of the Delhi International Arbitration Centre (DIAC), ensuring that the process adhered to principles of impartiality and fairness.

The High Court's decision reinforced the principle that arbitration clauses allowing unilateral appointment of Arbitrators by one party are invalid, as they compromise the impartiality essential to arbitration proceedings.

Within the Indian Courts, there has been a disagreement regarding the unilateral appointment of Arbitrators. In two distinct ways, the Courts have interpreted a dispute resolution clause in relation to the appointment of Arbitrators.

The initial strategy is centered on guaranteeing that the principles of impartiality, transparency, and fairness are adhered to in the selection of an Arbitrator. In contrast, the second approach is more constrained by the requirement to strictly adhere to the procedure that the parties have agreed upon in the contract.

Bksons Infrastructure (P) Ltd. v. National Highways & Infrastructure Development Corpn., 2024 SCC OnLine Del 5573 – *On default of the Pre-Arbitral Procedure, Section 11(6) allows the Court to immediately acquire Jurisdiction* - The Delhi High Court bench determined that the Court acquires jurisdiction under Section 11(6) of the Arbitration and Conciliation Act, 1996, promptly upon the default of either party in adhering to the pre-Arbitral or Arbitral procedure outlined in the contract.

The Delhi High Court bench ruled on a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"). The petition sought the appointment of an Arbitrator

to resolve disputes arising from an Engineering, Procurement, and Construction (EPC) contract between Bksons Infrastructure Pvt. Ltd (Petitioner) and the National Highways Authority of India (NHAI) (Respondent). The contract involved upgrading a two-lane stretch of NH 117 to a four-lane highway and contained an arbitration clause in Article 26, outlining the procedure for dispute resolution, including conciliation before arbitration.

The central issue was whether the Petitioner had exhausted the mandatory pre-Arbitral procedures before invoking arbitration. The Respondent argued that the petition was premature as the Petitioner had not adhered to the three-stage pre-Arbitral process detailed in Clause 26.2 of the contract. This clause required the Petitioner to first seek a decision from either the Authorized Engineer (AE) or an independent Conciliator. If that failed, the Petitioner was to approach the Chairman of the Respondent organization, who would convene a joint meeting to examine the claim. If the dispute remained unresolved, the Petitioner was to approach the Conciliation Committee of Independent Experts before moving to arbitration.

The Petitioner contended that despite multiple requests, the Respondent failed to appoint a Conciliator as required under Stage 1 of the process. This failure, the Petitioner argued,

entitled them to bypass the remaining stages and directly seek arbitration.

The High Court focused on the Respondent's failure to act according to the agreed pre-Arbitral protocol. The Court determined that under Section 11(6) of the 1996 Act, its jurisdiction is activated when one party fails to adhere to the agreed-upon procedure for appointing an Arbitral Tribunal, which includes any pre-Arbitral steps specified in the contract. In this case, despite three reminders, the Respondent did not appoint a Conciliator, thereby failing to comply with the first stage of the process.

The Court concluded that this default by the Respondent effectively resolved the matter. The Petitioner automatically became entitled to invoke arbitration due to the Respondent's failure to comply with the initial step of the dispute resolution process as outlined in Clause 26.2. The Court further noted that the Petitioner's subsequent, unsuccessful attempt to involve the Chairman did not negate the Respondent's initial default in failing to appoint a Conciliator. This failure constituted a breach of the agreed-upon dispute resolution procedure.

Consequently, the High Court appointed an Arbitrator to resolve the disputes between the parties. The Court also acknowledged the Petitioner's claim that the Respondent owed

approximately ₹18 Crores, although this amount had yet to be precisely quantified. The arbitration was to be conducted under the Delhi International Arbitration Centre (DIAC) and would follow its rules and regulations.

I Care Consultancy v. L&T Finance Ltd. and Ors. (06.08.2024 - PHHC): MANU/PH/2521/2024MANU/PH/2521/2024 – Punjab HC notes that a High Court does not fall under the definition of a Civil Court as per Section 2(1)(e) of the Arbitration Act – The Punjab and Haryana High Court bench has determined that the High Court does not meet the criteria for a Civil Court under Section 2(1)(e) of the Arbitration and Conciliation Act, 1996. Rather that it possesses jurisdiction under Section 11(6) of the Arbitration Act, which grants it the authority to address the issues that are subject to arbitration in the event that they are to be considered in a suit by the principal Civil Court of original jurisdiction.

The Applicant issued a legal notice demanding payment of outstanding dues in response to a dispute between the parties. The Respondent requested that the applicant submit the invoices that were submitted on September 30, 2022. The Respondent did not take any additional action, despite this. The Applicant subsequently issued a notice in which it requested that the Respondent

appoint an Arbitrator by mutual consent. The Applicant sought relief from the Court under Section 11(6) of the Arbitration Act when the Respondent failed to resolve the issue or appoint an Arbitrator within the stipulated 30-day period.

The Respondent argued that the Court was not authorized to appoint an Arbitrator because the agreement designated Mumbai as the arbitration venue. It contended that the parties were entitled to choose the arbitration venue, and the Civil Procedure Code's provisions could not supersede the venue.

The High Court examined the definition of "Court" as outlined in Section 2(1)(e) of the Arbitration Act. 'Court' is defined in this section to encompass the principal Civil Court of original jurisdiction and the High Court, which, in its ordinary original civil jurisdiction, could resolve matters that would have been the subject of a suit. The High Court observed that it does not have conventional original civil jurisdiction over these matters, as all civil suits within its territorial jurisdiction are filed with the District Court. As a result, the High Court determined that it does not meet the definition of a "Court" as outlined in Section 2(1)(e) of the Arbitration Act. Consequently, it was unable to address civil litigation or arbitration related matters on its original side.

The Court also reviewed Section 42 of the Arbitration Act, which establishes that a specific Court will have exclusive jurisdiction over all subsequent applications related to the arbitration agreement and arbitration proceedings if an application is submitted to it under Part I of the Arbitration Act. The High Court was determined to lack jurisdiction under Section 42 for matters arising from an arbitration agreement due to its failure to meet the definition of a "Court" as outlined in Section 2(1)(e). Furthermore, it was observed that Section 42 does not apply to applications under Section 11(6) of the Arbitration Act, which are required to be submitted to a High Court.

The HC interpreted Sections 20 and 31(4) of the Arbitration Act in relation to the determination of the site of arbitration. The parties are permitted to reach an agreement regarding the location of the arbitration under Section 20. The Arbitral Tribunal determines the site of arbitration based on the circumstances of the case if they are unable to reach an agreement. The High Court ruled that the parties or, in their absence, the Tribunal, determine the location of the arbitration. If it is more advantageous for the parties, the Tribunal may establish the location of the arbitration outside the jurisdiction of the appointing Court if an Arbitrator is appointed by a High Court or in another manner.

The High Court cited *Brahmani River Pellets Ltd. v. Kamachi Industries Ltd.*, (2020) 5 SCC 462, in which the Supreme Court determined that the Madras High Court was unable to exercise jurisdiction under Section 11(6) if the arbitration agreement designated Bhubaneswar as the venue. In the same vein, the Court in *Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd.*, (2017) 7 SCC 678 determined that the jurisdiction of other Courts is eliminated by determining the "seat" of arbitration in the agreement. These judgments were predicated on the Constitution Bench's decision in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 ("*BALCO*"), 'which elucidated the distinction between 'seat' and 'venue' of arbitration and the jurisdictional implications.

The High Court determined that Section 2(1)(e) was amended in 2015 to explicitly exclude international commercial arbitration from its scope. Part I is applicable solely when the arbitration is conducted in India, as stipulated in Section 2(2) of the Arbitration Act. The jurisdiction of international commercial arbitrations is determined by the subject matter of the dispute and the location of the arbitration. The High Court determined that jurisdiction is contingent upon the nature of the dispute and the location of the arbitration.

The High Court observed that it has the authority to consider an application under Section 11(6) of the Arbitration Act. This conclusion was reached due to the Court's failure to satisfy the criteria for a Civil Court as outlined in Section 2(1)(e) of the Arbitration Act. As a result, the jurisdiction of this Court is derived from the provisions of Section 11(6), which grant it the authority to act in cases where the principal Civil Court of original jurisdiction would have the authority to resolve the issues that constitute the subject matter of arbitration.

The arbitration venue was the central issue in the dispute. The Respondent argued that Mumbai has exclusive jurisdiction, as stipulated in the arbitration agreement. Nevertheless, the High Court determined that the Civil Courts in Karnal and Mumbai have jurisdiction under Section 2(1)(e) of the Arbitration Act in conjunction with Section 20 of the Supreme Court's ruling in the BALCO case.

Furthermore, Clause 14 of the arbitration agreement stipulated that the Respondent could select either Mumbai or another location for the arbitration. This clause suggested that Mumbai is not necessarily the sole location for arbitration. In the case of *Green Global Energy Vs. G.R. Infra Projects Ltd*, Arbitration Case No. 256 of 2019, vide order dated 10.05.2024, the High Court

determined that jurisdiction could still be exercised elsewhere, despite an agreement stipulating exclusive jurisdiction in Udaipur. The High Court held that this interpretation was consistent with a previous decision by a Coordinate Bench of the High Court.

The High Court determined that it possesses the authority to consider the application under Section 11(6) of the Arbitration Act in light of these findings. As a result, the petition was approved, and an Arbitrator was appointed to resolve the dispute between the parties.

Pam Developments (P) Ltd. v. State of W.B., 2024 SCC OnLine SC 2247 – The Supreme Court deems it the Duty of the Arbitration Tribunal and the Court to Examine the Provisions of the Contract – The Supreme Court has recently emphasized the necessity for Courts and Arbitral Tribunals to scrutinize the contract clauses in arbitration proceedings.

The Supreme Court has recently emphasized the necessity for Courts and Arbitral Tribunals to scrutinize the contract clauses in arbitration proceedings. The Court stated that it upheld the Calcutta High Court's decision to set aside the Arbitrator's decision to Award the amount for loss due to inactive machinery and labor, despite the fact that it was prohibited by the contract.

The SC noted in the judgement, that *"In reality, the High Court implemented the actions that the Arbitrator should have taken."* The bench also noted that the Arbitrator is authorized to grant interest for the pre-reference period under Section 31(7) of the Arbitration and Conciliation Act, 1996, unless the contract explicitly prohibits it, and that the High Court had no justification for interfering with the Award in relation to the grant of pre-reference interest, since the Contract between the parties did not explicitly bar it.

The SC further decided upon additional claims that were raised, and addressed to them systematically, touching upon various contentions that were raised and providing a final say on all such issues. On the Claim on the Loss Resulting from Idle Labor, Machinery, etc., the HC reviewed the pertinent contract clauses and determined that the contract explicitly prohibited claims for unproductive labor and additional establishment costs over an extended period. The Supreme Court concurred with the HC's decision, concluding that the Arbitrator had neglected to take into account the pertinent contractual provisions, which forbade such claims.

On the Claim of Interest on Delayed Payment of Running Account Bills, the Arbitrator granted the appellant interest for delayed payments, concluding that the appellant was entitled to compensation for any loss or injury to capital that

was either naturally resulting from the breach or anticipated by the parties. The Arbitrator observed that the payments were due when the total quantity of work completed surpassed Rs.1 crore, and the contract did not prohibit the payment of interest on "blocked capital."

The High Court determined that there was no justification for claiming interest, as the bills were settled promptly following the preparation. It also observed that the Arbitrator had not resolved matters such as the responsible party for the delayed preparation of the running account bills, the running account bills that were to be considered advances, the issuance of notice under the Interest Act, 1978, and the amounts and periods for which interest was granted.

Nevertheless, the Supreme Court determined that the HC's assertion that bills were paid promptly following preparation did not provide a basis for interference. The Supreme Court determined that the HC's assertion that the Arbitrator failed to address the issues was insufficient to invalidate the Award.

According to the High Court, the conclusion that the invoices were paid promptly after they were prepared, or that *"in that event, there could have been no claim for interest,"* does not qualify as a basis for interference under Section 37. Similarly, the High Court's stance that the Arbitrator did not

establish or discuss the questions posed by it is not a basis for setting aside the Award, the Court noted.

Arbitrators play a critical role in the resolution of disputes outside of the courtroom. They deliver equitable and enforceable resolutions that are customized to the unique requirements of the parties involved, leveraging their specialized knowledge and skill in customizing proceedings.

They act as impartial decision-makers, demonstrating integrity and diligence as they navigate the intricacies of dispute resolution. Their role is essential in guaranteeing that justice is administered impartially and equitably, from the interpretation of legal statutes to the promotion of constructive dialogue.

As such, the Supreme Court held that the Arbitrator's reasoning was not perverse, and the Award was not against public policy, according to the Supreme Court. Consequently, the Arbitrator's Award with respect to Claim No. 4 was reinstated by the Supreme Court.

On the award of interest, the HC had modified the Arbitrator's decision to exclude the pre-reference period and allowed only pendente lite interest to the date of the Award, as well as post-Award

interest. The Supreme Court reinstated the original Award of interest granted by the Arbitrator, which included the pre-reference interest, as the contract did not explicitly prohibit it.

DLF Ltd. v. Koncar Generators & Motors Ltd., 2024 SCC OnLine SC 1907 – *The Supreme Court touches upon the conversion of Arbitral Awards in Foreign Currency to Indian Currency* - The Supreme Court resolved the two critical inquiries regarding the enforcement of an Arbitral Award that was conveyed in a foreign currency in Indian currency, on the method of determination, and on when the date of conversion would be accounted for.

The Supreme Court has resolved the two critical inquiries regarding the enforcement of an Arbitral Award conveyed in foreign currency to Indian currency in a significant judgment regarding International Commercial Arbitration.

The Court was presented with two inquiries. The first being, the determination of the most suitable and accurate date for the foreign exchange rate for the conversion of the Award from foreign currency to INR, and the second, on the determination of such conversion when the Award debtor lodges a sum of money with the Court

during the pendency of proceedings challenging the Award.

The First Question was on what the most suitable and accurate date for determining the foreign exchange rate for the conversion of the Award amount from foreign currency to Indian rupees is.

The Court stated that the date on which foreign Awards expressed in foreign currency become enforceable is the pertinent date for determining the conversion rate. The Award is considered enforceable from the date on which the objections to its enforceability are ultimately resolved. *"When the objections against a foreign Arbitral Award are finally resolved, the statutory scheme of the Act renders it enforceable."* Consequently, the bench responded that the relevant date for determining the conversion rate of a foreign Award expressed in foreign currency is the date on which the Award becomes enforceable, in accordance with the Act and the principal in the case of *Forasol v. O.N.G.C., 1984 Supp SCC 263*. The Court determined that the appropriate date to determine the currency exchange rate is the date on which the Arbitral Award becomes enforceable.

The Second Question that was raised was on what would be the date of such conversion, which occurs when the Award debtor lodges a sum of

money with the Court during the pendency of proceedings challenging the Award.

The Court stated that the date of conversion of the Award from foreign currency to Indian currency will be the date on which the Award debtor deposited the amount when the Award holder withdraws it during the Arbitral proceedings. The Court reasoned that the deposited amount must be converted to the value of the deposit on the date of deposit when the Award debtor deposits it before the Court during the pendency of objections and the Award holder is permitted to withdraw it, even if it is against the requirement of security. Further, the Court that the exchange rate of the remaining Award amount to be payable in a future course of action would be determined based on the date on which the Arbitral Award becomes enforceable, after the Award holder withdraws the Award amount deposited by the Award debtor. The Court clarified that the remaining amount must be converted on the date the Arbitral Award becomes enforceable, which is the date on which the objections against it are ultimately resolved.

The Respondent/Award holder argued that the rate of currency exchange should be determined on the date of enforcement of the Award for the entire amount, rather than the date on which the partial Award amount of Rs. 7.5 crores were deposited in 2010 by the Award debtor during the

proceedings. Essentially contending that the amount deposited by the Award debtor during the proceedings is not convertible on the date of its deposit. The Court denied such an approach, asserting that the date of determining the currency exchange rate on Rs. 7.5 crores would be the date on which the amount was deposited before the Court, regardless of whether the Respondent/Award holder had withdrawn the deposited amount.

The Court ruled that the Award holder is unable to utilize the higher exchange rate to convert the entire Award amount at the rate established at the time of the Award's enforcement in order to obtain a higher sum of money. The Court also denied the assertion that the Respondent was unable to provide a bank guarantee from an Indian bank. It was noted that this argument is solely intended to serve its own interest in order to capitalize on a higher exchange rate, but it fails to address the principle that is at play when enforcing a sum conveyed in foreign currency.

"It is crucial to comprehend the necessity of converting this amount on that date in order to comprehend the consequence and effect of deposit during the pendency of proceedings." The Award debtor transfers the money to the Award holder on that date and provides the benefit of that amount through a deposit. The Award holder may convert, utilize, and capitalize on the amount at that time,

provided that it is permitted to withdraw it. The Court further stated that it would be inequitable and unjust to maintain that the amount does not stand converted on the date of its deposit, as it benefits the Award holder.

The inherent volatility of exchange rates presents a complex challenge when converting foreign currency Arbitral Awards into Indian Rupees. The ultimate amount payable by the Award debtor and received by the Award holder is significantly influenced by the selection of the conversion date. Consequently, it is crucial to comprehend the intricacies of currency conversion in the context of international commercial arbitration.

The judgment designates the enforceability date as the conversion benchmark in order to mitigate the effects of exchange rate fluctuations on both parties. This safeguards the Award holder from a depreciating rupee between the date of the Award and the date of enforceability. In contrast, it safeguards the Award debtor from incurring penalties in the event that the currency strengthens during this period. The use of a fixed reference point (enforceability date) for conversion in this approach ensures that neither party is unjustly benefited by currency movements, thereby fostering fairness.

