Arbitration Newsletter

Shardul Amarchand Mangaldas

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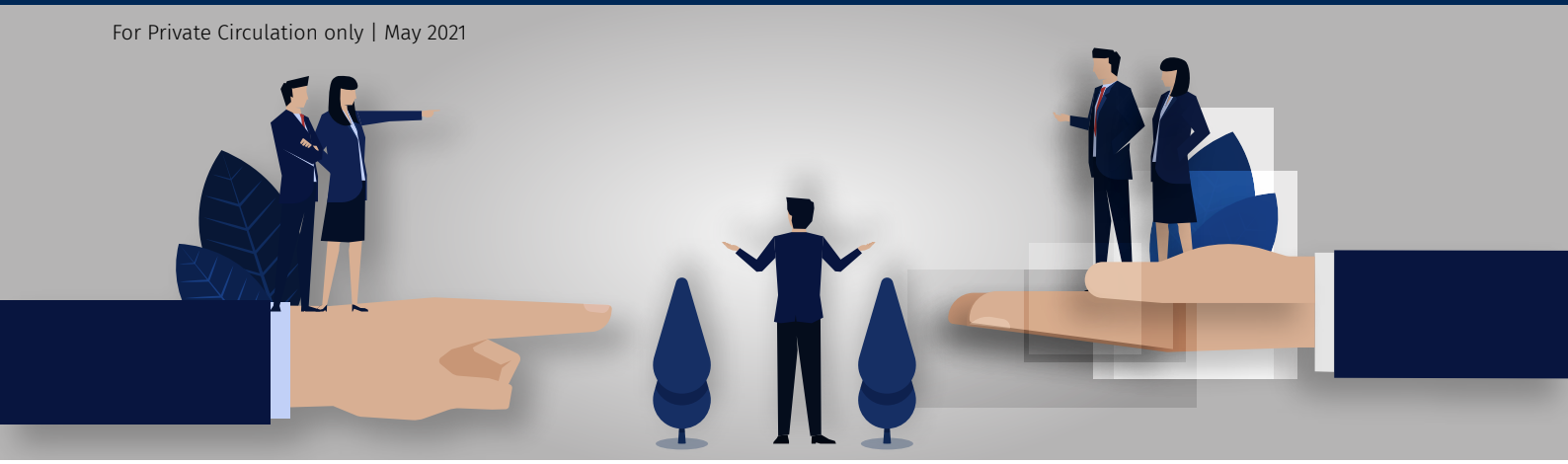

Arbitration Newsletter – May 2021

It gives us immense pleasure to circulate the seventeenth edition of the Arbitration Newsletter of Shardul Amarchand Mangaldas & Co.

At the outset, we sincerely wish that you, your family and colleagues have been, and continue to be, healthy and safe in the ongoing resurgent spread of COVID-19. We hope and pray that soon we will come out of these trying times.

In this edition, we have analysed the impact of recent arbitration related judgments of the Supreme Court of India and Indian High Courts.

We are pleased to share that the Chambers & Partners Global Rankings 2021 ranked Shardul Amarchand Mangaldas & Co's Dispute Resolution Practice as 'Band 1'. It also recognised **Pallavi Shroff (Managing Partner and National Practice Head-Dispute Resolution)** as a 'Star Individual' and **Tejas Karia (Partner – Head Arbitration)** as a 'Ranked Lawyer'.

Pallavi Shroff (Managing Partner and National Practice Head-Dispute Resolution), **Tejas Karia (Partner – Head Arbitration)** and **Rishab Gupta (Partner)** were recognised among top 100 individual lawyers in the Forbes India Legal Power List 2020.

Pallavi Shroff (Managing Partner and National Practice Head-Dispute Resolution) was recognised among the Economic Times Most Promising Women Leaders of 2021 and was also recognised as the 'Woman Lawyer of the Year' by BW Legal Awards 2020. **Rishab Gupta (Partner)** was recognised as a 'Future Legal Leader' by the Indian Business Law Journal's Future Legal Leaders 2020.

Rishab Gupta (Partner) was selected to continue to serve as the co-chair of the Young MCIA's Steering Committee for the 2021-23 term. **Kartikey Mahajan (Counsel)** was appointed to the YSIAC Steering Committee for a second two-year term in March 2021 and he was also appointed as the Joint Secretary of the Society of Construction Laws – India Chapter. **Shreya Gupta (Principal Associate)** was selected as a member of the Young MCIA Steering Committee for the 2021-23 term in March 2021. Both, **Kartikey Mahajan (Counsel)** and **Shreya Gupta (Principal Associate)** have also been inducted as members of the Rising Arbitrators Initiative.

Benchmark Litigation Asia Pacific 2021 Rankings have ranked **Pallavi Shroff** (**Managing Partner and National Practice Head-Dispute Resolution)** and **Tejas Karia (Partner – Head Arbitration)** as 'Litigation Stars' and **Aashish Gupta (Partner)** as a 'Future Star'.

We hope you enjoy reading this edition and find it useful to your practice.

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Arbitration Case Law Updates

Supreme Court holds that two Indian parties can choose a foreign seat of arbitration and an award passed therein is enforceable as a foreign award under Part II of the Act[1]

Brief Facts

The settlement agreement between the parties stipulated that any dispute shall be resolved by arbitration in Zurich, in accordance with ICC Rules. Pursuant to disputes having arisen, it was agreed between the parties that the substantive law applicable to the dispute would be Indian law. The arbitral tribunal passed a procedural order holding that two Indian parties can arbitrate outside India and in this case, the seat of arbitration was Zurich, which order was not challenged by either party. The tribunal passed a final award rejecting the Appellant's claim. The Respondent initiated enforcement proceedings under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 ("**Act**") before the High Court of Gujarat, within whose jurisdiction the Appellant's assets were located. At this stage, the Appellant asserted that the seat of arbitration was Mumbai, where all the arbitration hearings proceedings took place. So asserting, the Appellant challenged the award under Section 34 of the Act before the Commercial Court, Ahmedabad. In the enforcement proceedings, the High Court of Gujarat held, *inter alia*, that two Indian parties are free to select a foreign seat and such foreign award was enforceable in India, which judgment was challenged before the Supreme Court.

Before the Supreme Court, the Appellant argued that two Indian parties cannot designate a seat of arbitration outside India as doing so would be contrary to Section 23 of the Indian Contract Act, 1872 ("**Contract Act**") read with Sections 28(1)(a) and 34(2A) of the Act, and would enable two Indian parties to opt out of the substantive law of India, which itself would be contrary to the public policy of India. Further, the proviso to Section 2(2) of the Act provided a bridge joining Part II to Part I of the Act. Accordingly, the expression "*unless the context otherwise requires*" in Section 44 necessarily imports the definition of "*international commercial arbitration*" contained in Part I when the context requires this to be done, and Section 44 cannot apply to a foreign seated arbitration between two Indian parties in which a foreign element is absent. Further, applying the closest connection test, since every factor connected the present arbitration to India and no foreign element was involved, the seat of arbitration was Mumbai and Part II would not apply.

Lastly, there is a conflict between Section 10(3) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ("**CCA**") and Section 47 of the Act. Consequently, the former must prevail as per the non-obstante clause in Section 21 of the CCA. Hence, the impugned judgment has to be set aside as it was made without jurisdiction because even as per the impugned judgment, the present is not a case of an international commercial arbitration, but instead falls under the second category of "*other than international commercial arbitration*", as a result of which only the district court would have jurisdiction under Section 10(3) of the CCA.

The Respondent argued that Section 44 is modelled on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**New York Convention**"), that only requires "persons", both of whom can be Indian, having disputes arising out of commercial legal relationships to be decided in the territory of a State outside India, which State is a signatory to the New York Convention. Further, Part I and Part II are mutually exclusive and unlike the definition of "*international commercial arbitration*" in Section 2(1)(f) in Part I of the Act, nationality, domicile or residence of parties is irrelevant for the applicability of Section 44 of the Act. Further, neither Section 23 nor Section 28 of the Contract Act proscribe choice of a foreign seat.

Issues

Issue (i): Whether two companies incorporated in India can choose a seat for arbitration outside India?

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Issue (ii): Whether an award made at such a seat outside India, to which the New York Convention applies, can be said to be a "foreign award" under Part II of the Act and be enforceable as such?

Issue (iii): Is there any conflict between Section 10 of the CCA and Section 47 of the Act?

Issue (iv): In case answer to Issue (i) is yes, can two Indian parties seek interim reliefs before Indian courts in a foreign seated arbitration?

Judgment

Issue (i): The closest connection test would only apply if it is unclear that a seat has been designated either by parties or by tribunal. In this case, the seat has clearly been designated as Zurich by both, the parties and tribunal, and has been accepted by both parties**.**

Section 28(1)(a) of the Act, when read with Sections 2(2), 2(6) and 4 of the Act, makes it clear that where the place of arbitration is situated in India, in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute in accordance with the substantive law for the time being in force in India. Section 28(1)(a) makes no reference to an arbitration between two Indian parties in a country other than India and cannot be held to interdict two Indian parties from resolving their disputes at a neutral forum in a country other than India.

The Court held that party autonomy is the brooding and guiding spirit of arbitration, and nothing stands in the way of party autonomy in designating a seat of arbitration outside India, even when both parties are Indian nationals.

Issue (ii):

Part I and Part II of the Act have been held to be mutually exclusive in ***BALCO***[2] and Section 2(2) specifically states that Part I only applies where the place of arbitration is in India; therefore, its proviso cannot travel beyond the main enacting provision.

The context of Section 44 is party-neutral, having reference to the place at which the award is made. The expression "*unless the context otherwise requires*" cannot undo the very basis of Section 44 by converting it from a seat-oriented provision applicable to countries that are signatories to the New York Convention, to a person-oriented provision in which one party to the arbitration is foreign.

The expression "*international commercial arbitration*" in Section 2(1)(f) of the Act is unequivocally party-centric; however, when the expression is used in the context of an arbitration taking place outside India, it is place-centric as provided by Section 44 of the Act. This expression only refers to an arbitration between two parties in a territory outside India with the New York Convention applying to such territory, thus making it an "international" commercial arbitration.

The Supreme Court upheld ***Atlas Export Industries v. Kotak & Co***.[3] as valid authority for the proposition that Sections 23 and 28 of the Contract Act are out of harm's way when it comes to enforcing a foreign award under the Foreign Awards Act, 1961, where both parties are Indian companies. The Court overruled the judgments in ***M/s. Addhar Mercantile Pvt. Ltd. v. Shree Jagadamba Agrico Exports Pvt. Ltd.***[4] and ***Seven Islands Shipping Ltd. v. Sah Petroleums Ltd.***[5] on the basis that both decisions rely on ***TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd***.,[6] and have not appreciated the law in its correct perspective.

Issue (iii):

Section 10(1) of the CCA applies to international commercial arbitrations, and applications or appeals arising therefrom, under both Parts I and II of the Act. When applications or appeals arise out of such arbitrations under Part I, where the place of arbitration is in India, the definition of "*international commercial arbitration*" in Section 2(1)(f) will be applicable. However, when applied

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to Part II, "*international commercial arbitration*" has reference to a place of arbitration which is international in the sense of the arbitration taking place outside India. Thus construed, there is no clash at all between Section 10 of the CCA and the Explanation to Section 47 of the Act, as an arbitration resulting in a foreign award, as defined under Section 44 of the Act, will only be enforceable in a High Court under Section 10(1) of the CCA, and not in a district court under Section 10(2) or Section 10(3). Further, the Act is a special statute vis-à-vis the CCA, which is a general statute, and even a subsequent general law that contains a non-obstante clause does not override a special law as held in ***Kandla Export.***[7]

Issue (iv):

The High Court of Gujarat had held that the Respondent's Section 9 application was not maintainable on the basis that the expression "*international commercial arbitration*" in the proviso to Section 2(2) of the Act has the same meaning as ascribed by Section 2(1)(f) of the Act. Having already observed that this interpretation of the statute is incorrect, the Supreme Court set aside this part of the impugned judgment, thereby holding that the Respondent's Section 9 application was maintainable.

Analysis

This judgment is a significant salute to the fundamental tenet of arbitration, i.e., party autonomy. It also lays to rest the long standing controversy surrounding the choice of a foreign seat by Indian parties and the enforceability of the award rendered therein. The judgment further ensures that the proviso to Section 2(2) of the Act is read in a purposive manner so as to ensure that two Indian parties in a foreign seated arbitration are not deprived of the right to seek interim reliefs before Indian courts. The judgment also reaffirms the interplay of the CCA and the Act and that the Act being a complete code on arbitration law will prevail over the CCA.

High Court of Delhi clarifies the scope of Section 29A of the Arbitration Act in the context of insolvency proceedings[8]

Brief Facts

Reliance Communications Infrastructure Limited ("**Petitioner**") filed a petition under Section 29A(5) of the Act through its Resolution Professional ("**RP**") appointed under the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), to extend the mandate of the arbitral tribunal adjudicating the disputes with Bharat Sanchar Nigam Limited ("**Respondent**").

The Respondent objected to the maintainability of the petition on the ground that the Corporate Insolvency Resolution Period ("**CIRP**") of 270 days of the Petitioner ended on 22 June 2020 and therefore, the authority of the RP ceased to exist during the execution of the petition. The Respondent also contested that no further extensions in the CIRP could be granted to the RP in view of the first proviso to Section 12(3) of the IBC.

Issue

Whether the Court exercising its jurisdiction under Section 29A of the Act, has the power to examine the competency of the RP to file the petition?

Judgment

The Court held that Section 29A(5) of the Act merely authorises the Court to extend the mandate of the arbitral tribunal of the arbitral proceedings. The Court cannot get into the issue of competency of the RP to represent the Petitioner or the impact of the insolvency proceedings before the National Company Law Appellate Tribunal ("**NCLAT**") on the arbitral proceedings between the parties. All such issues would have to be addressed before the arbitral tribunal.

The Court, however, took the *prima facie* view that the CIRP was continuing and the RP had

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authority to execute the petition. The Court placed reliance on the order of the NCLAT dated 30 March 2020 in Suo Motu CA(AT) (Insolvency) No. 1 of 2020, whereby the NCLAT extended the strict timelines under Section 12 of the IBC till the operation of lockdown in the states where the registered office of the corporate debtor lies. Accordingly, upon presentation of the order of the Government of Maharashtra dated 29 December 2020, it cannot be denied that a lockdown continued to be in operation in the state of Maharashtra till 31 January 2021.

Thereafter, the Court held that in the instant case, the fact that arbitral proceedings are ongoing between the parties is not denied and the arbitral tribunal was well aware of the fact that the Petitioner was approaching this Court under Section 29A of the Act. Hence, by deciding the issue in favour of the Petitioner, the Court extended the mandate of the arbitral tribunal by a period of 12 months.

Analysis

The judgment has given much needed clarity regarding the limited scope of interference in petitions under Section 29A of the Act. While extending the mandate of the arbitral tribunal, the Court affirmed that the issue of merits and competency of the parties to the arbitration, including the effect of the CIRP on the arbitral proceedings as well as the authority of the RP, cannot be decided by the Court at the stage of extending mandate under Section 29A of the Act, and can only be agitated before the arbitral tribunal. By shedding light on the powers and authority of the arbitral tribunal, this judgment reasserts the principle of *Kompetenz-Kompetenz* giving the arbitral tribunal wide powers to adjudicate upon issues pertinent to its own jurisdiction and competence of the parties.

Supreme Court holds that appeal against order refusing to condone delay under Section 34(3) of the Act is maintainable under Section 37(1)(c) of the Act[9]

Brief Facts

Chintels India Ltd. ("**Appellant**") belatedly filed an application under Section 34(1) of the Act before the High Court of Delhi ("**Court**") seeking to set aside an award dated 3 May 2019 passed by an arbitral tribunal. The Court *vide* judgment dated 4 June 2020, dismissed the Appellant's application for condonation of delay. Consequently, the Appellant's application under Section 34(1) was also dismissed.

Aggrieved by the judgment, the Appellant preferred an appeal under Section 37(1)(c) of the Act read with Section 13 of the CCA. In the said appeal, the issue was whether an appeal against an order refusing to condone delay under Section 34(3) of the Act is maintainable under Section 37(1)(c) of the Act. The appeal was dismissed *vide* judgment dated 4 December 2020 ("**Impugned Judgment**") *inter alia* relying on the decision of the Supreme Court in ***BGS SGS Soma JV v. NHPC Ltd***.[10], which held that an appeal under Section 37 of the Act is not maintainable when an application under Section 34 is simply returned on the ground of lack of territorial jurisdiction, since the same does not amount to an order refusing to set aside the arbitral award under Section 34.

The Appellant filed an appeal before the Supreme Court, pursuant to a certificate issued by the Court under Article 133 read with Article 134A of the Constitution of India in the Impugned Judgment.

Issue

Whether an appeal against an order refusing to condone delay under Section 34(3) of the Act is maintainable under Section 37(1)(c) of the Act?

Judgment

The Supreme Court held that an appeal under Section 37(1)(c) against an order refusing to condone delay under Section 34(3) is maintainable for *inter alia* the following reasons: (i) the expression

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"*setting aside or refusing to set aside an arbitral award under section 34*" appearing in Section 37(1)(c) is not limited to grounds made out under Section 34(2); (ii) Section 39(1)(vi) of the Arbitration Act, 1940 is *pari materia* to Section 37(1)(c) of the Act. In this regard, the Supreme Court relied on its decision in ***Chief Engineer of BPDP/REO Ranchi v. Scoot Wilson Kirpatrick India (P.) Ltd.***;[11] (iii) the judgment in ***Soma*** (*supra*) can be distinguished since it dealt with a completely different issue, which is evident from paragraph 1 of the judgment. The Supreme Court's focus while deciding ***Soma*** (*supra*) was not concerned with the language of Section 37(1)(c) and no arguments were addressed as to its correct interpretation; and (iv) while dealing with its order in ***State of Maharashtra and Anr. v. M/s Ramdas Construction Co. and Anr.***,[12] the Supreme Court held that it had not stated the law correctly as it did not advert to its decision in ***Essar Constructions v. N.P. Rama Krishna Reddy***.[13] In the present judgment, the Supreme Court did not touch upon the reasoning of the High Court of Bombay, but referred to its judgment in ***State of Himachal Pradesh v. Himachal Techno Engineers***.[14]

Analysis

The Supreme Court, while coming to the aforementioned conclusion, applied the 'Effect Doctrine' and rightly considered the effect of an order of the court refusing to condone the delay in filing an application under Section 34 of the Act. An order refusing to condone delay has the effect of finally disposing off an application under Section 34. Therefore, an order of the said nature, in effect, refuses to set aside the arbitral award under challenge and hence, should be appealable.

Further, the Supreme Court clarified: (i) the context in which its decision in ***Harmanprit Singh Sidhu v. Arcadia Shares and Stock Brokers Pvt. Ltd.***[15] was relied upon in ***Soma*** (*supra*); and (ii) its reasoning in ***Ramdas Construction*** (*supra*). The present decision brings quietus to the widespread confusion which prevailed in relation to maintainability of appeals challenging orders wherein courts did not condone the delay in filing an application under Section 34 of the Act.

Supreme Court reiterates that presence of an arbitration agreement in a contract is not an absolute bar to availing remedies under Article 226 of the Constitution[16]

Brief Facts

Three appeals ("**Appeals**") were filed by (i) UNITECH Limited ("**Unitech**"); (ii) Telangana State Industrial Infrastructure Corporation ("**TSIIC**"); and (iii) State of Telangana against a judgment of a Division Bench of the High Court of Telangana, which upheld the order of a Single Judge of the High Court of Telangana confirming the liability of TSIIC to refund an amount of INR 1.65 billion to Unitech, but modified the date from which the interest rate had to be computed.

The background in which the judgments of the Division Bench and the Single Judge came to be passed is as hereunder:

The Andhra Pradesh Industrial Infrastructure Corporation Ltd ("**APIIC**") entered into a development agreement with Unitech for developing and constructing a township project subject to the outcome of the pending litigation regarding the project land. The development agreement also contained an arbitration clause.

Due to the reorganisation of the State of Andhra Pradesh into Andhra Pradesh and Telangana, the project land came under the control of the newly-formed TSIIC. In the meanwhile, the High Court of Andhra Pradesh and the Supreme Court decided the pending litigation and held that APIIC did not have the title to the project land.

Unitech sought a refund of all the amounts from APIIC and TSIIC together with interest and damages for the loss suffered. Consequently, despite the existence of an arbitration clause in the development agreement, Unitech filed a writ petition under Article 226 of the Constitution before the High Court of Telangana seeking a refund of INR 1.65 billion together with interest from the date of the payments made by it. This writ petition was allowed by the High Court.

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The State of Telangana and TSIIC filed a writ appeal, in which the order on the liability of TSIIC to refund INR 1.65 billion to Unitech was upheld, but the date for calculation of interest was modified from the date when Unitech first sought the refund, as opposed to the dates of payment of the instalments.

In the Appeals, TSIIC *inter alia* contended that the High Court should not have entertained a writ petition in a purely contractual matter and when the development agreement contained an arbitration clause. Unitech argued that the existence of an arbitration clause would not divest the High Court of its jurisdiction under Article 226 of the Constitution and that the exercise of writ jurisdiction in a contractual matter is not ruled out in cases where there is no dispute with respect to the basic facts.

Issue

Whether the writ petition filed by Unitech under Article 226 of the Constitution was maintainable despite the existence of an arbitration agreement?

Judgment

The Supreme Court noted the past precedents and took a view that the State or any of its instrumentalities will not be exempted from acting fairly in their business dealings on the ground that they have entered into a contract. It held that while exercising its jurisdiction under Article 226, the court is entitled to enquire whether the action of the State or any of its instrumentalities was arbitrary, unfair or in violation of Article 14 of the Constitution.

The Supreme Court categorically held and reiterated that the presence of an arbitration clause within a contract between a State instrumentality and a private party is not an absolute bar to availing remedies under Article 226. It held that if the State instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 would lie. It further held that the presence of an arbitration clause in a contract does not oust the jurisdiction under Article 226 in all cases but it ought to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked.

The Supreme Court noted that TSIIC, being a State instrumentality, had not only breached its contractual obligations but also failed to refund the amounts admittedly payable to Unitech. In view of the foregoing, the Supreme Court upheld the decision of the High Court as having rightly invoking the jurisdiction under Article 226 of Constitution and holding that the writ petition filed by Unitech was maintainable.

Analysis

The present decision is a reiteration of the principle that the existence of an arbitration agreement in a contract is not a bar to invoking the writ jurisdiction under Article 226 against the State or its instrumentalities for their arbitrary action. This judgment is favourable for investors who may have undisputed claims against State entities irrespective of the arbitration agreement as the State entities cannot insist on process of arbitration. This judgment is a much-needed reminder for the State entities who enter into commercial contracts with private entities that they must ensure that they do not violate their constitutional mandate under Article 14 to act fairly and reasonably, and consequently, contribute to ease of doing business in India, while ensuring smooth public-private partnerships.

Supreme Court holds that Section 14 of Insolvency and Bankruptcy Code is wide enough to include proceedings under Section 34 of the Act[17]

Brief Facts

M/s. Shah Brothers Ispat Pvt. Ltd ("**Respondent**") and M/s Diamond Engineering Pvt. Ltd.

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("**Company**") executed a contract pursuant to which the Respondent had to supply steel to the Company. An amount of INR 24,20,91,054/- was due and payable from the Company to the Respondent. The Company issued 51 cheques in favour of the Respondent. However, the cheques were dishonoured on the grounds of insufficient funds.

The Respondent issued demand notice(s) calling upon the Company and the Appellants to pay the due amount and upon the Company's failure to do so, instituted two criminal proceedings under Sections 138 and 141 of the Negotiable Instruments Act, 1881 ("**NI Act**") against the Company and the Appellants before the Additional Chief Metropolitan Magistrate, Mumbai.

The Respondent further issued a notice under Section 8 of the IBC against the Company, pursuant to which the Adjudicating Authority admitted the application under Section 9 of the IBC and ordered a moratorium under Section 14 of the IBC. The Adjudicating Authority stayed the criminal proceedings against the Company and the Appellants.

In appeal, the National Company Law Appellate Tribunal ("**NCLAT**") set aside the order of the Adjudicating Authority on the ground that proceedings under Section 138 of the NI Act, being criminal in nature, cannot be stopped/stayed under Section 14 of IBC. The Supreme Court in appeal against the NCLAT order, stayed the criminal proceedings before the Additional Chief Metropolitan Magistrate, Mumbai. Subsequently, the resolution plan was approved by the COC[18] and thus, the moratorium ceased to have effect. There are two pending proceedings before the Adjudicating Authority, i.e., (i) application filed by the financial creditors of the Company regarding withdrawal of the resolution plan; and (ii) application filed by the resolution applicant for extension of time for implementation of the resolution plan.

Issue

Whether the expression "*proceedings*" in Section 14 of the IBC includes proceedings under Section 34 of the Act?

Judgment

The Supreme Court held that the expression "*or*" occurs twice in the first part of Section 14(1)(a) of the IBC. First, between the expressions "*institution of suits*" and "*continuation of pending suits*"; and second, between the expressions "*continuation of pending suits*" and "*proceedings against the corporate debtor*". In light of the above, it was concluded that given the object and context of Section 14 of the IBC, the expression "*proceedings*" cannot be curtailed by any rule of construction and must be given a fair meaning to include institution, continuation, judgment and execution of suits and proceedings.

The Supreme Court held that the decision of the High Court of Delhi in ***Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.***,[19] wherein it was held that an application under Section 34 of the Act ("**Section 34 proceeding**") to set aside an arbitral award would not be covered by Section 14 of the IBC, does not state the correct position of law. It was observed that a Section 34 proceeding is certainly a proceeding against the corporate debtor, which may result in an arbitral award against the corporate debtor, where the corporate debtor would be required to pay money. A Section 34 proceeding against the corporate debtor in a court of law would be similar to an appellate proceeding in a decree from a suit. In light of the above, the Supreme Court concluded that a Section 34 proceeding would be covered under the realm of Section 14 of the IBC.

Analysis

The Supreme Court has re-affirmed the object of Section 14 of the IBC, i.e., preservation of assets of the corporate debtor during the corporate insolvency resolution process. The Supreme Court has also given a clear finding that a Section 34 proceeding would be covered under Section 14 of the IBC. This would essentially mean that a Section 34 proceeding would mandatorily have to be stayed until the conclusion of the corporate insolvency resolution process.

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The judgment is in line with the overall scheme and object of the IBC, i.e., to ensure the revival and continuation of the corporate debtor and avoid liquidation. However, it is likely to have the consequence of reducing the efficacy of Section 34 proceeding. Since the court would be compelled to stay a Section 34 proceeding, the judgment may also run afoul of Section 34(6) of the Act, which mandates courts to dispose of Section 34 proceedings expeditiously and within a period of one year from the date of serving notice to the other party in accordance with Section 34(5) of the Act.

Supreme Court holds that limitation period under Section 34 of the Act commences on receipt of award having signature of all arbitrators[20]

Brief Facts

A Service Level Agreement was executed between Dakshin Haryana Bijli Vitran Nigam Ltd. ("**DHBVN**") and Navigant Technologies Ltd. ("**NTL**") to provide call centre services. The agreement provided for a three-member arbitral tribunal to settle the disputes arising out of the contract. The agreement was terminated leading to submissions of various disputes before an arbitral tribunal.

On 27 April 2018, the arbitral tribunal orally pronounced the award in favour of NTL through a majority of 2:1 and provided a draft of the majority opinion to the parties to check for clerical errors. Thereafter, on 12 May 2018, a copy of the dissenting opinion dated 27 April 2018 was provided to the parties and they were asked to point out clerical errors by 19 May 2018. Since no errors were pointed out, the tribunal provided a signed copy of the arbitral award to both parties and the proceedings were terminated on 19 May 2018.

On 10 September 2018, DHBVN filed a petition under Section 34 of the Act before the Civil Court, Hisar, along with an application for condonation of delay. The Civil Court dismissed the application for condonation of delay stating that Section 34(3) allows condonation of delay for up to 30 days after the permissible period of three months. The Court opined that since the majority award was received on 27 April 2018, the limitation period had expired and the application filed on 10 September 2018 was beyond the 30-day time period. The Civil Court further noted that the dissenting opinion did not acquire the status of an award merely by being 'styled' as such by the minority arbitrator.

The judgment of the Civil Court was assailed before the High Court of Punjab and Haryana. The High Court affirmed the Civil Court's judgment and added that once an award is signed and communicated by a majority of the arbitrators, it is an "award" under Section 31 of the Act. Therefore, the High Court was also of the opinion that the limitation period began on 27 April 2018. DHBVN assailed the High Court's judgment before the Supreme Court.

Issues

Issue (i): Whether the limitation period for filing a petition under Section 34 commenced from the date on which the draft award was circulated or from when the signed copy was provided to the parties?

Issue (ii): Whether there is a mandatory legal requirement for the award to be signed by all arbitrators?

Issue (iii): What is the status of the dissenting opinion with respect to the arbitral award?

Judgment

Issue (i): The Supreme Court set aside the judgments of the Civil Court and the High Court and stated that the limitation period must be reckoned from 19 May 2018. Accordingly, the petition filed by DHBVN was found to be within the period of limitation. The Court also clarified that the limitation period only commences upon valid delivery to the parties of the signed copy of the award, and not just any other copy, as per Section 31(5) of the Act. Further, the Court concurred with its decision in ***State of Himachal Pradesh v. Himachal Techno Engineers***[21] to state that "*receipt*

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of the award" cannot happen on a holiday or a non-working day when the award is physically dropped at the office etc. The receipt would be considered to have taken place the next day and only then would the limitation period begin.

Issue (ii): The Supreme Court held that under Section 31 of the Act, the award must be signed by all members of the arbitral tribunal. The signing of the award makes it effective and gives it legal validity, and it is a mandatory requirement due to the use of the word "*shall*". Section 31(1) read with Section 31(4) shows that the Act contemplates a single date on which the arbitral award is passed, i.e., the date on which the signed copy is delivered to the parties.

Issue (iii): The Court opined that the arbitral tribunal becomes *functus officio* upon termination of arbitration proceedings after the final award is passed, as per Section 32 of the Act. Thus, if one of the members gives a dissenting opinion, it must be delivered on the same date as the final award. The dissenting opinion can be used to buttress submissions in proceedings under Section 34 and these arguments may be considered by the court.

Accordingly, the Supreme Court rejected DHBVN's argument as the arbitral tribunal only provided a draft, unsigned copy of the award to the parties for proofreading on 27 April 2018. The tribunal provided the signed copy of the award, along with the dissenting opinion, to the parties only on 19 May 2018. Hence, the limitation period commenced on 19 May 2018 and the objections under Section 34(3) were filed within the limitation period.

Analysis

The present decision clarifies the procedural requirements to be fulfilled by the arbitral tribunal towards the conclusion of the proceedings. It clarifies that the requirement of an arbitral award to be signed is not simply ministerial and cannot be done away with. It also recognises the importance of a dissenting opinion as the arbitral award made by a three member tribunal cannot logically be complete without the opinions of all three members, even if one of the opinions is unenforceable as an award.

The Supreme Court's clear view that there is supposed to be only one date of receipt of the award based on an analysis of different provisions of the Act will also further the understanding of the considerations to be accounted for while interpreting the same. This decision is likely to reduce litigation relating to the limitation period under Section 34(3) of the Act.

Supreme Court hints at need for amendments to Sections 11(7) and 37 of the Act[22]

Brief Facts

An online tender was invited by Chief Engineer, South Bihar Power Distribution Company Ltd. ("**SBDC**"), for which bid of Pravin Electricals ("**Appellant**") was accepted. Galaxy Infra & Engineering Pvt. Ltd. ("**Respondent**") alleged that it had made substantial efforts under a consultation agreement dated 7 July 2014 to facilitate the Appellant in getting the contract work from SBDC, for which it was entitled to commission ("**Contract**").

To the contrary, the Appellant submitted that a draft of Contract was sent to the Respondent on 15 July 2014. However, on the very same day, the Respondent communicated that the said draft of Contract was not acceptable and therefore, the parties had not entered into the Contract. The Appellant alleged that the Respondent had raised multiple invoices under the alleged Contract. As the Appellant denied to pay and also rejected the reference to arbitration, the Respondent approached the High Court of Delhi ("**High Court**") under Section 11(6) of the Act whereby the High Court appointed a sole arbitrator *vide* order dated 12 May 2020 ("**Impugned Order**").

The Appellant challenged the Impugned Order before the Supreme Court on the ground that there was no arbitration agreement between the parties as the alleged Contract was a concocted document and in fact, was not agreed by the parties. On the other hand, the Respondent

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argued that even if the Contract is not relied upon, the draft agreement sent by the Appellant to Respondent contained an arbitration clause and therefore, the parties were *ad idem* regarding arbitration being the dispute resolution mechanism.

Issues

Issue (i): Whether the '*prima facie*' test, which is applicable to Section 8, will also apply to Section 11 of the Act?

Issue (ii): Whether a valid arbitration agreement exists between the parties?

Judgment

Issue (i): While examining the validity of the arbitration agreement, the Supreme Court analysed Sections 8 and 11 vis-à-vis Section 37 of the Act. The Court also relied on its judgment in ***Mayavati Trading v. Pradyuat Deb Burman***[23] to reflect upon the amendments made to Sections 8 and 11 pursuant to the 246th Law Commission Report on Arbitration ("**Report**"). The Court also heavily relied on its judgment in ***Vidya Drolia v. Durga Trading Corporation***,[24] wherein it was held that:

- Courts should only do a '*prima facie*' examination of the arbitration agreement and not a full review while deciding an application under Section 8 of the Act. Courts should reject an application under Section 8 only if it is certain that no valid arbitration agreement exists upon a primary first review.
- In so far as the parameters of Sections 8 and 11 are concerned, courts may exercise their judicial discretion to carry out an intense yet summary *prima facie* review of the arbitration agreement in order to assist the arbitration procedure and not to usurp the jurisdiction of the arbitral tribunal.
- The expression "*existence of an arbitration agreement*" in Section 11 of the Act includes the examination of the existence as well as the validity of an arbitration agreement; however, at the referral stage, courts shall only apply the '*prima facie*' test and if the facts are disputed, then the question to decide the jurisdiction should be decided in favour of the arbitral tribunal.

After referring to the *prima facie* test as laid down in ***Vidya Drolia*** (*supra*), the Court observed that after the amendments to Section 8, an order refusing to refer parties to arbitration is appealable under Section 37. However, the recommendations of the Report in so far as Sections 11(6) and 11(6A) are concerned were not taken into consideration and resultantly, no appeal can be filed against the findings of a court in relation to the existence or non-existence of an arbitration agreement at the stage of appointing an arbitrator under Section 11 of the Act. The Court observed that since the '*prima facie*' test has now been read into Sections 8 and 11(6) read with Section 11(6A) are at par. However, an anomaly arises since orders rejecting an application under Section 8 are appealable whereas orders refusing the appointment of an arbitrator under Section 11(6) read with Section 11(6A) are not appealable.

Accordingly, the Court observed that the Parliament may need to have a re-look at Section 11(7) of the Act, which provides that a decision under Section 11(6) is final, as well as at Section 37, which provides for appeals under the Act, so that orders made under Sections 8 and 11 are brought at par.

Issue (ii): The Court set aside the Impugned Order to the extent that it held that a concluded arbitration agreement exists between the parties. However, the Court upheld the appointment of the sole arbitrator who will first determine whether a valid arbitration agreement exists between the parties as a preliminary issue and thereafter, decide the merits of the case.

Analysis

Sections 8 and 11 of the Act are intertwined with each other. While the former deals with the judicial powers to refer a matter to arbitration, the latter deals with commencing an arbitration

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by appointing an arbitrator under the Act. As both provisions are at an equal footing with respect to the applicability of the '*prima facie*' test for determining the existence and validity of an arbitration agreement, it is not clear as to what drove the Parliament to not allow for an appeal under Section 37 against orders refusing to appoint an arbitrator under Section 11(6) read with Section 11(6A), when an appeal is provided against an order rejecting an application under Section 8 of the Act.

In the present judgment, the Court has suggested redressing this anomaly by amending Section 37 to include appeals against orders refusing to appoint an arbitrator under Section 11 of the Act. Further, by setting aside the Impugned Order on the limited aspect of the validity of the arbitration agreement and leaving that issue for adjudication by the sole arbitrator, the Court has re-affirmed its role in supporting the arbitral process rather than interfering in the same.

High Court of Delhi holds that emergency arbitration orders are enforceable under Section 17(2) of the Act in India-seated arbitrations[25]

Brief Facts

Amazon.com NV Investment Holdings LLC ("**Amazon**") filed a petition before the High Court of Delhi ("**Court**") seeking enforcement of the order ("**Order**") passed by the emergency arbitrator ("**EA**"). The Order was passed in Indian seated arbitration proceedings, which Amazon had commenced against Future Coupons Private Limited ("**FCPL**"), Future Retail Limited ("**FRL**") and their promoters (i.e., the Biyanis) under the rules of the Singapore International Arbitration Centre, 2016 ("**SIAC Rules**"). The petition was filed under Section 17(2) of the Act read with Order XXXIX, Rule 2A and Section 151 of the Code of Civil Procedure, 1908 ("**CPC**").[26]

Issues

Issue (i): What is the legal status of an emergency arbitrator and is an order passed by an emergency arbitrator an interim order under Section 17(1) and enforceable under Section 17(2) of the Act?

Issue (ii): Does the 'group of companies' doctrine apply only to proceedings under Section 8 of the Act?

Issue (iii): Is the Order a nullity?

Judgment

Issue (i): The Court upheld the findings of the EA and held that an emergency arbitrator is an arbitral tribunal for all intents and purposes. Section 2(1)(d) of the Act defines "*arbitral tribunal*" to mean a sole arbitrator or a panel of arbitrators, which is wide enough to include an emergency arbitrator. The Court also referred to Rule 1.3 of the SIAC Rules, which defines "*Emergency Arbitrator*" as an arbitrator, and Rule 7 of Schedule I of the SIAC Rules, which empowers the emergency arbitrator to exercise all powers of an arbitral tribunal. Section 2(6) of the Act gives complete freedom to parties to authorise any person, including an institution, to determine disputes between the parties. Section 2(8) of the Act provides that where parties have authorised an institution, their arbitration agreement shall include the rules of that institution. Therefore, in the instant case, the Court deduced that the parties had incorporated the SIAC Rules into their arbitration agreement and had therefore, agreed to emergency arbitration as provided under the SIAC Rules. According to the Court, given an emergency arbitrator is an arbitral tribunal in the scheme of the Act, it follows that an emergency order/award is an interim order under Section 17(1) of the Act and is consequently, enforceable under Section 17(2) of the Act. The Court also opined that the current legal framework is sufficient to recognise emergency arbitration and no legislative amendment is required in this respect.

Issue (ii): The Court undertook an exhaustive review of the Supreme Court's jurisprudence on the

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'group of companies' doctrine ("**Doctrine**") to categorically hold that the EA had correctly invoked the Doctrine to conclude that FRL was a proper party to the arbitration agreement (Amazon had invoked arbitration under the agreement to which FCPL, and not FRL, was a signatory). The Court unequivocally confirmed that the Doctrine is not confined to proceedings under Section 8 of the Act. Applying the tests laid down by the Supreme Court, the EA had found, *inter alia*, that: (i) FCPL and FRL belonged to the same Biyani group; (ii) the parties' conduct reflected their clear intention to bind both, FCPL and FRL; (iii) the elements of direct relationship between the signatory and non-signatory, direct commonality of subject matter, and composite nature of transaction were satisfied; and (iv) the agreements contain similar arbitration clauses and are so intrinsically intermingled that their composite performance only shall discharge the parties of their respective mutual obligations.

Issue (iii): The Court held that the Order is not a nullity because the EA merely enforced the agreements, which were valid. Even FRL did not dispute their validity and therefore, the Court considered FRL's contention to be deliberately misleading, vague and unsubstantiated.

Analysis

The Court's decision, namely that emergency arbitration orders are directly enforceable as interim orders under Section 17(2) of the Act in India-seated arbitrations has significant ramifications. Thus far, emergency award holders have generally adopted a duplicative approach under Section 9 of the Act wherein they seek reliefs identical to what they sought and obtained in emergency arbitration. However, this judgment now empowers emergency award holders to directly enforce the award. Further, the Court expressly observed that emergency arbitration "*is a very effective and expeditious mechanism*" and "*has added a new dimension to the protection of the rights of the parties. However, if the order of the Emergency Arbitrator is not enforced, it would make the entire mechanism of Emergency Arbitration redundant*". In this vein, the Court was extremely critical of FRL's conduct to deliberately and wilfully violate the Order and also of FRL's contentions in the petition. Accordingly, the Court, *inter alia* imposed costs of INR 2 million on the Respondents and ordered attachment of the assets of all Respondents under Order XXXIX, Rule 2A(1) of the CPC. The Court also directed the Respondents to not take any further action in violation of the Order.

While FRL expectedly appealed this judgment the following day, the Court's logical treatment of the confusing issue of the status of emergency arbitration orders/awards in India is welcome. Therefore, subject to the outcome of FRL's appeal, it will be very interesting to track the uptake of emergency arbitration in India and how it compares to the oft-resorted remedy of seeking interim protection under Section 9 of the Act. The Court's emphatic recognition of emergency arbitration is also likely to provide impetus to institutional arbitration in India because, as also acknowledged by the Court, the rules of several institutions, such as the Delhi International Arbitration Centre and the Mumbai Centre for International Arbitration, provide for emergency arbitration akin to the SIAC Rules.
As on date, this proceeding has reached the Supreme Court, which has stayed all proceedings before the High Court of Delhi. Meanwhile, the SIAC arbitration proceedings are continuing.

High Court of Delhi sets parameters for exceptional circumstances to invoke Article 227 of the Constitution against arbitral tribunal's order and holds that objections to tribunal's jurisdiction are to be dealt with utmost urgency[27]

Brief Facts

The Petitioners herein were arrayed as parties in an arbitration arising out of a dispute between two brothers and their respective families under a family settlement/partition deed. In a civil suit filed by one of the brothers and his family, the High Court of Delhi ("**Court**") had referred the dispute to arbitration in an application filed by the other brother under Section 8 of the Act.

The Petitioners filed objections under Section 16 of the Act (*Competence of arbitral tribunal to*

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rule on its jurisdiction) and stated that the arbitrator has no jurisdiction to adjudicate the claims against the Petitioners since the Petitioners were *bona fide* purchasers of the property having valid title deeds and therefore, the arbitration clause was not binding upon them, and that the Petitioners were neither parties to the suit nor parties to the arbitration agreement and thus, cannot be compelled to participate in the arbitration proceedings.

The arbitrator adjudicated the Section 16 objections and held that the jurisdictional objections would be decided along with the final award. The Petitioners then filed an application for recall of the order, which was also rejected. Thereafter, the Petitioners filed a petition under Article 227 of the Constitution before the Court, seeking to set aside the order of the arbitral tribunal rejecting the Petitioners' objections under Section 16 of the Act.

Issues

Issue (i): Whether arbitral tribunals are tribunals over which jurisdiction under Articles 226 or 227 of the Constitution is exercisable by High Courts and what is the scope of interference?

Issue (ii): What is the law governing applications under Section 16 of the Act and manner of consideration of such applications by arbitral tribunals?

Issue (iii): Whether judicial interference is warranted in the facts of the present case where the orders passed by the arbitral tribunal are challenged?

Judgment

Issue (i): Relying on the recent decisions of the Supreme Court in ***M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited***[28] and ***Bhaven Constructions v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. & Anr.***,[29] the Court observed that in exceptional circumstances, a High Court has powers under Article 227 of the Constitution to interfere with orders passed by an arbitral tribunal rejecting objections under Section 16 of the Act, only if the orders passed are so perverse that the only possible conclusion is that there is a patent lack of inherent jurisdiction.

The Court also relied on ***Union of India v. R Gandhi, President Madras Bar Association***[30] and ***SREI Infrastructure Finance Limited v. Tuff Drilling Private Limited***[31] to observe that the term 'tribunal' mentioned in Article 227 would include arbitral tribunals constituted under the Act and thus, their orders can be challenged by invoking Article 227.

Issue (ii): The Court relied on ***Mcdermott International Inc. v. Burn Standard Co. Ltd. and Ors.***[32] and held that it is mandatory for an arbitral tribunal to decide jurisdictional objections at the earliest under Section 16(5) of the Act. The Court also identified the following factors that arbitral tribunals should keep in mind while adjudicating objections raised under Section 16 of the Act:

(a) If the issue of jurisdiction can be decided on the basis of admitted documents on record, then the arbitral tribunal ought to proceed to hear the matter/objections under Section 16 at the inception of the matter itself;

(b) If the arbitral tribunal is of the opinion that the objections under Section 16 cannot be decided at the inception and would require further enquiry into the matter, the arbitral tribunal could consider framing a preliminary issue and deciding the same as soon as possible;

(c) If the arbitral tribunal is of the opinion that objections under Section 16 would require evidence to be led, then the arbitral tribunal could direct limited evidence to be led on the said issue and adjudicate the same; and

(d) If the arbitral tribunal is of the opinion that detailed written and oral evidence needs to be led, then after the evidence is concluded, the objections under Section 16 would have to be adjudicated first before proceeding to passing of the award.

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Issue (iii): The Court was of the view that in the present case, the approach of the arbitrator was neither perverse nor patently lacking in jurisdiction and therefore, did not attract interference of the Court under Article 227. This is because while deciding the Section 16 objections, the arbitrator had stated that the final decision cannot be given unless further evidence is led by the parties. However, the Court observed that the arbitrator's observation that jurisdictional objections shall be decided while passing the final award is not fully in line with ***Mcdermott International*** (*supra*). The Court directed the arbitrator to decide the jurisdictional objections first before passing the final award and accordingly disposed of the writ petition.

Analysis

The decision provides much required clarity on Section 16(5) of the Act, namely that an arbitral tribunal must decide jurisdictional objections with a sense of urgency. Further, the guidelines or factors set out by the Court for adjudication of Section 16 objections would be beneficial for parties as arbitral tribunals would now be compelled to decide jurisdictional objections prior to passing the final award even if such adjudication requires evidence to be led. The judgment would certainly help in curbing the practice of keeping jurisdictional objections in abeyance. The decision also reinforces the recent shift in jurisprudence that under Article 227 of the Constitution, courts may interfere with orders of arbitral tribunals only in exceptional circumstances.

Supreme Court holds that National Company Law Tribunal can consider an application filed under Section 8 of the Act in a petition under Section 7 of the IBC[33]

Brief Facts

Indus Biotech ("**Petitioner**") filed a petition under Section 11 of the Act in the Supreme Court of India for appointment of the arbitral tribunal to adjudicate its disputes with Respondent Nos. 1 – 4 ("**Respondents**"). Respondent No. 1 is a Mauritius based company, whereas Respondent Nos. 2 – 4 are Indian companies and sister ventures of Respondent No. 1. The dispute sought to be referred to arbitration arose between the parties under different share subscription and shareholders' agreements. The Respondents sought to convert their preference shares they held in the Petitioner into equity shares. As the conversion formula to be applied in converting the shares was disputed, the Petitioner did not pay the Respondents the redemption amount. Terming this as 'default', Respondent No. 2 filed a petition under Section 7 of the IBC before the NCLT. The Petitioner argued that as the subject matter of the arbitration is same, although under different agreements, the arbitration could be conducted by a single arbitral tribunal as an international arbitration. The Petitioner filed an application under Section 8 of the Act in the Section 7 petition, seeking a direction to refer the parties to arbitration.
The NCLT, *vide* its order, dismissed the petition under Section 7 of the IBC and allowed the application under Section 8 of the Act.

The Supreme Court ("**Court**"), while hearing the application under Section 11 of the Act, also decided the connected Petition challenging the NCLT's order.

Issues

Issue (i): Whether the NCLT erred in passing an order under Section 8 of the Act in a petition under Section 7 of the IBC?

Issue (ii): Whether one arbitral tribunal can be appointed if there are separate arbitration agreements and one of the respondents is a foreign company?

Judgment

Issue (i): The Court, relying on its decision in ***Vidya Drolia*** (*supra*) held that a petition under Section 7 of the IBC becomes a proceeding *in rem* only once the Adjudicating Authority has

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recorded a finding of default and admitted the petition, from which point onwards the matter would not be arbitrable. The Court held that on admission of the petition under Section 7 of the IBC, a third party right is created in favour of all creditors of the corporate debtor and will have an *erga omnes* effect. Therefore, the mere filing of a petition and before it is admitted, it cannot be considered as proceedings *in rem*. The Supreme Court clarified that any application filed under Section 8 of the Act after a Section 7 petition is admitted would not be maintainable. However, if an application under Section 8 of the Act is filed before a Section 7 petition is admitted, the Section 7 petition will be heard first and the application under Section 8 of the Act would be kept along for consideration, as the decision in the Section 7 petition would have a direct bearing on the Section 8 application. The Court lastly observed that although the NCLT allowed the application under Section 8 of the Act in this case, the same would be subject to the petition filed under Section 11 of the Act.

Issue (ii): The Supreme Court held that as the petition under Section 7 of the IBC had been rightly dismissed, the petition under Section 11 of the Act is maintainable as otherwise, the parties would be left with no remedy if the process of arbitration is not initiated. Further, relying on its judgment in ***M/s Duro Felguera v. M/s Gangavaram Port Ltd***.,[34] the Supreme Court held that when there are separate arbitration agreements entered into by parties, there cannot be a single arbitral tribunal. However, keeping in mind the similarity in the nature of disputes under all the agreements, it was held that the members comprising the tribunal will be the same for all the arbitrations, but separately constituted in respect of each agreement. The Court lastly held that the arbitral tribunal should keep the international arbitration proceedings separate and club the domestic arbitrations.

Analysis

The Supreme Court came to the conclusion that if a petition under Section 7 of the IBC is dismissed, no proceedings *in rem* would exist and therefore, an application under Section 8 of the Act would be maintainable. It will be interesting to see whether this decision will encourage parties to file an application under Section 8 of the Act once a company is dragged to NCLT under the IBC. Nevertheless, the judgment undoubtedly saves parties from years of protracted litigation and unnecessary delays. Moreover, recognising that there existed separate arbitration agreements between the parties and that the nature of disputes is similar, the Court has correctly followed the judgment in ***Duro Felguera*** (*supra*) and constituted separate arbitral tribunals, albeit consisting of the same members to avoid multiplicity of proceedings.

Supreme Court holds that when parties change the 'venue / place of arbitration' by mutual agreement, the new venue / place will become the 'seat of arbitration'[35]

Brief Facts

An agreement dated 28 January 2012 for the purpose of manufacture and supply of power transformers was entered into by and between Gujarat Fluorochemicals Ltd. ("**GFL**") and Jayesh Electricals ("**Respondent**"). The said agreement contained an arbitration clause wherein the parties agreed that the venue of arbitration would be Jaipur. Resultantly, the courts in Rajasthan were given exclusive jurisdiction over disputes arising out of the said agreement in relation to proceedings challenging the arbitral award.

Thereafter, by way of a slump sale, GFL's entire business was taken over by Inox Renewables Ltd. ("**Appellant**"). The business transfer agreement entered into by and between GFL and the Appellant contained an arbitration clause, which fixed the venue at Vadodara, Gujarat, and accorded exclusive jurisdiction to courts at Vadodara. Subsequently, disputes arose between the Appellant and the Respondent. The Respondent approached the High Court of Gujarat

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under Section 11 of the Act seeking appointment of an arbitrator, which the High Court appointed. During the arbitration proceedings, the parties requested that the venue of arbitration may be changed to Ahmedabad, despite the arbitration clause in the agreement between GFL and the Respondent providing for Jaipur as the venue. The arbitrator accepted the parties' request. Subsequently, the arbitrator passed an award in favour of the Respondent. The Appellant challenged this award before a Commercial Court in Ahmedabad under Section 34 of the Act. The Court dismissed the Appellant's application and held that in terms of the business transfer agreement, the exclusive jurisdiction was vested with the courts in Vadodara.

Aggrieved by the order of the Commercial Court, the Appellant filed an appeal before the High Court of Gujarat. The High Court held that it did not have the jurisdiction to entertain the appeal and held that the courts in Jaipur had jurisdiction. Aggrieved by the order of the High Court, the Appellant approached the Supreme Court.

Issue

When parties to an arbitration agreement change the venue of arbitration by mutual agreement, does the new venue become the seat of arbitration?

Judgment

Before the Supreme Court, the Appellant argued that since the parties had changed the venue to Ahmedabad by way of mutual consent, Ahmedabad had become the juridical seat of the arbitration. Therefore, only the courts in Ahmedabad will have jurisdiction. The Appellant heavily relied on the decision of the Supreme Court in ***BGS SGS Soma JV v. NHPC Ltd***[36] in support of its contentions.

The Respondent argued that parties to an arbitration agreement can change the place of arbitration only by way of a written agreement. As a result, the exclusive jurisdiction vested in the courts in Jaipur was not affected by the continuation of proceedings in Ahmedabad. The arbitrator's finding that the venue was shifted by mutual consent from Jaipur to Ahmedabad only concerned Section 20(3) of the Act. Ahmedabad was a convenient place for the parties to conduct the arbitration proceedings while Jaipur continued to be the juridical seat of the arbitration.

Allowing the appeal, the Supreme Court held that the order of the High Court cannot stand. While coming to the said conclusion, the Court dismissed the Respondent's contention that a written agreement was necessary to change the venue of arbitration. The Court observed that the arbitrator had recorded that the parties had changed the venue to Ahmedabad by way of mutual consent, which was not disputed by the parties.

The Court essentially held that Jaipur was not just the original venue of arbitration but was also the original seat, which the parties subsequently shifted to Ahmedabad by mutual consent. Referring to its decision in ***BGS Soma*** (*supra*), the Court held that the parties' choice of Ahmedabad as the seat of arbitration under Section 20(1) of the Act was akin to an exclusive jurisdiction clause, thereby vesting courts in Ahmedabad with exclusive jurisdiction to deal with the arbitration. Accordingly, the courts in Rajasthan ceased to have any jurisdiction.

The Supreme Court referred to the decision in ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited***,[37] and observed that shifting of the venue from Jaipur to Ahmedabad resulted in shifting of the 'venue / place' in relation to Section 20(1) of the Act and not in relation to Section 20(3).

Analysis

This decision underscores the need to be cautious while deciding the venue and seat of arbitration. The Court settled an important issue regarding the change in seat of arbitration by the parties and clarified the causal effect of such a change on the jurisdiction of the courts. This decision provides

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necessary guidance to the parties while shifting the place / seat of arbitration after the initiation of the arbitral proceedings.

Although parties tend to shift the venue / place of arbitration by mutual agreement during the arbitral hearings for the sake of convenience, this decision serves as a reminder that such a change will result in conferring jurisdiction on courts at the venue. This decision also upholds party autonomy, which is the fundamental premise of arbitration.

Past Events

Daksha Conclave (12 February 2021)

The Daksha Conclave was organised in furtherance of the Daksha Fellowship's mission in which several sessions were held on diverse topics. **Rishab Gupta (Partner)** was a panellist in the session on "*Bilateral Investment Treaties: Evaluating India's Model BIT, 2016*".

CIArb YMG ADR World Tour (23-24 February 2021)

The Young Members Group (YMG) of the Chartered Institute of Arbitrators (CIArb) organised a world tour as a part of which they conducted a series of online events for the India leg of the tour. **Rishab Gupta (Partner)** was a panellist in the session on "*Developing Trends in Investments and the Future of Dispute Resolution Concerning India*" and **Kartikey Mahajan (Counsel)** was a panellist in the session on the "*Challenges Faced by Businesses During the Pandemic and the Road Ahead*".

AAA-ICDR Special India Focus Webinar Series (25 February 2021)

The American Arbitration Association (AAA) in association with the International Centre for Dispute Resolution (ICDR) organised a special India focus webinar series, as a part of which a fireside chat on the "*Scope of International Arbitration in Transactional Law*" was held. **Kartikey Mahajan (Counsel)** was a panellist at this event.

Panel discussion on Emergency Arbitration (15 March 2021)

Shardul Amarchand Mangaldas & Co organised a webinar on "*Emergency Arbitration under the SIAC Rules*". **Tejas Karia (Partner, Head – Arbitration)** and **Rishab Gupta (Partner)** were part of the panel and the discussions were moderated by **Kartikey Mahajan (Counsel)**.

Delos ROAP (18 March 2021)

Delos conducted a Remote Oral Advocacy Programme (ROAP) consisting of theoretical and practical sessions. **Tejas Karia (Partner, Head – Arbitration)** was a speaker in the session on '*Procedural Submissions*', where he discussed the difference between procedural and substantive submissions, interim measures and tips on soft skills in arbitration.

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GAR Interactive: India (18 March 2021)

GAR Interactive: India focussed on discussing arbitrator conflicts and bias, India as a seat for arbitration, followed by a symposium on what would make international arbitration better. **Rishab Gupta (Partner)** was a panellist in the session on "*Arbitrator Bias and Impartiality in International Arbitration*". Shardul Amarchand Mangaldas & Co was a co-sponsor of the event.

Arbitration Conclave (27 March 2021)

Nirma University's Centre for ADR conducted an event titled '*Arbitration Conclave: A Kaleidoscopic View*', where **Tejas Karia (Partner, Head – Arbitration)** discussed the enforcement of arbitral awards and the associated issues.

MCIA India ADR Week (6-10 April 2021)

The Mumbai Centre for International Arbitration conducted the first India ADR week from 6-10 April 2021. **Pallavi Shroff (Managing Partner and National Practice Head-Dispute Resolution)** was a panellist in the session on "*Investment Arbitration – Pendulum in favour of investor or Host State?*" **Tejas Karia (Partner, Head – Arbitration)**, **Rishab Gupta (Partner)** and **Ila Kapoor (Partner)** were panellists in the session on "*Practical tips for making India seated arbitration awards challenge proof*" while **Shruti Sabharwal (Principal Associate)** moderated the discussion. Shardul Amarchand Mangaldas & Co was a Platinum Sponsor of the India ADR Week.

AFIA Webinar on Emergency Arbitration (15 April 2021)

The Asia-Pacific Forum for International Arbitration (AFIA) in association with Latham & Watkins organised a webinar on "*Emergency Arbitration Perspectives from Asia*", which focussed on emergency arbitration procedures available in Singapore, Hong Kong, Mainland China and India, and enforcement of emergency arbitration decisions in these jurisdictions. **Kartikey Mahajan (Counsel)** was a panellist at this event.

Course on investor state disputes (17 April 2021)

Shreya Jain (Senior Associate) co-taught a module on 'Investor State Disputes in a Globalised World' for the certificate course on 'International Law and Relations' organised by the Society of International Law at SVKM's Pravin Gandhi College of Law, Mumbai.

Workshop by the National Judicial Academy, Bhopal (18 April 2021)

Tejas Karia (Partner, Head – Arbitration) was the resource person for the session on "*Commercial Courts vis-à-vis Arbitration and Interpretation of Contracts*" organised for the judges of the Commercial Courts across India.

Delos-Y Virtual Breakfast (7 May 2021)

Delos-Y organised its first virtual edition of the 'Delos-Y Breakfast' series on "*Making Memorials Memorable: Essential Tips for Junior Associates*". **Niyati Gandhi (Senior Associate)** was a speaker at this event.

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Upcoming Events

Transnational Training Workshop on Arbitration and the European Rule of Law (11-12 May 2021)

Yashna Mehta (Associate) is one of the 40 participants selected worldwide for the Transnational Training Workshop on Arbitration and the European Rule of Law, which is organised by Hague University of Applied Sciences. The workshop will focus on theoretical and practical issues emerging in the field of the European rule of law and arbitration at national and supranational levels.

SIAC Masterclass on Advocacy (14 May 2021)

The Singapore International Arbitration Centre is organising a masterclass on advocacy, in which **Kartikey Mahajan (Counsel)** is a facilitator.

BR Foundation Online Certificate Course (28-31 May 2021)

BR Foundation is conducting an online certificate course on "*International Dispute Settlement*", seeking to provide participants with in-depth knowledge of growing relevance of international dispute settlement mechanisms across the globe, where **Tejas Karia (Partner – Head Arbitration)** will be a speaker.

RGNUL-SAM Conclave on Arbitration in Practice (June 2021)

The conclave is being organised by the Editorial Board of the RGNUL Financial and Mercantile Law Review of the Rajiv Gandhi National University of Law, Punjab in collaboration with Shardul Amarchand Mangaldas & Co. The conclave would entail deliberations and discourse around the arbitration practice in India and the allied problems that practitioners often face during arbitration proceedings. The conclave will present novel and innovative solutions to various practical challenges in arbitration. **Tejas Karia (Partner – Head Arbitration)** and **Gauhar Mirza (Partner)** will be speakers at the conclave and **Prakhar Deep (Senior Associate)** will be the moderator.

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Endnotes

1 Authored by Tejas Karia, Partner & Head-Arbitration and Avlokita Rajvi, Senior Associate; PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited, Civil Appeal No. 1647/2021, Supreme Court, 2021 SCC OnLine SC 331, judgment dated 20 April 2021.

Coram: R.F. Nariman, B. R. Gavai and Hrishikesh Roy, JJ.

2 Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.

3 (1999) 7 SCC 61.

4 2015 SCC OnLine Bom 7752.

5 2012 SCC OnLine Bom 910.

6 (2008) 14 SCC 271.

7 Kandla Export Corpn. v. OCI Corpn., (2018) 14 SCC 715.

8 Authored by Gauhar Mirza, Partner, Prakhar Deep, Senior Associate, Nishant Doshi and Jasvinder Singh, Associates; Reliance Communications Infrastructure Ltd. v. Bharat Sanchar Nigam Limited, O.M.P. (MISC.) (COMM.) No. 277/2020, High Court of Delhi, judgment dated 9 February 2021.

Coram: C. Hari Shankar, J.

Reliance Communications Infrastructure Ltd. was represented before the High Court of Delhi by the team of Shardul Amarchand Mangaldas & Co comprising Gauhar Mirza, Partner, Prakhar Deep, Senior Associate and Nishant Doshi, Associate.

9 Authored by Aashish Gupta, Partner and Varun Byreddy, Associate; Chintels India Ltd. v. Bhayana Builders Pvt. Ltd., Civil Appeal No. 4028/2020, Supreme Court, 2021 SCC OnLine SC 80, judgment dated 11 February 2021.

Coram: R.F. Nariman, Navin Sinha and K.M. Joseph, JJ.

10 (2020) 4 SCC 234.

11 Chief Engineer of BPDP/REO Ranchi v. Scoot Wilson Kirpatrick India (P.) Ltd., (2006) 13 SCC 622.

12 State of Maharashtra and Anr. v. M/s Ramdas Construction Co. and Anr., 2017 SCC OnLine SC 2029.

13 Essar Constructions v. N.P. Rama Krishna Reddy, (2000) 6 SCC 94.

14 State of Himachal Pradesh v. Himachal Techno Engineers, (2010) 12 SCC 210.

15 Harmanprit Singh Sidhu v. Arcadia Shares and Stock Brokers Pvt. Ltd., 2016 SCC OnLine Del 5383.

16 Authored by Ila Kapoor, Partner, Shruti Sabharwal, Principal Associate and Akriti Kataria, Associate; Unitech Ltd. and Ors. v. Telangana State Industrial Infrastructure Corporation and Ors, Civil Appeal Nos. 317-319/2021, Supreme Court, 2021 SCC OnLine SC 99, judgment dated 17 February 2021.

Coram: D.Y. Chandrachud and M.R. Shah, JJ.

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18 Committee of Creditors.

19 2017 SCC OnLine Del 12189.

20 Authored by Smarika Singh, Partner, Saifur Rahman Faridi, Senior Associate and Yashna Mehta, Associate; Dakshin Haryana Bijli Vitran Nigam Ltd. v. M/s Navigant Technologies Ltd., Civil Appeal No. 791/2021, Supreme Court, 2021 SCC OnLine SC 157, judgment dated 2 March 2021.

Coram: Indu Malhotra and Ajay Rastogi, JJ.

21 (2010) 12 SCC 210.

22 Authored by Tejas Karia, Partner & Head - Arbitration, Grishma Ahuja, Principal Associate and Shalin Jani, Associate; Pravin Electricals v. Galaxy Infra & Engineering Pvt. Ltd., Civil Appeal No. 825/2021, Supreme Court, 2021 SCC OnLine SC 190, judgment dated 8 March 2021.

Coram: R.F. Nariman, B.R. Gavai and Hrishikesh Roy, JJ.

23 (2019) 8 SCC 714.

24 (2021) 2 SCC 1.

25 Authored by Rishab Gupta, Partner, Kartikey Mahajan, Counsel and Juhi Gupta, Senior Associate; Amazon.com NV Investment Holdings LLC v. Future Coupons Private Limited and Others, O.M.P. (ENF)(COMM) 17/2021, High Court of Delhi, 2021 SCC OnLine Del 1279, judgment dated 18 March 2021.

Coram: J.R. Midha, J.

26 The Court granted interim protection to Amazon in an interim order dated 2 February 2021 wherein the Court directed FRL to maintain status quo. FRL challenged this interim order, which was subsequently stayed by a division bench of the Court, which in turn was challenged by Amazon before the Supreme Court. The Supreme Court inter alia halted the regulatory approval process. The Supreme Court proceedings are ongoing.

27 Authored by Gauhar Mirza, Partner and Prakhar Deep, Senior Associate; Surender Kumar Singhal v. Arun Kumar Bhalotia, CM(M) No. 1272/2019, High Court of Delhi, judgment dated 25 March 2021.

Coram: Pratibha M. Singh, J.

28 2019 SCC OnLine SC 1602.

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29 2021 SCC OnLine SC 8.

30 2010 11 SCC 1.

31 2018 11 SCC 470.

32 2006 11 SCC 181.

33 Authored by Siddhartha Datta, Partner, Surabhi Binani and Sejal Agarwal, Associates; Indus Biotech Private Ltd. v. Kotak India Venture (Offshore) Fund. & Ors., Arbitration Petition (Civil) No. 48/2019, Supreme Court of India, 2021 SCC OnLine SC 268, judgment dated 26 March 2021.

Coram: S.A. Bobde, A.S. Bopanna and V. Ramasubramanian, JJ.

34 (2017) 9 SCC 729.

35 Authored by Anirudh Das, Partner and Varun Byreddy, Associate; Inox Renewables Ltd. v. Jayesh Electricals Ltd., Civil Appeal No. 1556/2021, Supreme Court, judgment dated 13 April 2021.

Coram: R.F. Nariman and Hrishikesh Roy, JJ.

36 (2020) 4 SCC 234.

37 (2017) 7 SCC 678.

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