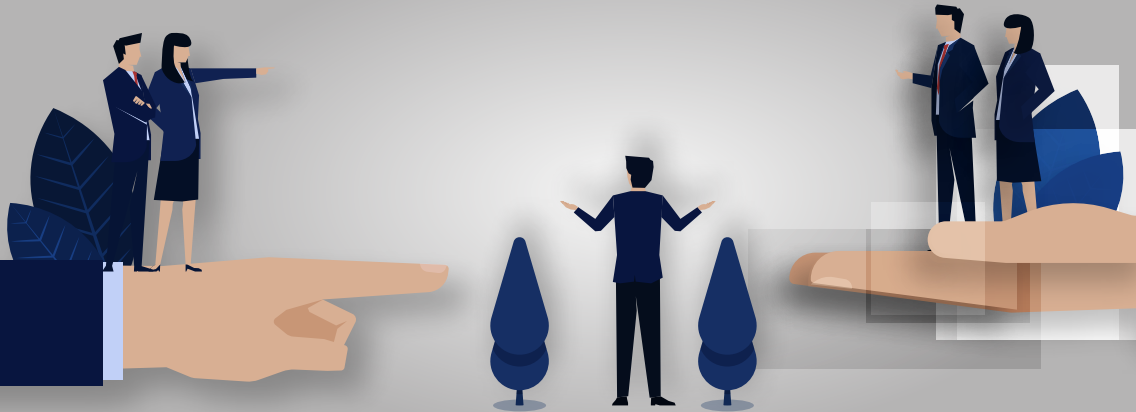


December 2022



## High Court of Delhi refuses to condone the delay in seeking substitution of an arbitrator<sup>1</sup>

### Brief Facts

The Petitioner and Respondents had entered into two Share Purchase Agreements (“**Agreements**”) dated 4 November 2006. The Agreements provided for disputes to be settled by arbitration before an arbitral tribunal comprising three arbitrators.

Disputes arose between the parties, leading the Petitioner to issue a notice invoking arbitration on 27 May 2009 and appointing a nominee arbitrator. The notice also called for the Respondents to nominate the second arbitrator to the prospective tribunal within 30 days. The Respondents failed to respond to the notice or appoint their nominee arbitrator. As a result, the Petitioner approached the High Court of Delhi (“**Court**”) under Section 11 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”). During the hearing before the Court, both parties consented to the appointment of a sole arbitrator, who was appointed by the Court on 12 May 2010.

The parties completed pleadings before the arbitral tribunal and were set to commence final arguments on 24 August 2015. However, on 27 July 2015, the sole arbitrator recused himself from adjudicating the dispute citing personal reasons and communicated to the parties by email. The Petitioner claimed that it did not have access to its email during the time and hence, was not aware of the arbitrator’s recusal. The Petitioner’s counsel, too, claimed that they were not aware of the recusal until two weeks after the arbitrator’s email.

The Petitioner filed a petition under Section 15 of the Arbitration Act before the Court on 1 August 2018, seeking substitution of the arbitrator (“**Petition**”), and an application on 22 September 2018 seeking condonation of delay in filing the Petition.

### Issues

**Issue (i):** Whether the Petition was barred by limitation?

**Issue (ii):** Whether any delay in filing the Petition must be condoned?

### Judgment

**Issue (i):** The Court rejected all the grounds raised by the Petitioner to argue that the Petition was filed within limitation. The Court affirmed that Article 137 of the Limitation Act, 1963 (“**Limitation Act**”), which stipulates a 3-year limitation period for residuary matters, would apply to the Petition. The Court noticed that the Petitioner had not produced any documentary evidence or cogent substantiation to support its claim that it was not aware of the arbitrator’s recusal.

Importantly, this was rendered irrelevant by the Court’s finding that the limitation period would be calculated from the time of the arbitrator’s recusal (i.e., when the right to file the Petition accrued), and not when the Petitioner or their counsel became aware of the arbitrator’s recusal (as was claimed by the Petitioner). In doing so, it followed settled law that a party’s “knowledge” of its right accruing would be immaterial in calculating limitation, unless the Limitation Act expressly provided so.

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The Petitioner had also argued that limitation ought to be calculated by excluding the 30-days that the arbitration clauses in the Agreements provided the Respondent to nominate a (substitute) arbitrator. The Court rejected this argument and held that since the original tribunal had been constituted by its order under Section 11 of the Arbitration Act, the parties had no right to appoint an arbitrator using the procedure under the arbitration clause. The Court applied the principle that once a party approaches a court to appoint an arbitrator under Section 11 of the Arbitration Act, none of the parties can resort to the procedure under their arbitration agreement and their rights stand forfeited.

Thus, the Petition was held to be barred by limitation.

**Issue (ii):** In the first instance, the Court recognised that the 3-year limitation period was itself unduly long and inconsistent with the intent of the Arbitration Act to enable speedy resolution of disputes. With that background, it remarked that only delay caused by exceptional circumstances merited to be condoned upon an application under Section 5 of the Limitation Act. Even though the actual delay in filing the Petition was merely five days, it found the Petitioner's conduct to be "lackadaisical" and unjustified. Therefore, it refused to condone the Petitioner's application to condone the delay in filing the Petition, thus dismissing both the Petition as well as the condonation application.

## Analysis

This decision sounds a warning bell to parties, clearly indicating that courts will come down heavily on delays that are attributable to the parties, and particularly those that are actively exacerbated by their conduct. In doing so, the Court has not only relied on existing precedent that supports its position but has also drawn from legislative trends that infuse swiftness in the arbitration process. Therefore, it is clear that courts will not stand by practices that weaponise delays to draw out adjudication.

Further, this decision further cements the principle that when parties elect to approach courts under Section 11 of the Arbitration Act, their right to constitute the tribunal by following the procedure mentioned under their arbitration agreement stands permanently foreclosed.

## Endnotes

1 Authored by Shruti Sabharwal, Partner and Ujval Mohan, Associate; *Tricolor Hotels Limited v. Dinesh Jain and Ors.*, OMP. T. (COMM) No. 99/2018 & I.A. No. 13048/2018, High Court of Delhi, 2022 SCC OnLine Del 4111, judgment dated 9 November 2022.

**Coram:** Mini Pushkarna, J.

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## PRACTICE AREA EXPERTS

### Pallavi Shroff

Managing Partner and  
National Practice Head Dispute Resolution  
+91 98100 99911  
E: pallavi.shroff@AMSShardul.com

### Aashish Gupta

Partner  
+91 98189 19857  
E: aashish.gupta@AMSShardul.com

### Binsy Susan

Partner  
+91 96500 80397  
E: binsy.susan@AMSShardul.com

### Shruti Sabharwal

Partner  
+91 98107 46183  
E: shruti.sabharwal@AMSShardul.com

### Shreya Gupta

Partner  
+91 99305 43295  
E: shreya.gupta@AMSShardul.com

### Tejas Karia

Partner and Head, Arbitration Practice sub-group  
+91 98107 98570  
E: tejas.karia@AMSShardul.com

### Siddhartha Datta

Partner  
+91 90070 68488  
E: siddhartha.datta@AMSShardul.com

### Smarika Singh

Partner  
+91 97170 98075  
E: smarika.singh@AMSShardul.com

### Karan Joseph

Partner  
+91 98452 11270  
E: karan.joseph@AMSShardul.com

### Aditya Mukherjee

Partner  
+91 98717 92744  
E: aditya.mukherjee@AMSShardul.com

### Anirudh Das

Partner  
+91 98100 98329  
E: anirudh.das@AMSShardul.com

### Ila Kapoor

Partner  
+91 98717 92737  
E: ila.kapoor@AMSShardul.com

### Gauhar Mirza

Partner  
+91 70423 98844  
E: gauhar.mirza@AMSShardul.com

### Bikram Chaudhuri

Partner  
+91 84339 48356  
E: bikram.chaudhuri@AMSShardul.com

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