



Luthra and Luthra
LAW OFFICES INDIA

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It gives us immense pleasure to circulate the September 2024 edition of the Luthra and Luthra Law Offices India's Dispute Resolution Newsletter. In this edition, we have primarily focused on the recent legal developments in the field of Arbitration and Insolvency Laws. Accordingly, we have covered key judgments passed by the Supreme Court, National Company Law Appellate Tribunal and High Court(s) for the period of July - August 2024. We hope you enjoy reading our newsletter.

Supreme Court

Enquiry while appointing an Arbitrator must be restricted to the existence of an arbitration agreement¹

The Supreme Court in a landmark judgment has clarified that referral Courts while considering an application under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") must restrict the enquiry to the existence of an arbitration agreement, apart from the consideration that Section 11 application has been filed within the period of limitation of three (3) years.

In the case at hand, the claim of the insuree arose from a fire insurance policy/contract. Accordingly, the insurer made payment and a discharge voucher was issued, which was construed as an 'accord and satisfaction' of the contract, implying that the dispute was settled and no further claims could be pursued. However, disputes arose between parties and an arbitrator was appointed by the High Court on the application of the insuree. The insurer impugned the said order before the Supreme Court.

The Supreme Court in the appeal *inter alia* was faced with the issue of whether an arbitration agreement existed post 'accord and satisfaction' and the issue of scope of judicial scrutiny at the stage of an application under Section 11 of the Arbitration Act. The Apex Court delved into intricacies of 'accord and satisfaction' in the context of arbitration and held that despite the issuance of a discharge voucher/full and final settlement the arbitration agreement would survive and parties could invoke arbitration. Further, it was held that at the stage of Section 11 application, the referral court is only to examine the existence of an arbitration agreement and if the said application has been filed within limitation. Further, it has been held that the arbitrability of the claim is to be adjudicated by the arbitrator.

NCLAT

The NCLAT holds that dispute regarding GST dues cannot be a bar to the initiation of proceedings under Section 9 of the Insolvency and Bankruptcy Code²

¹ SBI General Insurance Co. Ltd. v. Krish Spinning, 2024 SCC OnLine SC 1754.

² *Mr. Gulshan Kumar Ahuja v. Monika Gar g & Anr.* Company Appeal (AT) (Insolvency) No. 1202 of 2024



The National Company Law Appellate Tribunal (“**NCLAT**”) has held that a dispute regarding GST dues does not amount to a “pre-existing dispute” between the parties, which would bar initiation of Corporate Insolvency Resolution Process (“**CIRP**”) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”).

The decision came in an appeal before the NCLAT, wherein the Suspended Director of the Corporate Debtor impugned the CIRP Admission Order on the ground of pre-existing dispute vis-à-vis payment of GST on the invoices raised by Operational Creditor, which were under investigation by the GST authorities. The NCLAT was of the opinion that Corporate Debtor has failed to show any pre-existing dispute with respect to the invoices. The NCLAT also observed that raids conducted by the GST Department and questioning regarding payment of GST is an issue between the GST Authorities and the Corporate Debtor, which cannot be equated with a pre-existing dispute between the parties.

Successful Resolution Applicant cannot be substituted by another resolution applicant once the plan has been approved by the CoC³

The NCLAT has held that the Committee of Creditors (“**CoC**”) cannot substitute the Successful Resolution Applicant, who was not a part of the CIRP process or whose name did not feature in the list of prospective Resolution Applicants.

The NCLAT was faced with peculiar facts in an Appeal, wherein CoC approved Resolution Plan of an asset reconstruction company (“**SRA**”), however, during the pendency of plan approval application before NCLT, Reserve Bank of India (RBI) issued a circular barring asset reconstruction companies from carrying out any activities other than securitization or asset reconstruction without prior approval of RBI, rendering SRA ineligible. Thereafter, CoC passed resolution substituting SRA with another Resolution Applicant, who had not participated in the CIRP Process i.e., it had never submitted any expression of interest or a resolution plan during the CIRP process.

The NCLAT examined the case record and observed that the Request for Resolution Plan (RFRP) did not contain any provision, which allowed the change in the resolution applicant's name once the plan was approved. Moreover, the NCLAT noted that Regulation 39 of the CIRP Regulations bars consideration of resolution plans from resolution applicants, whose names did not appear in the list of Prospective Resolution Applicants. Thus, aligning with the scheme of IBC the NCLAT held that CoC cannot substitute the SRA, who was not a part of the CIRP process or whose name did not feature in the list of prospective Resolution Applicants

³ *Swan Energy Ltd. v. Chandan Prakash Jain*, 2024 SCC OnLine NCLAT 892.



HIGH COURT

Delhi High Court holds that Courts have the power to grant Anti-enforcement injunctions against proceedings in Foreign Court under Section 9 of the Arbitration Act⁴

The Delhi High Court has held that courts have the power to grant an anti-enforcement injunction under Section 9 of the Arbitration Act against proceedings in a Foreign Court or a decree issued by a Foreign Court when such proceedings threaten the arbitral process that is to be initiated in India.

The High Court in an application under Section 9 of the Arbitration Act was presented with circumstances wherein Respondent, despite there being an arbitration clause, clause providing applicable laws to be Indian Laws and exclusive jurisdiction clause conferring exclusive jurisdiction on courts in New Delhi, filed a suit against Petitioner before Courts in Dubai. The suit was decreed in favour of the Respondent applying the laws of Dubai. Resultantly, the Petitioner filed an Application under Section 9 of the Arbitration Act seeking an injunction against the Respondent from enforcing the decree of the Dubai Court, enabling him to invoke arbitration. The Respondent *inter alia* took an objection that the Courts under Section 9 of the Arbitration Act did not have the power to grant an anti-enforcement injection against a foreign court's decree.

The Delhi High Court rejected the contention of the Respondent and observed that Clause (e) of Section 9(ii), which allows court to order such interim measure which appears to court as just and convenient, broadens the scope of Section 9. The Court also observed that scope is further broadened by the stipulation therein i.e., "the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it". Considering the above, the High Court was of the opinion that the Court, under Section 9 of the Arbitration Act, is amply possessed of the power to grant anti-enforcement injunction i.e., to injunct the party who has instituted the foreign proceedings from further proceeding with them, or from enforcing the potentially threatening order or decree passed therein.

Calcutta High Court declares Arbitration Clause Unconstitutional⁵

The Calcutta High Court has delivered a pivotal judgment, striking down a portion of an arbitration clause in a contract as unconstitutional. The Court in its Judgment has addressed critical issues surrounding the fairness and autonomy of the arbitration process for subcontractors.

⁴ *Honasa Consumer Ltd. v. RSM General Trading LLC*, 2024 SCC OnLine Del 5631.

⁵ *M/s Zillion Infraprojects Pvt Ltd Vs Bridge and Roof Co India Ltd*, AP-COM No. 77 of 2024 and AP No. 407 of 2022



The Petitioner entered into a Sub-contract/Agreement with the Respondent, while the principal contract was between the Respondent and a Principal Contractor. Disputes between parties led the Petitioner to seek arbitration under Section 11 of the Arbitration Act ("**Petition**"). The Petitioner challenged the arbitration clause, which was divided into two parts. The first part barred arbitration or other modes of alternative dispute resolution for settlement of disputes between the Petitioner and Respondent. The second part allowed only the Respondent to decide whether to initiate arbitration with the Principal Contractor (even for the claims of the Petitioner) and required the Petitioner to bear the arbitration costs without having any direct role in the process.

The Court while considering the Petition found that the second part of the arbitration clause violated Article 14 of the Constitution by depriving the Petitioner of an independent right to arbitration while imposing the financial burden of arbitration. The Court deemed it unfair and unreasonable to require the subcontractor to cover arbitration costs without allowing participation in the proceedings. This decision is a crucial affirmation of the principle that arbitration clauses must be fair and provide equal rights to all parties involved. It reinforces the need for arbitration processes to be balanced and accessible, preventing scenarios where parties are burdened with costs or restricted from effective dispute resolution mechanisms.



This newsletter is only for general informational purposes, and nothing in this newsletter could possibly constitute legal advice (which can only be given after being formally engaged and familiarizing ourselves with all the relevant facts). However, should you have any queries, require any assistance, or clarifications with regard to anything contained in this newsletter (or Dispute Resolution in general), please feel free to contact the Dispute Resolution team at any of the contacts listed below. © Luthra & Luthra Law Offices India 2024. All rights reserved.

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