SA LAW
Attorneys & Solicitors

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Dear Readers,

Greetings from SA Law!

We are excited to present Special edition of our Newsletter "Salah".

This month's edition focuses on major developments surrounding Arbitration Law, domestic as well as international, over the last six months.

This newsletter is our attempt to bring industry-wide curated updates for our trusted clients and partners who look to us for timely inputs regarding their industry. We aim to cover the latest updates in law, policy and regulatory landscape through this endeavour.

We hope that you find this newsletter enlightening and insightful.

Regards,

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HON'BLE SUPREME COURT

Supreme Court of India invokes Article 142 to Correct Miscarriage of Justice in DMRC-DAMEPL Arbitration, Sets Aside 2021 Judgment

In a rare move, recently the Hon'ble Supreme Court of India invoked its jurisdiction under a curative petition in a commercial matter setting aside its 2021 judgment wherein, it has dismissed an appeal by the Delhi Metro Rail Corporation (DMRC) against an arbitral award in favour of Delhi Airport Metro Express Private Limited (DAMEPL).

The case had its roots in the 2008 Agreement, under which DAMEPL was granted exclusive rights to implement, manage, and operate the project concerning AMEL (Airport Metro Express Line). DMRC was responsible for clearances, land acquisition costs, and civil structures, while DAMEPL was to handle the design, supply, installation, testing, and commissioning of railway systems, complete the work in two years, and maintain AMEL until August 2038.

In April 2012, DAMEPL sought to defer one concession fee due to delays in station access provided by DMRC. DAMEPL thereafter expressed its intention to halt operations, citing safety concerns with the line, and stopped operations in 2012. DAMEPL also issued a notice to DMRC listing eight defects attributed to faulty construction and deficient designs, affecting the project's safety and their performance obligations under the 2008 Agreement. It requested DMRC to rectify these defects within 90 days. The DMRC failed to rectify these defects within 90 days and DAMEPL then issued a termination notice. In August 2013, an arbitral tribunal was constituted to adjudicate the claims of termination fee, and other expenses incurred by DAMEPL in operating AMEL. Thereafter on 11.05.2017, the tribunal passed a unanimous award in favour of DAMEPL observing that there were massive defects in the Civil structure that DMRC did not rectify within the stipulated 90-day period and awarded Rs 2782 crores plus interest as the termination payment along with several other expenses.

DMRC challenged this award before the Hon'ble High Court of Delhi wherein a single- judge Bench of the Hon'ble High Court dismissed the petition filed by DMRC. This decision was challenged before the Division Bench of the High Court which partly allowed the appeal stating the award to be perverse and patently illegal as the Tribunal did not consider several material evidence, including the statutory certification of the

Commissioner of Metro Railway Safety (CMRS) certifying that the line is fit for safety.

Aggrieved by the decision of the Hon'ble High Court, DAMEPL preferred an appeal before the Hon'ble Supreme Court, wherein the Division bench of the Hon'ble Supreme Court allowed the appeal and restored the award. A review against the order was preferred and dismissed. Therefore, a curative petition invoking inherent jurisdiction of the Supreme Court under Article 142 was filed.

While setting aside the earlier order of the Division Bench passed in 2021, the Hon'ble Supreme Court observed that the 2021 order resulted in a "great miscarriage of justice" by restoring an "illegal award" imposing exorbitant liability on DMRC, which was a public utility.

The Three-judge Bench of the Hon'ble Court observed that the judgment of 2021 by the Division Bench failed to consider the binding nature of the certification by the CMRS. It further observed that after due inspection, it was found that the defects alleged by DAMEPL did not have a material adverse impact on the working of the Metro.

The Hon'ble Supreme Court observed that there was a limited scope of interference with arbitral awards under Section 34. It reiterated that an award could not be set aside unless it was perverse or irrational, based on no evidence. However, in the present case, the findings of the Tribunal were unreasonable, as it had ignored the most critical piece of evidence—the certification by the Commissioner of Metro Safety (CMRS) and that the Hon'ble Delhi High Court Division Bench rightly set aside the said award on ground of patent illegality as the conclusions of the tribunal were not borne out by evidence on record.

Delhi Metro Rail Corporation Ltd. v Delhi Airport Metro Express Pvt. Ltd., 2024 INSC 292

Supreme Court affirms applicability of Limitation Act to Arbitration Petitions under Section 11(6) of Arbitration and Conciliation Act, 1996

Recently, the Hon'ble Supreme Court answered the question of applicability of the Limitation Act, 1963, on application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of arbitrators in affirmative. The decision is crucial for the arbitration regime in the country as it involves the intersection of contractual obligations, statutory limitations, and the timely initiation of arbitration proceedings.

Looking at the brief background of the case, three franchise agreements had been entered into between the parties to the Agreements in 2013. As per the agreements, the petitioner, a company based in Afghanistan, was granted a non-exclusive license by the respondent to establish and operate businesses under three trade names. Disputes arose between the parties with regards to their liability to pay renewal and payment of royalties for all three franchise agreements. In 2018,

when the respondent issued a recovery notice for non-payment of royalty/renewal fee, the petitioner informed the respondent of its decision not to renew two franchise agreements. In 2021, after a gap of around three years, the petitioner again raised the issue of non-payment of dues for the ICCR project with the respondent.

Thereafter, in 2022, the petitioner invoked a pre-institution mediation, upon failure of which, a notice of invocation of arbitration was issued to the respondent. The respondent, among others, contended that the claims were barred by limitation. Resultantly, the petitioner filed a Section 11(6) application for the appointment of an arbitrator.

While ruling that Article 137 of the Limitation Act is applicable to an application under section 11(6) of the Arbitration Act, the Hon'ble Supreme Court allowed the application since the application was filed within three years of date of accrual of cause of action.

The limitation period for Section 11(6) begins once the right to apply has accrued to the petitioner i.e. only after a valid notice invoking arbitration has been issued by one party and there has been a failure or refusal on the party of the other party to make the appointment as per the agreed procedure.

Caution has to be exercised to not confuse limitation period for filing Section 11(6) application with that for raising substantive claims that are to be arbitrated. Furthermore, the court may reject Section 11(6) application filed prematurely. However, once all prescribed procedures under the said provision are completed and the application passes all other tests laid down for scrutiny, the court is duty bound to appoint an arbitrator and refer the matter to arbitration.

M/S Arif Azim Co. Ltd. v M/S Aptech Ltd., 2024 INSC 155

Supreme Court of India clarifies incorporation of Arbitration Clauses in Multi-Contract Agreements

The Hon'ble Supreme Court in the recent case discussed the 'reference' and 'incorporation' of an arbitration clause in a contract along with the interplay between the same. In the present case, the parties entered into an agreement based on a Letter of Intent (hereinafter referred to as ***"LOI"***) and into large number of tender documents forming part thereof. Thereafter, as the dispute arose, the Respondent invoked the arbitration clause incorporated in the tender document.

The petitioner contended that a mere reference to terms and conditions of tender documents in the agreement would not make dispute amenable to arbitration, more so, when the LOI prescribed a distinct procedure for settlement of disputes. Therefore, the dispute shall instead be settled as per LOI i.e. through reference to the civil courts in Delhi.

Refuting the contentions of the petitioner, the Hon'ble High Court of Delhi allowed Section 11(6) application of the Arbitration Act and appointed a sole

arbitrator. The judgment was challenged before the Hon'ble Supreme Court. The question that fell for determination was whether the arbitration clause forming part of the tender documents was incorporated in the LOI.

Answering the question in negative, the Hon'ble Supreme Court reiterated that a general reference to another contract does not incorporate the arbitration clause contained in the referred document into the main contract unless a clear, specific and unambiguous reference to the arbitration clause is made. The Apex Court relied on its judgment in *M.R. Engineers and Contractors Private Limited v Som Datt Builders Limited, (2009) 7 SCC 696* to arriving at its ruling and resultantly, set aside the judgment of the Hon'ble High Court.

NBCC (India) Limited v Zillion Infraprojects Pvt. Ltd., 2024 INSC 218

Supreme Court limits judicial intervention in Arbitral Awards, upholds independence of Arbitration process

The Hon'ble Supreme Court in a recent judgment reasserted the power to set aside award under Section 34 and 37 of the Arbitration Act does not extend to power to modify the award.

The genesis of the case is traced to a contract awarded by the Karnataka State Public Works Department to one S.V. Samudram, a registered Class II Civil Engineering Contractor, to construct an office and residence of the Chief Conservator of Forests in the state. A dispute arose between the parties with respect to delayed execution of the contract and withholding of payments. Consequently, arbitration proceedings were initiated.

The learned Arbitrator, on a scrutiny of the evidence, granted a sum of Rs. 14,68,239 with interest @ 18% p.a. to the Contractor. The award was later on modified by the Civil Judge under Section 34 of the Arbitration Act, reducing the amount to Rs. 3,71,564 and the interest rate to 9% p.a.

The modification was challenged before Hon'ble High Court of Karnataka under Section 37 of the Arbitration Act which refused to interfere and criticized the approach of the Arbitrator in awarding claims as one based on *"assumptions and presumptions"*. Aggrieved by the order of the Hon'ble High Court, the petitioner moved an appeal before the Hon'ble Supreme Court.

The Hon'ble Supreme Court while allowing the Appeal filed by the Contractor held that the judicial intervention envisaged under Section 34 does not extend to the merit of arbitral awards and that the courts could either set aside or uphold an award but has no power modify it.

S.V. Samudram v State of Karnataka & Anr, 2024 INSC 17

Supreme Court reinforces minimal judicial intervention in enforcement of Foreign Arbitral Awards

The Hon'ble Supreme Court in a recent case reiterated the principle of minimal judicial intervention in the enforcement of foreign arbitral awards and that intervention can only be on exhaustive grounds laid down under Section 48 of the Arbitration Act.

In the instant case, HSBC, a party to a Singapore seated Arbitration filed Section 9 application under the Arbitration Act before the Hon'ble High Court of Bombay seeking direction to the appellants to deposit USD 60 million to secure disputed amount. The application was filed in wake of the interim awards passed by the Emergency Arbitrator in favour of HSBC.

The said relief was granted by the Hon'ble High Court and an appeal under Section 37 was preferred on the ground that the dispute involves allegations of fraud, therefore, is non-arbitrable under Indian law. Negating the contentions of Avitel, the Supreme Court ruled that the dispute is arbitrable.

In the meantime, SIAC three-member the Arbitral tribunal gave a unanimous award in favour of HSBC on the issue of jurisdiction. The enforcement of same was also challenged under Section 48 of the Arbitration Act as biasness was attributable to the Chairman, therefore, rendering the award violative of the *"public policy of India"* and the *"most basic notions of morality or justice"*.

The presiding Arbitrator, Mr. Christopher Lau, was an independent non-executive Director and the Chairman of the Audit and the Risk Committee of Wing Tai. Wing Tai was alleged to have contractual association with HSBC (Singapore) Nominees Pte Ltd., a subsidiary of parent company of the award debtor.

The Apex Court held that Wing Tia does not qualify an "affiliate" of the award debtor and as no reasonable third person would doubt Mr. Lau impartiality or independence as no conflict of interest with the parent company or its affiliates exists. Also, as per the 'Green List' in IBA Guidelines on Conflict of Interest in International Arbitration, 2004, there was no duty of disclosure upon the presiding officer.

Therefore, it was ruled that the judgment of High Court does not suffer from any infirmity as the award debtor has failed to substantiate their allegation of bias to meet the high threshold prescribed under Section 48.

Avitel Post Studioz Limited & Ors. v HSBC Pi Holdings (Mauritius) Limited, 2024 INSC 242

Supreme Court clarifies enforceability of Arbitration agreements in unstamped contracts: Emphasizes Separability and Competence-Competence Principles

In December 2023, the seven-Judge Bench of the Hon'ble Supreme Court delivered a crucial verdict on the validity of

unstamped or inadequately stamped Arbitration agreements.

The verdict came in light of challenge to the judgment of the Hon'ble Apex Court in *N N Global Mercantile (P) Ltd. v Indo Unique Flame Ltd., (2023) 7 SCC 1* wherein the court observed that an unstamped agreement containing an arbitration clause or a deficiently stamped arbitration agreement is void, non-existent in law and cannot be acted upon. A curative petition was filed questioning the correctness of the view in *N N Global (supra)*. The matter was referred by five-Judge Bench of the Hon'ble Court to a seven-Judge Bench for an authoritative pronouncement.

While answering the reference, the seven-Judge Bench of the Hon'ble Court sought to interpret the provisions of Arbitration and Conciliation Act, 1996, the Stamp Act, 1899 and the Indian Contract Act, 1872 harmoniously. The Hon'ble Court distinguished between the inadmissibility and voidability of an agreement. As provided in Section 2(g) of the Indian Contract Act, 1872, while enforceability of an agreement is concerned with its legal bindingness, admissibility, on the other hand, refers to whether a document can be utilized as evidence. Although an insufficiently stamped agreement that violates Section 35 of the Stamp Act is deemed inadmissible, it is not rendered perse void, such being a curable defect.

Furthermore, being a self-contained code, the Arbitration and Conciliation Act, 1996 is a special act the provisions of which will take precedence over provisions of any other legislation unless otherwise specified. Section 5 of the Arbitration Act further contains a non-obstante clause, thereby, overriding the provision of Stamp Act in case of conflict.

The judgment also notes the applicability of doctrine of severability and that of kompetenz-kompetenz. As per doctrine of severability, the main contract and the arbitration agreement constitutes separate agreements, thus, the invalidity of the main contract does not render the arbitration agreement null and void. The latter doctrine states that the arbitral tribunal is competent to decide on the existence and validity of the arbitration agreement in question and the court shall restrict its enquiry to prima facie validity of the arbitration agreement.

In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899, 2023 INSC 1066

HON'BLE HIGH COURTS

Delhi High Court affirms perpetuity of Arbitration clauses post-contract termination

The Hon'ble Delhi High Court in a recent case has provided substantial clarity on the continuity of survival of arbitration clauses despite termination of the main contract.

The parties to the dispute entered into an agreement in 2015 for an initial period of three years which is has allegedly continued to govern their relationship even after the said period. The petitioner invoked arbitration under Section 21 of the Arbitration for disputes arising even after the period of the agreement.

Allowing the Section 11 application, the Hon'ble High Court held that the questions concerning automatic termination of contract are for the arbitrator to adjudicate since in any event, the arbitration agreement survives termination of the main contract. It was reiterated that the arbitration agreement is independent of the main contract and the cessation of latter does not lead the arbitration clause invalid.

M/S S.K Agencies v M/S DFM Foods, 2023 DHC 9203

Gauhati High Court upholds Arbitration despite availability of remedies under RERA Act in real estate disputes

Recently, the Hon'ble Gauhati High Court was called upon to decide whether arbitration can be invoked in respect of disputes for which remedy under Real Estate (Regulation and Development) Act, 2016 (hereinafter to as the "***RERA Act***") is available.

In the instant case, the parties executed an agreement for sale of an apartment in 2017. However, despite payment of 95% of the total consideration, the respondents failed to hand over the possession to petitioners against which the petitioner has invoked arbitration seeking interest as per the provisions of Section 18 of the RERA Act and Clause 11.3 of the Agreement.

The respondent contended that the dispute shall be decided in accordance with the RERA Act and is not fit for arbitration. It relied on *Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1* to argue that disputes falling under DRT Act are not arbitration since it is a complete code and similarly, disputes falling within the ambit of RERA Act are not arbitrable.

Judging on the parameter of the four factor test laid in Vidya Drolia *(supra)*, the court held that the disputes falling within the domain of RERA Act cannot be held to be non-arbitrable. There is nothing the in the RERA Act or the Arbitration Act to suggest that these acts are inconsistent or in derogation of another. Unlike DRT Act, enforcement of an order passed under RERA Act is not automatic and appropriate procedure is required to be followed as prescribed under Section 40 of the Act. Therefore, the party can validly choose to invoke arbitration notwithstanding that an alternative remedy is available under RERA Act.

Pallab Ghosh v Simplex Infrastructures Limited, GA HC 010133652023

LEGISLATIVE UPDATES

Finance Ministry limits Arbitration in Government contracts for disputes over ₹10 Crore, promotes Mediation

The recent decision of the Ministry of Finance, Government of India, to bar the availability of arbitration under government contracts for less than ₹10 crore in dispute is a significant step in the arm for the resolution of disputes about public procurement.

The Ministry of Finance has drawn attention to a few challenges within the existing arbitration framework, urging this policy change. Under the guidelines issued by the Department of Expenditure, the scope of such arbitration has now been narrowed to disputes valued at less than ₹10 crore.

One of the most commonly stated reasons for the said decision is that arbitration is quite expensive, besides consuming much time. The guidelines of the Ministry point out the fact that although arbitration was supposed to be much less procedural and faster compared to the ordinary litigation process, quite often, it turned out otherwise, leading to prolonged and expensive procedures. This has posed a huge problem to governments, which are forced to maintain strict budgeting and accountability standards.

To enhance the efficacy of dispute resolution further, the constitution of high-level committees with retired judges and technical experts is also provisioned. These committees will be able to vet the proposed solutions to maintain consistency with the broad interests of the public and to maintain probity. Such committees can negotiate with the other party or intercede on their own—another level of supervision and expertise.

The guidelines come up at a time when there is an increased interest in making India a preferred destination for commercial arbitration. It is only a little time back when the Hon'ble Chief Justice of India stressed how arbitration played a significant part in commercial justice; he elaborated on the need to build up a culture ensuring due respect to arbitration. The judiciary's push towards arbitration goes hand in hand with the larger objective of providing relief to the overburdened judiciary and ensuring faster resolution of commercial disputes.

Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement, Ministry of Finance, 03.06.2024

FOREIGN COURTS

Dubai Court of Cassation limits Tribunal's authority on legal fees in ICC Arbitrations, sparking controversy

In an interesting development, Dubai Court of Cassation (***"DCC"***) in a recent case denied the award creditor the recovery of legal fees and expenses incurred on the conduct of arbitration proceedings.

The DCC categorically held that the authority of the arbitral tribunal to award costs and expenses extends to only tribunal's cost and expenses. The tribunal has no jurisdiction to award costs towards party's legal fees and expenses unless is specifically provided in the arbitration agreement, agreed by the parties' power of attorney holder or provided in the arbitration rules.

While analysing the Article 38(1) of the ICC Rules 2021, the DCC ruled that the rules do not explicitly provides for award of legal fees to the parties' representatives and are restricted to that of the tribunal.

Commercial Case No. 821/2023, Dubai Court of Cassation

High Court of England upholds state immunity in ICSID Award Enforcement against Zimbabwe

The High Court of England has handed down a judgment concerning recognition and enforcement of arbitration awards under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (***"ICSID Convention"***) observing that state immunity is no bar to the registration of an ICSID arbitration award in the United Kingdom.

The case herein involved an ICSID arbitration concerning Zimbabwe's Land Reform Programme, through which properties forming part of a forestry estate were expropriated. Two companies had brought claims under the Zimbabwe-Switzerland Bilateral Investment Treaty, claiming restitution and compensation for forestry estate bought by them. By the Award dated 28.07.2015, the Learned Tribunal had awarded the Claimants an amount of USD 125 million together with interest and costs.

That award was also upheld by the ICSID annulment committee on 21.09.2018 but remained unexecuted as Zimbabwe never paid the amount. Later on 15.09.2021, the claimants applied for an ex parte order to register the prize in England under the Arbitration (International Investment

Disputes) Act 1966, and the same was granted on 27.05.2022.

Zimbabwe resisted the order of registration on the ground that it is immune from the jurisdiction of courts in the UK by virtue of section 1(1) of the State Immunity Act (SIA) 1978. The claimants, on the other hand contended, that Sections 2 and 9 of the SIA, 1978 which provides exceptions to immunity would be applicable as Zimbabwe had waived immunity by submitting to the ICSID Convention and by its agreement to ICSID arbitration.

Dealing with Section 2 of the SIA 1978, the court held that the general waiver contained in the ICSID Convention was insufficient to amount to a submission to the jurisdiction of the English courts for particular purposes.

The court observed that states and their immunity from a particular jurisdiction cannot be brought up during the registration stage. The same will only come into play only when there is formal service on the state and execution steps are taken.

In light of the ex parte application filed by the Claimant, the court observed that the claimants had not adequately disclosed the issue of state immunity. It further found that such a breach was severe enough to violate the claimant's duty under an order of full and frank disclosure. The court, although did not set aside the order, but penalized the claimants with costs.

It is plausible to believe that Zimbabwe may be inclined to raise further challenges regarding state immunity during the stage of formal enforcement.

Border Timbers Limited v Republic of Zimbabwe, [2024] EWHC 58 (Comm)

United Kingdom Supreme Court enforces Arbitration agreements despite Non-UK seats amid EU sanctions on Russia

The Hon'ble Supreme Court of the United Kingdom has pronounced its oral judgment observing that arbitration agreements are upheld even if the seat of arbitration is outside England. This followed a fast-track appeal from the ruling of the Court of Appeal in February 2024, which had maintained the anti-suit injunction and declarations granted by that court.

The context in this case dates to the imposition of sanctions on multiple Russian companies in the year 2022, following the invasion of Ukraine. Several court proceedings were initiated by Russian parties in Russia wherein the proceedings are alleged to violate existing arbitration agreements.

In the present case, RusChemAlliance (RCA), a Russian company, had entered into several contracts with German firms to construct LNG facilities, with Unicredit Bank GmbH providing a performance bond. Following the EU sanctions against Russia, the German contractors i.e. Unicredit Bank GmbH ceased working, and RCA cancelled the contracts and sought back repayment and bond

payments, which was governed by English law that contained an ICC arbitration clause with Paris as the seat of arbitration, but RCA initiated legal proceedings in the Russian Courts contrary to an arbitration agreement earlier executed between the parties.

When Unicredit filed an application for an anti-injunction suit in the Court of First Instance in England seeking to prohibit the Russian party from continuing to take steps in the court proceedings instituted in Russia, the same was rejected.

Thereafter, when Unicredit preferred an appeal against the decision of the Court of First Instance before the Court of Appeal, the anti-suit injunction was granted observing that the English governing law clause provided a gateway for service out of jurisdiction and the English Courts were the proper place to seek the anti-suit relief.

The Court of Appeal also observed that there would be no interference with the jurisdiction of the French courts as the same did not have the authority to grant an anti-suit injunction. The balance of justice pointed to holding the parties to their arbitration agreement. The Court observed that it was abusive for RCA to suggest that Unicredit should start arbitration and obtain an injunction from an emergency arbitrator when RCA continued to argue before the Russian courts that the arbitration agreement was void.

The ruling of the Supreme Court on this issue is likely to further the filing of an anti-suit injunction in support of arbitrations seated in jurisdictions where this relief is unavailable. It also highlights the need to spell out the law in clear terms that shall govern the agreement to avoid the jurisdictional hassles in ensuring the enforceability of the award.

UniCredit Bank GmbH v RusChemAlliance LLC, UKSC 2024/0015

SICC upholds Arbitral award, emphasizes early objections and evidence in Arbitration

The Hon'ble Singapore International Commercial Court recently dealt with issues of allegations of forgery, waiver of objections in an arbitration.

The dispute in the present case arose from the construction of a massive project, a power plant in the Sasan Village located in India. The arbitration was initiated by Shanghai Electric Group Co Ltd (Shanghai Electric) alleging non-payment of dues and alleged breach of contracts.

The arbitration was instituted at SIAC. Upon conclusion of the said proceedings before the arbitral tribunal, an award was passed in favour of the Respondent Shanghai Electric Group Co Ltd (Shanghai Electric).

The said award was later on challenged by the Reliance Infrastructure Limited (Reliance Infrastructure) before the Hon'ble Court on the grounds that the Guarantee Letter of which the arbitration agreement was a part of was forged, claiming the signatures of their former officer, Mr. Rajesh Agrawal, were

falsified, and alternatively, that Mr. Agrawal lacked authority to bind the company to an arbitration agreement with Shanghai Electric.

Before Singapore International Commercial Court, Reliance argued that the award passed by the arbitral tribunal violates Singapore's public policy as it was procured by fraud. However, the court found that Reliance had waived its right to challenge these issues by not raising them during arbitration and was unpersuaded by the merits of their claims even if they had not been waived.

Waiving of rights under UNCITRAL Model Law on International Commercial Arbitration and the International Arbitration Act 1994 (IAA 1994) refers to a party giving up certain legal rights or claims, generally by neglecting to raise them timely during legal procedures, preventing them from addressing the matter subsequently. A party can utilize a plea of forgery to contest the legitimacy of a document or agreement in court, such as asserting that an arbitration agreement or contract was fabricated and illegitimate.

It is crucial to note that the Reliance did not raise any concerns of forgery till the very end of the arbitration process, at which point the tribunal had sought clarification regarding the original letterhead of the Guarantee Letter.

The Court relying upon the UNCITRAL Model, observed that Reliance by not raising jurisdictional issues during arbitration, waived its right to contest the arbitral ruling for fabrication and lack of power and that it waived its jurisdiction grounds, as despite early concerns and considerable fabrication of evidence, Reliance Infrastructure did not pursue this plea throughout arbitration

The Court further tested the principles of waiver given under the UNCITRAL Model Law and reiterated that objections, if any, to the jurisdiction of an arbitral tribunal must be raised at the earliest opportunity, as provided under Article 16(2) of the UNCITRAL Model Law. Inaction then would result in a waiver as far as the right to object is concerned.

The Hon'ble court eventually upheld the award of the tribunal, observing that Reliance Infrastructure had waived its right to object by failing to raise allegations of forgery and the lack of authority to enter into the contract at an earlier stage.

Reliance Infrastructure Limited v Shanghai Electric Group Co Ltd, [2024] SGHC(I) 3

LEGISLATIVE UPDATES

United Kingdom introduces Arbitration Bill to update 1996 Act, strengthening International Arbitration Framework

The United Kingdom has introduced the Arbitration Bill, 2024 in the House of Lords, marking a significant stride towards the modernization of the existing Arbitration Act of 1996. This measure is

designed to fortify the status of the United Kingdom as a prominent centre for international arbitration. The new law is anticipated to receive the Royal Assent in early or mid of 2024 and is designed to enhance the current framework in order to ensure its continued competitiveness and robustness in global markets. Up until now the Arbitration Act, 1996 has worked as a fundamental component of English arbitration law and has established the complete legal framework for arbitrations in England, Wales, and Northern Ireland. The default law of the year 1996 will continue to apply to all arbitration agreements, whether concluded before or after the operation of the rule, but it shall not affect pending arbitrations or court cases.

As regards the 2024 bill, the same came into being when the Law Commission undertook a complete review of the erstwhile act in commemoration of the 25th anniversary of its enactment in the year 2021 and to make amendments that would facilitate in making England and Wales as prominent seats for international commercial arbitration. It is important to note that the Arbitration Bill, 2024 is very close to the Draft Arbitration Bill drafted by the Law Commissions, with very few amendments being made in the actual Bill.

One of the most important features of the new Act is introduction of default statutory rule to govern the determination of the proper law of the arbitration agreement in the absence of party choice. The other significant change comes in the form of a power for summary disposal that will enable awards to be dismissed on a summary basis when a party has no real prospect of success. This follows well-established principles in English jurisprudence and will benefit financial institutions and parties to arbitration where, typically, the grounds advanced are simply disputes over the non-payment.

One important change has been made to section 44 of the Arbitration Act 1996 that allows the court to make orders in support of arbitration proceedings, such as taking witness evidence, preserving evidence, dealing with relevant property, selling goods, issuing interim injunctions, and appointing a receiver. Arbitrating parties need the court's permission to appeal under this section. Clause 9 amends section 44 to clarify that court orders can be made against third parties, like those holding relevant evidence or banks with relevant funds, aligning arbitration with court proceedings. It also allows third parties to appeal without needing the court’s permission, giving them the same appeal rights as in court cases, it encourages enforcement of orders made by emergency arbitrators.

Emergency arbitration has been a relatively recent innovation that allows parties to get urgently needed protective measures from an emergency arbitrator before the constitution of the tribunal. Thus, the new provisions ensure compliance with interim orders of emergency arbitrators and put to rest all concerns about their enforceability.

One more essential improvement under the new Act is the codification of the duty of an arbitrator to disclose circumstances that would cause a fair-minded and informed observer reasonably to have doubts concerning that arbitrator's impartiality or independence. The codified section will have to be read considering the best international practices to bring the law into more accessibility.

The 2024 enactment also modifies the framework of challenge to the jurisdiction of tribunals under section 67 of the Arbitration Act 1996.

In addition, the new Act extends further the immunity of the arbitrators for their unreasonable resignation and the costs on any application for their removal provided they do not act in bad faith. This reform is intended to strike a balance between the arbitrators and the parties involved.

It is within the fast-track procedure of the Arbitration Bill that its importance has been demonstrated along with the UKs commitment to not losing its position among the leading countries in arbitration.

London, the dominant international arbitration hub, will be the primary beneficiary of these amendments. These modifications aim at guaranteeing that London continues to be a location where English and Welsh law is both selected and likely to be upheld as a method of arbitration in international commercial disputes, thereby increasing its appeal as an arbitration venue.

In conclusion, the Arbitration Act of 2024 represents a proactive strategy for the continuous modernization of the arbitral legal framework in the United Kingdom. In addition to benefiting businesses and states involved in arbitration, these advancements also enhance the UKs reputation as a fair, efficient, and reliable jurisdiction for resolving international disputes.

Arbitration Bill, House of Lords, 2023-24

Germany Proposes major Arbitration Law reform to enhance attractiveness for International disputes

The German Ministry of Justice on 01.02.2024 has published a Draft Bill to reform the arbitration law in Germany. The reform makes changes in three main phases of arbitration: the validation of the arbitration agreement, the arbitration proceedings, and arbitration-related litigation before German state courts.

The first stage focuses on the validity of the arbitration agreement. What this reform does is loosening the formal requirements of arbitration agreements in commercial transactions by an amendment to Section 1031 (4) of the Code of Civil Procedure (Zivilprozessordnung) hereinafter ZPO.

The current law in Germany says that for an arbitration agreement to be valid it must be in writing i.e. signed by the parties or with exchanged documents. The Proposal permits categories of parties to make oral arbitration agreements. Upon request of either party, written confirmation shall be required.

This is to facilitate the conclusion of arbitration agreements in global supply chains and complex framework agreements. However, the reforms still recommend to adhere to formal requirements of written agreements, with the view of avoiding legal uncertainties and possible delays.

The reform also changed Section 1032 (2) of ZPO, to the effect that a competent Higher Regional Court can decide whether an arbitration agreement exists and is valid upon request by a party. This mirrors the tribunal's power under Section 1040(1) of the ZPO and furthers procedural economy by making available a legally effective declaratory decision at the pre-arbitral level on the effectiveness and validity of an arbitration agreement.

The draft maintains digitization of arbitral proceedings as one of the critical areas of focus. The amendment to Section 1047(2) of ZPO permits the tribunal to conduct remote hearing regardless of whether one party wishes for the oral hearing to proceed in person. It also increases the legal certainty for further flexible and cost-effective arbitral proceedings, particularly in cross-border disputes. Additionally, it now permits the issuance of awards in digital form and signing by arbitrators through a qualified electronic signature, such as in the amended Section 1054(2) of ZPO. This makes things relatively more accessible, particularly with the location of parties and arbitrators being in different countries around the globe.

The reform establishes a statutory default mechanism for the nomination of arbitrators in multi-party arbitrations, detailed under the new Section 1035(4) of ZPO. It will then be prescribed that, if several parties on the same side of the dispute have not jointly nominated an arbitrator, the competent Higher Regional Court may nominate one or both party-nominated arbitrators.

The reform also specifies that an arbitrator in a three-member tribunal can issue a dissenting opinion regarding the result of the case or the reasoning behind the award as per newly introduced section of 1054a of ZPO. The provision is often deemed necessary considering that dissenting opinions are helpful to raise the quality of awards.

Regarding arbitration-related litigation, the reform allows certain proceedings such as setting aside and enforcement proceedings to be done exclusively in English. This covers the writing of briefs and submission of exhibits in English, the holding of oral hearings in English, and the pronunciation of judgments in English. The competent bodies for these cases are the English-speaking Commercial Courts at the Higher Regional Court level. At least some in the international arbitration community in Germany are likely to welcome that development; it undoubtedly will increase global access to German seats.

The reform also provides for a possibility of legal redress of final awards in exceptional cases when it is necessary to

quash a decision upon the prevalence of justice where an award is based on a document that has been forged to an extremely flagrant extent. This constitutes the content of the new Section 1059a of ZPO. Finally, it enables enforcement in Germany of interim measures passed by foreign arbitral tribunals, amending Sections 1025 (2) and 1041 (2) of ZPO.

This amendment is crucial in securing the interests of a claimant while arbitral proceedings are going on, ensuring the assets of respondents located in Germany. The 2024 German reform steps in a moment when the legal framework for arbitration is being modernized across jurisdictions. The Proposal is currently in the phase of public consultation, and further improvement can be expected over time, with the possibly revitalized rules coming into force at the beginning of 2025.

German Arbitration Law Reform, 2024

IBA updates Guidelines on conflicts of interest in Arbitration, enhancing transparency and impartiality

In March 2024, the International Bar Association (IBA) updated the Guidelines on Conflicts of Interest in International Arbitration. The IBA Guidelines, first introduced in 2004 and revised in 2014, were subjected to a thorough review to align them with contemporary developments in the arbitral practice and current best practices in international commercial arbitration.

The IBA Guidelines are reputed by the traffic light system, which classifies potential conflict of interest situations into three lists: Green, Orange, and Red. Each catalog provides illustrative examples of what may or may not be a conflict of interest and the required level of disclosure. The 2024 revision has been exceptionally expansive of the Orange List, which includes situations that might generate doubts as to an arbitrator's impartiality or independence, depending on the circumstances.

Part I of the Guidelines i.e. General Standards Regarding Impartiality, Independence, and Disclosure, is the core of the Guidelines and contains seven fundamental principles. The 2024 edition introduced several significant changes in this part, which has, in a more transparent manner, provided the considerations that an arbitrator should make in using discretion not to accept an appointment, refuse to continue to act, or make a disclosure.

Another crucial update has to do with the conditions in which an arbitrator should make disclosure, even when restricted by other professional standards that may prohibit such disclosure. This is embodied in General Standard 3(e) of the Code and helps arbitrators handle complex professional situations while being open to disclosure and ethics.

The updated Rule recognizes that while an arbitrator typically brings with him the identity of his law firm or employer, a

determination must be made depending on the facts and circumstances of the case.

The 2024 Guidelines also clarify that any legal entity or a natural person over which a party exercises controlling influence may be taken to bear the identity of that party. This implicates third-party funders, insurers, corporate parents, subsidiaries, and state entities, as further explained in General Standard 6(c).

Part II of the Guidelines i.e. Practical Application of the General Standards does not alter what Part I call the traffic light approach in providing practical examples of when a situation may be considered to create a conflict of interest.

The Orange List in the 2024 Guidelines has been further divided into new additional categories i.e. 3.2.8 to 3.2.13, which address several relationships and other circumstances that are likely to raise justifiable doubts as to an arbitrator's impartiality or independence. These include services provided to one of the parties, relations between an arbitrator and another arbitrator or counsel, relations between an arbitrator and a party, and other relevant circumstances.

IBA Guidelines on Conflicts of Interest in International Arbitration Approved by the IBA Council, 25.05.2024

CIETAC introduces 2024 Arbitration Rules, enhancing efficiency, flexibility, and digitalization

The China International Economic and Trade Arbitration Commission (hereinafter referred to as ***"CIETAC"***) on 01.01.2024 has introduced the new Arbitration Rules, revisioning the 2015 Rules that were in application for more than eight years. Recently published 2024 Rules provides many new provisions toward enhanced efficiency and flexibility in arbitration, bringing CIETAC more in line with international best practices.

Another significant improvement pertains to party-ordered measures. Under the 2024 Rules, CIETAC may now receive and transmit applications for preservation to courts outside Mainland China. The recent change, as stipulated in Article 23, offers parties greater flexibility in obtaining protection. Also, CIETAC may now postpone serving the arbitration notice on the respondent until the claimants application for preservation is presented to the court so that the respondent does not dissipate assets. The 2024 Rules further extend the ways of nominating the presiding arbitrator. Until now, parties have seldom exercised their right to suggest five candidates each because they were too troublesome to try and agree on.

According to rule 27 of the new regulations, two other methods that have been added are: the party-nominated arbitrators can jointly nominate the presiding arbitrator, or parties can require CIETAC to nominate a list of three candidates from which each party has the right to exclude one or more persons on a peremptory challenge basis, with CIETAC choosing from the remaining list. The revision enlarges the parties role in selecting the presiding arbitrator and is

consistent with the current trend in international arbitration. Another significant amendment is the examination of reports from experts and forensics. Article 44 now makes it possible for an expert or a forensic appraiser to go for hearings and be subjected to cross-examination without the need for the tribunal's consent as long as one-party requests it.

Article 12 that deals with failure to Negotiate or Mediate, provides that the failure to negotiate or mediate does not bar the claimant from making an application for arbitration, nor does it bar the Arbitration Court from receiving a case unless stipulated by any applicable law.

CIETAC has also relaxed the prerequisites for filing a single arbitration involving disputes arising from more than one contract. Article 14 now allows contracts related in subject matter to be made part of a single arbitration even if the contracting parties are not the same. The rationale behind this amendment is to cut costs and time for the parties, which would otherwise be taken up in the fragmentation of related disputes into several arbitrations.

A focus on digitalization also characterizes the 2024 Rules. The new rules prioritize the electronic service of documents in arbitration under Article 8 and the filing of documents in electronic form under Article 21.

Online case filings, although made temporarily during the outbreak and spread of COVID-19, are now expressly provided for under Article 11. The electronic signatures of the arbitrators, affixed on the arbitral award, shall be considered as validly affixed as if the same were done on paper, and the service of the award could also be effected through electronic means, should the parties agree to it or under the discretion of CIETAC (Article 52).

Article 37 now allows the tribunal to decide on hearings in a virtual mode after consultation with parties. This provision endorses flexibility, though parties that wish to have a hearing in person should state their preference in no uncertain terms to the tribunal.

Rule 2024 also requires that a party that gets financed from a third party shall disclose such information as the name, residence, and interest in the case by the third party. Such a provision is meant to be transparent and maintain independence and impartiality on the part of the arbitrators.

Article 49 makes provisions for the tribunal to issue interim awards, according to a point or upon the application of a party on any question with respect to the subject matter; this is general practice under most international arbitration principles. Article 50 allows the tribunal to eliminate claims or counterclaims that are devoid of legal merit or beyond its jurisdiction, making the process easier.

Moreover, Article 2 now lists out the services that CIETAC shall be capable of providing with regard to ad hoc arbitration. The said provision foresees

prospective changes in the law where ad hoc arbitration for foreign-related disputes is possible in the future. Article 86 exempts CIETAC, as well as its staff, arbitrators, and other members of the arbitral organs, from their civil liabilities based on their performance of arbitration activities; such an exemption does not apply if one of these persons has engaged in the conduct intentionally or with gross negligence.

The 2024 Rules demonstrate that CIETAC, in its efforts to keep pace with development in international arbitration, has improved efficiency, flexibility, and transparency. Such changes will induce reforms to Chinese arbitration practices, making CIETAC an attractive destination for international arbitration.

Arbitration Rules 2024, China International Economic and Trade Arbitration Commission, 01.01.24

MISCELLANEOUS

SVAMC introduces Guidelines for ethical use of AI in Arbitration, ensuring fairness and transparency

The Silicon Valley Arbitration & Mediation Center ((hereinafter referred to as ***"SVAMC"***) California USA, with co-sponsorship by its Technology Committee, published its 1st *"in the nation"* Guidelines on the Use of Artificial Intelligence in Arbitration, in April 2024, in a response to the maturation of AI's centrality within the legal profession. It purports to work as a comprehensive framework for the ethical and effective use of artificial intelligence in arbitration, ensuring fairness, efficiency, and transparency throughout the arbitral process.

SVAMC is a non-profit organization that is dedicated to the advancement of efficient and effective dispute resolution in the technology and intellectual property sectors. SVAMC, which is situated in the centre of the technology industry, offers specialized arbitration and mediation services that are specifically designed to meet the distinct requirements of technology companies and their global operations.

The guidelines also include the definition of AI as computer systems that can undertake activities which, if done by humans, would be considered to require intelligence. This involves the understanding of natural language and recognizing complex patterns that can help to generate "human like" outputs. The guidelines emphasize these AI tools should not replace human "decision making" but only assist in the arbitration process. This distinction is very crucial as far as maintaining the integrity of arbitration, making sure that the use of AI supports human judgment rather than undermines it.

Yet another essential field considered in the guidelines is that of confidentiality. Given the sensitive nature of the issues in the arbitration, the information used with

AI tools must be kept confidential. Users are advised to run AI tools with data confidentiality and not input sensitive information into AI systems where confidentiality cannot be assured. The process will ensure the necessary trust and integrity in the arbitration. Disclosure of AI use is approached very carefully. While, as a general matter, the use of an AI tool need not be disclosed, it has been pointed out that there may be times when disclosure is appropriate. Whether to disclose must be determined through a fact-specific inquiry, including whether due process requires it and any relevant privileges. If disclosure is necessary, then such disclosure shall contain information sufficient to enable the reproduction and assessment of the results of the AI Tool so that there is transparency on how the arbitration was conducted.

For the parties and their representatives, these guidelines stress the principle of competence and diligence when using AI. Legal professionals have been reminded of the role of reviewing any output created by AI to ascertain its truthfulness from facts and legality. Parties and their representatives are warned not to tamper with the authenticity of evidence or mislead the tribunal through the application of AI. This goes even further to making false evidence using AI tools, something that can profoundly interfere with the arbitration process and its fairness.

The guidelines emphasize that decision-making responsibilities are non-delegable. An arbitrator cannot delegate the mandate to AI tools but can use them for analysis and decision-making. This is a principle that sees the human element set at the very center of arbitration, allowing the independent judgment and accountability of an arbitrator to be ensured.

Another pertinent principle for AI use by arbitrators is that of due process. The standards demand that the arbitrators disclose an involvement with information emanating from the AI, which affects their perception of the dispute, so that the parties can respond to this issue. This must be done transparently so that the right of the parties to be heard can be preserved and the procedure in arbitration shall be fair.

In summary, the SVAMC Guidelines on the Use of Artificial Intelligence in Arbitration stands for a level playing field in embracing AI use. They assure that AI is applied to enhance but never allowed to vitiate the process, its integrity, or the fundamental principles of due process and confidentiality.

Guidelines on the Use of Artificial Intelligence in Arbitration, Silicon Valley Arbitration & Mediation Center, 30.04.24

Ecuador votes to ban International Arbitration for Foreign Investor disputes, emphasizes Sovereignty and Sustainable Development

On 21.04.2024, the people of Equador participated in a referendum and overwhelmingly voted to keep Article 422 of the Constitution of Ecuador 2008 which

bans international arbitration for dispute resolution between Ecuador and foreign investors or private individuals in any international treaties or instruments. This move follows Ecuador's strategy developed after adverse experiences with investment arbitration and ISDS.

Ecuador has been the focus of several devastatingly costly ISDS tribunal damage awards to investors. Perhaps the most widely publicized of these took place in 2012 when a tribunal awarded the U.S. based oil company Occidental over USD 1.5 billion, or nearly 9 percent of Ecuador's 2012 annual budget, 59 percent of its annual budget for education, and 135% of the nation's annual budget for healthcare. That made the financial stakes high enough for Ecuador to renounce the ICSID Convention and then cancel its bilateral investment treaties (BITs) with other states.

Ecuador's decision to reject ISDS will call for a model of protection of assets that better reconciles the rights of investors with the right of the state to regulate for pursuing sustainable development.

Ecuador Referendum 2024, Election Guide, Republic of Ecuador, 21.04.2024

Delhi Arbitration Weekend 2024 explores key issues and trends in Domestic and International Arbitration

The Delhi Arbitration Weekend is a flagship event of the Delhi International Arbitration Centre whose second edition this year was presented by the Supreme Court of India and the Delhi High Court.

The recent event of Delhi Arbitration Weekend (DAW) 2024 took place in the Indian Capital city of New Delhi- brought together legal professionals, arbitrators, and scholars to share ideas on different aspects of domestic and international arbitration. It acts as a platform for judges, practitioners and arbitration enthusiasts to engage in discussion concerning most prominent themes of Arbitration.

The conference saw a series of sessions hosted by prominent arbitration institutions such as SIAC, LCIA, and Permanent Court of Arbitration. Pertinent issues such as ethical dilemma in arbitration, joinder of non-signatories to the arbitration, selection of and challenges to appointment of arbitrator, and Investor-State Dispute Settlement were discussed amongst the eminent legal luminaries who were speakers for the sessions from around the world.

ABOUT THE FIRM

SA Law is a full service law firm based in New Delhi with a focus on dispute resolution. We offer services throughout India and our services include Litigation, Transactions, Arbitration, Mediation, Conciliation, Compliance and Regulatory matters We handle myriad legal issues including Domestic and International Arbitration, Anti-Trust, Competition Law, Civil and Commercial Laws, Family Law, Insolvency and Bankruptcy Laws, Intellectual Property Laws, Tax Laws, Criminal Laws, Service Law, Family Law, Property Laws, etc to name a few.

Our Partners oversee legal services for several clients located pan India. Our practice areas extend to key judicial forums including the Supreme Court, High Courts, NCLAT, NCLT, Electricity Appellate Tribunals (APTEL), Competition Commission of India, NCDRC, and various Trial courts at Delhi and at several other locations in India.

Over the years, our team has handled several high stakes litigation from the Trial Court up to Supreme Court and before several other forums and tribunals. We have carved a niche for ourselves and advise several Fintech, Edutech and Meditech companies for their various requirements including regulatory advice, compliance, transactions and litigation. We have several corporate companies as our clients who turn to us for our counsel on legal challenges faced by them. SA Law has also advised several Start-Ups to build their companies from scratch starting from the founders' agreement to raising capital or day to day running of the companies. Our core value is to offer most practical and legally sound advice in the most affordable and time-bound manner.

SA Law also believes in giving back and collaborates with several law colleges to train future lawyers on latest nuances of the law.

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