Dispute Resolution Hotline

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DELHI HIGH COURTS RULES ON THE AMENDED PROVISIONS OF THE ARBITRATION AND CONCILIATION ACT, 1996

- the scope of enquiry while deciding an application for appointment of an arbitrator must be confined to the existence of an arbitration agreement;
- ruled that prior to appointment, the arbitrators must make active disclosures about any relations with the parties in the arbitration that may give rise to justifiable doubts as to their impartiality or independence;
- While disclosure was at the discretion of the arbitrators in the pre-amendment regime, the amendments have made disclosures in terms of the Fifth Schedule of the Act mandatory;

INTRODUCTION

Recently, the Delhi High Court ("**Court**") has enforced the amendments made to Section 11 and Section 12 of the Arbitration and Conciliation Act, 1996 (the "**Act**"). Taking a pro-arbitration approach, the Court held in *Picasso Digital Media Pvt. Ltd. ("**Picasso**") v Pick-A-Cent Consultancy Service Pvt. Ltd.* ("**Pick-A-Cent**") ("**First Case**")[1] that where a valid arbitration agreement has been entered into by the parties, the Court would necessarily have to appoint an arbitrator. Any allegations as to arbitrabililty of the dispute or the jurisdiction of the tribunal would be examined by the arbitrator in the arbitral proceedings and not by the court. Further, the Court *in Dream Valley Farms Pvt. Ltd. & Anr. ("**Dream Valley**") v. Religare Finvest Ltd. & Ors. ("**Religare**")* ("**Second Case**"),[2] entertained a petition seeking an appointment of an arbitrator, on the ground that the arbitrator presiding over the arbitral proceedings had made misleading disclosures. The Court emphasized on the amendments made to Section 12 and 13 of the Act- which impose a mandatory obligation on a person approached in connection with appointment as an arbitrator to disclose any circumstances which are likely to give rise to justifiable doubts as to his/her impartiality or independence.

FIRST CASE

Picasso and Pick-A-Cent had entered into a Memorandum of Understanding ("**MoU**") on July 1, 2009 in terms of which Picasso was to grant Pick-A-Cent a franchisee of the '**Picasso Animation College**' in Bangalore. The MoU provided for disputes arising from the agreement to be referred to a sole arbitrator. Neither party contested the existence of a valid MoU or arbitration agreement. However, Pick-A-Cent alleged that Picasso had made certain misrepresentations regarding ownership of intellectual property transferred between the parties. Pick-A-Cent relied on *N. Radhakrishnan v. M/s. Maestro Engineers & Ors.*[3] to argue that allegations of fraud must be settled in Court and not through arbitration.

Denying the claim, the Court noted that the decision cited had been passed prior to the amendments to the Act, which has changed the law significantly. Under the amended Act, sub-section 6A of Section 11 requires that the court confine its examination of petitions under Section 11 to the existence of an arbitration agreement. The Court observed that at this stage of proceedings, it could not examine whether Pick-A-Cent has a justified claim of fraud against Picasso which would be a question to be determined by the arbitrator in the arbitration proceedings. Thus, as long as the parties agreed about the existence of an arbitration agreement, the Court was bound to appoint an arbitrator.

SECOND CASE

Dream Valley and Religare started arbitration proceedings and appointed a sole arbitrator in pursuance of the same. As per the amended Section 12, sub-clause (1) the arbitrator was mandated to disclose in writing any circumstances that were likely to give rise to justifiable doubts as to the his independence or impartiality. The arbitrator made the declaration in the format of the Sixth Schedule of the amended Act, stating that he had been presiding over 20 arbitrations out of which a majority formed a part of disputes in connection with group companies without mentioning whether these group companies were connected to Religare. However, after the proceedings had commenced, a further disclosure by the arbitrator revealed that the arbitrator had been appointed by Religare in twenty matters and was in fact, serving as an arbitrator in twenty seven matters related to Religare. Interestingly, instead of initiating a process of challenging the appointment of the arbitrator under Section 13 of the Act, Dream Valley filed the present petition under Section 11 for appointment of a new impartial arbitrator.

The Court held that while an application under Section 13 would constitute the option in the normal course, in the present case the arbitrator had contravened Clauses 22 and 24 of the Fifth Schedule,[4] and had misled Dream Valley – suppressing facts that ought to have been disclosed in the first instance. Thus noting, the Court held that the arbitrator had become *de jure* disqualified from continuing in his position in terms of Section 14(1)(a) of the Act, and

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his mandate accordingly stood terminated.

ANALYSIS

The Court has undertaken active steps to give effect to the amended provisions of the Act.

In the first case, the Court restricted itself to only examining the existence of an arbitration agreement, even though the Respondent had raised a defence that Petitioner's claim was based on allegations of fraud which were non-arbitrable according to the Respondent. Rather than towing the line of the Supreme Court of India **("Supreme Court")** in *Swiss Timings Ltd. v. Commonwealth Games 2010 Organizing Committee,* wherein the Supreme Court in an application under Section 11 of the Act for appointment of an arbitrator, had held that even allegations of fraud are arbitrable, in the present case, the Delhi High Court has left it upon the arbitral tribunal to adjudicate upon its jurisdiction- in line with the internationally *recognized competenze-competenz*e doctrine.

In contrast, the position with respect to the scope of interference of the Court in an application under Section 11 of the Act (as it stood prior to amendment) has been encapsulated in *National Insurance Co. Ltd. v Boghara Polyfab Pvt. Ltd.*[5], where the Supreme Court had laid down that in an application filed under Section 11 of the Act (as it stood prior to amendment):

1. *The issues (first category) which Chief Justice/his designate will have to decide are:*
   - *Whether the party making the application has approached the appropriate High Court?*
   - *Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement?*
2. *The issues (second category) which the Chief Justice/his designate may choose to decide are:*
   - *Whether the claim is a dead (long barred) claim or a live claim?*
   - *Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?*
3. *The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:*
   - *Whether a claim falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)?*
   - *Merits of any claim involved in the arbitration.*

In the second case, the Court has held the arbitrator to stringent and onerous obligations of disclosure that the amended Act has introduced. While the obligation to disclose had existed prior to the amendment, it remained at the discretion of the arbitrator acting in good faith. The amended Section 12 has defined the obligation to narrow down the scope of discretion resting with arbitrators. Further, the Fifth Schedule has identified specific circumstances which give rise to justifiable doubts as to the independence. In cases of circumstances that fall within the Fifth Schedule, disclosure would not remain at the discretion of the arbitrator, but will be mandatory.

However, it must be noted that in the second case, the Court has admitted a petition for appointment of an arbitrator, before the removal of the serving arbitrator. For removal, an application under Section 13 of the Act should have been filed by Dream Valley. The Court thus deviated from the procedure established under the Act which may lead to a situation where parties come forth with petitions for appointment of arbitrators and contest removal of the serving arbitrators thereunder.

Nevertheless, the Court's approach towards implementing the amendments to the Act, and its support in affirming the best practices of arbitration is commendable.

– Arjun Gupta, Alipak Banerjee & Moazzam Khan
You can direct your queries or comments to the authors

[1] ARB.P. 635/2016.

[2] ARB.P. 22/2016.

[3] (2009) (13) SCALE 40

[4] 22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.
24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

[5] (2009) 1 SCC 267

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