DISPUTE RESOLUTIONS

The Bi-Monthly Newsletter of the Nani Palkhivala Arbitration Centre

Volume 6 Issue 2 June 2023

GOVERNING COUNCIL

Justice M. N. Venkatachaliah
Former Chief Justice of India

Mr. K. K. Venugopal
Attorney General of India and Senior Advocate, Supreme Court of India

Mr. B. S. Raghavan
IAS (Retd.), Former Advisor to the United Nations (FAO)

Mr. Iqbal Chaqla
Senior Advocate, Bombay High Court

Mr. T. S. Krishnamurthy
Former Chief Election Commissioner

Mr Justice A. P. Shah
Former Chairman, Law Commission of India and Former Chief Justice of the High Courts of Madras and New Delhi

Mr. S. Mahalingam
Former Chief Financial Officer, Tata Consultancy Services

Mr. Gaurav Pachnanda
Senior Advocate, Supreme Court of India.

Ms.Leigh-Ann Mulcahy KC
Fountain Court Chambers, London

Mr.Jimmy Yim SC
Chairman, Drew & Napier, Drew Network, Asia

BOARD OF DIRECTORS

Arvind P. Datar
Senior Advocate, Madras High Court and Supreme Court of India.

Mr. R. Anand
Chartered Accountant

Mr. N. L. Rajah
Senior Advocate, Madras High Court

Ms.Payal Chawla
Advocate, Founder, JusContractus

K.Balaji
Former Director, Kasturi & Sons Ltd.

Aditya Ghosh
CEO - South Asia, OYO

Mr.Shreyas Jayasimha
Advocate, Founder, Aarna Law LLP, India

Mr.Shourav Lahiri
Barrister, Atkin Chambers, London

Ms.Sherina Petit
Partner, Norton Rose Fulbright LLP, London.

Message to the Readers

The application of the 'Henderson Abuse Principle' to arbitration proceedings

The 'Henderson Abuse principle' owes its origin to a principle laid down in England in ***Henderson vs. Henderson***. In ***Henderson vs. Henderson (1843 3 HARE 100),*** the Court held that "*where a given matter becomes the subject of litigation... the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation*". It is now well-accepted that this principle applies even where a matter was not 'brought forward' on account of negligence or inadvertence.

When a matter is agitated before a civil court, and an issue or a subject matter which should have been agitated in an earlier litigation was not brought forward in such litigation, then the provisions of the Code of Civil Procedure ("**CPC**"), especially the provisions of Order 2 protect the interests of the defendant. In such cases, unless the plaintiff has sought leave under Order 2 Rule 2 of the CPC, he cannot agitate issues which should have been part of the same cause of action in the earlier proceeding, in the subsequent proceeding.

Even though the provisions of the CPC do not strictly apply to arbitration proceedings, the spirit of the provisions of Order 2 still apply through adoption of the 'Henderson Abuse Principle'.

This principle also came to be authoritatively reviewed by the House of Lords in ***Johnson vs. Gore Wood & Company (a firm) [2002 2 AC1]***. In that judgment, Lord Bingham pointed out that the principle is based on two well recognised foundations of civil litigation i.e. there should be finality to litigation and that no party must be vexed twice by the same matter.

Editorial Board: N.L. Rajah, Senior Advocate, K. Balaji, Former Director, Kasturi and Sons Ltd, Dr. J. Durgalakshmi, Registrar, NPAC, Aishwarya Mahesh, Advocate

However, Lord Bingham also elucidated that the burden to show that a case falls within the 'Henderson Abuse Principle' would be on the party alleging it. It was further laid down in the said case that the said principle would not only be applicable to new claims that were agitated in relation to matters that had already been adjudicated upon in court, but would also apply to those matters that were the subject of a settlement agreement.

The question of the application of the above principle to arbitration proceedings came to be recently considered by a Commercial Court in England in a case between Reliance Industries and the Government of India in ***Union of India vs. Reliance Industries Ltd and another*** **[2022] EWHC 1407 (Comm)**. The Government argued that the principle in ***Henderson vs. Henderson*** is one of substantive English law and that Indian law principles of *res judicata* alone would apply. The Court however referred to Lord Sumption's comments in ***Virgin Atlantic Airways Limited vs. Zodiac Seats UK Limited [2013] UKSC 46, [2014] AC 160***and in ***Takhar vs. Gracefield Developments Ltd ([2020] AC 450)***where it was held that:

1) While the principle in ***Henderson vs. Henderson*** has been treated as part of the law of '*res judicata'*, it is better analysed as part of the principle of the '*abuse of process*'; and

2) Whereas *'res judicata'* is a rule of substantive law, *'abuse of process'* is a concept which informs the exercise of the court's procedural powers.

The Court, therefore, held that the 'Henderson Abuse principle' is properly characterised as procedural and there would be no problem in applying it to arbitral proceedings. The primary rationale behind this ruling is that there is need for procedural power to guard against abusive and duplicative proceedings in the arbitration context as was the case in the court context.

Interestingly, the Court also found that the principle in ***Henderson vs. Henderson*** can apply to all stages of the same proceedings and to defences as well as claims.

This judgment is of particular interest since it seeks to clarify on the application of the principle in ***Henderson vs. Henderson*** to arbitration proceedings. The result of this judgment is four-fold:

a) The principle applies to arbitration proceedings as it is a procedural safeguard;

b) It can apply between different phases of the same proceeding;

c) It applies both in respect of defences as well as claims; and

d) Since it is a procedural rule, it is the law of the seat rather than the governing law of the contract which will determine its application.

N.L. Rajah
Senior Advocate, Madras High Court
Director, NPAC

LEGAL UPDATES

❖ **Supreme Court: An unstamped arbitration agreement cannot be enforced until the stamp duty has been paid**

- A five-judge Constitution Bench of the Supreme Court of India ("**SC**") in ***NN Global Mercantile Limited vs. Indo Unique Flame Limited and Ors.*** held by a 3:2 majority that an arbitration agreement or clause in a contract would not constitute a contract enforceable under Indian law, if the instrument containing the arbitration agreement is not duly stamped. Further, as per the Arbitration Act, the SC must be provided with a 'certified copy' of the arbitration agreement which must indicate the stamp duty that was paid. Without this, the SC cannot entertain an application to refer the parties to arbitration.
- Further, the Court highlighted the obligation of the Court under Section 33 of the ***Indian Stamp Act, 1899 ("Stamp Act")*** to 'impound' or take legal possession of any unstamped agreement until the stamp duty is paid. The agreement will then be inadmissible as evidence and cannot be acted upon as per Section 35 of the Stamp Act. The SC can only consider the agreement after the stamp duty and the necessary penalties for non-payment have been paid as per Section 42 of the Act.
- ***Justice Ravikumar*** concurred with ***Justice Joseph*** and added that under ***Section 11(6)(A) of the Arbitration Act*** the SC must ascertain the 'existence' of an arbitration agreement. In order to do so, the arbitration agreement must be admissible as evidence which requires the payment of stamp
  https://www.barandbench.com/columns/will-supreme-court-decision-of-stamping-of-arbitration agreement-stamp-out-pro-arbitration-image-of-india
  https://www.scobserver.in/journal/judgement-pronouncement-validity-of-an-unstamped arbitration-agreement/

❖ **Calcutta High Court: Unilateral appointment of arbitrator by one party is null and void**

- In the case of ***Cholamandalam Investment & Finance Company Ltd vs. Amrapali Enterprises and Another***, Single Judge bench of ***Justice Shekhar B. Saraf*** of the Calcutta High Court refused to enforce an arbitral award passed by a sole arbitrator appointed unilaterally by the petitioner in the matter. An application had been filed by the award holder, Cholamandalam Investment and Finance Company Ltd under Section 36 of the Arbitration and Conciliation Act, 1996 seeking execution of an arbitral award passed by the sole arbitrator.
- The court observed that an arbitral award passed by a unilaterally appointed arbitrator can't be considered an award under the Act and such appointments would be affected by possible bias in favour of the appointing party, which will be in violation of ***Section 12 (5) of the Arbitration Act, 1996 (Act) read with Schedule VII*** to the Act.
- The court held that an arbitral reference that begins with an illegal act vitiates the entire arbitral proceedings from its inception and the same cannot be validated and such arbitral proceedings will be considered void ab initio. Therefore, the court refused the enforcement of the arbitral award and directed the parties to re-agitate the claims before the fresh tribunal and directed the award debtor to withdraw the application filed under Section 34 of the Arbitration and Conciliation Act, 1996 before the City Civil Court. Accordingly, with the consent of the parties, the Court appointed a new sole Arbitrator.
  https://www.legaleraonline.com/from-the-courts/calcutta-high-court-strikes-down-arbitration award-passed-by-unilaterally-appointed-arbitrator-856718
  https://www.livelaw.in/pdf_upload/display-12-463564.pdf

❖ **Delhi High Court: *NTPC Ltd. vs. Larsen and Toubro Limited &Anr.***

- NTPC moved an application before the Arbitral Tribunal seeking permission to update/revise its counter claims. The Arbitral Tribunal rejected the said application on the ground that the same was filed belatedly, while granting liberty to NTPC to invoke fresh arbitration with regard to the updated claims. Against the said order, NTPC filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 before the Delhi High Court.
  The bench of ***Justice V. Kameswar Rao*** has ruled that where a party has filed an application seeking to update/revise its counter claims before the Arbitral Tribunal, intending to primarily alter/change the amount of the counter claims, the said application was, in effect, an application for amendment of the counter claims, even though it was termed as an 'updation application'.
  https://www.legumlex.com/law-news/updation-application-seeking-to-change-the-amount-ofcounter-claims-in-arbitral-proceedings-is-an-application-for-amendment-delhi-high-court/

❖ **Bombay High Court: Application of Principles of Equity by arbitrator can't be done without authorization of parties.**

- In the case of ***John Peter Fernandes vs. Saraswati Ramchandra Ghanate (since deceased) &Ors***, the petitioner, John Peter Fernandes, entered into an agreement with the respondents to purchase the property. After a dispute arose between the parties regarding the amount of consideration paid by the petitioner under the agreement, the same was referred to arbitration. The Bombay High Court has reiterated that the doctrine of severability can apply to arbitral awards, so long as the objectionable part can be segregated.
- The Court added that if the award is partially set aside by applying the doctrine of severability, the same would not amount to modification or correction of the errors of the arbitrator.
- The bench of **Justice Manish Pitale** further held that the Arbitral Tribunal cannot decided an issue in violation of the terms of the agreement between the parties, by applying the principles of equity. This is so especially when the parties have not expressly authorized the arbitrator to decide the matter ***ex aequo et bono or as amiable compositeur*** under ***Section 28(2) of the Arbitration and Conciliation Act, 1996 (A&C Act)***, the bench added.
  https://www.lawyerservices.in/John-Peter-Fernandes-and-Another-Versus-Saraswati-Ramchandra-Ghanate-since-deceased-and-Others-2023-03-23
  https://indiankanoon.org/doc/79121810/

❖ **Delhi High Court: Terminated Contract cannot be restored under Section 9 of the Arbitration Act.**

- In the case of ***Yash Deep Builders vs. Sushil Kumar Singh***, the High Court of Delhi has held that the scope of Section 9 of the A&C Act does not envisage relief in the nature that would restore a contract which already stands terminated.
- The bench of ***Justice Chandra Dhari Singh*** held that the Court while exercising powers under Section 9 of the A&C Act cannot direct specific performance of a determinable contract. It held that a contract, which in its nature is determinable, cannot be specifically enforced under Section 14(d) of the Specific Reliefs Act, therefore, the Court cannot do something that is statutorily prohibited.
  https://www.scconline.com/blog/post/2023/03/16/delhi-high-court-refuses-relief-under-section-9-specific-performance-of-contract-being-barred-by-section-14-collaboration-agreement-determinable-in-nature-legal-news-research-awareness/

❖ **Bombay High Court: Facilitation Council Under MSMED Act has no jurisdiction to conduct Arbitration dispute arising under a works contract.**

- In the case of ***National Textile Corporation Ltd vs. Elixir Engineering Pvt Ltd &Anr***, the Bombay High Court has set aside an arbitral award passed by the Facilitation Council by invoking statutory arbitration under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act), while holding that the Council could not have exercised jurisdiction to conduct arbitration in a dispute arising under a works contract.
- The bench of ***Justice Manish Pitale*** remarked that a works contract is not amenable to the provisions of the MSMED Act, and therefore the MSMED Act could not have been invoked by the claimant/ award holder. The Court concluded that the lack of jurisdiction of the Facilitation Council to conduct the arbitral proceedings rendered the arbitral award patently illegal.
- The Court, however, ruled that since the provisions of the MSMED Act could not have been invoked in the present case, the award was rendered without jurisdiction and thus, it was liable to be set aside on the said ground alone.The bench thus allowed the petition and set aside the award.
  https://indiankanoon.org/doc/42949092/

❖ **Delhi High Court: Non-signatory to agreement can be subjected to arbitration without prior consent only in exceptional cases**

- In the case of ***A ES Engineers Pvt Ltd v. Ugro Capital Limited,*** the Court dismissed a plea seeking the appointment of an arbitral tribunal while opining that the petitioner could not invoke arbitration since they are not a party to the agreement.
- The Delhi High Court held that a non-signatory or third party to an agreement can be subjected to arbitration without their prior consent, only in exceptional cases.
  https://www.lawyerservices.in/Ms-UGRO-Capital-Limited-Formerly-known-as-Chokhani-Securities-Ltd-Versus-Raj-Drug-Agency-and-Others-2023-04-26

❖ **Delhi High Court: Third-party funders in arbitration ensure access to justice; cannot be saddled with liability they did not undertake**

- In the case of Tomorrow Sales Agency Private Limited v. SBS Holding, Inc and Ors, there was a Bespoke Funding Agreement (BFA) between Tomorrow Sales Agency (TSA), a Non-Banking Financial Company (NBFC), and SBS Transpole Logistics and its promoters. TSA provided financial assistance to pursue a claim for damages against SBS Holdings Inc and Global Enterprise Logistics (GEL), Singapore, amounting to nearly ₹250 crores.
- SBS Transpole and its promoters failed in the arbitration, and costs were awarded in favour of SBS Holdings. *When SBS Holdings sought to enforce the award, it was discovered that SBS Transpole did not have sufficient assets to satisfy the award. SBS Holdings then demanded payment from TSA.*
- The single-judge initially ordered TSA and SBS Transpole to disclose their assets and restrained them from encumbering their assets. The ***d***ivision Bench of ***Justices Vibhu Bakhru and Amit Mahajan*** held that "*third-party funders play a crucial role in ensuring access to justice and cannot be held liable for risks they have not undertaken or are unaware of*".
  https://www.thelawadvice.com/news/third-party-funders-in-arbitration-not-accountable-for-risks-they-are-unaware-of-delhi-hc
  https://www.lexology.com/library/detail.aspx?g=97d7e927-5d8f-4e59-bc78-bede703f2565

14TH ANNUAL INTERNATIONAL CONFERENCE ON RECENT ADVANCES AND DEVELOPMENTS IN GLOBAL ARBITRATION.

The Nani Palkhivala Arbitration Centre (NPAC) is proud to announce its 14th Annual International Conference, titled *"Recent Advances and Developments in Global Arbitration."* This prestigious event will be held on the 1st and 2nd of September, 2023, in the vibrant city of New Delhi, India. We cordially invite you to join us and contribute to making this conference a resounding success.

The primary objective of the conference is to promote awareness and understanding of institutional arbitration as a desirable method of dispute resolution. NPAC aims to spearhead the institutionalization of effective measures for the growth of arbitration laws in India and build an efficient and competent arbitral regime. By organizing this event, we seek to facilitate the exchange of knowledge, experiences, and best practices among professionals, practitioners, academicians, and industry representatives in the field of arbitration.

We, the entire team at NPAC, invite you to participate in the 14th Annual International Conference on *"Recent Advances and Developments in Global Arbitration."* Your presence and contribution will help make this conference a grand success, furthering the growth and development of arbitration laws in India. Join us in New Delhi on the 1st and 2nd of September, 2023, as we collectively strive to promote institutional arbitration and build an efficient and competent arbitral regime in India and beyond.

Click here for the NPAC Conference 2023 invite:
https://drive.google.com/file/d/1dDS-fhE9m4HtreLs7QH05Fdrv9c1PkjV/view?usp=sharing

SATYA HEGDE ESSAY COMPETITION I PRIZE ESSAY

by Ms.Sunidhi Kashyap
Rajiv Gandhi National University of Law, Punjab

Though arbitration is a private dispute-resolution mechanism, parties still rely on national courts to pass certain orders related to the arbitral proceedings. Consequently, certain disputes are either legislatively and/or judicially categorized as inarbitrable, and courts may decline to pass orders in these disputes.

One type of order that Indian courts pass in relation to arbitral proceedings is a Section 11 order for the appointment of an arbitrator. When either party or arbitral institution has failed to appoint an arbitrator, the Court can intervene and do the same. However, it is not clear what should be done when the appointment of an arbitrator is sought in an inarbitrable dispute. Should the judiciary defer to the principle of *kompetenz-kompetenz* and allow the arbitrator to rule on the arbitrability of the dispute? Or should the judiciary strike down the proceedings at the first instance?

This Article explores whether arbitrability of a dispute is a precondition under Section 11 of the Arbitration & Conciliation Act, 1996. First, it discusses the three reasons due to which a dispute may be categorized as inarbitrable. Then, it briefly describes the legislative scheme of Section 11. It further discusses whether a Section 11 order can be passed in each of the three scenarios through an examination of both legislation and caselaw. Part V concludes that courts will decline to make a Section 11 order in obviously inarbitrable disputes, but will allow arbitration to proceed in most other cases so that the arbitrator may rule on his own jurisdiction.

The complete essay is available at
https://docs.google.com/document/d/1Du92BgNcUsNqKvm-FTbJ_naox1rI141f2rdL1deALyM/edit