



THE CADR

# NEWSLETTER

VOLUME IV ISSUE 3

**October**  
2022

Contact us at:  
[adrc@rgnul.ac.in](mailto:adrc@rgnul.ac.in)



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# ABOUT US

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The Centre for Alternative Dispute Resolution, RGNUL (CADR-RGNUL) is a research centre dedicated to research and capacity-building in ADR. The ultimate objective, at CADR, is to strengthen ADR mechanisms in the country by emerging as a platform that enables students and professionals to further their interests in the field.

In its attempt to further the objective of providing quality research and information to the ADR fraternity, the CADR team is elated to present the Special Edition of the Fourth Volume of 'The CADR Newsletter'. The Newsletter initiative began with the observation that there exists a lacuna in the provision of information relating to ADR to the practicing community. With an aim to lessen this gap, the Newsletter has been comprehensively covering developments in the field of ADR, both national and international. The CADR Newsletter is a one-stop destination for all that one needs to know about the ADR world; a 'monthly dose' of ADR News!



# DOMESTIC ARBITRATION UPDATES

## Circumstances for Invocation of the Group of Companies Doctrine Discussed by the Delhi High Court

Recently, in the case of *Esha Kedia v. Milan R. Parekh & Ors.*, the Delhi High Court decided that an agreement which is signed by a company being a part of a group, will not make the other members of the group liable for the same, unless certain exceptional scenarios come into play. While discussing the validity of an MoU signed by the director of the non-signatory company, the court held that there are certain instances when non signatories can be impleaded into the arbitration. The same includes the non-signatory party having a direct relationship with the party which has signed the arbitration agreement. The nature of the subject transaction can also be taken into consideration, which may include the non-signatory party serving a critical feature for the completion of the contract. Holding the agreement valid, the court stated that an application for impleadment of the non-signatory can be filed in front of the arbitrator. [Read more.](#)

## Section 11 orders cannot be Reviewed on the Merits of the case: Andhra Pradesh High Court

Recently, in the case of *Nagireddy Srinivasa Rao v. Chinnari Suryanarayana*, the Andhra Pradesh High Court decided upon whether or not an order passed under Sec. 11 of the Arbitration and Conciliation Act ("A&C act") can be reviewed. The court held that the same is not possible since the power pertaining to review should come from a statute, and the same is absent. The court further held that an order under Section 11 can only be reviewed in case of procedural irregularities and not on merit. The applicant had filed for review on the ground of limitation and the same was rejected by the court citing the case of *Jain Studios Ltd., v. Shin Satellite Public Co. Ltd.*, wherein it was held that only the Supreme Court can review an order under Sec. 11 under Article 137 and the same is out of the scope of the High Court. [Read more.](#)

## If Question Of Fact Is Not Involved, then the Jurisdiction To Allow Any Claim Can Be Challenged even if it was not done before the tribunal: Delhi High Court

According to a Delhi High Court ruling in the case of *M/s. Manraj Enterprises v. Union of India*, a claimant is not permitted to support his claims with arguments that were not made before the arbitral tribunal. However, where a question regarding the jurisdiction of the tribunal to award any claim is raised, which does not require any decision on a question of fact, then the party contesting the arbitral award is not prohibited from raising such grounds that were not raised before the arbitral tribunal. The court stressed on the fact that a contract term prohibiting the

# DOMESTIC ARBITRATION UPDATES

payment of interest on the earnest money deposit, security deposit, or any amounts due under the contract would also bar the arbitral tribunal from paying pendente lite interest. [Read more.](#)

## Interest on Security Deposit can be awarded if the Clause Prohibiting such Interest was not Specifically Pleaded: Madras High Court

As per recent decision of the Madras High Court in the case of *The Union of India v. R.K. Constructions*, the arbitral tribunal, during the passing of award, can award interest to the aggrieved party if the clause prohibiting such interest being awarded was not specifically pleaded by the opposite party, Further, the court clarified that the clause cannot be made a ground for challenging the award if the same wasn't done during the arbitration proceedings. The power to award interest lies solely with the arbitrator under Sec. 31(7)(a) of the Arbitration & Conciliation Act, 1996 and no provision in the contract can bypass that authority. Moreover, the court explained that even though objections on jurisdiction can be taken for the first time in a Sec. 34 application, the same does not hold true for contractual objections. [Read more.](#)

## Award Holder causing Delay not Entitled to Interest and the Arbitral Tribunal must give Reasons for the Fixing Rate of Interest: Supreme Court

The Supreme Court in the case of *Executive Engineer (R and B) v. Gokul Chandra Kanungo*, stated that the interest on the arbitral award may be reduced by the court under Article 142 of the Constitution when the award holder causes delay in the proceedings thereby leading to a substantial effect on the duration of the case. The reasoning behind the same is that if the beneficiary of the award himself has caused the delay, then he should not be given the advantage his actions. According to the Court, this is one of the reasons which can be deemed acceptable as a justification for reducing the interest on the award. [Read more.](#)

## Task of quantifying amount of award cannot be fully delegated to a third party: Calcutta HC

As per the recent decision of the Calcutta High Court in the case of *Usha Martin Limited v. Eastern Gases Limited*, the act of quantification of damages is an important task and the same cannot be entirely outsourced to a third party by the arbitrator, while at the same time, taking the help from such parties is acceptable. The court was of the opinion that the arbitral award formed through this process, will be valid in the eyes of law, since the arbitrator has shunned away from a crucial function and transferred that responsibility to a third party, which is not an acceptable form of delegation. [Read more.](#)



# INTERNATIONAL COMMERCIAL ARBITRATION UPDATES

## Exemption granted to LCIA from Russia and Belarus sanctions

The United Kingdom's Office of Financial Sanctions Implementation (OFSI) has granted the London Court of International Arbitration (LCIA) a General Licence, allowing it to process payments from designated parties (DPs) who are subjected to the United Kingdom's recent financial sanctions against Russia and Belarus. The General Licence is considered as a positive development for the LCIA, which has seen a number of arbitrations interrupted by the sanctions on Russia and Belarus. The General Licence took effect on 17th October, 2022 and applies indefinitely. [Read More](#)

## UK judge clarifies the stance on granting of interim award in Arbitration

A judge in the United Kingdom did not accede to the request to disqualify three of the arbitrators who were a part of a dispute pertaining to power supply worth US\$500 million which revolved around an allegation made by one party, which pertained to fraudulent conduct on the part of the opposite party. The dispute revolved around whether or not it was permitted under the UNCITRAL rules for interim remedies to be granted as an award. [Read More](#)

## US\$200 million award being awaited for a dispute regarding cancer-fighting antibodies.

The ongoing dispute with respect to two companies operating in the biotechnology sector located in China and USA has now reached the award stage wherein an award of US\$200 million awaits. The dispute, in its essence, arose from a collaborative drive between the two companies, which was aimed to develop antibodies that would be useful in fighting and mitigating cancerous cells. [Read More](#)

## The Eleventh Circuit affirms the district court's decision that non-signatory parties can enforce arbitration clauses

In the case of *Outokumpu Stainless USA, LLC v. Coverteam SAS*, it was held by the Eleventh Circuit on remand from the U.S. Supreme Court that, although GE Energy Power Conversion France SAS, Corp. (GE), a subcontractor, did not sign the contract in question or any arbitration agreement, GE could require arbitration of its claims. It was further held that a contracting party may wish to define to whom the arbitration clause does and does not apply in order to prevent persons named in, or associated with, the contract from invoking the right to arbitrate. [Read More](#)

# INVESTMENT ARBITRATION UPDATES

## Swiss Court dismisses Croatia's Request for Reopening the UNCITRAL Award after Bribery Verdict

Croatia had filed for the review of the UNCITRAL award in the corruption case of former Croatian Prime Minister (PM) Ivo Sanader, where his alleged involvement in helping Hungarian oil and gas group MOL to gain a controlling stake in INA through corrupt practices was dismissed. The review was filed on the verdict of Croatian court where the PM was convicted of the charges. However, the Swiss Court dismissed Croatia's request ruling that the arbitrators were not bound by the judgments of Croatian criminal courts. [Read More](#)

## France withdraws from the controversial Energy Charter Treaty (ECT)

France has withdrawn itself from the controversial Energy Charter Treaty (ECT) after 30 years of signing it, citing the conflict between the treaty and France's climate goals and commitments. The ECT, which was created in 1994, was ratified by almost 50 countries and the European Union. It enabled investors in the energy sector to get compensated by approaching arbitration tribunal if the government's actions could affect their profits. [Read More](#)

## Italy applies for annulment of the Rockhopper Award

Italy has filed for the annulment of the award given by the ICSID Tribunal in favour of Rockhopper Exploration. The arbitral tribunal, in its award, unanimously ruled that the actions of Italy breached its obligations under the Energy Charter Treaty (ECT). Italy enforced a prohibition on near-shore exploration in 2015 and Rockhopper was unable to secure a final concession for the Ombrina Mare field which led to the present dispute. [Read More](#)

## UK Court lifts the stay on the case involving enforcement of Yukos Awards

The London High Court has lifted the 2016 stay imposed on the enforcement of a \$50 billion award against the now defunct oil group Yukos in Britain. The stay was imposed in lieu of the Russian challenge to the arbitration award in the Netherlands citing state immunity. However, the Dutch court ruled against it, thereby paving way for the resumption of the case in the UK. [Read More](#)

# MEDIATION UPDATES

## [Kiren Rijiju talks about strengthening the judicial system through mediation](#)

While speaking at the All-India Conference of Law Ministers and Law Secretaries, Rijiju stated that through the institutionalization of the Mediation Bill, the government is creating an efficient process to make it easier to settle disputes outside the court. It will lessen the strain on the legal system. He assured that the government is working towards the introduction and implementation of the Bill. [Read More](#)

## [World Bank appoints a neutral expert and an arbitrator to resolve Indus Water Treaty Dispute](#)

To resolve the dispute between India and Pakistan over the Kishenganga and Ratle hydroelectric power plants, the World Bank began with two parallel legal processes of Mediation and Arbitration as India and Pakistan failed to reach a consensus. Pakistan chose the Court of Arbitration whereas India demanded the appointment of a “Neutral Expert”. Therefore, the World Bank appointed Michel Lino to be the Neutral Expert and Professor Sean Murphy as Chairman of the Court of Arbitration. The treaty was signed by India and Pakistan in the year 1960, after nine years of discussions and was ratified by the World Bank. [Read More](#)

## [Pre-Institution of mediation mandate only when urgent relief not contemplated: Delhi HC](#)

A division bench in *Chandra Kishore Chaurasia v. RA Perfumery Works Pvt. Ltd* held that a plaintiff who seeks to file a lawsuit for immediate interim relief is not required to avail the remedy in Sec. 12A (1) of the Commercial Courts Act, 2015. In the present case, the court rejected the contention of the defendant that the suit was filed without abiding by Sec. 12A of the Commercial Courts Act, 2015 which mandates the requirement for a pre-institution mediation. [Read More](#)

## [China Govt. sets up preparatory office for International Court of Mediation in Hong Kong](#)

In order to facilitate intergovernmental negotiations over international conventions, the Chinese Foreign Ministry and the government of Hong Kong Special Administration Region [HKSAR] signed an arrangement on the establishment of the preparatory office on October 21, 2022. Despite a mounting need from the international community in recent years, there is no intergovernmental international institution devoted to mediation. The existing conflict resolution organisations primarily used litigation and arbitration to resolve international disputes, and typically only use mediation as an auxiliary or preventive measure. The international court of conciliation is proposed to be an intergovernmental international organization of a treaty-based nature. [Read More](#)



# CASE COMMENT

Panasonic India Private Limited v. Shah Aircon, (2022 SCC OnLine Del 3288)

Decided on October 11, 2022, by Justice Prateek Jalan

## Introduction

The Delhi High Court, in the recent case of **Panasonic India Private Limited v. Shah Aircon** [1], held that the mere use of the word ‘can’ in the agreement cannot be used to deter arbitration proceedings. The true intent of the parties is of the essence and this intent is to be established through a comprehensive and thorough reading of the contract. It is only through a holistic reading of the contractual provisions that it could be determined whether the parties wanted to refer the dispute to an arbitral tribunal or not. This judgment is of much significance as it sheds light on the fact that interpretation is imperative in order to establish a valid arbitration clause. The bench also reiterated that the exclusive jurisdiction clause would override the venue clause as given in the invoices as there in the instant case.

## Facts of the Case

The parties to the case, namely Panasonic India Private Limited (hereafter referred to as the petitioner) and Shah Aircon (hereafter referred to as the respondent) entered into a distribution agreement pertaining to the sale of electronic goods. The respondent was acknowledged as the authorized dealer of the petitioner through the agreement. Allegations were made from both the sides. The petitioner alleged unpaid invoices on the part of the respondent which were raised by the petitioner for the goods sold to the respondent while the respondent alleged unapproved actions of the petitioners towards the third party were in contravention of the terms of the contract. As a result of disagreements between the parties, the petitioner invoked the clause of arbitration contained in the terms of the contract. The respondent, in response, stated that the dispute be referred to the Haryana civil court and filed a civil suit against the petitioner there. However, the petitioner filed an application before the court to refer to Section 8 of the Arbitration and Conciliation Act, 1996 which pertains to the power of the judicial authority to refer the dispute to arbitration.[2] Subsequently, a petition was filed by the petitioners in the Delhi High Court under Section 11 of the Arbitration and Conciliation Act, 1996 which provides for the appointment of an arbitrator.[3]

## Contentions of the Parties

The Petitioner contended that the arbitration clause is valid as all the essential conditions are present, and the use of the word ‘can’ will not function as a deterrent to refer the dispute to

## CASE COMMENT

arbitration. Furthermore, the petitioner pleaded that the exclusive jurisdiction clause overrides the venue clause as vested in the agreement as well.

The Respondent, however, emphasised on the use of the word ‘can’ in the arbitration and contended that it indicated an option rather than a mandatory recourse to refer the dispute to arbitration, as opposed to the word, ‘shall’. Furthermore, it was contended that the Respondent did not sign the agreement with the Petitioner. The Respondent also stated that the commencement of the arbitration proceedings was barred by the limitation period. They further contended that the High Court does not have the jurisdiction to deal with the present dispute in light of the non-existence of the agreement at the first place, as alleged.

### Judgment of the Court

The Court observed that the word ‘can’ has been unduly emphasised and there has to be a holistic and comprehensive reading of the contract in order to determine the intent of the parties. Therefore, the sole emphasis on the use of the word ‘can’ in the clause is not of the essence in establishing that intention. The court observed that the ‘can’ has been used along with the phrase ‘either party’ indicating the option at the hands of either of the parties to refer the dispute to arbitration. Hence, the arbitration clause will not be rendered ineffective because of the same. The court held that the parties must make a mandatory reference to the arbitration clause as stated in Section 7 of the Arbitration and Conciliation Act,1996.[4]

Further, placing reliance on previous judgments, the court held that the provision of exclusive jurisdiction of the court would supersede the venue of the arbitration in a different court and the agreement granted exclusive jurisdiction to the Courts in Delhi for issues pertaining to arbitration proceedings including the appointment of arbitrator. On the issue of the limitation period, the court held that it should be left to the arbitrator to resolve.

Therefore, the court allowed the petition and appointed an arbitrator to resolve the dispute in the present case. The rights and assertions of the parties pertaining to the arbitrability and maintainability are left to the adjudicator.

### Analysis

The Delhi High Court has rightly observed that the contract has to be read as a whole as the reading of certain phrases in isolation may lead to ambiguity and might defeat the purpose of the clause of arbitration. It is to be noted here that the true intention of the parties is of much

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significance in determining whether the parties wanted to refer any dispute that may arise in the course of their business to arbitration or not. In establishing that intent, proper interpretation of the contractual terms is imperative. The clauses should be interpreted in relation to each other. Reliance cannot be placed solely on certain words while neglecting others. Therefore, a simple insertion cannot negate an arbitration clause. The court also provided more clarity to the issue of jurisdiction by reiterating the principle of giving primacy to the exclusive jurisdiction clause over the venue clause as specified in the invoices in the present case. This clarifies the position of the agreements that have a distinct place for the exclusive jurisdiction clause and the venue clause. Thus, the decision makes its mark by making it clear that it is the intention that should be focused upon and the parties cannot avoid the arbitration clause by unjustifiably emphasising on literary meaning of certain words read in isolation with other terms mentioned in the contract.

### Conclusion

The Delhi High Court has emphasised on the proper interpretation of the contractual provisions in order to determine the intent of the parties. It has been observed that certain words should not be unduly emphasised just for negating the arbitration clause. The terms have to be read in relation to each other and the contract should be interpreted as a whole. The court also reiterated the principle of the exclusive jurisdiction clause overriding the venue clause. Therefore, the judgment holds much significance in interpreting the intention of the parties towards referring the dispute to arbitration in case of any ambiguity.

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[1] *Panasonic India Private Limited v. Shah Aircon* 2022 SCC OnLine Del 3288.

[2] The Arbitration and Conciliation Act, 1996, § 8, No. 26, Acts of Parliament, 1996 (India).

[3] The Arbitration and Conciliation Act, 1996, § 11, No. 26, Acts of Parliament, 1996 (India).

[4] The Arbitration and Conciliation Act, 1996, § 7, No. 26, Acts of Parliament, 1996 (India).

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