

NEWSLETTER

VOLUME I

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“According to the biblical theory, King Solomon arbitrated the first dispute”

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ABOUT US

Established in 2000, we are a law firm, comprising of an expert team of senior lawyers, advocates, and a professional advisory panel with extensive courtroom experience and expertise in compliance issues pertaining to Corporate Law, Property Law and Economic offences (White collar crime).

We work as an extended legal department for domestic as well as international businesses. Our range of services provides a comprehensive legal cover to businesses which helps them in defending their interests through legal advice, vetting of compliant contracts, help in alternative dispute resolutions during the breach of contract, arbitration, litigation and filing of writs.

With a nationwide presence, we are able to ensure that our clients are able to concentrate on their work while we ensure that legal issues arising across the country are handled fast and results expedited.

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ARBITRATION

Background

Arbitration is the process of resolution of a dispute between consenting parties, without recourse to a court having jurisdiction, through an umpire (Arbitrator) appointed to resolve the dispute. The process was governed by the Indian Arbitration Act, 1889 and Schedule II of the Code of Civil Procedure, till it was repealed by Indian Arbitration Act, 1940. The process is presently governed by The Arbitration and Conciliation Act, 1996 as amended by The Arbitration and Conciliation (Amendment) Act, 2019. The Arbitration and Conciliation Act, 1996 keeps in view the Model Law on Arbitration of the United Nations Commission on International Trade Law (UNCITRAL). The Act has three parts, viz. Part-I, that deals with domestic arbitration, Part-II that deals with Enforcement of Foreign Awards, and Part-III that deals with Conciliation. **The overview is confined to Part-I of the Act that deals with domestic arbitration, i.e arbitration where both parties are Indian entities.**

Significant Change in the Act of 1996

Delays plagued operation of the Indian Arbitration Act, 1940. The significant difference that assists in reducing delays that plagued the Act of 1940 is that the Award is not required to be made the rule of the Court or decree under the 1996 Act for being enforced.

Non Arbitrable Matters

Every dispute cannot be resolved through arbitration. Certain categories of disputes are not arbitrable. The principle is that disputes that affect rights in rem i.e. rights against the world at large are not arbitrable, such as criminal offences where offenders are prosecuted by the State, landlord and tenant disputes where rent control enactments are in force, matrimonial and testamentary disputes and other disputes governed by specific enactments. However, a contractual or commercial dispute with the State or an entity controlled by the State does not fall in the category of disputes that are not arbitrable. Some State Governments have set up Tribunals for resolution of disputes relating to Public Works Contracts where jurisdiction of civil courts is barred and the operation of the Arbitration Act is excluded.

Basic Requirement for Reference to Arbitration

Consent between the parties to refer a dispute to arbitration is necessary. The law therefore requires that an agreement to refer a dispute for arbitration is required to be in writing where the signature of the parties signifies their consent for reference of the dispute to arbitration. Such an agreement can be executed when a dispute arises or in anticipation of a disputes that could arise in the course of a legal relationship. The normal practice is to include an arbitration clause in the contract for resolution of disputes relating to the contract. The arbitration clause could specify or exclude certain categories of disputes as agreed between the parties from the purview of arbitration. The arbitration clause should specify the seat of the arbitration as this would govern the jurisdiction of the court which is required to be approached where necessary in terms of the Act. The law leaves it to the parties to decide on the number of arbitrators but specifies that the number cannot be an even

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number. Where this is not specified the arbitral tribunal consists of a sole arbitrator.

Arbitration Process

The arbitration process is set in motion by issue of a notice for invoking arbitration by a party in terms of arbitration agreement/arbitration clause delineating the dispute to be arbitrated and indicating the arbitrator for resolving the dispute. In case of disagreement the law permits an application in terms of Section 11 to a High Court for appointment of an arbitrator delegated powers to designate an arbitral institution or from a panel maintained for this purpose. The arbitral tribunal is empowered to rule on its own jurisdiction where the issue is raised and to decide the place of arbitration. The arbitral tribunal is not bound by the Civil Procedure Code and the Indian Evidence Act but the Limitation Act is applicable. The arbitral tribunal could order interim measures that are appealable under Section 37 of the Act. The procedure requires the submission of the Statement of Claim and Written Statement of Defence. Set off and Counter Claim could also be raised where applicable. The tendering of oral evidence and oral arguments are permissible. The arbitral proceedings are expected to be completed within a period of six months. Extension of time is permissible with the consent of the parties for a further period of six months for the pronouncement of the award. If the award is not pronounced within 12 months further extension can be granted only by the Court. The award is expected to state the reasons on which it is based. A settlement of dispute between the parties during the process of Arbitration is also permissible.

Challenge to Set Aside Award

The arbitral award can be challenged only on the specific grounds as set out in Section 34 of the Act. The arbitral award may be set aside by the Court only if-

1. It is established on the basis of the record of the arbitral tribunal that –
 - A party was under some incapacity, or
 - The arbitration agreement is not valid under the law to which the parties subjected it, or under any law for the time being in force
 - The party was not given proper notice of appointment of the arbitrator or arbitration proceedings or unable to present his case
 - Arbitral award deals with a dispute not falling within the terms of the submission to arbitration or contains decisions on matters beyond scope of submission to arbitration,
 - Composition of the arbitral tribunal or procedure was not according to agreement and in conflict with the provisions of the Act.
 - The award is vitiated by patent illegality appearing on the face of the award.

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2. The Court finds that –

- Subject matter of dispute is not capable of settlement by arbitration under the law in force, or
- The arbitral award is in conflict with the public policy of India.

The application challenging the award is required to be made within three months from the receipt of the award.

Enforcement of the Award

The arbitral award is final and binding on the parties. Where the time for filing the application challenging the award has expired, the award becomes enforceable in accordance with the Civil Procedure Code. Even if an application challenging the award is filed the award is enforceable unless a stay is granted by the Court, on the basis of a separate application. Stay if granted by the Court can be subject to conditions that are imposed by the Court at its discretion. An unconditional stay can be granted by the Court only if satisfied that a prima facie case is made out that the agreement or contract that are the basis of the award, or the making of the award were induced by fraud or corruption.

Appeal against Order Setting Aside or Refusing to Set Aside the Award

An appeal under Section 37 of the Act lies against the above Order under Section 34 of the Act. However, no second appeal is allowed. The right to appeal to the Supreme Court remains.

Conclusion

The dispensing with need for the award to be made a rule of the Court, the conditions imposed for extension of time for rendering the award, the limited grounds for challenge of the award and appeal, as also permitting settlement of the dispute between the parties in the arbitration process have remedied the delays that plagued the earlier Act of 1940.

CONSUMER LAWS

Liability Of Bank in cases of Fraudulent transaction

In an appeal¹ filed by the Punjab National Bank under Section 19 of the Consumer Protection Act, 1986 before the Hon'ble NCDRC these three issues came up for consideration:

1. Whether the Bank is responsible for an unauthorized transfer occasioned by an act of malfeasance (wrongdoing) on the part of functionaries of the Bank or on the part of any other person (except the Complainant / account-holder)
2. Whether the Bank is responsible for an unauthorized transfer due to any virus or hacking in the Bank's computerized system?
3. What should be the role of the bank when the customer reports about the fraudulent transfer to his banker?

- The first question was answered in affirmative on the ground that if an account is maintained by the Bank, the Bank itself is responsible for its safety and security. Any systemic failure, whether by malfeasance on the part of its functionaries or by any other person (except the consumer/account-holder), is the responsibility of the bank, and not of the consumer.
- The second question was also answered in affirmative.
- In reply to third issue, the Hon'ble NCDRC opined that once the fraud is brought to the notice of the bank without undue delay by the complainant, it is the Bank's responsibility to identify the systemic failure, remedy the pecuniary loss and injury to the Complainant.

CPA vis a vis Arbitration and Conciliation Act²:

In *'Emaar MGF Land Ltd v/s Aftab Singh* (RP 2629-2630/2018 in CA no. 23512-23513/2017) an order of the NCDRC (3 members bench) holding the consumer disputes as non-arbitrable was impugned before the Hon'ble Supreme Court of India. The order was impugned on the basis of the amendment made to section 8 of the *Arbitration and Conciliation Act, 1996* by which the Parliament added the words "*notwithstanding any judgment, decree or order of the Supreme Court or any court*" in the said section.

The Supreme Court while referring to the said amendment held that the purpose of the said amendment was to limit the scope of the judicial intervention while deciding an application seeking a reference to arbitration and the only ground of refusal could be the non-existence of any arbitration agreement. The legislative intent was confined only to the aforesaid aspects and to extend it to areas where certain disputes were not 5required to be refereed for arbitration is too far-fetched. The court while relying upon the ratio laid down in *Booz Allen and Hamilton v/s SBI Home Finance Ltd* (2011) 5 SCC 532 declared that the consumer disputes cannot be decided by way of arbitration.

¹ Chairman, Punjab National Bank vs. Leader Valves Ltd. , (2020) CPJ 92 (NC)

² Dr Vikas Trivedi and Mr Abhishek Awasthi, Paradox of Concurrent Jurisdiction in Consumer Cases, 5(5), International Journal of Law Management and Humanities, 54 - 59, available at <https://doij.org/10.1000/IJLMH.113553>, last seen on 21/11/2022.

RECOVERY OF COMMERCIAL DEBT

Today one of the challenges faced by the corporates after entering into business relation is the increasing pile of unpaid invoices and then there is a burden to recover the money for the same. These unpaid invoices are like hump on corporates back and the only recourse is the treatment of the same with the ever present fear of it growing back. This article is dedicated to how one can recover such commercial debt in the form of unpaid invoices.

Background

An invoice is generally raised when goods are supplied. The invoice becomes payable after it is raised on receipt by the purchaser. In case credit is extended to the purchaser it would become payable after receipt by the purchaser on expiry of the period for which credit has been extended. In either case it is necessary for the supplier to ensure delivery of the goods, their acceptance and the invoice to the purchaser and keep record of such delivery and retain invoices as evidence in the event of having to take legal resort for recovery of unpaid invoices.

Credit is extended to a purchaser based on trade practice and assessment of the creditworthiness of the purchaser. The period of credit is reflected in the invoice. The monitoring of payments against goods supplied is a management function that could prompt the denial of supplies and credit to defaulting purchasers where liaison and reminders to clear outstanding payments are ignored. This is also necessary to plan and manage the cash flows of the business.

Jurisdiction for Recovery of Unpaid Invoices

Action for recovery of payments is required to be initiated either at the place where the purchaser resides or carries on business or where the cause of action wholly or partly arises as per Section 20 of the Civil Procedure Code. Where the purchaser and supplier are located at the same place it is clear where action for recovery is to be initiated. Where goods are supplied to purchasers located elsewhere it is advisable to ensure that purchase orders are accepted at the location of the Head Office and payments are received in a Bank Account in the same location. The invoice issued could specify that this location will have exclusive legal jurisdiction for settlement of disputes irrespective of the fact that supply of goods is effected from a different territorial jurisdiction. Similar considerations are applicable in case orders are accepted and made by a branch office of the seller. These considerations are also relevant in case goods are supplied under a contract over a period of time where the contract contains an arbitration clause specifying the seat of arbitration. This aspect is also relevant where action is considered more appropriate under Section 138 of the Negotiable Instruments Act to recover unpaid invoices.

Limitation for Action to Recover Unpaid Invoices

In accordance with the Limitation Act, 1963 the period of limitation for instituting a suit is 3 years from the date of delivery of the goods. In case a fixed period of credit is extended the period is 3 years, but this period begins to run from the date the period of credit expires. Where no specific

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period of limitation is prescribed the period of limitation is 3 years. In the circumstances it is necessary to ensure that action for recovery is taken before expiry of the period of limitation. The only provision for extending this period is to obtain an acknowledgement of the debt within the period of limitation.

Conclusion

Keeping the above aspects in view could obviate issues of jurisdiction, limitation and required evidence becoming a stumbling block in the recovery of unpaid invoices.

The ways by which a creditor can recover unpaid invoice are as followed:

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