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The Significance of a Minority Opinion in an Arbitral Award

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INTRODUCTION

The Arbitration & Conciliation Act ("**A&C Act**") under Section 31 recognizes only one arbitral award being passed by an Arbitral Tribunal which can be either unanimous or an award signed by a majority of the arbitrators in the case of a panel of arbitrators. Although, a dissenting opinion by an arbitrator is not barred under the A&C Act, the provisions of the A&C Act provide no clarity as to the importance or the status of a dissenting opinion by an arbitrator sitting in a panel of arbitrators. Furthermore, Indian courts and globally recognized arbitration institutional rules have construed a dissenting opinion by an arbitrator differently which raises the question of the actual significance of a dissenting opinion.

This piece seeks to analyze how Indian courts have treated a dissenting opinion by an arbitrator and provide a comparative outlook as to how international arbitral institutions have perceived dissenting opinions and how should courts treat a dissenting opinion.

Recent Rulings by Indian Courts construing a dissenting opinion by an Arbitrator

A division bench of the High Court of Kerala in a recent judgment in *Lloyed Insulations (India) Ltd v. Foremexx Space Frames* [1] faced a curious situation wherein a 3-member Arbitral Tribunal was unable to pass a unanimous award and hence separate findings were rendered by Arbitrator No. 1 and 2 on different & consecutive dates, while the Presiding Arbitrator on a later date, concurred with the award of the Arbitrator No. 1 and passed a separate award after the two awards were passed. Thus, the issue arose as to which award would be valid and binding between the parties and that whether the Presiding Arbitrator can direct the remaining two Arbitrators to write separate awards and then adopt one without giving separate or independent reasons either for accepting one and rejecting the other.

The division bench of the high court went on to hold that that the findings of the minority arbitrator, i.e., Arbitrator No. 2 is not an

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Award, but only the dissenting view and the same does not form part of the Award and held that in this case, the findings of Arbitrator No. 1 was the Majority Award, as the same was concurred to by the Presiding Arbitrator and his concurrence was recorded in a separate award by the Presiding Arbitrator which by virtue of Section 29 & 31(2) of the A&C Act was treated as the final award. The court also noted that in this case though the majority award was not signed by Arbitrator No.2, it is not a necessity which is clear from Section 31(1) & 31(2) as per which signatures of the majority of the members of the tribunal shall be sufficient so long as the reason for any omitted signature is stated.

The court supported its ruling by placing reliance upon a decision of the Supreme Court ("**SC**") in *Dakshin Haryana Bijli Vitaran Nigam Ltd. v. Navigant Technologies Pvt. Ltd*. [2] ("**Dakshin Haryana**") and went on to observe that *"An Award is made when it is authenticated by the person(s) who make it. In other words, an Award takes legal effect only after it is signed by the Arbitrators, which gives it authentication. There can be no finality of the Award except after it is signed, since signing of the Award gives legal effect and validity to it. … The findings/opinions/views of the Minority Tribunal is not an Award, but only the dissenting view and the same does not form part of the Award. Such dissenting view/opinion cannot be made the basis of a proceeding under Section 34 or under Section 36 for its enforcement. But it can be relied upon by the party seeking to set aside the Award to buttress his submissions in the proceedings under Section 34."*

Therefore, these judgments suggest that a minority opinion by an arbitrator is not an award by itself and the majority award will be valid even if the dissenting arbitrator abstains from signing the majority award, however such an opinion will be beneficial for an award debtor only during a proceeding under Section 34 of the A&C Act to supplement arguments to set aside the award.

Importance of a Minority Opinion

Indian courts have not hesitated from upholding a minority opinion by an arbitrator while setting aside the majority award. The SC's judgment in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI* [3] assumed significance as in this case the tribunal had rendered a majority and a minority opinion, and in a challenge under Section 34 of the A&C Act, the SC set aside the majority award and in order to bring a quietus to the dispute between the parties, upheld the minority opinion by invoking Article 142 of the Constitution of India which grants the SC power to do complete justice, thus invariably granting it the status of a valid arbitral award.

The High Courts too have not been behind in adopting a similar approach and have adopted the minority opinion of an arbitrator while setting aside the majority award in challenge proceedings under Section 34 of the A&C Act. The Bombay High Court ("**BHC**") in *ONGC v. Interocean Shipping (India) (P) Ltd*. [4] upheld the award passed by a minority member of the Arbitral Tribunal while setting aside the majority award on the ground of the award being perverse.

However, the approach by the Indian courts concerning the status of a minority opinion in an arbitral award has been inconsistent. For instance, the Delhi High Court ("**DHC**") in *Government of India, BSNL v. Acome* [5] had ruled that that the Act contemplates only one award and a dissenting opinion is not an award under the Act. The DHC placed reliance upon the 176th Report of the Law Commission and observed that the minority decision by a tribunal has no efficacy as an award as it cannot be enforced.

This position was similarly echoed by the BHC in *Axios Navigation v Indian Oil Corporation Ltd* [6] ("**Axios Navigation**") wherein it was held that the majority award can be set aside only on the basis of the challenge sustained therein and not on the basis of what is stated in the minority award. However, the BHC in *Axios Navigation* did not disallow the parties from relying upon the dissenting opinion of the arbitrator while making submissions for setting aside the majority award.

The SC in *Dakshin Haryana* took a more pragmatic approach and placed some significance to a dissenting opinion by an arbitrator. The SC observed that in proceedings under Section 34 of the A&C Act, the party seeking to set aside the award can rely upon the dissenting opinion of a minority arbitrator to buttress its submission, thus echoing with the observations in *Axios Navigation*. However, in *Dakshin Haryana*, the SC went a step ahead and added that the court under Section 34, is not precluded from considering the findings and conclusions of the dissenting opinion of the minority member of the Tribunal.

Thus a minority opinion in an arbitral tribunal cannot be discouraged by the courts in absence of any specific provision in the A&C Act and although a minority opinion by itself is not a valid arbitral award in the eyes of the A&C Act, the courts can rely upon a well-reasoned minority opinion by an arbitrator to set aside a perverse majority award in order to avoid relegating the parties to their original position by setting aside the award. Furthermore, such an approach ought to be viewed positively as this would ensure that arbitrators have a fundamental right to freely express their opinion unimpeded by any directive from the co-arbitrators where there is no unanimous view. It gives a parallel outlook to the court when deciding to set aside the majority award and assist parties in saving on costs and time if there exists a good dissenting opinion which can be upheld by the court in place of an erroneous majority award.

Approach adopted by the International Chamber of Commerce ("ICC") Commission and other international institutions/jurisdictions on Dissenting Opinions

In April 1988, the ICC Commission on International Arbitration adopted a final report [7] on dissenting and separate opinions in international arbitration wherein it invited comments from several member states on the relevance and significance of a dissenting opinion. The deliberations by member states during the process of finalizing the report offers an interesting insight as to the actual relevance of a dissenting opinion by a tribunal. It was commonly agreed by member states that it is neither practical nor desirable to attempt to suppress dissenting opinions in ICC arbitrations and the prevailing view was that the ICC should neither encourage nor discourage the giving of such opinions.

However, it was recommended by the commission that currently it is not necessary or desirable to introduce any new article relating to dissenting opinions into the ICC Rules of Arbitration, and till date the ICC Rules of Arbitration have not made any such amendments to make a separate provision with respect to a dissenting opinion, though it was recommended that the guidelines for the Court of Arbitration and the Secretariat should include provisions relating to :-

i. The communication of dissenting opinions to the Court of Arbitration;
ii. Time limits;
iii. The opportunity for the majority arbitrators to see the dissenting opinion before the draft award is finalized; and
iv. Notification of dissenting opinions to the parties.

Other international arbitral institutions although do not discourage a dissenting opinion but fail to provide any specific provision for a dissenting opinion. The LCIA rules recognize an award signed by the majority arbitrators to be a valid award even if a minority arbitrator fails or refuses to sign the award, provided the reasons for the same are provided [8]. The UNCITRAL has no specific provision for dissenting opinions but under Article 31, a dissenting arbitrator may withhold their signature. The China International Economic and Trade Arbitration Commission ("**CIETAC**") Rules are more clearer on the aspect of a dissenting opinion and Article 43.5 of the CIETAC Rules provides that any dissenting opinion is to be docketed into the file and may be attached to the award, but does not form any part of the award.

Individual jurisdictions such as Bolivia, Columbia and Japan seem to discourage a dissenting opinion by an arbitrator. The Bolivian Arbitration Law mandates that a dissenting arbitrator record his reasons in writing and may lose his fees if he refuses to sign an award. Similarly, Columbian Arbitration Law provides for forfeiture of the fees of an arbitrator if he refuses to sign the award [9]. Interestingly, the Japan Commercial Arbitration Association under Article 63 prohibits the disclosure of a dissenting or any individual opinion in any manner [10].

CONCLUSION

Although the A&C Act and the UNCITRAL ad hoc arbitration rules remain silent as to the significance of a minority opinion in an arbitral award, the courts have started to lean in favour of granting a positive status to the minority opinion in a challenge to the majority award under Section 34. Therefore, an aggrieved party is not precluded from supplementing its submissions with the observations made by a dissenting arbitrator, and the A&C Act does not bar a court hearing a Section 34 application to rely upon such observations in setting aside the award.

Russell on Arbitration explained the relevance of a dissenting opinion [11] as follows:

"*The arbitrator should consider carefully whether there is good reason for expressing his dissent, because a dissenting opinion may encourage a challenge to the award. This is for the parties' information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge or may add weight to the arguments of a party wishing to appeal against the award*."

However, a dissenting arbitrator should refrain from making adverse comments on the award passed by the majority members of the tribunal as it would not be of any actual benefit to the parties. To avoid confusion, it is also advisable that where possible, the dissenting arbitrator should circulate their minority opinion to the majority members of the tribunal so that there may be an attempt to reconcile the conflicting views and a unanimous award be passed.

In an adversarial judicial system, reasoned dissents can contribute positively towards jurisprudence and can act as precedent, however the same may not apply to Arbitration as it adjudicates the dispute between two private parties and often does not contribute to the development of the law as there is no system of precedent in Arbitration. However, a dissenting opinion may encourage production of better awards by the majority if the dissenting opinion is circulated prior to publication of the award.

REFERENCES

[1] 2022 SCC OnLine Ker 344

[2] AIR 2021 SC 2493

[3] (2019) 15 SCC 131

[4] 2017 SCC OnLine Bom 10032

[5] 2007 SCC OnLine Del 226

[6] 2012 SCC OnLine Bom 4

[7] Final Report on Dissenting and Separate Opinions, ICC Digital Library, https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0003.htm?l1=bul

[8] Article 26.6, LCIA Arbitration rules 2020.

[9] https://www.ciarb.org/media/1309/2011draftingawards.pdf

[10] Article 63, JCAA Commercial Arbitration Rules, 2019

[11] David St. John Sutton, Judith Gill and Matthew Gearing QC, Russel on Arbitration, 24th Edn (Sweet & Maxwell), p. 313.

ARBITRATION

THE COURT CAN ONLY SET ASIDE, AND NOT MODIFY AN ARBITRAL AWARD UNDER SECTION 34 OR 37 OF THE ARBITRATION AND CONCILIATION ACT ("A&C ACT")

The Supreme Court ("**SC**") in *National Highways Authority of India vs P. Nagaraju* has held that under Section 34 or 37 of the A&C Act, the only option available to the court is to set aside the award and remand the matter back to the arbitral tribunal in terms of Section 34(4) of the A&C Act.

NEW GROUNDS OF CHALLENGE NOT PERMISSIBLE BY WAY OF AMENDMENT IN SECTION 34 APPLICATION OF A&C ACT

The Bombay High Court ("**BHC**") in *Friends & Friends Shipping Pvt. Ltd v. Central Warehousing Corporation* has held that a party challenging the arbitral award under Section 34 of the A&C Act cannot add absolutely new grounds by way of an amendment application and held that the amendment can only add some facts to the pending challenge.

The court observed that the grounds being sought to be added by the petitioner by way of the amendment had absolutely no foundation in the petitioner's application under Section 34 of the A&C Act and that the petitioner had never raised the objections under Section 12, 13 and 14 of the A&C Act.

PARTIES CANNOT BE PRESUMED TO HAVE EXCLUDED APPLICABILITY OF SECTION 9 OF A&C ACT MERELY BECAUSE THEY HAVE CHOSEN A FOREIGN-SEATED INSTITUTIONAL ARBITRATION

The Delhi High Court ("**DHC**") in *Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd.* has held that merely because the parties have agreed on a foreign seat of arbitration under the UNCITRAL Rules, it cannot amount to "an agreement to the contrary" as per proviso to Section 2(2) of the A&C Act, so as to exclude the applicability of Section 9 of the A&C Act. The Court relied on the judgment in *Big Charter Pvt. Ltd. v. Ezen Aviation Pty Ltd. (2020) SCC OnLine Del 1713* wherein the Court held that exclusion of

Section 9 in a foreign seated arbitration must be by an express stipulation/agreement.

USE OF THE WORD 'MAY' CONFERS A DISCRETION UPON THE PARTIES TO REFER DISPUTE TO ARBITRATION

The BHC in *Derivados Consulting Pvt. Ltd. versus Pramara Promotions Pvt. Ltd*. has held that when the parties to an arbitration agreement provide that they "may" refer the disputes to arbitration, the word "may" takes away a conclusive and mandatory affirmation between the parties to refer the disputes to arbitration. It was observed that once the parties have agreed to use the word 'may', the parties have conferred a choice or a discretion to a party to enter into an arbitration agreement in the future.

IF THE MAIN RELIEF IS REJECTED BY THE ARBITRAL TRIBUNAL, THE TRIBUNAL CANNOT AWARD AN ANCILLARY OR INTERIM AMOUNT THAT MADE A PART OF THE SAME CLAIM

The DHC in *Orchid Infrastructure Developers (P) Ltd. v. Five Star Construction Pvt. Ltd.* observed that the arbitrator has partly allowed the claim in favor of a party which was included in the main relief sought by him and noted that if the arbitrator has concluded that a party is disentitled to the claim, it cannot award other interim or ancillary amount since the same was included in the main claim. Accordingly, it was held that if the main relief is rejected, the interim relief automatically ought to have been rejected.

ONCE THE ARBITRATOR HAS HELD THAT PROVISIONS OF MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT (MSMED) ACT, 2006 APPLIES TO THE DISPUTE, IT MUST GIVE REASONS FOR NOT AWARDING INTEREST UNDER SECTION 15 AND 16 OF THE MSMED ACT

The DHC in the case of *Bharat Heavy Electrical Lid v. Bhatia Engineering Company*, noted that once the arbitrator has held that provisions of MSMED Act would apply to the case, it becomes incumbent upon the arbitrator to give reasons for not awarding compounding interest under Section 15 and 16 of the MSMED Act. The sections abovementioned are mandatory provisions of the MSMED Act and any order made in derogation of these mandatory provisions shall be set aside.

THERE CANNOT BE TWO ARBITRATION PROCEEDINGS ARISING FROM THE SAME TRANSACTION/CONTRACT

The SC in the case of *M/S Tantia Constructions Limited v. Union of India*, opined that if a dispute has been referred to arbitration and an award has been passed on the claim, it is '*rightful*' to refuse to refer the matter to arbitration under Section 11(6) of the A&C Act. The SC asserted that fresh arbitration proceedings concerning further claims cannot be allowed as after disputes are adjudicated no claims subsists which requires further resolution. Therefore, the application for the appointment of an arbitrator for deciding a dispute that has already been decided cannot be given effect.

A COURT IS NOT DEPRIVED FROM EXAMINING ARBITRABILITY AND JURISDICTION OF AN ARBITRAL TRIBUNAL WHILE CONSTRUING AN APPLICATION FOR THE APPOINTMENT OF ARBITRATORS, IF THE FACTS ARE SUFFICIENTLY CLEAR UNDER SECTION 11 OF THE A&C ACT

The SC in *Indian Oil Corporation Limited v. NCC Limited*, held that despite the insertion of Section 11(6A) in the A&C Act, the court can determine whether the dispute falls within the excepted clause or not. The SC in the present case expressed disagreement with the opinion undertaken by the High Court that after the insertion of Section 11(6), the scope of the inquiry has got limited according to which courts can only see whether a binding arbitration agreement exists between parties or not. The apex court noted that though jurisdiction lies with the Arbitral Tribunal to determine the question of jurisdiction or arbitrability but the same can also be considered by the court while deciding an application under Section 11 of A&C Act. Moreover, the court may also prima facie consider accord and satisfaction of a claim.

PARTY CAN WITHDRAW ITS CONSENT FOR REFERENCE TO ARBITRATION UNDER SECTION 89 OF THE CIVIL PROCEDURE CODE (CPC) ANY TIME BEFORE THE COURT HAS ACTED UPON SUCH REFERENCE

The Gujarat High Court in *Krishna Calibration Services v. Jasmin Bharat Patel* held that merely because the party had agreed to refer their matter to arbitration, the jurisdiction of an arbitrator over the said matter cannot still be presumed. It was further noted that it is well within the rights of the parties to withdraw their consent any time before the matter is taken up by the court. Deemed waiver provided by Section 4 of the A&C Act would only apply where parties have a valid arbitration agreement and not when a simple reference to arbitration under Section 89 of the Code for Civil Procedure, 1908 has been made.

COUNTERCLAIMS CANNOT BE REJECTED MERELY BECAUSE THEY WERE NOT NOTIFIED BEFORE INVOKING ARBITRATION

The SC in *NHAI v. Transstroy (India) Limited* held that counterclaims would not stand rejected if the same were not notified at the pre-arbitral stage. The Division bench further added that there is a difference existing between the words 'claim' and 'dispute' as claims may be one-sided while dispute by definition requires both sides. It was opined that once conciliation fails, the whole gamut (which includes set off/ counterclaim) becomes the subject matter of the arbitration.

REJECTION OF APPLICATION UNDER SECTION 34 OF THE A&C ACT WOULD NOT MEAN THAT THE COURT HAS AGREED WITH THE VIEW UNDERTAKEN BY THE ARBITRAL TRIBUNAL

The DHC in the case of *Glitter Overseas and Ors v MMTC Lad* held that the court would not be presumed to concur with the stand taken by the tribunal, merely because the challenge against the award was rejected. Furthermore, it was noted by the court that the decision to not interfere with the award cannot be said to be binding as the court merely dismisses the challenge (because grounds of section 34 of the A&C Act do not meet up) and does not dwell on the question of law or fact. The Court differentiated challenge petition filed under the A&C Act from the first appeal against a decree as in the latter case questions of law and fact are examined by the court.

AWARD HOLDER UNDER SECTION 36 OF THE A&C ACT HAS BEEN GIVEN THE STATUTORY SAFEGUARD TO SECURE THE ENTIRE ARBITRAL AWARD AMOUNT EVEN DURING THE PERIOD WHEN APPLICATION FOR SETTING ASIDE OF AWARD IS PENDING

The Calcutta High Court in the case of *Siliguri Jalpaiguri Development Authority v Bengal Unitech Siliguri Projects Limited* held that Section 36 of the A&C Act after the amendment provided security for the entire arbitral award and such security must be real and not insignificant or illusionary. It was further noted by the Hon'ble Court that through rights of the award holder are not crystallized till the application is disposed under Section 34 of the A&C, however, the award holder still has the statutory safeguard under Section 36 of the A&C Act. The Court further opined that that the award holder should be secured for the entirety of the amount along with all the other costs and interest.

OTHER UPDATES

POWER TO ADMIT FINANCIAL CREDITOR'S CORPORATE INSOLVENCY RESOLUTION PROCESS ("CIRP") APPLICATION DESPITE DEFAULT ON PART OF THE CORPORATE DEBTORS IN PAYMENT OF DEBT

The SC in *Vidarbha Industries Power Limited v. Axis Bank Limited* has held that the power of the National Company Law Tribunal ("**NCLT**") to admit an application for initiation of the CIRP by a financial creditor under Section 7(5)(a) of the Insolvency and Bankruptcy Code, is discretionary and not mandatory. The court further observed that such discretionary power cannot be exercised arbitrarily or capriciously.

IF THE DEBT IS DISPUTED, THE APPLICATION OF THE OPERATIONAL CREDITOR FOR INITIATION OF CIRP MUST BE DISMISSED

The SC in *SS Engineers vs Hindustan Petroleum Corporation Ltd* has held that an operational creditor can trigger the CIRP only when there is an undisputed debt and a default in payment thereof, however, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed. It was also observed that the NCLT under Section 7 or Section 9 of the Insolvency & Bankruptcy Code is not a debt collection forum.

A SUIT SET IN MOTION BY OR AGAINST A FIRM IS A SUIT BY OR AGAINST ALL THE PARTNERS OF THE FIRM WHO WERE PARTNERS AT THE TIME WHEN CAUSE OF ACTION CAME TO LIGHT

The Kerala High Court in the case of *M/S CS Company & Ors v. Kerala State Electricity Board & Anr.*, held that name of the firm stands for all its partners and the effect of using the name is to bring the partners before the Court. The court further added that whenever a suit is instituted by or against a firm in reality it is a suit instituted by or against all its partners and therefore any decree passed against the firm would be binding on all such persons who were partners on the day when the cause of action arose.

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