

Limitation And Appointment Of Arbitrators

Recently, in *Arif Azim Co. Ltd. v. Aptech Ltd.*, a three-judge bench of the Supreme Court of India held that the Limitation Act, 1963 applies to proceedings for the appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act'). The Court clarified, however, that if the claims are *prima facie* time-barred on the date of commencement of arbitration proceedings, a Court may decline to make a reference.



Facts

On March 21, 2013, an Afghanistan based company (petitioner /franchisee) entered into three separate franchise agreements with a Mumbai based company (respondent /franchisor) engaged in the business of IT training and education. Under these agreements, the petitioner, as the franchisee, was granted a non-exclusive license by the respondent to establish and operate businesses. Later, in 2016, the Indian Council for Cultural Relations, Delhi ('ICCR') selected the respondent for providing a short-term english training course to Afghans who had been selected for admission in Indian universities. This course was also implemented and provided by the petitioner in Kabul in 2017. Disputes arose between the parties in 2018 regarding the renewal and payment of royalties for all three franchise agreements. On March 20, 2018, the respondent called upon the petitioner to pay outstanding royalties. In its response dated March 23, 2018, the petitioner asked the respondent to make payments for the additional course provided by the petitioner at the respondent's behest in 2017. On March 28, 2018, the respondent stated that the reason for the payments being delayed was that it had not received the corresponding payments from the ICCR. It also urged the petitioner, once again, to pay royalties payments. On April 23, 2018, the petitioner informed the respondent of its decision not to renew two out of the three franchise agreements due to the dispute over payment for the courses provided by the petitioner.

The petitioner raised the issue of non-payment of dues with the respondent again on December 29, 2018. Subsequently, approximately three years later, the petitioner addressed the issue of pending dues through a legal notice dated August 26, 2021. Thereafter, the petitioner initiated pre-institution mediation before the Main Mediation Centre of the Bombay High Court on July 5, 2022, in accordance with the Commercial Courts Act, 2015; however, mediation failed. Following this, the petitioner sent a notice invoking arbitration to the respondent on November 24, 2022. In response, the respondent replied on April 5, 2023, denying all the claims raised therein and asserting that, irrespective of their merits, the claims were time-barred.

Issues

The Bench formulated the following issues for consideration:

1. *Whether provisions of Limitation Act, 1963 apply to an application for the appointment of an arbitrator under Section 11(6) of the Act? If so, was the present petition barred by limitation?*
2. *Whether the court has the authority to decline to make a reference under Section 11, in cases where the claims are ex-facie and hopelessly time-barred?*

Judgement

The Court observed that Section 11(6) of the Act does not prescribe a specific time limit for filing an application for appointment of an arbitrator. That said, by virtue of Section 43, the Limitation Act applies to arbitrations and accordingly, Article 137 of the Limitation Act, the residual provision, would cover such applications.

Based on this interpretation, the Court deliberated on when the right to apply under Section 11(6) accrues to a party. It determined that the limitation period begins ‘once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on the part of that other party to comply with the requirements mentioned in such notice.’ Furthermore, the Court emphasised the duty of courts to preliminarily assess and reject claims that are not arbitrable or conclusively time-barred, aiming to shield parties from entanglement in protracted and costly arbitration proceedings.

Consequently, the Court outlined a two-pronged test for evaluating limitation issues in Section 11(6) petitions:

1. *Whether the petition under Section 11(6) is time-barred, and*
2. *Whether the claims intended for arbitration are manifestly time-barred at the outset of arbitration proceedings.*

If either of these conditions is unfavourable to the party seeking arbitration referral, the Court may decline to appoint an arbitral tribunal.

Applying this test to the case at hand, the Court noted that (i) the arbitration petition was filed within three years from the respondent's non-compliance with the notice, and (ii) the petitioner issued the arbitration invocation notice within three years from the accrual of the cause of action. In the facts of the case, the rights of the petitioner can be said to have been crystallised on March 28, 2018. In ordinary circumstances, the petitioner would have a period of 3 (three) years from March 28, 2018, i.e., by March 27, 2021, for raising its claims. However, in terms of the extensions in limitation granted on account of the Covid-19 pandemic, the time period between March 15, 2020 – February 28, 2022 would stand excluded from calculations and the balance period of limitation available to the petitioner on March 15, 2020 would become available from March 1, 2022. Taking this into account, the period of limitation available to the petitioner was to end on March 13, 2023. Consequently, the petition was granted, and a former Supreme Court judge was appointed as the sole arbitrator.

Conclusion

The verdict of the Supreme Court underscores the pressing need for legislative intervention to establish a specific limitation period for Section 11(6) applications – as three years is too long a period and does not align with the swift resolution of commercial disputes envisioned by the Act.