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COURTROOM.

Eye on payment aggregators

Payment aggregators fall within the definition of 'designated payment system' under Section 23A of the Payment and Settlement Systems Act, the Delhi High Court has ruled. The Reserve Bank of India can issue guidelines for running such payment systems. A division bench comprising Justice Rajiv Shakdher and Justice Tara Vitasta Ganju dismissed a plea by Lotus Pay Solutions, which provides recurring payment solutions for businesses. The company challenged clauses 3, 4 and 8 of an RBI circular dated March 17, 2020, titled 'Guidelines on regulation of payment aggregators and payment gateway'. The court said that services offered by payment aggregators to the payer and beneficiary through technology should fall within the ambit of the payment system. Because the gateways do not handle funds, and only provide technology to route and/or facilitate online payments, clauses 3, 4 and 8 are not applicable to them, it observed.

Bank of India must pay

Sometimes the money involved isn't much, but the underlying principle is. Bank of India must have felt so, because it refused to release ₹1 crore, given on behalf of a corporate borrower, against whom insolvency proceedings were initiated. The bank said that the ₹1 crore belonged to it. The resolution professional held that it still belonged to the corporate debtor (Actif Corporation) and should be treated as part of the assets that would be divvied up in the resolution process. The National Company Law Tribunal (NCLT), Ahmedabad bench, judged that the ₹1 crore belonged to the corporate debtor; the bank had held it in a separate 'no-lien' account. The bank approached the National Company Law Appellate Tribunal, which upheld the NCLT verdict. It said: "It is clear that the said amount (₹1 crore) was to be adjusted/utilised upon approval of the resolution plan and was not to be adjusted towards 'interest' or 'principal' till then... the amount lying in the 'no lien account' belongs to the 'corporate debtor' and under Section 18(f) of the Insolvency and Bankruptcy Code, 2016."

CONCILIATION

The arbitrary element in arbitration fees

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BILLING BLUES. How the Supreme Court ruling in a recent case can facilitate dispute resolution at reasonable cost

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In a recent decision in ONGC vs Afcons Gunanusa, the Supreme Court decided on a few crucial issues pertaining to arbitral fee. Before the 2015 amendment of the Arbitration and Conciliation Act, 1996, arbitrators unilaterally charged excessive fees.

Taking note of this, the apex court, in Union of India vs Singh Builders, called for an urgent solution to "save arbitration from the arbitration cost". It gave three suggestions. First, institutional arbitration could be given preference where the arbitrator's fee was as per a prescribed rate, based on the complexity of the matter and the number of hearings required. Second, when courts appoint an arbitrator, they could fix the fee. Third, retired judges could serve as arbitrators based on a fee structure decided by high courts.

The decision in the Singh Builders case came at a time when parties felt constrained to agree to the fee sought by arbitrators as they feared there would otherwise be an unfavourable decision. The apex court found this to be objectionable and unfortunate. In Sanjeev Kumar Jain vs Raghubir Saran Charitable Trust, the Supreme Court observed that arbitrators in ad hoc arbitrations were charging disproportionately high fees. It said that one possible remedy could be to disclose the fee prior to the appointment of arbitrators to allow the party to express its unwillingness to pay.

Against this backdrop, the Law Commission of India, in its 246th report, recommended inserting a model schedule of fees in the Arbitration Act, to serve as a guide for high courts in framing the rules governing the fees. Based on these recommendations, a Fourth Schedule was introduced in the Act. The Supreme Court observed that despite the Fourth Schedule, high courts had "been slow, if not tardy, in framing these rules". Apart from the high courts of Rajasthan, Kerala and Bombay, no other had framed rules for determination of fees. Further, these rules only governed the arbitrators appointed by the courts.

FEE VS COST

In Afcons Gunanusa JV, defending the arbitrators' right to decide their fee, the respondents argued that Section 31A of the Arbitration Act provided the arbitral tribunal the discretion to determine the cost of arbitration, which included a "reasonable cost relating to the fee and expenses of the arbitrators". The apex court opined that the 'costs' and 'fees' must be distinguished from each other. Fees are the remuneration payable to the arbitrators for their service; costs were typically compensatory amounts paid by the losing party to the winning party for litigation expenses — to indemnify the winning party. Therefore, the functions of costs and fees were different; the principle under Section 31A and 38 of the Act could not empower arbitrators to unilaterally fix their fees.

The Supreme Court in Afcons Gunanusa, under Article 142 of the Constitution, laid down guidelines for fixing arbitrators' fees in ad hoc arbitrations — including convening a preliminary hearing specifically for determining the fee. The arbitral tribunals must set out the components of their fee in the "terms of reference". Once finalised, they cannot be changed.

On whether the Fourth Schedule under the Arbitration Act was mandatory, the Supreme Court opined that the failure of the high courts to notify rules had rendered the Fourth Schedule nugatory and, hence, not mandatory.

Further, the Fourth Schedule does not apply to international commercial arbitrations. The court opined that when one or both parties are unable to reach consensus, it is open to the arbitral tribunals to charge fees as stipulated in the Fourth Schedule, which is the model fee schedule. Consequently, when an arbitral tribunal fixes the fee in terms of the Fourth Schedule, the parties shall not be permitted to object to it.

On whether a claim and a counter-claim were to be treated as a single proceeding or two independent proceedings, the court held that the Arbitration Act treats claims and counter-claims as independent proceedings, since the latter is not contingent upon the former. Therefore, under the Fourth Schedule, the claim and counter-claim should be treated distinctly and separate fees should be charged for them.

FEE CEILING

The apex court held that the ceiling of ₹30 lakh was applicable to the sum of the base and variable amounts. The highest fee under the Arbitration Act would thus be ₹30 lakh. The court also observed that there was nothing in the Fourth Schedule to suggest that the ceiling of ₹30 lakh applied to the entire tribunal; such an interpretation would lead to absurd consequences.

The Supreme Court decision in Afcons Gunanusa JV has introduced much-needed clarity to the fee regime for ad hoc arbitrations where the parties fail to determine the arbitral fee among themselves.

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