

## India - courts must follow the procedure under the Arbitration and Conciliation Act when appointing arbitrators (Devki Nandan Steel Works v HP State Electricity Board Ltd)

First published on Lexis<sup>®</sup>PSL Arbitration on [27/09/2018](#)

**Arbitration analysis:** The amended Arbitration and Conciliation Act 1996 (ACA 1996) came into force on 23 October 2015 and contains provisions to ensure that the appointed arbitrators are neutral and, among other things, have the ability to devote sufficient time to the arbitration. In *Devki Nandan Steel Works and others v HP State Electricity Board Ltd and others*, the High Court of Himachal Pradesh was faced with a situation where it had to substitute a non-performing arbitrator over a year and a half after the arbitral proceedings should have ideally commenced. Sahil Kanuga, co-head, Bhavana Sunder, associate and Akshay Shankar of the International Litigation & Dispute Resolution Practice at Nishith Desai Associates discuss this decision.

*Devki Nandan Steel Works and others v HP State Electricity Board Ltd* OMP No 390 of 2018 in Arb Case No 102 of 2016 (not reported by LexisNexis<sup>®</sup> UK)

### What did the Indian High Court decide?

#### Termination of mandate

The High Court appointed an arbitrator with respect to disputes between the parties by an order dated 23 December 2016. However, the appointed arbitrator did not act on his appointment and refused to accept the statement of claim. Subsequently, the arbitrator expressed his inability to arbitrate on the matter. The parties were thus compelled to approach the court to seek the appointment of a substitute arbitrator.

While determining whether a substitute arbitrator must be appointed, the court considered ACA 1996, s 14 which states that an arbitrator's mandate shall be terminated if he becomes de jure or de facto unable to perform his functions or for another reason fails to act without undue delay. ACA 1996, s 15 also provides that once the mandate of the arbitrator has been terminated, a substitute arbitrator can be appointed. Relying on the above provisions, the court terminated the mandate of the arbitrator and appointed a substitute arbitrator.

#### Disclosure requirements

ACA 1996, s 12 inter alia, provides that an arbitrator must disclose in writing any circumstances which are likely to affect his ability to devote sufficient time to the arbitration and in particular, his ability to complete the arbitration within a year. Arbitrators are expected to provide such disclosures in writing as specified in ACA 1996, Sch 6.

The 246<sup>th</sup> Law Commission Report specifically set out that 'in the event the High Court is approached in connection with the appointment of an arbitrator, the Commission has proposed seeking the disclosure under

ACA 1996, s 12(1) and in which context the High Court or the designate is to have “due regard” to the contents of such disclosure in appointing the arbitrator.’

In the present case, the court appointed a Senior Advocate as the substitute arbitrator after obtaining and recording his consent and declaration that he had no objection to the appointment.

This decision was rendered on 4 September 2018, which is over a year and a half after the appointment of the first arbitrator on 23 December 2016. Considering that the amendments to the ACA 1996 came into force on 23 October 2018, the court could have obtained the relevant disclosures from the initial arbitrator. The purpose of such a declaration is to ensure that when a person is appointed as an arbitrator, not only is he willing to act as one but that he is also willing to devote sufficient time for the same. The said amendments were incorporated with a view to ensure that arbitration under the ACA 1996 would be completed in an efficient and time-bound manner.

### **What are the practical implications?**

With the evolution of arbitration as the preferred commercial dispute resolution mechanism, courts must be watchful of such aberrations and give effect to the purpose and intention of the ACA 1996. While an arbitrator has been appointed presently in the case, the parties suffered delay. Ideally, a precise application of the available statutory provisions by the court in the first instance could have resulted in the timely progression of the arbitration proceedings.

*The views expressed are not necessarily those of the proprietor.*