

India—Delhi High court's vaccine for combating multiplicity of arbitral proceedings (*Gammon India v National Highways Authority of India*)

[First published on Lexis®PSL Arbitration on 24/07/2020](#)

Arbitration analysis: Vyapak Desai, partner and head of the International Dispute Resolution and Investigations Team at Nishith Desai Associates, Payel Chatterjee, leader and Shweta Sahu, senior member of the same team, discuss a recent decision of the High Court of Delhi on multiplicity of arbitral proceedings.

Gammon India Ltd & another v National Highways Authority of India ([OMP 680/2011 \(New No O M P \(COMM\)392/2020\)](#)) (subscription to Lexis Advance® required)

Note: other Indian judgments not reported by LexisNexis® UK

What are the practical implications of this decision?

The court in this ruling rightly pointed that there is nothing in Arbitration and Conciliation Act 1996 (ACA 1996), which prohibits parties from raising claims and counter-claims in multiple proceedings arising out of the same contract. Therefore, the observations and directions issued by the Court to curb the nuances of multiplicity of proceedings, are laudable and expected to provide clarity and lay guidelines for parties in case of future disputes. However, in the absence of a binding statutory obligation or a Supreme Court ruling putting to rest this issue, the same are only recommendatory in nature.

Considering the guidelines are only in the form of directions, the court has taken an additional step to enforce it by conveying its suggestions to the Registry for considering amendments to the Rules of the Delhi High Court framed under the Act as well as to the Ministry of Law and Justice. The court also referred to its practice directions, such as, the mandatory requirement for petitions seeking interim reliefs under the Act for the party to mention that no other petition on the same cause of action was filed (see, Practice Direction No 16/Rules/DHC, dated 7 December 2009).

It may be noted that the court relies on the premise where parties to an arbitration are expected to adhere to a bona fide discipline of use of arbitral processes. However, the same may not succeed in case of recalcitrant parties.

While the codification and further implementation of the recommendations are awaited in India, reference may be drawn to internationally recognised tools already in existence such as 'consolidation' of arbitral proceedings. Such consolidation of proceedings is usually driven by the consent of parties (see, ICC Rules 2017, Article 10; SIAC Rules 2016, Rule 8; HKIAC Rules 2013, Article 28; SCC Rules 2017, Article 15; CIETAC Rules 2015, Article 19) or when the varying arbitration agreements are compatible (*Ameet Lal Chand Shah v Rishabh Enterprises* (2018) 15 SCC 678) *P R Shah, Shares & Stock Brokers (P) Ltd v B H H Securities (P) Ltd*, (2012) 1 SCC 594).

What was the background to this decision?

This article analyses a recent ruling of the High Court of Delhi (court) in *Gammon India Ltd & another v National Highways Authority of India* (OMP 680/2011 (New No O M P (COMM)392/2020), judgment dated 23 June 2020). While hearing a petition challenging an arbitral award, the court took cognisance of the issues surrounding 'multiplicity' of arbitral proceedings, ie, multiple invocation, multiple references to arbitrations,

constitution of multiple tribunals, multiple awards being rendered and consequently multiple challenges thereto—between the same parties, in respect of the same contract or the same series of contracts.

A construction contract (the contract) was entered between Gammon-Atlanta JV, a joint venture of Gammon India Ltd and Atlanta Ltd (the contractor) and National Highways Authority of India (NHAI) on 23 December 2000. During the execution of the road project underlying the contract, certain disputes arose between the parties. Thereafter, the contractor invoked arbitration against NHAI. The parties appointed three different arbitral tribunals, adjudicating different claims arising out the contract. An overview of the arbitral awards rendered, has been produced below:

	Claims made	Findings in the arbitral award	Status of the award
Award dated 5 October 2007 (Award No 1)	(i) Compensation for losses incurred on account of overhead and expected profit; (ii) Compensation for reduced productivity of machinery and equipment deployed; and (iii) Revision of rates to cover for increase of cost of materials and labour during extended period over and above the relief available under escalation (price adjustment) provision in the agreement (the Third Claim)	The arbitral tribunal allowed the first two claims but rejected the Third Claim, as being outside the terms of reference.	The Award No 1 was challenged before Single Bench of the Delhi High Court which upheld claims (i) and (ii) and granted liberty to raise the Third Claim before the second arbitral tribunal. Subsequently, the Award No 1 was upheld by two Division Benches and eventually the Supreme Court in August 2017–September 2017 and attained finality.
Award dated 21 February 2011 (Award No 2)	The contractor invoked arbitration in respect of additional claims in 2007 including the Third Claim, pursuant to the permission granted by the court. Note: This arbitration was invoked while the challenge proceedings against Award No 1 was still pending.	The Third Claim filed before the arbitral tribunal—was rejected by a 2:1 majority. The minority award granted the claims of the contractor. Note: This award was rendered during the pendency of the third arbitration.	This award was challenged, leading to the present proceedings.
Award dated 20 February 2012 (Award No 3)	A third arbitration, in respect of recovery of amounts collected as liquidated damages, along with other claims, was invoked by the contractor on 23 December 2008.	The contractor's claim for recovery of amounts paid as liquidated damages to NHAI, was allowed. It was also observed that NHAI had failed ' <i>to provide a hindrance-free site and had also taken over the road</i> '.	NHAI has paid the awarded sum and Award No 3 had attained finality.

Issues considered

Considering the observations in Award No 3 holding NHAI responsible for some delay in the road project, the court considered whether it is permissible for the court to rely on the findings of a subsequent award (Award No 3) in deciding the objections raised against a previous award (Award No 2)?

While determining the afore-mentioned issue, the court also took note of the underlying problem of multiplicity of arbitral proceedings between the same parties under the same contract.

Decision of the court

The court upheld the rejection of the Third Claim in Award No 2. While dealing with this issue, the court also analysed the observations made in Award No 3 as compared with Award No 1, and its impact on Award No 2.

Contradictory decisions in the Arbitral Awards

Award No 1	Award No 3
Award No 1 held that though the initial work of the contractor was affected by NHAI's inability to fulfil its obligations, once the hindrances were removed, the contractor was unable to accelerate the progress of the work.	Award No 3 recorded that NHAI could not impose liquidated damages on the contractor when it had failed to provide a hindrance-free site and had also taken over the road. Award No 3 also held that NHAI did not provide sufficient evidence to support the claim that delay was caused by the contractor.

The court clarified that notwithstanding the aforementioned difference, the awards stand independently on their own and Award No 2 is well-reasoned and passed in accordance with the terms of the contract. The court observed that a finding in a subsequent award would not render the previous award illegal or contrary to law. Instead, the impugned award would have to be examined as on the date when it was rendered, on its own merits. Accordingly, the court held that the findings in Award No 3 cannot be deployed to argue that Award No 2 ought to be set aside.

The court was, however, of the view that one arbitral tribunal ought to have dealt with all claims, since the core issue in the underlying awards was of 'delay'. Thereafter, the court dealt with the issue of multiplicity of arbitral proceedings arising out of the same contract.

Legal position on multiple arbitrations and awards

- the court observed that ACA 1996 contemplates disputes, which can be raised at different stages and there can be multiple arbitrations in respect of a single contract. (see, ACA 1996, ss 7, 8, 21)
- the court also referred to the principles of *res judicata* and provisions of the Code of Civil Procedure 1908 (CPC), which enshrine the legislative intent to avoid multiplicity of proceedings (see, CPC 1908, Order II, Rule 2). It further stated even though arbitral proceedings are not strictly governed by the CPC, multiplicity of proceedings ought to be avoided as per the principles of public policy and *res judicata* principles apply to arbitral proceedings. (see *Dolphin Drilling Ltd v ONGC AIR 2010 SC 1296*) and *K V George v Secretary to Government, Water and Power Department, Trivandrum & others, R 1990 SC 53*)
- the court also noted that multiplicity of arbitral proceedings involves parallel adjudication of overlapping issues resulting in uncertainty and confusion, which further defeats the purpose of arbitration as a mechanism for speedy and effective resolution of disputes

The court also observed that multiplicity of arbitral proceedings may arise in the following situations:

- arbitrations and proceedings between the same parties under the same contract
- arbitrations and proceedings between the same parties arising from a set of contracts constituting one series, which bind them in a single legal relationship
- arbitrations and proceedings arising out of identical or similar contracts between one set of entities, wherein the other entity is common

Guidelines to tackle multiplicity of proceedings

The court having dealt with the root cause, made certain suggestions for reducing multiplicity of arbitral proceedings:

- in respect of a particular contract or a series of contracts that bind the parties in a legal relationship, the endeavour always ought to be to make one reference to one arbitral tribunal

- a party invoking arbitration under a contract ought to raise all its claims that have already arisen as on the date of invocation for reference to arbitration. In order to deter parties from raising only 'few' disputes instead of 'all' the disputes that have arisen, such other disputes/claims that had arisen but not included (in the invocation letter or in the terms of reference) ought to be held as being barred/waived. Such non-inclusion may be condoned only on being specifically permitted by the arbitral tribunal for any legally justifiable/sustainable reasons
- 'if an arbitral tribunal is constituted for adjudicating some disputes under a particular contract or a series thereof, any further disputes which arise in respect of the same contract or the same series of contracts, ought to ordinarily be referred to the same tribunal. The arbitral tribunal may pronounce separate awards in respect of the multiple references. However, the possibility of contradictory and irreconcilable findings would be avoided, since the tribunal would be the same
- in case of proceedings initiated to challenge arbitral awards:
 - the parties approaching the court ought to disclose any other proceedings pending or adjudicated in respect of the same contract or series of contracts, the stage of the said proceedings (if any) and the forum where the said proceedings are pending or have been adjudicated
 - during challenge proceedings—parties ought to disclose the pendency of all challenge petitions, if any, in respect of the same contract. Parties should also seek disposal of such said petitions together in order to avoid conflicting findings
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- regarding appointment of arbitrators:
 - in petitions seeking appointment of an arbitrator, parties ought to disclose if any arbitrator has already been appointed—for adjudication of the claims of either party arising out of the same contract or the same series of contracts
 - appointing authorities under contracts having arbitration clauses ought to avoid appointment or constitution of separate arbitrators/arbitral tribunals for different claims/disputes arising from the same contract, or same series of contracts