

Recent Court Decisions on Arbitration Law

Indian Supreme Court Splits on Whether Two-Tiered Arbitration Agreements are Valid

A Division Bench of the Indian Supreme Court has handed down two diverging opinions on the validity of two-tiered arbitration agreements. In one decision, Justice S.B. Sinha held two-tiered arbitral decisions invalid under India's Arbitration and Conciliation Act, 1996 (the Act) because the Act provides for "only one award under one set of rules." According to Justice Sinha, this precludes agreement to submit potential disputes to two different arbitral bodies, providing arbitral parties a second bite at the apple. Reaching an opposite conclusion, Justice Tarun Chatterjee found that the prior Arbitration and Conciliation Act, 1940 allowed two-tiered arbitration and nothing in the new law affirmatively changed it. Now a larger bench of five or more justices, referred to as a Constitutional Bench, will hear the matter again to settle the controversy.

This case demonstrates the uncertainty that can be created by two-tiered arbitration agreements in which the parties seek determinations in multiple jurisdictions. Typically, the better approach is a well crafted, single-tiered arbitration clause. This clause should clearly stipulate a single place of arbitration and applicable law, the language of arbitration, the method of selecting arbitrators, and built-in enforcement mechanisms. Parties might, however, include measures for interim relief in situations where judicial intervention may be necessary to preserve their equitable rights. For example, joint ventures that share intellectual property can lead to a situation where a member may need immediate injunctive relief to prevent the violation of its intellectual property rights. While many jurisdictions permit courts to order interim relief in connection with arbitration, the extent to which courts may consider interim relief provisions a form of two-tiered arbitration and, thus, invalid is unsettled.

U.S. Supreme Court Holds That Challenges to the Legality of a Contract Not Specific to Arbitration Clause Must Go to Arbitrator

On February 21, 2006, in *Buckeye Check Cashing Inc. v. Cardegna, et al.*, 126 S. Ct. 1204 (2006), the United States Supreme Court ruled 7-1, with Justice Thomas dissenting, that a challenge to the legality of a contract, not specific to the arbitration clause, must go to the arbitrator and not the courts. With its ruling the Court reversed the Florida Supreme Court, thereby seeking to ensure uniform enforcement of arbitration clauses in all states, regardless of their individual state contract laws.

The Supreme Court held that *Prima Paint v. Flood & Conklin Manufacturing Company*, 388 U.S. 395 (1967), the Supreme Court decision that established the doctrine of severability, applied to the case. The doctrine of severability provides that an arbitration clause is severable from the rest of the contract. Therefore, while challenges to the arbitration clause itself may go to the courts, the arbitral tribunal has sole jurisdiction regarding contract validity.

The *Buckeye* decision secures a party's right to arbitrate, even in cases where the overriding contract itself is declared illegal. Moreover, the decision reinforces the Court's holding in *Prima Paint* and demonstrates the Court's current pro-arbitration bent.

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English Court Refuses to Set Aside an Arbitration Award on Grounds That One of the Parties Admitted Liability

Exfin Shipping Ltd. v. Tolani Shipping Co. Ltd., [2006] EWHC 1090 (Comm) (U.K.)

The Queen's Bench Division of the English Commercial Court held that if a party admits liability to a specific claim but does not render payment, there is a sufficient dispute for the matter to be referred to arbitration under an applicable arbitration clause. The English justice rejected a party's application which sought to set aside an arbitration award on the ground that no dispute existed because the party had admitted liability, calling the application "wholly unmeritorious." With the decision, the English court prevents parties from attempting to concede their way out of arbitration.

In *Exfin*, Exfin Shipping (India) Ltd. sought to set aside an award in favor of Tolani Shipping Co. Ltd Mumbai for \$130,000 plus interest. Exfin argued for want of substantial jurisdiction under Section 67(1) of the 1996 U.K. Arbitration Act. As they had admitted liability, Exfin asserted, there was no "dispute" referable to arbitration under the arbitration clause. However, Justice Langley ruled that "[i]f one party says you must pay now and the other refuses to do so they are in dispute."

Dismissing the application, Justice Langley awarded indemnity costs against Exfin. "Charterers have acted in their own perceived commercial interest and without merit and should pay the commercial price of doing so."

English Court Upholds Arbitration Agreement Where Arbitrator Would Rule on Whether He Has Jurisdiction Over Arbitration

Amir Weissfisch v. Anthony Julius, Rami Weissfisch, and Philip Davis, [2006] EWCA Civ 218 (U.K.)

On March 8, 2006, the English Court of Appeals held that an arbitrator may consider whether he has jurisdiction over an arbitration even though a party alleged that the arbitration agreement was void due to fraudulent acts committed by the arbitrator. The Court rejected Amir Weissfisch's argument that arbitrator Anthony Julius would be both judge and witness if he were allowed to decide on the jurisdiction issue. The Court found that Weissfisch "expressly agreed that disputes should be resolved by Mr. Julius under arbitration which would be governed by Swiss law and have its seat in Switzerland."

The Court ruled that Weissfisch could appear before Julius in Switzerland to challenge his jurisdiction without affirming the arbitration agreement. The Court agreed that "it is not uncommon for arbitrators to be called upon to consider submissions that they are not competent to act by reason of bias." If unsatisfied with the result, Weissfisch will be able to appeal the decision to the Swiss courts as allowed by the arbitration agreement.

Clients are, therefore, advised to give lengthy consideration to their choice of arbitrators, seat of arbitration, and choice of law, as these decisions may bind them even in what may seem extraordinary circumstances.

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