

Supreme Court of India—Arbitral tribunal cannot reject counter-claims arising out of the dispute, due to respondent's failure to notify claims prior to commencement of arbitration (National Highway Authority of India v Transstroy (India) Ltd)

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Arbitration analysis: This case preserves a respondent's valuable right to file a counter-claim under section 23(2A) of the Indian Arbitration & Conciliation Act 2015 (A&C Act 2015), without the need to follow the pre-arbitration procedure in an arbitration clause and to make a separate or new reference, as long as the counter-claim falls within the scope of the arbitration agreement. The court held that once any dispute, difference or controversy is notified by a claimant under the arbitration clause, the entire subject matter including counter claim/set off would form subject matter of arbitration as a dispute arising out of the arbitration clause. In view of A&C Act 2015, s 23(2A), there is no reason for and additionally requiring a respondent to make a new reference and curtailing a respondent's right to make the counter claim. Dis-allowing the counter claim in proceedings arising out of the claims made by a claimant may lead to parallel proceedings before various fora. Written by Adimesh Lochan, member, International Dispute Resolution Practice and Kshama A Loya, leader, International Dispute Resolution Practice at Nishith Desai Associates.

[National Highway Authority of India v Transstroy \(India\) Ltd Civil Appeal, No. 6732 of 2021](#)

What are the practical implications of this case?

A claimant can challenge the respondent's attempt to file a counter-claim by hair-splitting a dispute and demonstrating that the subject matter of counter-claim does not fall within the scope of the arbitration agreement. The corollary is that the tribunal does not have jurisdiction, and the respondent will need to start afresh by making a new reference as per the arbitration clause.

The respondent will need to demonstrate that the subject matter of the counter-claim arises out of the same dispute initiated by the claimant. Once this threshold is met, there is no requirement under Indian law for the respondent to additionally comply with the pre-arbitration procedure as per the arbitration clause. It can seek refuge to file a counter-claim under A&C Act 2015, s 23(2A).

The appropriate test would be to only consider whether the 'dispute' arisen between the parties has been adequately notified by either party to the counterparty. Particularly, it is not relevant to consider whether each claim/s raised by each party is also notified.

Therefore, a respondent's non-compliance with procedure under an arbitration clause would not be fatal to its right to file a counterclaim.

Such an approach is likely to further expeditious resolution of disputes and curtail multiplicity of proceedings—the very object of section 23(2A) brought about by the 2015 amendment to A&C Act 2015.

It may still be worthwhile for parties to reserve their right to make counter-claims in legal notices, and also at the preliminary meeting with the arbitral tribunal. This will ensure an element of predictability in the arbitration schedule for filing of pleadings and completion of arbitration proceedings within the set time-limit.

What was the background?

TIL and NHAI entered into an Engineering Procurement and Construction Agreement ('Contract'). Dispute arose between the parties with respect to certain default in contractual obligations of the

Respondent. NHAJ alleged that even after a cure period was provided to the respondent, it remained in breach of its obligations under the contract.

Pursuant to a termination notice issued by NHAJ, where NHAJ had reserved its right to claim damages, TIL invoked arbitration and followed the pre-arbitration procedure.

In its statement of defense, NHAJ reserved its right to make counter-claims. Two days after filing the statement of defense, it applied for extension of time to file a counter-claim. The arbitral tribunal rejected this request on the ground that the counterclaims were not notified at the pre-arbitral stage as per the arbitration clause; and hence fell outside the scope of the 'dispute' initiated by TIL.

The arbitration clause provided for a three-step mechanism to resolve the disputes, as follows:

- notification of disputes: In the event that a 'dispute, difference, or controversy' arose between the parties, the same is required to be 'notified in writing' to the other party
- resolution by amicable settlement: The parties are required to attempt to amicably resolve the 'dispute' in accordance with the conciliation procedure set out at Clause 26.2
- invocation of arbitration: Any dispute that is not resolved amicably shall be finally settled by arbitration in accordance with A&C Act 2015

The arbitral tribunal held that since NHAJ did not notify the Respondent of its counterclaim under Clause 26.1.1 of the contract, the counterclaim was beyond the scope of the arbitration agreement and the Tribunal did not have jurisdiction to adjudicate upon the dispute.

Aggrieved by the orders of the arbitral tribunal, NHAJ preferred an appeal before the Delhi High Court, which upheld the decision of the tribunal. Thereafter, NHAJ moved the present appeal before the Supreme Court.

The issues before the Supreme Court was: whether the High Court and arbitral tribunal had committed an error in rejecting NHAJ's application under A&C Act 2015, s 23(2A)?

What did the court decide?

The Supreme Court expressed that the first two steps of Clause 26 of the contract (viz notification and amicable settlement) were conciliatory in nature, and therefore, must be interpreted in a pragmatic and practical manner. The Supreme Court held that once a dispute is notified under Clause 26.1 of the contract, the entire subject matter of the dispute would form the subject matter of arbitration, including all claims, setoffs and counterclaims. Accordingly, the Supreme Court held that both the arbitral tribunal and the Delhi High Court erred in rejecting the counter-claims for want of NHAJ's compliance with the pre-arbitral procedure. The Supreme Court also noted that NHAJ had reserved its right to claim damages in its termination notice, and to file counter-claims in its statement of defence.

If NHAJ's counterclaim is rejected, it would defeat the object and purpose of A&C Act 2015, s 23(2A), and further lead to multiplicity of the proceedings.

In the light of the above reasons, the Supreme Court quashed and set aside the order of the tribunal and impugned judgment of the High Court.

Case details:

- Court: Supreme Court of India
- Judge: Justice M.R. Shah
- Date of judgment: 11 July 2022

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