Dispute Resolution Hotline

February 25, 2011

SUPREME COURT REJECTS PETITION FOR APPOINTMENT OF ARBITRATOR

Supreme Court of India rejects petition under Section 11(6) of Arbitration & Conciliation Act, 1996 holding that application of Part I of the Act has been deemed to be excluded

INTRODUCTION:

The Supreme Court of India ("**Supreme Court**") in the case of *Dozco India Pvt. Ltd.(**"Applicant"**) –Vs- Doosan Infracore Co. Ltd. (**"Respondent"**)*[1], held that when applicability of Part I of the Act has been excluded, petition under Section 11 (6) of the Arbitration & Conciliation Act, 1996 ("**the Act**") for appointment of arbitrator is not maintainable.

FACTS:

Applicant is a company registered under the Companies Act, 1956 and the Respondent is incorporated in Seoul, South Korea having its principal place of business at Seoul.

A Distributorship Agreement (**"Agreement"**) was executed by and between the Applicant and the Respondent pursuant to which the Applicant was to be the exclusive distributor of the Respondent in India and Bhutan for its products like Excavators, Wheel Loaders etc. Disputes arose by and between the Applicant and the Respondent pursuant to which the Respondent purported to terminate the Agreement.

The Agreement contained an arbitration clause for resolution of disputes. Disputes having arisen between the Applicant and Respondent, the Applicant issued notice to the Respondent for appointment of arbitrator for resolution of disputes between them. The Respondent having failed to appoint an arbitrator, the Applicant filed an application under Section 11(6) of the Act[2] for the appointment of an arbitrator before the Chief Justice of India treating the disputes between the Applicant and Respondent as international commercial arbitration.

The arbitration clause was contained in Article 23 of the Agreement which is reproduced as under:

"Article 23. Arbitration - 23.1: All disputes arising in connection with this Agreement shall be finally settled by arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement then in force of the International Chamber of Commerce."

Moreover, Article 22 of the Agreement stated that, *"This agreement shall be governed by and construed in accordance with the laws of The Republic of Korea."*

ISSUES:

The Applicant relied on the law laid down by the Supreme Court of India in *Bhatia International*v. *Bulk Trading S.A. and Anr.*[3], *Indtel Technical Services Private Ltd.* v. *W.S. Atkins Rail Ltd.*[4]and *Citation Infowares Ltd.* v. *Equinox Corporation*[5] which states that in case of international commercial arbitration which are to be held outside India and are to be governed by foreign laws, the provisions of Part I of the Act would still apply unless the parties by agreement, express or implied, have excluded the application of all or any of provisions of Part I of the Act.

Thus the Applicant contended that the agreement did not specifically or impliedly exclude the application of any of the provisions of Part I of the Act. The Applicant further contended the fact that the seat of arbitration was at Seoul could not be taken as exclusion as under Article 23 of the Agreement it was also provided within the brackets that the arbitration may take place at such other place as the parties may agree. Hence, the Applicant contended that Seoul cannot be taken to be the seat of arbitration and the same could be anywhere the parties decide it to be.

The Application was challenged by the Respondent on the ground of maintainability. It was contended by the Respondent that Article 22 and Article 23 of the Agreement implies that the Rules of Arbitration of International Chamber of Commerce would apply for appointment of arbitrator and that there is express exclusion of Indian Courts and/or the applicability of Part I of the Act as the Agreement shall be governed by and construed in accordance with laws of Republic of Korea. The Respondent relying on the decision in *Naviera Amozonica Peruana S.A.* v. *Compania Internationacional De Seguros Del Peru* [6] contended that the bracketed portion in Article 23 of the Agreement cannot be interpreted to mean that the seat of arbitration could be anywhere else as per the choice of the parties. The bracketed portion is only for the purpose of providing the convenience of holding proceedings of the arbitration elsewhere than Seoul and in no way alters the seat of arbitration. The Respondents further relied upon the following passage from *Redfern & Hunter:*

"…..it is by no means unusual for an arbitral Tribunal to hold meeting- or even hearing - in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses.... It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country - for instance for the purpose of taking evidence.... In such circumstances, each move of the arbitral Tribunal does not in itself mean that the seat of arbitration changes. The seat of the arbitration remains the place initially

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agreed to by the parties."

It was contended that there is a distinction between legal seat of arbitration and geographically convenient location for holding proceedings.

The Respondent also compared Article 23 of the Agreement with the arbitration clause under reference in the case of *Citation Infowares Ltd.* v. *Equinox Corporation* (*Supra*) and contended that the express provision as contained under Article 23 of the Agreement providing the seat of arbitration to be Seoul was not the case in the *Citation Infowares* and therefore contended that the application of Part I of the Act has been specifically excluded by the Agreement.

JUDGMENT AND THE RATIONALE:

Relying on the judgment of *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd. and Ors*[7], the Supreme Court observed that "*the arbitrability of the dispute is to be determined in terms of the law governing arbitration agreement and the arbitration proceedings has to be conducted in accordance with the curial law*" i.e. procedural law of the arbitration. It is the curial law which governs how a reference is to be conducted.

Further, quoting from the judgment of *Sumitomo Heavy Industries Case (Supra)* which referred to Mustill and Boyd (the Law and Practice of Commercial Arbitration in England, 2nd Edition) the Supreme Court held that:

"In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e. the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate."

Thereafter the court differentiated the present case from *Indtel Technical Services Private Ltd.* v. *W.S. Atkins Rail Ltd* & *Citation Infowares Ltd.* v. *Equinox Corporation* (*Supra*) on the ground that in the two cases the parties had not chosen the law governing the arbitration procedure and the seat of arbitration while under the current factual matrix they have.

The judgment of *Naviera Amozonica Peruana S.A.* v. *Compania Internationacional De Seguros Del Peru (supra)* was heavily relied upon and the Supreme Court quoted with approval that:

"All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law: (a) the law governing the substantive contract; (2) the law governing the agreement to arbitrate and the performance of that agreement; (3) the law governing the conduct of the arbitration. In the majority of the cases all three will be the same, but (1) will often be different from (2) and (3) and occasionally, but rarely, (2) may also differ from (3)"

It was then observed that the language of Article 23.1 suggested that all the three laws are the laws of the Republic of Korea with the seat of the arbitration in Seoul, Korea and the arbitration to be conducted in accordance with the rules of International Chamber of Commerce.

Supreme Court agreed with the contentions of the Respondent and the distinction between the legal seat and the geographically convenient location as highlighted by the Respondent. It was held that the bracketed portion could not restrict the application of the main clause and that the same was only inserted as a provision for the convenience of the arbitral tribunal to hold its proceedings.

The Supreme Court held that the seat of arbitration to be Seoul and therefore the laws that would govern the reference i.e. the curial law are laws of Korea. The Supreme Court held that it was clear from Article 22 and Article 23 of the Agreement that the parties had agreed to exclude the application of Part I of the Act and hence the Supreme Court did not have jurisdiction to entertain an Application under Section 11(6) of the Act.

Therefore, the Supreme Court held that the present petition Section 11(6) of the Act was not maintainable as the application of Part I of the Act has been impliedly excluded by the Agreement.

ANALYSIS

The judgment take a step forward in cases of international commercial arbitration and holds that where parties have chosen a foreign law and seat of arbitration outside India, application of Part I of the Act was deemed to be excluded even in absence of express exclusion.

Thus, this judgment comes as a welcome change step curtailing the scope of judicial interference in line with the objective and policy behind the Act and the UNCTRAL Model law on which the Act is based.

- Debargha Basu & Vyapak Desai

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1 MANU/SC/0812/2010

2 Sec. 11(6) of the Arbitration & Conciliation Act, 1996 states:

"(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

3 2002 (4) SCC 105

4 2008 (10) SCC 308

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5 2009 (7) SCC 220

6 1998 1 LLR

7 1998 (1) SCC 305