Dispute Resolution Hotline

March 09, 2009

WHERE THE INTENT TO ARBITRATE ONCE AGAIN PREVAILED

Following its earlier decisions, the Hon'ble Supreme Court of India ("**Court**"), by its order dated February 11, 2009, passed in Arbitration Application No. 6 of 2007, filed by *M/s. Nandan Biomatrix Ltd.* ("**Applicant**")*against D1 Oils Ltd.* ("**D1 Oils**"), held that the existence of an arbitration agreement was required to be gathered from the intention of the parties to resolve disputes through arbitration and the Arbitration & Conciliation Act, 1996 ("**the Act**") did not prescribe any form for an arbitration agreement. The Court also, exercising its judicial power under Section 11 of the Act, as elucidated upon in *S.B.P. & Co. Vs. Patel Engineering Ltd.*[1], proceeded to delve into the issue of whether there was a valid arbitration agreement between the parties and whether there existed a live claim between the parties. In this matter, the Court has referred all disputes and differences between the parties to the Singapore International Arbitration Centre, which would nominate an arbitrator from its panel to decide all disputes and differences.

BACKGROUND:

On August 10, 2004, the parties had entered into an agreement for inter alia supply of seeds and establishing nurseries ("**Supply Agreement**"). The Supply Agreement contained an arbitration clause whereunder "*Any dispute that arises between the parties shall be resolved by submitting the same to the institutional arbitration in India under the provisions of Arbitration and Conciliation Act, 1996.*"

In addition to the Supply Agreement, the parties also entered into a joint venture agreement on September 30, 2004 ("**Joint Venture Agreement**") and a research and development agreement on November 26, 2004 ("**R&D Agreement**"). Whilst the Joint Venture Agreement did not contain an arbitration clause, an arbitration clause was incorporated into the R&D Agreement on April 09, 2005 by an addendum. However it was claimed by D1 Oils that on October 16, 2004, an agreement terminating the Supply Agreement ("**Deed of Termination**") was executed by and between the parties whereunder, the Supply Agreement *purportedly*stood terminated.

Disputes arose between parties, when the Applicant claimed damages under the Supply Agreement. The Applicant contended that the said Deed of Termination was not executed by the Applicant and the Deed of Termination was brought about by D1 Oils forging the signatures of the directors of the Applicant, with a view to avoid the liabilities and obligations under the Supply Agreement. The Applicant claimed knowledge of the Deed of Termination only on May 24, 2005 and further claimed that the two directors whose signatures had been forged did not, in fact, have the authority to sign the Deed of termination and to investigate the matter further, the Applicant lodged criminal complaint with the Police on September 1, 2005 in Hyderabad.

D1 Oils, whilst denying any allegation of forgery, inter alia contended that if the Applicant truly believed that the Supply Agreement had not been terminated (by the Deed of Termination), it would not have entered into the R&D Agreement (which was subsequent in time to the Deed of Termination) and under which, the Applicant had received monies. D1 Oils contended that the intention of entering into the R&D Agreement was to put an end to the Supply Agreement.

JUDGMENT:

The Court observed that the entire controversy revolved around the purported Deed of Termination and that the claims of the Applicant concerns willful breach of obligations by D1 Oils under the Supply Agreement. The Court, exercising its judicial power under Section 11 of the Act, as elucidated upon in *S.B.P. & Co. Vs. Patel Engineering Ltd.*, proceeding to delve deeper into the matter and examine the fundamental questions before it being whether there was, in fact (1) an arbitration agreement and (2) a live dispute, between the parties before it.

Relying upon its earlier decisions, the Court has held that:

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1. Where parties had agreed that if disputes arose between them in respect of the subject matter of the contract, then such disputes would be referred to arbitrations – such an arrangement would spell out an arbitration agreement;
2. an arbitration clause was not required to be stated in any particular form;
3. it was immaterial whether or not the expressions "arbitration", "arbitrator" or "arbitrators" had been used, where the intention of the parties to refers disputes to arbitration could be determined from the terms of the agreement;
   Relying upon the intention of the parties recorded in the Supply Agreement to refer disputes to institutional arbitration and not through ad-hoc arbitration, the Court held that there existed a valid arbitration agreement between the parties.

Interestingly, whilst dealing with the question of whether there was a live claim under the arbitration agreement, the Court held that a number of issues arose for determination such as whether the Deed of Termination stood forged, whether it had been signed by two directors, who were not authorized to sign it, effect of the (subsequent) R&D Agreement on the Supply Agreement, whether the Joint Venture Agreement replaced the Supply Agreement, whether the three agreements should be read together or whether the Supply Agreement was a stand-alone item, whether claims under the Supply agreement stood extinguished or had ceased, in view of the Deed of Termination.

Holding that if these issues were to be looked into, there existed a 'live claim' between the parties, the Court referred all disputes and differences between the parties to the Singapore International Arbitration Centre, which would nominate an Arbitrator from its panel to decide all disputes and differences between the parties.

ANALYSIS & IMPLICATIONS:

This judgment reaffirms that intention of the parties to arbitrate is pivotal in determining whether there exists an arbitration agreement. Thus as held earlier in *Great Offshore Ltd. Versus Iranian Offshore Engineering & Construction Company* (see our hotline dated September 09, 2008), where the Court has held that technical issues such as stamping, seals, signatures or production of original agreement are to be considered as mere indicators of intent and should not be insisted upon if parties are able to show intent (to arbitrate) in other ways. Further, in *M. Dayanand Reddy versus A.P. Industrial Corporation Limited* [2] the Court has held that the intention of the parties to refer the dispute to arbitration can be ascertained from the terms of the agreement and thus the use of expressions such as "*arbitration*", "*arbitrator*" or "*arbitrators*" is immaterial.

In light of this judgment, even where there exists a specific arbitration agreement whereunder parties have agreed to refer disputes to institutional arbitration but have failed to name such institution, the courts will interpret such clause as the intent to refer disputes to institutional arbitration (instead of ad-hoc arbitration) rather than as a vague and inoperative clause.

This judgment has a significant impact on the much debated issue raised by the judgment in *S.B.P. & Co. versus M/s Patel Engineering Ltd. & Anr*[3], on whether the act of appointment of arbitrators under Section 11 of the Act is an administrative or judicial power of the courts. The debate revolves around the issue that whilst the Act seeks to minimize the role of the courts in arbitration, if the court treats its powers under Section 11 as a judicial power, the courts would, effectively, have powers to delve deeper into the issues in the dispute around the arbitration agreement and would not merely have a limited role to play, as envisaged under the Act. As of now though, the judgment in *S.B.P. & Co. versus M/s Patel Engineering Ltd. & Anr* is settled law on this aspect and which judgment had, in the instant case, enabled the Court to delve into the matter and let the intention of the parties to arbitrate prevail.

- Litigation & Dispute Resolution Team

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1. (2005) 8 SCC 618
2. (1993) 3 SCC 137
3. (2005) 8 SCC 618

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the need to refer to the original pronouncements.