

Dispute Resolution Hotline

October 04, 2011

SUPREME COURT INTERPRETS CHOICE OF SIAC RULES AS EXCLUSION TO THE APPLICABILITY OF PART I OF THE INDIAN ARBITRATION ACT

INTRODUCTION

The Supreme Court in its judgment dated September 1, 2011 in the matter of *Yograj Infrastructure Ltd* (“Appellant”) *v. Ssang Yong Engineering & Construction Co. Ltd.* (“Respondent”), rejecting an appeal under section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 (the “Act”) ruled that where the seat of arbitration was Singapore and rules governing the arbitration were of the Singapore International Arbitration Centre (“SIAC”), then Part I of the Act was excluded.

FACTS

The Appellant is a company incorporated under the Companies Act, 1956, while the Respondent is a company incorporated under the laws of the Republic of Korea with its registered office at Seoul in Korea and its project office at New Delhi. In 2006, the National Highways Authority of India (“NHAI”) awarded a contract to the Respondent, for a project in the State of Madhya Pradesh. The Respondent entered into a Sub-Contract with the Appellant for carrying out the work in question.

In 2009, Respondent issued a notice of termination of the Agreement, inter alia, on the ground of delay in performing the work under the Agreement.

The arbitration clause contained in the Agreement in Clause 27 read as follows:

"27.1 All disputes, differences arising out of or in connection with the Agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules as in force at the time of signing of this Agreement. The arbitration shall be final and binding.

27.2 The arbitration shall take place in Singapore and be conducted in English language.

27.3 None of the Party shall be entitled to suspend the performance of the Agreement merely by reason of a dispute and/or a dispute referred to arbitration."

Clause 28 of the Agreement described the governing law and provided:

"This agreement shall be subject to the laws of India. During the period of arbitration, the performance of this agreement shall be carried on without interruption and in accordance with its terms and provisions."

On account of the above, the Appellant filed an application before the District and Sessions Judge, Narsinghpur, Madhya Pradesh, under Section 9 of the Act praying for interim reliefs. A similar application under Section 9 the Act was filed by the Respondent before the same Court on 30th December, 2009, also for interim reliefs. Ultimately, on 20th May, 2010, the dispute between the parties was referred to arbitration in terms of the Agreement and a Sole Arbitrator, Mr. G.R. Easton, was appointed by the SIAC on 20th May, 2010. Both the parties filed applications before the Sole Arbitrator seeking interim relief under Rule 24 of the SIAC Rules in June, 2010. The Arbitrator passed an interim order on 29th June, 2010 in favour of Respondent.

An appeal was filed by the Appellant before the District Court, Narasinghpur, under Section 37(2)(b) of the Act, against the order of the Sole Arbitrator, which was dismissed on the ground of maintainability and lack of jurisdiction, since the seat of the arbitration proceedings was in Singapore and the said proceedings were governed by the laws of Singapore.

A Civil Revision filed against this order of the District Court was dismissed by the Madhya Pradesh High Court in August, 2010. The High Court observed that under Clause 27.1 of the Agreement, the parties had agreed to resolve their dispute under the provisions of SIAC Rules which expressly or, in any case, impliedly also adopted Rule 32 of the said Rules, which categorically provides that the law of arbitration under the said Rules would be the International Arbitration Act, 2002, of Singapore.

Rule 32 (of the 2007 Rules) provides:

"Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act (Chapter 143A, 2002 Ed, Statutes of the Republic of Singapore) or its modification or re-enactment thereof (emphasis supplied)

Against this decision of the High Court, the Appellant filed the present Special Leave Petition before the Supreme Court of India.

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The issues involved in the instant case were:

- (i) Whether Indian Courts would have jurisdiction to entertain an appeal under Section 37 of the Act against an interim order passed by the Arbitral Tribunal with its seat in Singapore;
- (ii) Whether the "law of arbitration" would be the International Arbitration Act, 2002, of Singapore; and
- (iii) Whether the "Curial law" would be the laws of Singapore.

ARGUMENTS

Contentions of Appellant

Appellant contended that:

- 1. Indian law is the applicable law of arbitration, in terms of the agreement arrived at between the parties. This agreement is evident from the wording of clause 28 of the Agreement, which provided that the Agreement would be subject to the laws of India. In other words, all interim measures sought to be enforced would necessarily have to be in accordance with Sections 9 and 37(2)(b) of the Act.
- 2. As per clause 27.1 of the Agreement, SIAC Rules would apply only to the arbitration proceedings, but not to appeals from such proceedings. It was submitted that the right to appeal from an interim order under Section 37(2)(b) is a substantive right provided under the Act and was not governed by the SIAC Rules.
- 3. Section 37(2)(b) of the Act is a substantive and non-derogable provision.
- 4. Rule 32 of the SIAC Rules, which does not provide for an appeal, is in direct conflict with non-derogable provision contained in Section 37(2)(b) of the Act and hence in light of Rule 1.1 of the SIAC Rules, appeal under Section 37 (2) (b) of the Act would lie.
- 5. The very fact that the Respondents themselves had approached the District Court, Narsinghpur, in India and had filed an application under Section 9 of the 1996 Act, and even mentioned that the contract was within the jurisdiction of the court, indicated that the Respondent also accepted the applicability of the Act. The Appellant further relied on section 42 in Part I of the Act, to further buttress their contention that the District Court, Narsinghpur would have jurisdiction to deal with the Appeal.

Thus, the Appellant argued, the proper law of the arbitration would be the laws of India i.e the Act, and only the curial law/ procedural law would be the SIAC Rules. Appellant contended that in the absence of any express choice, the proper law of the contract would be the proper law of the Arbitration Agreement. In the instant case, admittedly the proper law of contract was the law of India and since the parties had not expressly made any choice regarding the law governing the Arbitration Agreement, the proper law of contract, would be the proper law of the Arbitration Agreement. Thus, Part I of the Act was applicable in this case, and the International Arbitration Act of Singapore would have no application as substantive law to this case, though the conduct of the proceedings of arbitration would be governed by the SIAC Rules.

CONTENTIONS OF RESPONDENT

RESPONDENT SUBMITTED THAT:

- 1. The parties had agreed that the seat of arbitration would be Singapore and that the arbitration proceedings would be continued in accordance with SIAC Rules, as per Clause 27.1 of the Agreement. Though it was also agreed that the proper law of the contract would be Indian law, the proper law of the arbitration would be Singapore law in light of Rule 32 of the SIAC Rules.
- 2. It was submitted that choice of the seat of arbitration empowered the courts within the seat of arbitration to have supervisory jurisdiction over such arbitration.
- 3. By virtue of Clause 27 of the Agreement, and by accepting the SIAC Rules, the parties had agreed that Part I of the Act would not apply to the arbitration proceedings taking place in Singapore. This was reiterated in the Terms of Reference that the arbitration proceedings would be governed by the laws of Singapore.
- 4. Application under Section 9 of the Act was filed before the District Court, Narsinghpur, prior to the date of invocation of the arbitration proceedings and before the curial law, Singapore law, became operative and therefore Section 42 of the Act will not be applicable after the arbitration proceedings have commenced.

JUDGMENT

The decision turned on Clause 27.1 and 28 of the Agreement between the parties. As evident from Clause 27.1, the procedural law with regard to the arbitration proceedings, was unambiguously the SIAC Rules. Clause 27.2 made it clear that the seat of arbitration would be Singapore.

To decide on the law on the basis of which the arbitral proceedings were to be decided, the Court looked at the Clause 28 of the Agreement. Clause 28 prescribed that the governing law of the agreement would be the laws of India.

The Supreme Court held that while the proper law governed the agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is the law governing the agreement, which would also be the proper law applicable to the arbitration proceedings <s>itself</s>. But, as the parties had categorically agreed that the arbitration proceedings, if any, would be governed by the SIAC Rules as the curial law, which included Rule 32, requiring applicability of the Singapore International Arbitration Act, 2002, the proper law of arbitration proceedings would be the Singapore International Arbitration Act, 2002 and thus Part I of the Act stood excluded.

With regard to Section 42 of the Act, the Supreme Court held that the same was applicable at the pre-arbitral stage i.e. when the Arbitrator had not also been appointed. Once the Arbitrator was appointed and the arbitral proceedings were commenced, the SIAC Rules became applicable excluding the applicability of Section 42 as well as Part I of the

Act, including the right of appeal under Section 37 thereof.

Thus, the appeal under Section 37(2) (b) of the Act was held not maintainable and was dismissed.

ANALYSIS

This judgment continues the positive stand taken by the Supreme Court in its recent decisions to respect party autonomy in International Arbitration. It is the first case in which the court has shown willingness to examine the rules of the International Arbitral Tribunal to reach to its final conclusion. It is therefore a step forward in the direction of diluting the effect to past judicial precedents in case of Bhatia International and Venture Global.

- **Prateek Bagaria & Vyapak Desai**

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