

Dispute Resolution Hotline

October 14, 2011

DELHI HIGH COURT DEALS WITH MULTIPLE QUESTIONS IN AID OF INTERNATIONAL ARBITRATION

INTRODUCTION

The Delhi High Court in its judgment dated August 11, 2011 in the matter of *Anita Garg* (“Appellant”). *v/s* *Glencore Grain Rotterdam B.V.* (“Respondent”), rejecting an application under section 34, of the Arbitration and Conciliation Act, 1996 (“Act”) held that:-

1. Where the curial and substantive law is English law, Part I of the Act is expressly excluded.
2. The Appellant application under Section 34 of the Act is barred by *res judicata* in light of the recourse taken under Section 48 of the Act by defending the Execution Petition filed by the Respondent.
3. Section 10 of the Act is derogable.

FACTS:

The present case is an appeal assailing the order of the learned Single Judge of the Delhi High Court that dismissed dismissing the Appellant's Objections under Section 34 of the Act challenging both the Interim Award dated June 20, 1997 as well as the Final Award dated July 29, 1997 (“Awards”) passed by The London Rice Brokers' Association (“LRBA”).

The contract between the parties contained an arbitration clause and a domicile clause which read as follows:

11. Any dispute arising on this Contract shall be referred for settlement to the Arbitration by two Members of this Association's Panel of Arbitrators or their Umpire, being also a Member of this Panel. Each party to appoint one Arbitrator and having the right to reject one nominee. In the event of any party omitting to nominate an Arbitrator within ten days of receipt of notice of appointment of an Arbitrator by the other party, or of the Arbitrators failing to agree on the appointment of an Umpire, the Committee of the London Rice Brokers Association, in either case, shall have power to appoint one forthwith, who shall act on behalf of and as if nominated by the party or parties in default. Claims for arbitration other than Arbitration on quality shall be made and the Claimant's Arbitrator shall be nominated not later than 90 days after the expiry of the contract period of shipment or not later than 90 days from the date of final discharge of the ship at port of destination whichever period may last expire. The parties to the Arbitration shall have the right of appealing against any Award (except on questions of law) within thirty days from the date of Award to the London Rice Brokers Association, whose decision shall be final. Any payments arising out of the Award are to be made within 30 days of the date hereof.

14. Domicile- The Contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by English Law. Any dispute arising out of or in connection therewith shall be submitted to arbitration in accordance with the Rules of the London Rice Brokers' Association. The serving of proceedings upon any party by sending same to their last known address together with leaving a copy of such proceedings at the office of the London Rice Brokers' Association shall be deemed good service, rule of law or equity to the contrary notwithstanding.”

A. CIVIL SUITS FOR SET ASIDE AND ENFORCEMENT

In the first instance, after the Awards were passed by LRBA, M/s Shivnath Rai Harnarain (India) (“Firm”), a partnership firm, of which the Appellant and her husband, Mr. Prem Chand Garg are partners along with others, filed a suit (“Firm's Suit”) in the Delhi High Court where it was prayed that the contract containing an Arbitration Clause is void and not binding on the Firm. The Respondent had also filed a suit in the Delhi High Court seeking the enforcement of the Awards, before filing for execution, which was allowed (“Enforcement Proceedings”).

The Firm's Suit was dismissed by the court. The learned Single Judge in her judgment had ordered that the Final Award shall be deemed to be a decree of the court. The Firm carried the matter in Appeal to the Division Bench, which held that an appeal was not maintainable against such orders.

B. EXECUTION PETITION

In the interregnum, the Respondent had filed Execution Petition for execution of the Awards in which the partners were impleaded in their individual names, for the first time. By Order dated April 19, 2010, the learned Single Judge had directed the sale of the shares of Shri Lal Mahal Limited held by Mr. Prem Chand Garg and the Appellant. That Order was assailed before the Division Bench, which also came to be dismissed.

The matter was taken up in appeal before the Hon'ble Supreme Court (“SC”). Taking note of the fact that the Firm had failed to deposit fifty per cent of the principal amount under the Awards, the SC ordered the sale of the shares

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C. SECTION 34 PROCEEDINGS

Although the Firm, as well as one of its partners, Shri Prem Chand Garg by taking recourse under section 48 of the Act, had resisted the aforesaid Execution Petition of the Act initiated by the Respondent under Section 49 of the Act, neither of them had taken out proceedings under Section 34 of the Act. The Appellant filed an application under Section 34 of the Act before the Delhi High Court challenging the Awards. In the impugned Order, the learned Single Judge has, inter alia, held that the action before him was barred from consideration on the principles of *res judicata*.

Against this decision of the Ld. Single Judge, the Appellant filed the present appeal before the Division Bench of the Delhi High Court.

ISSUES

The issues involved in the instant case were:

(I) MAINTAINABILITY:

Whether Indian Courts would have jurisdiction to entertain an appeal under Section 34 of the Act where in the contract the parties have specified that 'the contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by English law.'

(II) RES JUDICATA:

Whether the action of the Appellant challenging the Awards under section 34 of the Act is barred from consideration by *res judicata* in light of their participation in the execution proceedings?

(III) COMPOSITION OF THE TRIBUNAL:

Whether the arbitral Award is illegal under Section 10 the Act, since it was passed by a panel of an even number of arbitrators?

ARGUMENTS

Contentions of Appellant

Appellant contended that:

- a) The Appellant had sought to overcome the objection of *res judicata* by contending that the learned Single Judge had wrongly equated the exercise of jurisdiction under Section 48 of the Act with that under Section 34 of the Act.
- b) Inasmuch as the Arbitral Tribunal consisted of two Arbitrators, the Award is illegal and *non est*. Section 10 of the Act ordains that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

CONTENTIONS OF RESPONDENT

RESPONDENT SUBMITTED THAT:

- a) Challenge under Section 34 of the Act is not maintainable as the parties have specified that 'the contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by English law.'
- b) The principle of *res judicata* bars consideration of objections under Section 34 of the Act in light of the Firm's/ Appellant's participation in the execution proceedings.
- c) If the English Arbitration Act, 1996 were to be applied, Section 15(2) thereof enables the parties to derogate from the general prescription of having an odd number of persons comprising the Arbitral Tribunal. The effect of Rule 9 of the LBRA would be that the parties have agreed that an additional arbitrator would have to be appointed, as Chairman of the Tribunal, only in the event that the two arbitrators or the even number of arbitrators do not arrive at a unanimous decision.

JUDGMENT

A. MAINTAINABILITY

The court observed that the laws of arbitration, as it has developed globally, recognizes that there is a difference between the substantive law of contract and the curial law governing the conduct of the Arbitral Tribunal. It thus concluded that Parties are empowered to nominate which national laws will govern either or both these divisions.

Importantly, the court stated that if the seat of arbitration or the juridical seat of arbitration or the place of arbitration or the venue of arbitration is specified in a contract, then the same will also indicate the parties' choice of the curial law pertaining to the conduct of the Arbitral Tribunal's proceedings.

The court further stated that in the case of any inconsistency, courts must read out the stipulations as to the venue or seat of arbitration as being one among several places where the Arbitral Tribunal conducts its workings. The selection of the law that will be applied to the resolution of disputes must be one amongst many other forums which would possess jurisdiction.

The court further observed that the Act has not been properly worded or conceived of. Part I thereof contains provisions which relate to the substantive law as well as to the curial law moderating workings of the Arbitral Tribunal. The court pointed out that the curial law is contained in Chapters III to VI of Part I of the Act, whereas substantive law of the contract is covered in large measure in the other Chapters of Part I.

The court also observed that Sections 9 and 34, which fall under chapters II and VII respectively do not pertain to curial law. If a contract stipulates that the functioning of the Arbitral Tribunal shall be governed by laws in a foreign country, whereas the substantive or contract law will be governed by Indian laws, recourse to Section 9 as well as Section 34 will be available.

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But as the present Arbitration was to be conducted by the LBRA, the contract was made in England and the construction, validity and performance of thereof was expressly chosen by the parties to be governed in all respects by English Law, the court concluded that Part I of the Act had been specifically excluded by the parties and thus Section 34 would have no application to the present case.

B. RES JUDICATA

While appreciating that there may be a slight difference in the ambit and scope of the Sections 48 and Section 34 of the Act, the Court agreed with the finding of the Single Judge and held that the Appellants were barred by res judicata to make the present application as the Firm had defended the Execution Petition filed by the Respondent. The Court further opined that the application filed by the Appellant, was patently time barred.

C. COMPOSITION OF THE TRIBUNAL

The Court relying upon the Supreme Court's decision in *Narayan Prasad Lohia vs Nikunj Kumar Lohia and Ors.*(AIR 2002 SC 119) observed that Section 10 of the Act is a derogable provision. Even so, it may be open to a party to object to even number of arbitrators in the first instance before the Arbitral Tribunal, since the contract for an even number of arbitrators would be contrary to the statute.

It was further observed that the position of law in England up to 1996, as well as in India, is that whilst the expectation of Parliament is that the Arbitral Tribunal should logically comprise an odd number of persons, the contrary may not be fatal to the validity of an award. The objection to the score of Arbitrators, if any has to be raised before the Arbitral Tribunal. If no objection had been raised on the score of the Arbitral Tribunal consisting of even number of persons, the Award is valid even though it was pronounced by an Arbitral Tribunal comprising only two persons.

ANALYSIS

Though the judgment eventually upholds party autonomy as to application of English law, it opens a new dimension of debate by holding that two provisions of the same act bar each other by *res judicata*. Also, interestingly it holds that some parts of Part I of the Act are substantive law, which will lead to a new genre of debate, dampening party autonomy in international arbitration.

- **Prateek Bagaria & Vyapak Desai**

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