

# Dispute Resolution Hotline

November 11, 2011

## SUPREME COURT IS THE APPROPRIATE FORUM FOR SUBSTITUTION OF DECEASED ARBITRATOR IN AN INTERNATIONAL ARBITRATION

### INTRODUCTION

The Delhi High Court by its order dated the November 3, 2011 M/s. HRD Corporation (“**Petitioner**”) v. M/s. GAIL (India) Ltd (“**Respondent**”) concluded that a petition for substitution of a deceased arbitrator in an international arbitration would lie before the Supreme Court.

### BACKGROUND

In pursuance of Article 14 of the agreement dated April 01, 1999 (“**Agreement**”) entered into for sale and supply of [.] between the contending parties, which contained the Arbitration Clause, the parties had referred the matter to the International Center for Alternate Dispute Resolution (“**ICADR**”) arbitration to resolve the disputes therein. It was a case of International Commercial Arbitration as the Petitioner was a foreign entity and the quorum of the Arbitral Tribunal was constituted on July 13, 2010 consisting of Mr. Justice Avadh Behari Rohatgi (Retd.) as the presiding officer, Mr. Justice J.K. Mehra (Retd.) appointed by the Petitioner and Mr. Justice N.N. Goswamy (Retd.) appointed by the Respondent. During the pendency of arbitral proceedings unfortunately, one of the arbitrators Mr. Justice N.N. Goswamy (Retd.) passed away. For the continuation of the pending arbitral proceedings, Petitioner contented before ICADR that that neither did the presiding officer nor Petitioner’s nominee vacate their office. Therefore, in the present case appointment of only the substituted arbitrator is warranted and not the appointment of the fresh tribunal but ICADR ordered the contending parties to constitute a new Arbitral Tribunal. Hence, the Petitioner filed a petition before the Delhi High Court (“**Court**”) under Section 11(6) of the Arbitration & Conciliation Act, 1996 (“**the Act**”) for appointment of a substitute arbitrator.

### ISSUES

1. Whether the order of the ICADR for the constitution of the new Arbitral Tribunal was valid?
2. Whether the High Court of Delhi had the jurisdiction to entertain the present petition?

### ARGUMENTS

#### CONTENTIONS OF THE PETITIONER

The Petitioner submitted placing reliance upon Rule 11 of the ICADR Rules that the death of the arbitrator had to be considered as a circumstance warranting the substitution of the arbitrator and not constitution of a new Arbitral Tribunal. Therefore, the new arbitrator had to be substituted as per the rule of the appointment; instead, the ICADR had ordered the contrary. Hence, the ICADR as an institution had failed to perform its function in accordance with the law. In view of the fact that the agreed procedure of the appointment and substitution or termination of the mandate of the arbitrator is in consonance with Section 14 and 15 of the Act, the Petitioner also submitted that the case was within the ambit of Section 11(6) of the Act where the said Court had the power to appoint the arbitrator in the event of an institution failing to perform its function in accordance with the law. The Petitioner further submitted that the said Court could entertain the present petition in view of the fact that the language of Section 11 of the Act only enables the Supreme Court of India to appoint the arbitrator at the first instance and it could not be a legislative intent to knock at the doors of the Supreme Court time and again for the replacement or substitution of the arbitrators which the High Court of Delhi could conveniently do. Therefore, no such prohibition exists in exercise of jurisdiction by the High Court of Delhi.

#### CONTENTIONS OF THE RESPONDENT

The Respondent submitted that the Arbitral Tribunal constituted with effect from July 13, 2010 could continue only with the mutual consent of the parties, and as the Respondent did not consent to the continuance of the said Arbitral Tribunal a new Arbitral Tribunal was to be constituted with Mr. Justice Anil Dev Singh (Retd.), as the nominee arbitrator of the Respondent. According to the Respondent, the petition was premature as there was nothing suggesting any disagreement between the appointed arbitrators over the third arbitrator. Further, it was stated that as the Respondent did not wish to continue with the Arbitral Tribunal constituted, a fresh arbitral tribunal had to be constituted although it was open to the Petitioner to reappoint Mr. Justice J.K. Mehra (Retd.) as its nominee arbitrator. The Respondent placing reliance on Sections 2(1) (f), 11(6), 11(11), 11(12), 14 and 15 of the Act submitted that the Arbitration between the Petitioner and the Respondent was an International Commercial Arbitration and in such a case the appropriate Court for the purposes of appointment of the arbitrator had to be the Supreme Court of India where the Chief Justice of India or his designate is empowered to appoint such arbitrator. Therefore, the Court would not have the jurisdiction to entertain the present petition and the same was liable to be dismissed.

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The Court noted that by a conjoint reading of Sections 2(1)(f), 11(6), 11(11), 11(12), 14 and 15 of the Act, especially the interplay between Section 2(f) read with Section 11(6) and Section 11(12) of the Act made it abundantly clear that the legislature had intentionally carved out a fine distinction between matters relating to “any other Arbitration” and “International Commercial Arbitration” when it came to the process of appointment of the arbitrator. Section 11(12) of the Act had clarified all the doubts in explicit terms by stating that when it came to matters referred to in Sub-Sections (4), (5) and (6) of Section 11 of the Act arising in an International Commercial Arbitration, the reference to the term Chief Justice had to be construed as reference to the Chief Justice of India. A further reading of Sections 14 and 15 of the Act would reveal that upon termination of the mandate of the arbitrator, a substitute arbitrator shall be appointed according to the Rules that were applicable to the appointment of the arbitrator being replaced which was made clear in terms of Section 15(2) of the Act. This is due to the reason that the powers of the court for the purposes of appointment of the arbitrator are mutatis mutandis applicable to the appointment of substitute arbitrator. Therefore, the Court in such circumstances is no different from the purposes of appointment. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. The said power can be delegated by the respective Chief Justice of the High Court to another judge of that High Court only and by the Chief Justice of Supreme Court to another Judge of Supreme Court only. Thus, it being purely statutory power vested in appropriate cases by the statute the said Court cannot supplement or supplant the said power by assuming jurisdiction on the subject which falls within the domain of the Chief Justice of India as per the provisions of Section 11(6) read with Section 11(12). The Court found no substance in the submissions that, the court should appoint the substitute arbitrator as the legislative intent could not be to knock at the doors of the Supreme Court for the purposes of substitution. The Court . In light of the above findings, the Court held that the Supreme Court has the jurisdiction to entertain such petition and did not examine the validity of the order of the ICADR for the constitution of new Arbitral Tribunal as it was beyond its jurisdiction. The present petition was accordingly dismissed.

ANALYSIS

The judgment lays down emphasis on the principles of statutory interpretation. It has accredited due respect to the legislative intent which is in turn upholding and maintaining the separation of powers which is of utmost importance for good governance and a strong and able judiciary..

- Prateek Bagaria & Vyapak Desai

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