Dispute Resolution Hotline

January 30, 2014

ALLEGATIONS OF FRAUD NOT A BAR TO FOREIGN SEATED ARBITRATION

- Supreme Court held that allegation of Fraud is not a bar to refer parties to foreign seated arbitrations;
- The law does not require a formal application to refer parties to arbitration;
- If an arbitration agreement exists and a party seeks reference to a foreign seated arbitration, court is obliged to refer the parties to arbitration;
- The only exception is in cases where the court finds the arbitration agreement to be null and void or inoperative or incapable of being performed.

INTRODUCTION

In a landmark decision the Supreme Court of India has expressly removed allegations of fraud as a bar to refer parties to foreign seated arbitrations. The Supreme Court by its decision dated January 24, 2014 in *World Sport Group (Mauritius) Ltd ("**WSG**") v. MSM Satellite (Singapore) Pte. Ltd ("**MSM**")* set aside the judgment of the Division Bench of the Bombay High Court ("**Bombay HC**") in *MSM Satellite (Singapore) Pte. Ltd* v. *World Sport Group (Mauritius) Ltd* dated September 17, 2010 ("***Impugned Judgment***"). Previously as the law stood, allegations of fraud were arguably not arbitrable under Indian Law. The Supreme Court has now clarified the position, removing another possible hurdle that one could face while arbitration against Indian Parties outside India.

BACKGROUND

The dispute pertained to obtaining media rights for the Indian sub-continent from the Board of Cricket Control of India. In this regards WSG and MSM entered into a Deed for Provision of Facilitation Services (Facilitation Deed"), where under MSM was to pay WSG □ 4,250,000,000 as facilitation fees. The Facilitation Deed was governed by English Law and parties had agreed to settle their disputes through arbitration before the International Chamber of Commerce ("***ICC***"), with a seat of arbitration in Singapore ("***Arbitration Agreement***").

Eventually, MSM rescinded the Facilitation Deed alleging certain misrepresentations and fraud against WSG and initiated a civil action before the Bombay HC for inter alia a declaration that the Facilitation Deed was void an for recovery of sums already paid to WSG. WSG filed a request for arbitration with ICC and ICC issued notice to the MSM to file its answer. In response MSM filed initiated a fresh action seeking an anti-arbitration injunction against WSG from proceeding with the ICC arbitration.

MSM'S CASE

It was MSM's case that since the Facilitation Deed, which contained the Arbitration Agreement, in null and void on account of the misrepresentation and fraud of WSG, the Arbitration Agreement itself was void and could not be invoked.

WSG'S CASE

It was WSG's case unless the Arbitration Agreement, itself, apart from the Facilitation Deed, is assailed as vitiated by fraud or misrepresentation; the Arbitral Tribunal will have jurisdiction to decide all issues including validity and scope of the arbitration agreement.

IMPUGNED JUDGMENT

The Bombay HC had, in the impugned Judgment, held that disputes where allegation of fraud and serious malpractice on the part of a party are in issue, it is only the court which can decide these issues through furtherance of judicial evidence by the party and these issues cannot be properly gone into by the arbitrator, thereby granting the anti-arbitration injunction sought for. This decision of the Bombay HC was the only judgment where an Indian Court had held allegations of fraud as a bar to foreign seated arbitrations, though such findings were prevalent in the sphere of domestic arbitrations.

JUDGMENT OF THE SUPREME COURT

The Supreme Court, by re-enforcing its pro-arbitration approach, set aside the Impugned Judgment and held that only bar to refer parties to foreign seated arbitrations are those which are specified in Section 45 of the Indian Arbitration and Conciliation Act, 1996 ("**Act**") i.e. in cases where the arbitration agreement is either (i) null and void or (ii) inoperative or (iii) incapable of being performed.

While explaining the term null and void, the Supreme Court clarified that the arbitration agreement being a separate agreement does not stand vitiated if the main contract is terminated, frustrated or is voidable at the option of one party. The Supreme Court held that a court will have to see in each case whether the arbitration agreement is also void along with the main agreement or whether the arbitration agreement stands apart from the main agreement and is not null and void, thus accepting the submissions of WSG.

The Supreme Court interpreted the terms inoperative and incapable narrowly, adopting the interpretation of the international authors of these terms in Article II (3) of the Convention on the Recognition and Enforcement of Foreign

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Arbitral Awards, 1958 ("**New York Convention**"). The expression '*inoperative*' is understood to cover situations where the arbitration agreement has ceased to have effect such as where parties may have by conduct or otherwise revoked the arbitration agreement. Further, '*incapable of being performed*' covers situations where the arbitration cannot be effectively set into motion and covers the practical aspects of the prospective arbitration. Accordingly, the court held that arbitration agreements do not become "inoperative and incapable of being performed" where allegations of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act.

The Supreme Court also opined that no formal application is necessary to request a court to refer the matter to arbitration under Section 45 of the Act and in case a party so requests even through affidavit, a court is obliged to refer the matter to arbitration with the only exception being cases where the arbitration agreement is null and void, inoperative and incapable of being performed, thus limiting the scope of judicial scrutiny at the stage of referring a dispute to foreign seated arbitrations.

ANALYSIS

This is a welcome decision for foreign parties having arbitration agreements with Indian counter-parts. Before this judgment was delivered, Indian parties were increasing challenging arbitrability of disputes where allegations of fraud were made against them, relying of the Supreme Court's own decision in the case of *N. Radhakrishnan v. Maestro Engineers & Ors*[1] (*"**N Radhakrishnan**"*). By this decision the Supreme Court has limited the applicability of its decision in N Radhakrishnan to domestic arbitrations hence clarifying that, allegations of fraud against a party or consequential rescission of the main agreement is not a bar on arbitrability of disputes between the parties under Indian Law, when the seat of arbitration is outside India.

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You can direct your queries or comments to the authors

[1] (2010) 1 SCC 72

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