

# Dispute Resolution Hotline

April 10, 2014

## SUPREME COURT OF INDIA CONSIDERS INDEPENDENCE AND IMPARTIALITY IN APPOINTMENT OF AN ARBITRATOR

- Supreme Court holds that it is important to ensure that doubts are not cast on neutrality, impartiality and independence of the Arbitral Tribunal;
- Supreme Court has re-affirmed that under Section 11(9) of the Act it is not mandatory for the court to appoint an arbitrator not belonging to the nationality of either of the parties to the dispute;
- Supreme Court after relying on renowned scholars has held that qualification, experience and integrity should be the criteria for appointment of an arbitrator;
- Victory is bitter-sweet for Petitioners – with the appointment coming after nearly 28 months of having sent Notice of Arbitration.

In Reliance Industries Ltd. & Ors. v. Union of India,<sup>1</sup> the Hon'ble Supreme Court of India ("Supreme Court") ruled that in an international commercial arbitration if the two nominated arbitrators failed to reach a consensus on the appointment of the third/presiding arbitrator, considerations of neutrality and impartiality are of great significance. The Supreme Court observed that considerations of nationality were not mandatory while making a decision on the appointment of the third arbitrator. This is certainly a welcome judgment as it provides clarity on the interpretation of Section 11(6) and 11(9) of the Arbitration and Conciliation Act, 1996 ("Act").

### FACTS

Under New Exploration and Licensing Policy ("NELP") of 1999, Reliance Industries Ltd ("RIL") and Niko Resources Limited ("NIKO") jointly entered into a Production Sharing Agreement ("PSC") in 2000, with Union of India ("UOI"), for exploration of oil block at KG-D6 ("Block"). Subsequently, RIL upon approval of UOI assigned 30% of its participating interest in the Block to British Petroleum ("BP"). Differences arose in 2010-2011 on the interpretation of PSC, between RIL, NIKO, BP (collectively referred to as "Petitioners") and UOI.

RIL initiated arbitration proceedings in terms of Article 33 of the PSC ("Arbitration Agreement"), by a Notice of Arbitration ("NOA"), thereby nominating their nominee arbitrator and called upon UOI to appoint their nominee arbitrator within thirty days of the receipt of the said NOA. UOI maintained that the NOA was premature and as such there was no dispute.

Even after series of communications, the deadlock concerning the claim and the appointment of arbitrator could not be resolved between RIL and UOI. Finally, on April 16, 2012, RIL and NIKO filed Arbitration Petition<sup>2</sup> under Section 11 of the Act in the Supreme Court ("Arbitration Petition-1") for appointment of UOI's nominee arbitrator. However, eventually, UOI agreed to the appointment of arbitrator and appointed their nominee arbitrator and accordingly the Petitioners discontinued Arbitration Petition-1. Thereafter, the two party nominated arbitrators could not agree on the third arbitrator, and hence RIL filed the present petition ("Arbitration Petition 2") seeking appointment of the presiding arbitrator.

### CONTENTIONS BY THE PETITIONERS

The main issue related to appointment of the presiding arbitrator. The two relevant clauses are set out below:

#### Art. 33.5

"33.5 Any Party may, after appointing an arbitrator, request the other Party(ies) in writing to appoint the second arbitrator. If such other Party fails to appoint an arbitrator within thirty (30) days of receipt of the written request to do so, such arbitrator may, at the request of the first Party, be appointed by the Chief Justice of India or by a person authorised by him within thirty (30) days of the date of receipt of such request, from amongst persons who are not nationals of the country of any of the Parties to the arbitration proceedings".

#### Art. 33.6

"33.6 If the two arbitrators appointed by or on behalf of the Parties fail to agree on the appointment of the third arbitrator within thirty (30) days of the appointment of the second arbitrator and if the Parties do not otherwise agree, at the request of either Party, the third arbitrator shall be appointed in accordance with Arbitration and Conciliation Act, 1996".

Petitioners contended that the relevant clause of the PSC did not preclude appointment of a person of foreign nationality and that it was in fact required to instil a sense of impartiality and neutrality. Petitioners also submitted that UNCITRAL Rules which were in force when the PSC was drafted and entered into, recognized that while the appointing authority could appoint an arbitrator of the same nationality as that of the defaulting party (in the event

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where a party fails to nominate its arbitrator), but the presiding arbitrator that had to be appointed would be of the nationality other than that of the parties. Petitioners contended that the Arbitration Agreement provided for a greater degree of neutrality than the UNCITRAL Rules, by providing that in case one of the parties made a default in nominating its arbitrator then such arbitrator had to be appointed from a neutral nationality.<sup>3</sup>

## CONTENTIONS BY UOI

UOI contended that Arbitration Petition-2 had been filed under Sections 11(6) and 11(9) of the Act, read with Article 33.6<sup>4</sup> of the PSC, which in effect, unlike Article 33.5<sup>5</sup>, did not require that the arbitrator to be appointed should be a foreign national. UOI argued that the Petitioners, by not objecting to the appointment of UOI's nominee arbitrator, who was of Indian nationality, had waived the requirement that a foreign national be appointed as an arbitrator by the parties, under Article 33.5 of the PSC. Hence, Petitioners were estopped from insisting upon appointment of a foreign arbitrator.

It was also argued that the PSC is one of the most valued, crucial and sensitive contracts because it deals with license and exploration, discovery, development and production of the most valuable natural resources, viz. petroleum products, including crude oil and/or natural gas and hence its interpretation, and execution involved intricate and complex questions of law and facts relating to Indian conditions and Indian laws. Accordingly, UOI submitted that the parties at the time of entering into PSC consciously refrained from having the requirement that the third arbitrator should be a foreign national. It was further submitted that since the parties did not choose to have a foreign national to be appointed as the third arbitrator in Article 33.6, therefore, the parties intentionally chose not to make Section 11(1) of the Act<sup>6</sup> applicable to them and instead agreed to proceed under Section 11(2)<sup>7</sup> because they agreed to appoint an arbitrator without requiring him to be of any foreign nationality.

Finally, UOI submitted that appointment of a foreign national as the third arbitrator was not only legally untenable, but also undesirable, because as both BP and NIKO were multi-national companies, with presence/business connections in about 80 countries. UOI concluded that it was most desirable that a retired judge of the Supreme Court be made the presiding arbitrator.

## JUDGMENT

The main issue related to interpretation of Articles 33.5 and 33.6 of the PSC. The Supreme Court rejected Petitioner's contention that only a foreign national could be the presiding officer and Respondent's contention that only an Indian could be the presiding officer. Supreme Court held that in terms of the Arbitration Agreement there leaves no concern that the Chief Justice of India ("**CJI**"), is to appoint the third/presiding arbitrator, who would be neutral, impartial and independent from anywhere in the world, including India. According to the Supreme Court, just as India could not be excluded, similarly the countries where BP and NIKO are domiciled, as an option from where the third arbitrator could be appointed, could not be ruled out. Supreme Court observed that the CJI while exercising jurisdiction under Section 11(6) of the Act was to be guided by the provisions contained in the Act and generally accepted practices in the other international jurisdictions. Supreme Court relied on *Malaysian Airlines Systems BHD II v. STIC Travels (P) Ltd.*<sup>8</sup> and *MSA Nederland B.V. v. Larsen and Toubro Ltd.*<sup>9</sup> where it was held that while nationality of the arbitrator was a matter to be kept in view, it did not flow from Section 11(9) that the proposed arbitrator is necessarily disqualified because he belonged to the nationality of one of the parties. The word "*may*" in Section 11(9) of the Act was not used in the sense of "*shall*" and hence the provision was not mandatory. After considering the two earlier rulings, Supreme Court held that "*...ratio in the aforesaid cases cannot be read to mean that in all circumstances, it is not possible to appoint an arbitrator of a nationality other than the parties involved in the litigation...*". According to Supreme Court, unless the parties object otherwise, CJI can appoint an arbitrator belonging to the nationality of one of the parties, and in the event of an objection, the CJI would consider and if an arbitrator from a neutral jurisdiction could be appointed in light of such objections. According to Supreme Court, while taking such a decision, the CJI (or his nominee) could also keep in mind, cases where the parties had agreed that the law applicable to the case is the law of a country to which one of the parties belonged, whether there will be an overriding advantage to both the parties if an arbitrator having knowledge of the applicable law is appointed. Finally, the Supreme Court emphasized that the trend of the third arbitrator/presiding officer of a neutral nationality being appointed was now more or less universally accepted under the arbitration acts and arbitration rules in different jurisdictions and accordingly appointed former Chief Justice of New South Wales as the third arbitrator, from a neutral jurisdiction.

After the Supreme Court pronounced the above judgment on March 31, 2014, UOI brought to the attention of the Supreme Court that Hon'ble James Spigelman was one of the suggested arbitrators by Petitioner. However, during the proceedings, the Supreme Court observed that it would not rely on suggested arbitrators of the Petitioners as well as the Respondent. Consequently, the Supreme Court by way of an Order dated April 2, 2014 has recalled the appointment of Hon'ble James Spigelman and has noted that the substitute arbitrator shall be shortly appointed by a separate order.<sup>10</sup>

## ANALYSIS

Independence and impartiality forms an integral part of any adjudicatory system, including ICA, as it affects the perception of administration of justice and administration of justice itself. While independence is generally understood to mean that the arbitrator has no stake or apparent conflict with the parties or the sum involved in the proceedings, impartiality means that the arbitrator allows equal opportunity to both the parties to present their case. Impartiality should be ascertained upon satisfaction of the tests laid down for '*bias*', which again, can be divided under two categories, actual bias and apparent bias. As held in *Locabail (UK Limited) v. Bayfield Properties Limited*<sup>11</sup> ("**Locabail**"), instances of actual bias happen when the judge is shown to have an interest in the outcome of the case which he is to decide or has decided, however, on the other hand, apparent bias, as explained in *R v. Gough*,<sup>12</sup> means whether there is a real danger of bias.

The Supreme Court correctly held that it was important to ensure that no doubts were cast on the neutrality, impartially and independence of the arbitral tribunal. Before arriving at the reasoned conclusion, the Supreme Court referred to notable commentators<sup>13</sup> and applied their view that qualification, experience and integrity should be the criteria for appointment of an arbitrator. Therefore, in the Indian scenario the CJI has been vested with a wide discretion to appoint an arbitrator in an ICA, taking into consideration all necessary factors which would preserve the integrity of the arbitration, and in essence, would not lead to any possibility of bias at a later date.

The other aspect which requires some consideration is that, although two different arbitration petitions were filed at the relevant time for seeking appointment of second as well as the presiding arbitrator, however, it took more than two years to complete the appointment process. The essence of arbitration lies in speedy resolution of a dispute, and if an arbitrator cannot be appointed at the earliest possible opportunity, the purpose would seem to be defeated.

— Alipak Banerjee, M.S. Ananth & Vyapak Desai

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<sup>1</sup> Arbitration Petition No. 27 of 2013.

<sup>2</sup> Arbitration Petition No. 8 of 2012.

<sup>3</sup> Article 33.5 of the PSC

<sup>4</sup> Article 33.5 of the PSC provided for appointment of the second arbitrator incase the other party defaults in the making.

<sup>5</sup> Article 33.6 of the PSC provided for appointment of the presiding arbitrator when the nominated arbitrators were unable to reach a consensus on the presiding arbitrator.

<sup>6</sup> Section 11(1) of the Act provides that an arbitrator can be of any nationality, unless otherwise agreed by the parties.

<sup>7</sup> Section 11(2) of the Act provides that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

<sup>8</sup> (2001) 1 SCC 509

<sup>9</sup> (2005) 13 SCC 719

<sup>10</sup> Order dated April 2, 2014 available at <http://courtnic.nic.in/supremecourt/temp/fc%202713p.txt>

<sup>11</sup> [2000] 1 QB 451

<sup>12</sup> Court of Appeal (1992) 4 All ER 481

<sup>13</sup> Redfern and Hunter on International Arbitration, Fifth Edition (2009):

At Page 263 - "...*The fact that the arbitrator is of a neutral nationality is no guarantee of independence or impartiality. However, the appearance is better and thus it is a practice that is generally followed...*"

At Para 4.59 - "...*In an ideal world, the country in which the arbitrator was born, or the passport carried, should be irrelevant. The qualifications, experience, and integrity of the arbitrator should be the essential criteria...*"

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