

Dispute Resolution Hotline

December 12, 2016

NO VALID ARBITRATION IF CLAUSE IN UNSIGNED AGREEMENT

DELHI HIGH COURT:

- Reaffirms the criteria to deem a foreign arbitral award valid under section 44 of the Arbitration and Conciliation Act, 1996 and the Convention on the Recognition and Enforcement of Awards, 1958.
- A contract containing an arbitration agreement must be signed by all parties to the contract, in order to make the arbitration agreement valid and binding upon the parties.

INTRODUCTION:

The Delhi High Court ("**Court**") in the case of *Virgoz Oils and Fats Pte. Ltd. ("Virgoz") v National Agricultural Marketing Federation of India* ¹ ("**NAFED**") has refused the enforcement of a foreign arbitral award after allowing an objection to its enforcement under Section 48 of the Arbitration and Conciliation Act, 1996 ("**The Act**"). The Court has referred to and relied upon the requirements set out under the Convention on the Recognition and Enforcement of Awards, 1958 ("**The Convention**") and the Act, to examine the requirements of a valid arbitration agreement. Applying these guidelines, the Court has held that the arbitration agreement between the parties in the present matter, was a part of a written agreement which was not signed by NAFED. Thereby, rendering the arbitration agreement inoperable and invalid against NAFED.

FACTS:

Virgoz and NAFED, through a broker, had entered into negotiations for the sale of edible oil by Virgoz to NAFED. Through the negotiations, a series of sales contracts were formed, which were transmitted to NAFED by the broker. NAFED, upon receipt of the same, requested a deferred date of shipment of the goods to the broker, who in turn, communicated the same to Virgoz. The contracts were amended accordingly by Virgoz with the changes in the date of shipment being the only material alteration.

The contracts were signed by the broker and Virgoz, but not by NAFED or its representatives ("**Impugned Contracts**"). Virgoz, proceeded, with its obligations under the Impugned Contracts assuming the same to have become effectively concluded between the parties and shipped the goods to NAFED. Upon NAFED's failure to provide a Letter of Credit, as per the terms of the Impugned Contracts, Virgoz declared NAFED to be in default. Thereafter, Virgoz proceeded to initiate arbitration proceedings before an arbitral tribunal constituted under the Palm Oil Refiners Association of Malaysia, Rules of Arbitration and Appeal ("**PORAM Rules**"), in accordance with the arbitration clause contained in the contracts.

The Tribunal passed an award on April 5, 2012, which accepted two key submissions advanced by Virgoz being (a) a letter dated July 29, 2008, from NAFED requesting a deferred date of shipment while making reference to the contracts, was evidence of the existence of a contractual arrangement between the parties and (b) the signing of an Agreement by a broker on behalf of the buyer, was '*common practice*' in the industry. The award was passed in favor of Virgoz.

Virgoz, vide an enforcement petition filed before the Court sought to enforce the award against NAFED and its assets in India.

ISSUE:

Whether there existed a valid arbitration agreement between the parties.

CONTENTIONS:

Virgoz advanced two primary contentions to establish that the award being a foreign award must be enforced under Part II of the Act, they were (a) the parties were dealing with each other through a broker and therefore there was no requirement for NAFED to sign the Impugned Contract and (b) the Letter dated July 29, 2008, indicated that NAFED had accepted the terms of the Impugned Contract and requested a deferred date of shipment.

NAFED, stated that there were no communications directly between Virgoz and NAFED implying that NAFED had consented to the terms of the Impugned Contract. Further, NAFED had not signed the Impugned Contract thereby making it invalid against NAFED.

JUDGMENT:

The Court analyzed the definition of a '*foreign award*' under section 44 of the Act, which stipulates that the award

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must be rendered in pursuance of an arbitration agreement in writing between the parties, to which the Convention shall apply. In order to examine whether there was a valid arbitration agreement in terms of the Convention, the Court analyzed Paragraph 2 of Article II of the Convention, which states that an '*agreement in writing*' would *inter alia* mean an arbitration clause contained in a contract signed by the parties or contained in an exchange of letters or telegrams.

The Court held that, Virgoz had relied upon an arbitration agreement contained in the Impugned Contracts and not in any correspondence exchanged between the parties. Therefore, as per the aforementioned requirements under the Convention, the Impugned Contracts should have been signed by all parties to the contract in order to deem it as a valid arbitration agreement. This requirement was not met as NAFED had not signed the contracts, thus, resulting in the arbitration agreement becoming invalid and inoperative with respect to NAFED. The Court also examined the communications between the parties, holding that the Letter dated July 29, 2008, did not evidence the intention of NAFED to bind itself to the terms of the Impugned Contract or the arbitration clause contained therein.

The Court based its judgment on the following reasoning:-

1. Although NAFED was described as a buyer, with a specific provision for its signature in the Impugned Contract, no signatures appear by NAFED at the designated parts of the Impugned Contracts.
2. The broker signed the Impugned Contract in his own capacity and not for and on behalf of NAFED
3. There were no correspondences exchanged between the parties establishing a meeting of minds as to their intention to submit their disputes to arbitration.

Thus, the Court concluded that under section 48, there were valid reasons to refuse the recognition and enforcement of the award and passed orders effecting the same.

ANALYSIS:

The judgment of the Court, might be construed as a departure from the pro-arbitration stance adopted by the judiciary of late. If an appeal was to be preferred it would be interesting to observe whether the Appellate Court would consider (a) the usual trade practice between parties trading in palm oil in India to have unsigned contracts; (b) the correspondence exchanged between the parties by which the Impugned Contract was deliberated upon and amended and (c) the verdict of an expert body mandated to preside over disputes in that particular industry.

However, it must be noted that the legal analysis conducted by the Court which formed the basis of the judgment is sound. The requirement of an agreement in writing, when evidenced in an arbitration agreement, results in the consequent requirement that the agreement must be of the nature of a valid contract. The lack of a party's signature upon the contract, would be strong evidence as to the lack of the party's consent to the agreement and consequently to an arbitration clause contained therein.

A valuable take away from this pronouncement is to ensure that all parties to a contract containing the arbitration agreement should sign the same even if they are being represented by another for all practical purposes. Further, if parties intend to enter into commercial transactions basis communications exchanged, then they must ensure to incorporate a dispute resolution mechanism in the same.

– Arjun Gupta & Vyapak Desai

You can direct your queries or comments to the authors

¹ EX.P. 149/2015 & EA(OS) No. 66/2016

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