

Dispute Resolution Hotline

March 03, 2010

SUPREME COURT SAYS IT'S UNFORTUNATE THAT ARBITRATION IN INDIA IS EXPENSIVE AND TIME-CONSUMING

In *Dolphin Drilling Ltd. ("Petitioner") v. M/s. Oil and Natural Gas Corporation Ltd. ("Respondent")*¹, the Supreme Court of India ("Court") has, amongst other things, held that the fact that there is already an ongoing arbitration in respect of other disputes between the same parties under the same agreement, would not come in the way of either party invoking a fresh arbitration in respect of other arbitrable disputes under the same agreement. Thus, multiple arbitrations for different disputes under one agreement can be possible.

FACTS:

The Petitioner and the Respondent entered into agreement dated October 17, 2003 for, *inter alia*, charter hire of deepwater drilling rig drill ship alongwith services on an integrated basis ("Agreement"). Whilst the period of the Agreement came to an end on February 13, 2007, the Petitioner contended that they continued to provide services until April 10, 2007 for which they were entitled to be paid additionally. Failing to get any response from the Respondent in spite of repeated reminders, the Petitioner invoked arbitration under the Agreement and nominated an ex-judge of the Supreme Court of India as their arbitrator. The Respondent failed to respond to the arbitration notice and accordingly, the Petitioner filed an application under Section 11(6) of the Arbitration & Conciliation Act, 1996 ("the Act"), for appointment of arbitrator in the Supreme Court of India, this being an International Commercial Arbitration under the Act.

The Respondent contended that the arbitration clause as set forth in the Agreement provided for one single arbitration which would encompass all disputes between the same parties under the same Agreement. The Respondent's further contention was that the arbitration clause in the Agreement does not envisage different arbitrations for different disputes at different times under the same Agreement arising between the same parties. The relevant provision reads as under:

".....28.3 The party desiring the settlement of dispute shall give notice of its intention to go in for arbitration **clearly stating all disputes to be decided by arbitral tribunal** and appoint its own arbitrator and call upon the other party to appoint its own arbitrator within 30 days....."

(emphasis supplied)

The Respondent submitted that as the Petitioner had already invoked arbitration under the Agreement earlier, which arbitration was at its concluding stage, the said remedy of arbitration was no longer open to the Petitioner. The Respondent further submitted that the financial burden cast upon them by arbitration was onerous.

JUDGMENT:

Recognizing the issue at hand and terming it as "*unfortunate*", the Court observed that arbitration in India has proved to be a highly expensive and time-consuming means for resolution of disputes. The Court, however, held that the words "*all disputes*" in the Agreement, which formed the bone of contention of this matter, would necessarily have to be interpreted to mean all disputes which may be in existence when the arbitration clause is invoked.

Noting that the interpretation as suggested by the counsel for the Respondent could lead to an anomalous situation where disputes which occurred in the earlier period of the Agreement could be rendered *time-barred* at the end of the period of the Agreement, the Court rejected the contention of the Respondent that arbitration was provided only as a onetime measure.

Appreciating that increased cost of dispute resolution had indeed become a cause for concern, the Court noted that the issue of financial burden was a legitimate concern and would need to be addressed by the parties by amending the arbitration clause and providing for a single arbitration at the end of the period of the Agreement or at its earlier termination/cancellation and at that time, suitably providing for the express saving of any dispute/claim which would otherwise become time-barred and hence, non-arbitrable.

ANALYSIS:

This judgment of the Court has, amongst other things, acknowledged that arbitration in India is an expensive and time consuming dispute resolution mechanism. The very objective of providing for arbitration, which is to ensure fast and efficient disposal of disputes between the parties to the arbitration agreement, has been lost.

Parties to an arbitration agreement can now provide to avoid the onerous financial implications of multiple arbitrations under a single agreement and can instead, provide for a single onetime arbitration to be conducted at the end of the period of the agreement (or its sooner determination). This can prove to be a twin-edged sword given that a party with a legitimate claim will have no option but to wait until a certain time until they are able to invoke arbitration, thus negating the object of arbitration in the very first place.

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An arbitration agreement no longer remains a simple agreement to refer all disputes to arbitration. Over time, an arbitration agreement has evolved into a complex mechanism and an integral provision in any agreement. Care must be taken to ensure that foreseeable situations have been envisaged and necessary provisions have been made especially when there is a possibility that parties will continue to perform under the terms of the same agreement while there would be a dispute pending. Parties would now be well-advised to ensure that the arbitration clause is carefully worded and encompasses the true intention of the parties.

- Sahil Kanuga & Shafaq Uraizee-Sapre

1 Order dated February 17, 2010 in Arbitration Petition No. 21 of 2009;

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