

Dispute Resolution Hotline

May 20, 2011

SUPREME COURT HEDGES AGAINST AN ATTACK TO BROADEN BHATIA INTERNATIONAL

Supreme Court of India rejects petition under Section 9 of Arbitration & Conciliation Act, 1996 holding that application of Part I of the Act has been excluded

INTRODUCTION:

The Supreme Court of India ("**Supreme Court**") in the case of *Videocon Industries Limited ("Appellant") –Vs- Union of India and Anr.¹ ("Respondents")* held that when an arbitration agreement is governed by a foreign law as selected by the parties, it necessarily implies that the parties had agreed to exclude the provisions of Part I of the Arbitration & Conciliation Act, 1996 ("**the Act**") and hence petition filed under Section 9² shall not be entertained.

FACTS:

Government of India owned petroleum resources within the area of India's territorial waters and exclusive economic zones. A Production Sharing Contract (PSC) was executed in 1994 between Respondent on the one hand and a consortium of four companies consisting of Oil and Natural Gas Corporation Limited, Videocon Petroleum Limited, Command Petroleum (India) Private Limited and Ravva Oil (Singapore) Private Limited in terms of which the latter was granted an exploration licence and mining lease to explore and produce the hydro carbon resources owned by Respondent. In 2000, disputes arose between the Respondents and the contractor with respect to correctness of certain cost recoveries and profit. Since the parties could not resolve their disputes amicably, the same were referred to the arbitral tribunal under clause 34.3 of the PSC. It read as:

33.1 INDIAN LAW TO GOVERN

Subject to the provisions of Article 34.12, this Contract shall be governed and interpreted in accordance with the laws of India.

33.2 LAWS OF INDIA NOT TO BE CONTRAVENED

Subject to Article 17.1 nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.

"34.3 UNRESOLVED DISPUTES

Subject to the provisions of this Contract, the Parties agree that any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably within twenty one (21) days may be submitted to a sole expert (where Article 34.2 applies) or otherwise to an arbitral tribunal for final decision as hereinafter provided.

34.12. VENUE AND LAW OF ARBITRATION AGREEMENT

The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England"

The arbitral tribunal fixed a date of hearing at Kuala Lumpur (Malaysia), but due to outbreak of epidemic SARS, the arbitral tribunal shifted the venue of its sittings to Amsterdam in the first instance and, thereafter, to London.

ISSUES:

Respondent No.1 challenged partial award by filing a petition in the High Court of Malaysia at Kuala Lumpur. The Appellant questioned the maintainability of the case before the High Court of Malaysia by contending that in view of clause 34.12 (as mentioned above) of the PSC only the English Courts have the jurisdiction to entertain any challenge to the award. After filing the petition before the High Court of Malaysia, the Respondents made a request to the tribunal to conduct the remaining arbitral proceedings at Kuala Lumpur, but their request was rejected and it was declared that the remaining arbitral proceedings will be held in London. At that stage, the Respondents filed Other Miscellaneous Petition (OMP) under Section 9 of the Act in Delhi High Court for stay of the arbitral proceedings. The Appellant objected to the maintainability of OMP and pleaded that the Courts in India do not have the jurisdiction to entertain challenge to the arbitral award. The learned Single Judge of the Delhi High Court heavily relied on Bhatia International and overruled the objection of the Appellant and held that the said High Court has the jurisdiction to entertain the petition filed under Section 9 of the Act.

In the Supreme Court, the senior counsel appearing for the Appellant argued that the impugned order is liable to be set aside because the High Court misconstrued and misapplied the judgment of the Supreme Court in Bhatia International v. Bulk Trading S.A.³ and erroneously held that it had jurisdiction to decide OMP. The counsel further

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argued that the Single Judge of the HC failed to appreciate that the reliefs prayed for in OMP could not have been granted on an application filed under Section 9 of the Act because stay of arbitral proceedings is beyond the scope of that section. He emphasized that Section 5 of the Act expressly bars intervention of the Courts except in matters expressly provided for in the Act and, therefore, even if the petition filed by the Respondents under Section 9 could be treated as maintainable, the High Court did not have jurisdiction over the arbitration proceedings because the same are governed by the laws of England.

The counsel on behalf of the Respondents submitted that as per the arbitration agreement which is binding on all the parties to the contract, a conscious decision was taken by them that Kuala Lumpur will be the seat of any intended arbitration, Indian law as the law of contract and English law as the law of arbitration and the mere fact that the arbitration was held outside Kuala Lumpur due to the outbreak of epidemic SARS, the venue of arbitration cannot be said to have been changed from Kuala Lumpur to London. He emphasized that once Kuala Lumpur was decided as the venue of arbitration by written agreement the same could not have been changed except by amending the written agreement as provided in clause 35.2 of the PSC. He then argued that the arbitral tribunal was not entitled to determine the seat of arbitration and the record of proceedings held at London cannot be construed as an agreement between the parties for change in the juridical seat of arbitration

JUDGMENT AND THE RATIONALE:

The court referred to Dozco India P. Ltd. v. Doosan Infracore Co. Ltd⁴, and quoted the Judge who referred to the following passage from *Redfern & Hunter*:

"The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings - or even hearings - in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses....

It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country - for instance, for the purpose of taking evidence..... In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties."

To the important point whether Delhi High Court could entertain the petition filed by the Respondents under Section 9 of the Act, the Supreme Court referred to Bhatia International, Venture Global⁵ and ultimately the case of Hardy Oil and Gas Limited v. Hindustan Exploration Company Limited and ors⁶, a Gujarat HC Decision whose facts were similar to the instant case. According to the SC, the learned Single Judge of Gujarat High Court had rightly followed the conclusion recorded by the three-Judge Bench in Bhatia International v. Bulk Trading S.A. and held that the District Court, Vadodara did not have the jurisdiction to entertain the petition filed under Section 9 of the Act because the parties had agreed that the law governing the arbitration will be English law. In the present case also, the parties had agreed that the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, the Supreme Court held that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the Respondents under Section 9 of the Act.

ANALYSIS

The judgment is indeed another good sign in the line of progressive and positive decisions in cases of international commercial arbitration. It comes soon after the Dozco Case and holds that when the substantive law of the arbitration agreement is a foreign law as selected by the parties, it necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act.

This judgment too, like the Dosco Case comes as another positive decision portraying the changing outlook of Indian judiciary towards international arbitrations.

- Vyapak Desai & Prateek Bagaria

¹ MANU/SC/0598/2011

² Section 9-Interim measures etc.by Court.- A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure or protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

- 3 2002 (4) SCC 105
- 4 MANU/SC/0812/2010
- 5 AIR 2008 SC 1061
- 6 (2006) 1 GLR 658

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