

Dispute Resolution Hotline

November 23, 2011

CONSENSUS AD IDEM ESSENTIAL FOR A VALID ARBITRATION AGREEMENT

INTRODUCTION

The Supreme Court in its judgment dated 14 November, 2011, in the matter of *M/s. Powertech World Wide Limited* (“**Petitioner**”) *v/s M/s. Delvin International General Trading LLC* (“**Respondent**”), ruling in favour of a petition filed under Sec. 11(6) of the Arbitration and Conciliation Act, 1996 (“**the Act**”) held that the element of *consensus ad idem* (mutual agreement of the parties) had to be satisfied for an arbitration agreement to be held valid.

FACTS

The Respondent, which was a Company incorporated under the laws of Dubai was engaged in the business of importing and selling of various commodities got desirous of purchasing various articles from the Petitioner, a limited Company incorporated under the provisions of Companies Act, 1956. A Purchase Contract dated December 1, 2006 was executed between the said parties with a validity period of one year with effect from the date of execution (“**Purchase Contract**”). The Contract contained an Arbitration Clause, which reads as under:

“Any disputes arising out of this Purchase Contract shall be settled amicably between both the parties or through an Arbitrator in India/UAE”.

The transactions between the Petitioner and the Respondent started in accordance with the Contract executed. As alleged by the Petitioner there was certain outstanding payments not made by the Respondents for consignments. Despite repeated oral and written requests made by the Petitioner for the payment of outstanding dues, such outstanding dues were not acceded to by the Respondent. On March 30, 2008, the Petitioner issued a notice to the Respondent claiming a sum of AED 4,00,000 and informing that the said payment must be made within seven days, failing which, a law suit would be instituted for recovering the same coupled with compensation and costs. The Petitioner having failed to receive any response to the said letter, issued another letter dated May 30, 2008 to the Respondent invoking the arbitration proceedings to adjudicate the disputes regarding the Purchase Contract dated 01 December, 2006. The said letter also informed the respondent, the appointment of Mr. Justice D.R. Dhanuka (Retired) Judge, High Court of Bombay, as the sole arbitrator and the venue to be Mumbai, India. The Respondent vide letter dated June 27, 2008, expressed willing to suggest an arbitrator subject to the consent of the Petitioner. Thereafter, the Respondent did neither concur to the appointment of the said Arbitrator nor did it settle the disputes. Treating it to be inaction or refusal to act on the part of the Respondent, the Petitioner filed the present petition under Section 11(6) of the Act on March 20, 2010. As no person appeared on behalf of the Respondent, despite several attempts of service, the suit was ordered to be proceeded ex-parte.

ISSUE

Whether the arbitration agreement in the Purchase Contract was binding and enforceable under Section 11(6) of the Act?

ARGUMENTS

Contentions of the Petitioner

The Petitioner contended that from the language of the said arbitration clause it was unambiguous and clear that there was an arbitration agreement binding between the said parties. The Petitioner further contended that the words 'shall' and 'or' appearing in the said arbitration clause had to be interpreted with their true meaning. The expression 'shall' had to be construed mandatorily while the expression 'or' had to be read as disjunctive. The Petitioner also contended that, as a result of the said interpretation, the said arbitration agreement would be binding between the said parties as the expression 'settled amicably between both the parties' could not be construed as a condition precedent to the invocation of the said arbitration agreement and the reference to arbitration being an alternative and agreed remedy, the Petitioner had to be unequivocally allowed to invoke the said arbitration agreement.

JUDGMENT

Initially the Court felt that the main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration, is missing in Arbitration Clause relating to settlement of disputes. Therefore, it is not an arbitration agreement as defined under Section 7 of the Act. In absence of an arbitration agreement, the question of exercising power under Section 11 of the Act to appoint an arbitrator does not arise. But when the correspondence between the said parties and the attendant circumstances were read jointly with the present petition and with particular reference to the said Purchase Contract, it had become evident that the parties had an agreement in writing and were ad idem in their intention to refer the matters to an arbitrator in accordance with the provisions of the Act.

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The Court noted that the Respondent while replying to the letter of the Petitioner dated June 27, 2008, had neither denied the existence nor the binding nature of the said Arbitration Clause. On the contrary, the Respondent had requested the Petitioner not to take any legal action for appointment of an arbitrator, as the Respondent per se was willing to suggest an arbitrator subject to the consent of the Petitioner. Hence, the Court noted that the said letter had conclusively proved the Respondent's admittance to the existence of an arbitration agreement between the said parties and had consented to the idea of appointing a common/sole arbitrator to determine the disputes between the said parties and thus, any ambiguity in the said Arbitration Clause contained in the said Purchase Contract stood extinct.

The Court also noted that, since, the said parties could not settle the disputes inter se, as claims and counter claims had been raised in the correspondence exchanged inter se, the said parties had committed to settle their disputes by arbitration. Hence, even the pre-condition for invocation of an arbitration agreement stood satisfied. In light of the above findings, the Court allowed the present petition and Mr. Justice D.R. Dhanuka (Retired) Judge, High Court of Bombay, was appointed as Sole Arbitrator to adjudicate upon the said disputes.

ANALYSIS

The judgment lays down emphasis on the element of intention and concurrence, in short, *consensus ad idem*, for holding an arbitration agreement valid. It also lays down emphasis on the correspondence between the entities in a legal relationship, which can be relied to establish the meeting of the minds of the entities in a legal relationship. This judgment is a positive sign showing the increasing inclination of the Indian Judiciary in referring the parties to arbitration.

- **Prateek Bagaria & Vyapak Desai**

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