# Dispute Resolution Hotline

February 28, 2012

## CONTINUING THE TREND: IMPLIED EXCLUSION OF PART I OF THE ARBITRATION ACT

### INTRODUCTION

The Madras High Court ("**MHC**") in the case of Financial Software & Systems Pvt. Ltd. ("**Appellant**") vs. ACI Worldwide Corp. & Ors.[1] ("**Respondents**") held that Indian courts have no jurisdiction to entertain Section 9 applications if the governing law (substantive law) and the curial law (procedural law) of the contract is a foreign law, thereby impliedly excluding Part I of the Arbitration and Conciliation Act, 1996 ("**Act**").

### FACTUAL BACKGROUND

The Appellant, an Indian party, entered into an International Distribution Agreement ("**IDA**") with ACI Worldwide (Asia) Private Limited, ("**Respondent No. 2**") a foreign entity in 1998. Several disputes arose between the parties and litigation was commenced to settle the differences. Thereafter, the parties entered into a Settlement and Release Agreement ("**SRA**") in 2010 to resolve the disputes and achieve full and final settlement. Clause 14.6 of the SRA provided for a dispute resolution clause and the same is reproduced hereinbelow:-

#### Enforcement of Agreement

"This Agreement shall be construed and enforced in accordance with and governed by the laws of Singapore. The Parties hereby agree that any act to enforce the terms of this Agreement, or for any other remedy arising out of said Agreement, will be settled exclusively by compulsory arbitration in accordance with Arbitration Rules of the Singapore International Arbitration Centre ("SIAC"); except that either Party may pursue legal/equitable remedies in any court of competent jurisdiction."

The Appellant continued with the performance of its activities under the SRA however, due to breach of obligations on the part of the Respondent No. 2, the Appellant was constrained to initiate Section 9 proceedings to restrain Respondents from violating Clause 6 of the SRA. The Respondents challenged the maintainability of the application on the ground of jurisdiction of Indian courts being barred under Clause 14.6 of SRA. The Respondents contended that in the absence of seat of arbitration being specified, as per Rule 18 of SIAC Rules, seat of arbitration would be Singapore unless specified otherwise by the Arbitral Tribunal. The Single Judge of the MHC after hearing both the parties held that as per the terms of the SRA, laws of Singapore governed the SRA and seat of arbitration was Singapore. Thus, Part I of the Act was excluded and thereby dismissed the application leading to the present appeal.

### ISSUE

The question falling for consideration was whether this court had jurisdiction to entertain Section 9 application.

### ARGUMENTS

The Appellant relying on the precedents of *Bhatia International vs. Bulk Trading S.A.*[2] and *Venture Global Engineering vs. Satyam Computer Services*[3] held that Part I of the Act is applicable to all international commercial arbitrations whether the seat of arbitration is in India or not, unless the parties by agreement, express or implied, exclude all or any of its provisions. Further, as per the interpretation of the SRA, there is no express provision to exclude the applicability of Part I of the Act and in no manner had the parties ousted the jurisdiction of this Court. The fact that there was no exclusion in the SRA was stressed, stating that in the absence of the same, whole of Part I of the Act would apply.

The Appellant placed reliance on several other judgments including *Indtel Technical Services Private Limited v. W.S. Atkins Rail Limited*[4] and Citation Infowares Limited v. Equinox Corporation[5] and submitted that merely if proper law of the contract is a foreign law, it can no way be interpreted to exclude applicability of Part I of the Act.

The Appellant also contended that the relevant clauses in the SRA do not refer to place of arbitration and seat of arbitration not been included within the provisions of the Act, Part I could not be excluded.

### JUDGMENT AND ANALYSIS

The MHC interpreting the provisions of the SRA relied on the principles upheld by the Supreme Court ("**SC**") in *Sumitomo Heavy Industries Limited vs. ONGC*[6] that for any given arbitration, several laws are applicable including:-

- *The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of the arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal*

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*validity of the award; the question whether the parties have been discharged form any obligation to arbitrate future disputes.*

- *The curial law governs the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.*
- *The proper law of the reference governs the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.*

The MHC held that while the proper law governed the agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is the law governing the agreement, which would also be the proper law applicable to the arbitration proceedings. The MHC clarified that in the absence of any express agreement, it is presumed that the curial law is the law of the seat of arbitration and operates during the continuance of the proceedings providing the powers to the Court within its jurisdiction to entertain applications in conformity with the requirements of the curial law and the powers seize when the arbitration proceedings are concluded.

Further, the MHC referring to earlier SC decisions in Dozco India Private Limited v. Doosan Infracore Company Limited,[7] Videocon Industries[8] and Yograj Infrastructure[9] held that in the present case the parties had impliedly excluded application of Part I of the Act by choosing a foreign law as the substantive law and curial law. Applying the same logic as in Dozco (supra), the MHC stated that though seat was not specified explicitly by the parties, but choice of SIAC Rules to govern arbitration proceedings excluded application of Part I of the Act. Rule 18 of SIAC Rules states that the seat of arbitration would be Singapore if no other seat is mutually decided between the parties. The MHC held that as the as the substantive law governing the contract and curial law governing the procedure for conduct of arbitration is Singapore law, Part I of the Act is excluded. As there was an implied exclusion of Part I of the Act, the appeal was dismissed and the MHC refused to entertain such applications.

This judgment is yet another decision reflecting India's positive approach towards promoting international commercial arbitration and applying proper interpretation of the international rules to decide applicability of the Act. The recent decision has carefully scrutinized all relevant precedents pertaining to application of the Act in international commercial arbitrations and adopted the correct approach by differentiating the facts of each case and interpreting the agreements on a case to case basis.

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You can direct your queries or comments to the authors

[1] O.S. No. 280 to 283 of 2011
[2] (2002) 4 SCC 105
[3] (2008) 4 SCC 190
[4] (2008) 10 SCC 308
[5] (2009) 7 SCC 220
[6] (1998) 1 SCC 305
[7] (2011) 6 SCC 179
[8] Videocon Industries Limited v. Union of India & Anr. (2011) 6 SCC 161
[9] Yograj Infrastructure Limited v. Ssang Yong Engineering and Construction Company Limited (2011) 9 SCALE 567



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