

Dispute Resolution Hotline

April 04, 2012

ARBITRAL AWARD: CHALLENGE ONLY IN THE COUNTRY WHERE THE SEAT LIES

The Calcutta High Court ("**Court**") in its recent judgment in the case of Coal India ("**Petitioner**") v. Canadian Commercial Corporation ("**Respondent**") concluded any annulment proceedings in respect of a foreign award can only be made in the country that was the juridical seat of the arbitration.

FACTS

The parties entered into an agreement sometime in the year 1989 for the Respondent to set up a coal extracting facility for the Petitioner in the Rajmahal area in the state of Jharkhand. The parties agreed that the agreement was to be governed by the laws in force in India; that the dispute- resolution mechanism envisaged thereunder was of arbitration; and, that the arbitration was to take place under the rules of the International Chamber of Commerce (ICC) with the place of the arbitration in Geneva, Switzerland.

Upon disputes arising between the parties the petitioner sought a reference. The parties nominated their representatives on the arbitral tribunal and the presiding arbitrator was filled in by the ICC. The arbitral tribunal held its meetings in the United Kingdom but recognized that the seat of the arbitration was Switzerland. An award came to be passed in favor of the Respondent, under which it was entitled to cost.

Aggrieved by the award, the Petitioner filed a challenge under Section 48 of the Arbitration and Conciliation Act, 1996 ("**Act**") and also invoked the provisions of Section 34 of the Act and Sections 47 of the Act and 151 of the Code of Civil Procedure, 1908 ("**CPC**") to have the award set aside to be able to pursue afresh in support of its claim ("**Challenge**")

ARGUMENTS BY THE PARTIES

A preliminary objection was raised by the respondent, as to the jurisdiction of any Indian court to receive a challenge to an arbitral award passed in a reference conducted beyond the territorial limits of India. The substance of the Respondent's argument was that in an international commercial arbitration, if the parties agree to a seat of the reference, the law of the seat of the reference would govern a challenge in the nature of setting aside the award unless the parties have expressly agreed otherwise. It is only a competent authority in the country, which is the seat of the arbitration that may receive such a challenge to the exclusion of all other forums.

The Petitioner insisted, however, that courts India- Calcutta High Court on its Original Side being one of them - is competent to receive a challenge to the award notwithstanding the place of the arbitration having been outside India and despite the Respondent not having attempted to implement it.

JUDGMENT

The Court distinguished all the judgment relied by the Petitioner to make its case. It distinguished the judgment pronounced in White Industries Australia Limited v. Coal India Limited¹ ("**White Industry**") relied by the petitioner by stating that the White Industry case has to be confined to an award passed in a foreign country when the parties did not choose the seat of arbitration and where the arbitration agreement and the arbitration were found to be governed by Indian law. Further, relied upon the finding in the case of Fuerst Day Lawson Ltd v. Jindal Export Ltd², which held that it is impermissible for the provisions of Part I of the Act to be made applicable to matters covered by Part II of the Act, unless the parties by agreement provide for the same or the relevant convention recognizes it.

The Court then went on to distinguished the judgment in the case of Bhatia International v. Bulk Trading S.A.³ by relying on basic principles of the New York Convention and concluded that the judgment has to been seen in light of an application for an interim order. As the present case is an application for setting aside the award, the test for implied exclusion of Part I would be different.

The Court importantly distinguished the judgment in the case of Venture Global Engineering v. Satyam Computer Services Ltd⁴ ("**Venture Global**") by stating that the petitioner in that case had filed a suit to challenge a foreign award and the verdict of the court apply only in context's where a suit is filed to challenge a foreign award's enforceability. The present case is a challenge under Section 48 of the Act and the Court held Venture Global not to be applicable in the facts of the case.

The Court distinguished the judgment is National Thermal Power Corporation v. Singer Company⁵ ("**NTPC**") by stating that in that case the parties had only chosen ICC as a body of arbitration and then ICC chose a seat of arbitration as London. Hence, as there was no choice of seat by the parties the judgment would not be applicable to the present case as in the present case the parties had expressly chosen seat of arbitration to be Switzerland.

The Court further observed that the judgments in NTPC and Sumitomo Heavy Industries Ltd v. Oil and Natural Gas

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Commission Ltd⁶ dealt with issues under the provisions of Arbitration Act, 1940, which is materially amended and replaced by the Act.

The Court then by relying on recent judgments by the supreme court and certain important judgment of various High Courts inter alia in the case of Dozco India Pvt. Ltd v. Doosan Infracore Company Ltd⁷ and Videocon Industries Ltd v. Union of India⁸, *Inventa Fischer GmbH & Co., K.G. v. Polygenta Technologies Limited*⁹, *Vikrant Tyres Limited v. Techno Export Foreign Trade Company Limited*¹⁰ etc. and several international precedents concluded that, whether a court to which the petition under Section 34 of Act is carried is competent or not to receive the petition has to be assessed with reference to the Act, particularly Sections 2(1)(e) and 42 of the Act

It stated that Sections 2(1)(e) and 42 of the Act preclude any Indian court from receiving a petition under Section 34 of the Act unless the situs of the Respondent therein or a part of the cause of action relating to the subject- matter of the arbitration or a part of the immovable property, which was the subject-matter of the arbitration is within the jurisdiction of the court.

An arbitral award rendered in another New York Convention country will always be regarded as a New York Convention award in this country but the legal fiction that is evident from the Act may permit an arbitral award rendered in another New York Convention country to be regarded as a domestic award within the meaning of that expression in Section 2(7) of the Act.

All three factors in assessing the territorial jurisdiction of a court under Indian law would then have been taken into account; and the word "domestic" in Section 2(7) of the Act would have been given its full meaning since in an imaginary case of two parties domiciled abroad, entering into an agreement that has no nexus with India or an agreement that relates to an immovable property, which is not in India, a petition under Section 34 of the Act cannot be carried to any Indian court.

An award rendered in a foreign country and which may even be a "foreign award" within the meaning of Section 44 of the Act, can be a domestic award and amenable to annulment proceedings under Indian law in this country only if such award has been made, pursuant to an agreement between the parties, under the law of India.

Even if such an award is not subjected to any annulment proceedings in India, upon the time for making an application to set aside such award under Section 34 of the Act expiring, the award would ripen to be executed under the Code of Civil Procedure in the same manner as if it were a decree of the court under Section 36 of the Act.

At the post-award stage, therefore, Part I and Part II of the Act will not overlap nor be seen to be alternative routes available in respect of the same award.

The law of the arbitration, as distinct from the law of the arbitration agreement, would then have been the law of the country where the arbitration was agreed to take place. The award that was rendered in the arbitration was then not subject to Indian law and any annulment proceedings in respect thereof could only have been made in the country that was the juridical seat of the arbitration.

On the basis of the aforementioned the Court dismissed rejected challenge filed by the Petitioner as not being maintainable.

ANALYSIS

This judgment by the Court is a bold and a welcome move. The Court has distinguished several Supreme Court judgments which had taken a stand contrary to the one taken here by the Court and has taken shelter under the newer judgments given by Supreme Court and international jurisprudence. This is a positive development in the field of international arbitration in India.

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You can direct your queries or comments to the authors

¹ (2004) 2 Cal LJ 197

² (2011) 8 SCC 333

³ (2002) 4 SCC 105

⁴ (2008) 4 SCC 190

⁵ (1992) 3 SCC 551

⁶ (1998) 1 SCC 305

⁷ (2011) 6 SCC 179

⁸ (2011) 6 SCC 161

⁹ (2005) 2 Arb.LR 125

¹⁰ 2005 (Suppl.) Arb.LR 454

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