Dispute Resolution Hotline

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INDIA, ARBITRATION FRIENDLY: SUPREME COURT BRINGS INDIAN ARBITRATION LAW UP-TO INTERNATIONAL STANDARDS

- An arbitration agreement is valid so far as the intention of the parties to resolve the disputes by arbitration is clear; any allegation of non-conclusion of the main contract is immaterial.
- If the intention to arbitrate is clear, the court can make good an omission to make the arbitration agreement workable.
- Sections 8, 10, 11 and 45 of the Arbitration and Conciliation Act are mere machinery provisions for the Court to support and aid arbitration.
- The seat of arbitration would be the country whose law is chosen as the curial law (law of arbitration) by the parties.
- The courts of the seat of arbitration have the exclusive jurisdiction to exercise supervisory powers over the arbitration process. The courts of the venue of arbitration cannot have concurrent jurisdiction in this regard.

INTRODUCTION

The Supreme Court ("**Supreme Court**") in *Enercon (India) Ltd. & Ors. ("**Appellants**") v. Enercon GmBH & Anr.* ("***Defendants***")[1] has rendered a landmark decision affirming the pro-arbitration outlook the Indian courts have developed in the past few years. This judgment is a step in the right direction to bring Indian arbitration law in line with international jurisprudence and will aid India in being perceived as an arbitration-friendly jurisdiction.

FACT

Background

In 1994, Members of the Mehra family ***("2nd and 3rd Appellants")*** and Enercon GmBH ("***1st Respondent***") entered into an agreement to start a joint venture business by setting up Enercon (India) Ltd ("***1st Appellant")***, with registered office in Daman, India.

On January 12, 1994 the 1st Appellant & 1st Respondent, entered into a Technical Know-How Agreement ("**THKA**") for transfer of technology from the 1st Respondent to the 1st Appellant. In April 2004 the THKA expired but the 1st Respondent continued its supply to the 1st Appellant. The parties thereafter negotiated possibility of further agreements. These negotiations were recorded in document titled "Heads of Agreement" ("**Heads of Agreement**").

On September 29, 2006 the parties entered into a document titled "Agreed Principles" which recorded the principles based on which new agreements were to be entered into. On the same day the Intellectual Property License Agreement ("**IPLA**") containing an arbitration clause ("**Arbitration Agreement**") at Clause 18, was allegedly executed between the Parties. Under the Arbitration Agreement:

1. the arbitral tribunal was to consist of three arbitrators, of who one would be appointed by each of the two parties to the IPLA. The arbitrator appointed by the 1st Respondent was to act as the presiding arbitrator,
2. the venue of the arbitration proceedings was London,
3. the provisions of Indian Arbitration and Conciliation Act, 1996 ("**the Act**") were to apply.,=, and,
4. Indian laws were to govern the Arbitration Agreement and the IPLA.

Disputes

Disputes arose between the parties when the 1st Respondent stopped all shipments of supply to India. In response, on September 11, 2007, the 2nd and 3rd Appellants filed a derivate action before the Bombay High Court ("**Bombay Suit**"), seeking resumption of supply. In this action the 1st Respondent filed an application under Section 45 of the Act seeking reference of the disputes between the parties to arbitration. The Bombay Suit and the application remained pending for disposal.

On March 13, 2008, the 1st Respondent invoked arbitration and sought certain declaratory reliefs from the High Court of Justice, Queens Bench Division, Commercial Court, United Kingdom ("**English High Court**") including constitution of an arbitral tribunal under the IPLA.

On April 8, 2008 the Appellants filed a fresh suit ("**Daman Suit**") before the Court of Civil Judge, Sr. Division, Daman Trial Court ("**Daman Court"**) seeking a declaration that the IPLA was not a concluded contract and correspondingly, there was no arbitration agreement between the parties. The Respondents, in response, filed an application under

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Section 45 of the Act before the Daman Court seeking reference of the disputes between the parties to arbitration ("**Section 45 Application**"). The Appellants on the other hand sought an anti-suit injunction over the English High Court Proceedings ("**Anti-suit Application**").

After adjudication by the Daman Court on the Section 45 Application and the Anti-suit Application in favour of the Appellants, which was subsequently overturned by the Daman Appellate Court in the favour of the Respondent, the Appellants filed two writ petitions challenging the decisions of the Daman Appellate Court in the Section 45 Application and the Anti-suit Application ("**Writ Petitions**") before the Bombay High Court.

The Bombay High Court dismissed the Writ Petitions vide its order dated October 5, 2012 ("**Impugned Order**") which decision was in appeal before the Supreme Court in the present case.

FINDINGS:

Validity of the Arbitration Agreement

The primary defense of the Appellants was that the IPLA was not a concluded contract and hence, the Arbitration Agreement contained therein could not be considered to constitute a valid arbitration agreement. The Respondents on the other hand contended that an intention to arbitrate was the only requirement for determining the existence of an arbitration agreement and it did not depend on the presence or absence of a concluded substantive contract between the parties.

The Supreme Court upholding the concept of separability of the arbitration clause from the underlying contract, ruled in favour of the Respondents. The Supreme Court held that Section 16 of the Act[2] recognized that the substantive agreement and the arbitration agreement formed two separate contracts and the legitimacy and validity of the latter could not be affected even if one claims that the former is void or voidable or unconcluded.

The Supreme Court clarified that legislative mandate under Section 45 of the Act not to refer a dispute to arbitration in cases where the agreement is *"null and void, inoperative or incapable of being performed"* is applicable only to the arbitration agreement and a party must contend and prove one of these infirmities to exist in the arbitration agreement itself, as against the substantive agreement. The Supreme Court also clarified that any challenge to the validity of the substantive agreement was a dispute that would fall within the domain of the arbitral tribunal.

Reading the Heads of Agreement where the parties had agreed to be irrevocably bound by the Arbitration Agreement contained in the IPLA, along with the IPLA, the Supreme Court found a clear intention of parties to resolve their disputes via arbitration and concluded without hesitation that the parties must proceed with the arbitration.

Unworkability of the Arbitration Agreement

The Appellants contended that the Arbitration Agreement was unworkable as it prescribed for a three member arbitral tribunal but provided for the procedure of appointment for only two of these arbitrators.

The Respondents contended that an arbitration agreement was workable if a manifest intention to arbitrate existed between the parties, in which case any lacuna in an arbitration agreement could be cured. The Respondents relying on Sections 10 and 11 of the Act argued that the underlying object was to avoid failure of appointment of arbitrators.

The Supreme Court ruled in favour of the Respondents and held that courts must adopt a pragmatic, reasonable business person's approach (and not a technical approach) while interpreting or construing an arbitration agreement and must strive to make a seemingly unworkable arbitration agreement workable. The Supreme Court opined that the legislative mandate to support this was contained in Section 5 of the Act.

The Supreme Court held that courts must strictly follow the "least intervention" policy in arbitration process and that they must only play a supportive role in encouraging the arbitration proceedings rather than letting it come to a grinding halt. The Supreme Court opined that where there is an omission which would be obvious even to an officious bystander[3] the court should make good such omission to give effect to the arbitration agreement.

The Supreme Court further held that provisions contained in Sections 8, 10, 11 and 45 of the Act are machinery provisions to ensure that parties can proceed to arbitration provided they have expressed the intention to arbitrate in terms of Section 7 or Section 44 of the Act and thus, while constructing an arbitration agreement the approach of courts should be to make it workable.

Distinction between Venue and Seat of Arbitration

The Appellants argued that for fixing the seat of arbitration the court would have to apply the 'closest connection test'. They pointed out that as parties had made provisions of the Act applicable under the Arbitration Agreement; substantive law of the contract was Indian Law; law governing the arbitration was Indian law; curial law was Indian law; applicable Patent Law was that of India; IPLA was to be acted upon in India; enforcement of the award was to be done in India; the joint venture between the parties was to be acted upon in India and the relevant assets were in India, the seat of arbitration would be India.

The Respondents contended that the closest connection test was completely irrelevant as the parties had designated all three laws applicable in the contract and had designated London the place for resolving their disputes. It was also submitted that London, and not India, was to be the seat of arbitration as the terms usually used to denote seat were "venue", "place" or "seat" and the word "venue" in the Arbitration Agreement attached to London was a misnomer.

The Supreme Court relying on the established jurisprudence in *Bharat Aluminum Company Limited v. Kaiser Aluminum Technical Service, Inc.*[4] concluded that by choosing to apply the Act, the parties had made a choice that the seat of arbitration is India. The Supreme Court held that having chosen all the three applicable laws to be Indian laws, the parties would not have intended to have created an exceptionally difficult situation, of extreme complexities, by fixing the seat of arbitration in London and thus, concluded that in the facts of the case, it would not be appropriate to read the word "venue" as "seat", as contended by the Respondents.

Concurrent jurisdictions of venue and seat courts

In the Impugned Order, the Bombay High Court had concluded that though London was not the seat of arbitration, the English Courts would have concurrent jurisdiction since venue of arbitration was London.

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The Supreme Court disagreed with this finding of the Bombay High Court and held that once the seat of arbitration was established, it was clear under both, Indian and English law[5], that the courts of the seat of arbitration would have exclusive jurisdiction to exercise supervisory powers over the arbitration. It was further held that allowing different courts from different jurisdictions concurrent jurisdiction over an arbitration would lead to unnecessary complications and inconvenience which would, in effect, frustrate the purpose of arbitration i.e. a speedy, economic and final resolution of disputes.

Based on this finding, the Supreme Court granted the anti-suit injunction against the Respondents, restraining them from pursuing any reliefs before the English High Courts.

ANALYSIS

The international outlook and the pragmatic approach followed by the Supreme Court is clear evidence that the arbitration law in India has finally evolved to meet the demands of an ever-dynamic arbitration jurisprudence.

The Supreme Court though addressing issues involving an International Arbitration, took aid of provisions under Part I of the Act, making a point that the legislative mandate even in Part I of the Act is for courts to aid, support and facilitate arbitration. This indeed is welcome news for Indian and foreign parties alike. Parties would now be encouraged to choose India as the seat of arbitration.

Lastly, this judgment re-establishes the importance of specifically mentioning in the arbitration agreement the law governing it and the seat (not venue) of arbitration in order to avoid litigation.

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You can direct your queries or comments to the authors

[1] Civil Appeal No.2086 of 2014 (Arising out of SLP (C) No. 10924 of 2013), decided on February 14, 2014

[2] The Court, in this regard, relied upon the interpretation of Section 16 of the Act in the decision of *Reva Electric Car Company Private Limited v. Green Mobil,* (2012) 2 SCC 93

[3] As laid down in *Shirlaw v. Southern Foundries*, [1937 S. 1835]

[4] (2012) 9 SCC 552

[5] Reliance was placed upon the decision in *A v. B*, [2007] 1 Lloyds Report 237