

Dispute Resolution Hotline

May 19, 2009

INTERNATIONAL COMMERCIAL ARBITRATION - THE CASE OF THE AMBIGUOUS ARBITRATION CLAUSE

Appointing an arbitrator is often a sensitive matter for the concerned parties. A lot of care is taken in choosing an arbitrator or arbitral panel and clauses relating to the same are drafted very carefully so as to avoid any ambiguity at the stage of enforcement. However, the instant case¹ is one wherein an interesting ambiguity arose as to the power of the Chief Justice of India to appoint an arbitrator where the governing law is not Indian and the Arbitration and Conciliation Act, 1996 (**"the Act"**) finds no mention in the arbitration agreement between the parties.

FACTS OF THE CASE:

The Applicant, Citation Infowares Limited (**"Citation"**), a Company incorporated under the provisions of Companies Act, 1956, carries on business in the USA and in Gurgaon, India. The Respondent, Equinox Corporation (**"Equinox"**) is a Company incorporated under the laws of the State of California, USA and carries on an outsourcing business in India through its subsidiary, Equinox Global Services Private Limited. Equinox had entered into an outsourcing agreement signed in Kolkata, India, with Citation dated February 9, 2004, wherein Citation was engaged as service provider on certain terms and conditions included therein for a term of 3 years.

Citation had set up about 200 customized seats at its Gurgaon premises for Equinox and had entered into two subsequent agreements dated July 23, 2004 and January 25, 2007 respectively. Equinox, via an email notice dated January 1, 2008, terminated the agreements, resulting in an apparent loss to Citation. Clause 10.1 of the Agreement dated January 25, 2007 reads as follows:

"10.1 Governing law- This agreement shall be governed by and interpreted in accordance with the laws of California, USA and matters of dispute, if any, relating to this agreement or its subject matter shall be referred for arbitration to a mutually agreed Arbitrator"

Equinox did not agree upon an arbitrator within the period of 30 days provided in Section 11(5) of the Act, resulting in Citation approaching the Hon'ble Supreme Court of India (**"Court"**) for the appointment of an arbitrator.

ARGUMENTS:

Interestingly, there was no dispute between the parties relating to the fact that this was an international commercial arbitration and therefore, under the Act, the power to appoint an arbitrator in this case would lie with the Chief justice of the Court, or his designate and also that there was, in fact, a live dispute between the parties.

Equinox argued that the provisions of the Act would necessarily stand excluded in view of the fact that the parties had agreed to Californian law governing the contract. Relying on the decision in *Venture Global Engineering v. Satyam Computer Services Limited*², Citation pointed out that the Court had come to the conclusion that the provisions of Part I of the Arbitration Act would be equally applicable to international commercial arbitrations held outside India, unless any of the said provisions are expressly or impliedly excluded by agreement between the parties. Citation argued that as per the Court's decision in *Bhatia International v. Bulk Trading SA*,³ Part I of the Act would apply even where the governing law envisaged by the parties is the law of a foreign state.

Equinox argued that the positive language of the parties whilst choosing Californian Law impliedly excluded the provisions of Part I of the Act. Further, Equinox contended that where the parties have agreed that the governing law would be a foreign law, normally the question relating to the appointment of the arbitral tribunal will also be governed by such foreign law as held by the House of Lords in *James Miller and Partners Limited v. Whitworth Street Estates Limited*⁴.

JUDGMENT:

The Court observed that though the parties had chosen Californian law as the law governing the contract, there was no agreement with respect to the law governing the procedure or even the venue of arbitration. The Court further observed that one of the parties is Indian and the obligations under the contract were to be completed in India.

Given such facts, it was difficult for the Court to read in an implied exclusion of Part I of the Act, as was sought to be argued and therefore, relying on its earlier decisions in *inter alia Bhatia International*⁵ and *Venture Global Engineering*⁶ the Court appointed the Hon'ble Mr. Justice R.C. Lahoti (former Chief Justice of India) as the sole arbitrator in this matter. The Court further specified that the law governing the contract would be Californian law.

ANALYSIS:

- By this judgment, the Court has appointed the Hon'ble Mr. Justice R.C. Lahoti (former Chief Justice of India), to govern an arbitration (and pass award thereon) where the governing law is Californian law.
- This judgment reaffirms that if parties in an international commercial arbitration wish to exclude the provisions of the Act, including Part I thereof, they should do so specifically.

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■ Most agreements of an international commercial nature these days contain arbitration clauses. The importance of drafting such arbitration clauses properly can be seen from the ambiguities in the arbitration clause in the instant case. Some important aspects which must be clearly set out are:

- The law governing any dispute arising under the contract;
 - The seat of arbitration;
 - Procedure governing the arbitration proceedings;
 - The language in which the proceedings are to be conducted;
 - Jurisdiction of the courts;
 - The express inclusion or exclusion of relevant statutes in the concerned jurisdictions; and
 - The composition of the arbitral panel and the method of selecting the arbitrator(s).
- An arbitration clause drafted with these points in mind will leave minimal scope for imaginative interpretation and provide the parties to a contract with clarity from the very outset of their relationship.

- Arjun Rajgopal, Sahil Kanuga & Vyapak Desai

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1. Arbitration Application No. 8 of 2008
 2. 2008 (4) SCC 190
 3. 2002 (4) SCC 105
 4. 1970 AC 583
 5. Supra
 6. Supra

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