

Dispute Resolution Hotline

February 18, 2013

ARBITRAL TRIBUNAL V. COURT

Affirming the duty of a curial court in arbitration, recently the Delhi High Court in *Indeen Bio Power Limited ("Petitioner") v. Dalkia India Pvt. Ltd¹ ("Respondent")* found that it was for the arbitral tribunal to determine the existence and validity of the arbitration agreement. The Delhi High Court through this decision has reaffirmed the doctrine of the negative effect of *Kompetenze-Kompetenze*.

FACTS

The Petitioner was in the business of developing a biomass plant in Rajasthan and entered in a Project Development Agreement dated May 2, 2010 with the Respondent, which is a wholly owned subsidiary of a French company. The parties agreed on an EPC contract and the Respondent wanted for the contract to be split into three, being the Supply Contract, the Works Contract and the Service Contract for tax purposes. All these three Collective Contracts dated September 8, 2011 set out the rights and responsibilities of the parties and one Synchronization and Co-ordination Agreement ("SAC Agreement") of the same date was entered into to tie in the three Collective Contracts and memorialize the responsibility of the Respondents for completing the entire contract as a single whole.

In October 2011, the Petitioner got to know that the Respondent was planning to cease its operations in India. Relying on the existing contracts, the Petitioner had approached various banks for loans and all of this financing would be jeopardized if the Respondent shut shop midway and the agreements fell through. As a result the Petitioner invoked arbitration under Clause 13.2 of the SAC Agreement and the Respondent in reply disclaimed the existence of any agreement and any arbitration agreement. The Petitioner then sent the Respondent a notice and after the expiry of 30 days filed this Petition under section 11 of the Arbitration & Conciliation Act, 1996 ("**Act**") for appointment of arbitrator. Upon the filing of the Petition the Respondent contested the existence and / or validity of the SAC Agreement and the Collective Contracts stating that the same had either expired or never come into effect. The Petitioner sought the appointment of the Arbitrator on the ground that the SAC Agreement was valid and binding while the Respondent sought to challenge the very existence of the SAC Agreement and thereby questioned the existence of the arbitration agreement. The Petitioner also argued that it had made several onward commitments on the basis of the Respondent's presence in the project.

HELD

The Delhi High Court held that where the existence or non-existence of an arbitration agreement is not clear, it is settled law that it would be proper for the arbitrator to determine the question under Section 16 of the the Act. The Court observed, "*It is because the power that is exercised by the Court under Section 11 is in the nature of an administrative order.*"² The Court observed that it is the Arbitral Tribunal which would rule on its own jurisdiction including the existence and validity of the arbitration agreement. "*The Arbitral Tribunal authority under Section 16 is not confined to width of its jurisdiction but goes also to the root of its jurisdiction.*"³

The Court accordingly went on to appoint a retired judge of the Delhi High Court as a sole arbitrator (despite the fact that the arbitration clause under the SAC Agreement prescribed for a 3 member tribunal) who was to determine questions relating to the existence of the arbitration agreement and accordingly disposed of the Section 11 Petition.

ANALYSIS

- The principle that the Arbitral Tribunal can rule on its own jurisdiction is well settled. The Supreme Court has also held that a civil court does not have the power to stay arbitration on the grounds that no arbitration agreement exists since it is the premise of the arbitrator to make decisions with respect to its jurisdiction and the existence and / or validity of an arbitration agreement.⁴ However in the heavily criticized decision of *SBP Co. v. Patel Engineering*⁵ a seven judge bench had held that in a Section 11 application the Court's power is not merely administrative but judicial and it can determine the existence of a valid arbitration agreement, the existence of a claim, and on the qualifications of the arbitrator or arbitrators. It appears that the present case has not referred to *Patel Engineering*. In any event, since the proposition set out by *Patel Engineering* is sweeping it remains to be seen what will happen in the present case once it is appealed. Interestingly, in *National Insurance Co. Ltd v. Boghara Polyfab Pvt. Ltd.*⁶ while interpreting *Patel Engineering* the Supreme Court observed (in para 17.1 (b)) that the Court will have to decide whether there is an arbitration agreement. It would be important to see if the present case falls within this category and if so whether it would withstand the scrutiny of the Supreme Court.
- Interestingly, the Delhi High Court appointed a single arbitrator although the clause provided for a panel of 3. There have been other decisions where upon failure of appointment of a panel it has been understood that agreement

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failed and Courts have appointed a sole arbitrator even when the clause required three.⁷

- The other important aspect of the questions examined in this case is the doctrine of negative effect Kompetenz-Kompetenze. The Kompetenz-Kompetenze doctrine provides that the Arbitrator has the power to rule on its jurisdiction. Negative effect of Kompetenz-Kompetenze states that in order for the Arbitrator to be able to decide on its jurisdiction Courts ought not to needlessly interfere and must transfer the matter before the arbitrator. This is a fine balance to tread. In matters where a party is being dragged into arbitration and if the court exercises negative Kompetenz-Kompetenze then the losing party would have to wait until the final award is passed in order to challenge this order under Section 34 of the Act. Therefore, courts ought to tread with caution even when exercising their discretion in a pro-arbitration manner. The scheme of the Act with respect to jurisdictional challenge under the Act is provided below.

The position in India with regard to the plea of jurisdiction is as follows:

- When a party raises a plea on lack of jurisdiction or exceeding the scope of jurisdiction and the tribunal holds that it has jurisdiction and / or the dispute falls within its scope, the only remedy available to an aggrieved party is to challenge the final award under a section 34 set aside petition. If however a party wins on a plea of lack of jurisdiction that is the tribunal accepts that it does not have jurisdiction or that it has exceeded the scope of its jurisdiction then an immediate remedy would lie in terms of an appeal under Section 37.⁸
- Bombay High Court in a decision has held that if a tribunal holds it has jurisdiction and the same is challenged in the form of an interim application under Section 17 then an appeal lies against this under Section 37 and nothing in Section 16 (6) or Section 34 bars such an appeal.⁹ On the other hand whether the tribunal rejects a plea that it lacks jurisdiction or accepts it, in either case it is not an award but an interim order. Thus even if it accepts that it has jurisdiction the same can be challenged only with the final award u/s 34.¹⁰
- When a plea of jurisdiction is not raised before the Tribunal
- The Supreme Court has held that when a plea of jurisdiction is not raised in before the tribunal under Section 16, the award would still be liable to be set aside under section 34 if such ground is raised (the tribunal cannot assume jurisdiction simply because the parties did not object to it.) However good reasons have to be shown as to why the plea was not taken under Section 16 and why it is now being belatedly taken under Section 34.¹¹

- **Shalaka Patil, Moazzam Khan & Vyapak Desai**

You can direct your queries or comments to the authors

¹ Arb P No. 184/2012, Judgment delivered on January 21, 2013.

² Supra note 1 at p 5, para 9.

³ Supra note 1 at p 6, para 9.

⁴ Kvaerner Construction India Ltd. v. Bajrangdal (2001) 4 SLT 535

⁵ AIR 2006 SC 450

⁶ AIR 2009 SC 170

⁷ K Venkateswaralu v. State of AP (2003) 3 Raj 214 (AP); See also Talwar Brothers v. Punjab State Industrial Development Corporation Ltd. (DB) 2001 4 Raj 48 (Del).

⁸ Scan Organics Ltd. v. Mukesh Babu Financial Services Ltd. (1998) 3 RAJ 240 (Bom), Jain Studios Limited vs Maitry Exports Pvt. Ltd I (2008) BC 640

⁹ Leslie David Isaacs v. Bapuji Sanjana , decided on April 9, 2012

¹⁰ UOI v. East Coast Builders and Engineers (1999) 4 Raj 365; Traid India v. Tribal Co-op 1 Arb LR 327

¹¹ Gas Authority of India v. Ketu Construction (2007) 2 Arb LR 323, 338.

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