



DSK Legal Knowledge Center

Updates on

- Miscellaneous Update

MISCELLANEOUS UPDATE

ARBITRATION

International Commercial Arbitration – Appointment of Arbitrator

In a recent judgment¹, an interesting question 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”) is not specifically excluded in the arbitration clause of the agreement entered into between the parties.

¹ Citation Infowares Ltd. Vs. Equinox Corporation; Arbitration Application No. 8 of 2008

Facts-

The Applicant, Citation Infowares Limited (“Citation”), a Company incorporated under the provisions of Companies Act, 1956, has business operations in the USA and India, both. The Respondent, Equinox Corporation (“Equinox”) is a Company incorporated under the laws of the State of California, USA. Equinox had entered into an outsourcing agreement signed in Kolkata, India, with Citation dated February 9, 2004, wherein Citation was engaged as a service provider on certain terms and conditions included therein for a term of three years.

Citation had set up about 200 customized seats at its Gurgaon premises for Equinox and had entered into two supplementary agreements dated July 23, 2004 and January 25, 2007, respectively. Equinox, via an email notice dated January 1, 2008,

terminated the said 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, both the parties were clear about the fact that it 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 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

² 2008 (4) SCC 190

³ 2002 (4) SCC 105

James Miller and Partners Limited v. Whitworth Street Estates Limited⁴.

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 International⁵ and Venture Global Engineering⁶, 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-

- Court has finally appointed the Hon'ble Mr. Justice R.C. Lahoti (former Chief Justice of India), as an arbitrator to govern an arbitration (and pass award thereon), where the governing law would be Californian law.
- This judgment reaffirms that if parties in an international commercial arbitration wish to exclude the provisions of the Act, including Part 1 thereof, they should do so specifically. Thus, the present judgment reaffirms the law laid under Bhatia International and Venture Global Engineering.

⁴ 1970 AC 583

⁵ Supra

⁶ Supra

Contact Details: dsklegal.knowledgecenter@dsklegal.com

Mumbai Office
4th Floor, Express Towers,
Nariman Point,
Mumbai 400 021
India
Tel: (91 - 22) 6658 8000
Fax: (91 - 22) 6658 8001

Delhi Office
46, Aradhana, Chanakyapuri,
New Delhi 110 066
India
Phone: (91 - 11) 2687 1122; 2687 1133;
2687 1144
Fax: (91 - 11) 2687 1155

Disclaimer

The update is intended for your general information only. The information and opinions contained in this document are derived from public sources which we believe to be reliable and accurate but which, without further investigation, cannot be warranted as to their accuracy, completeness or

correctness. It is not intended to be nor should be regarded as legal advice and no one should act on such information without appropriate professional advice. DSK Legal accepts no responsibility for any loss arising from any action taken or not taken by anyone using this material.