Dispute Resolution Hotline

September 11, 2014

A MISSED OPPORTUNITY – COURT DOES NOT CLARIFY WHETHER TWO INDIAN PARTIES CAN CHOOSE A FOREIGN SEAT FOR ARBITRATION

- In the instant case, assignment agreement has been entered into to effectuate maintenance agreement and not to substitute the same.
- Arbitration clause in an agreement does not perish on account of alteration in certain terms of the parent contract
- No clear court decision on whether two Indian Parties could choose a foreign seat

INTRODUCTION

The High Court of Delhi (the "**Court**") recently in *Delhi Airport Metro Express Pvt. Ltd.("**Plaintiff**") v. CAF India Pvt. Ltd ("**1st Defendant**") &* Construcciones Y Auxiliar De Ferrocarriles, SA (**2nd Defendant**).[1] was faced with the question with regard to the permissibility of two Indian parties to choose a foreign seated arbitration. The court did not opine on the question as it reached a conclusion that the impugned arbitration agreement was a tripartite agreement where 2nd Defendant was a foreign party thereby dismissing the Plaintiff's application.

BACKGROUND

The Plaintiff (an Indian entity) in connection with the Delhi airport metro express line project had executed a Rolling Stock Supply Contract dated June 30, 2008 ("**Supply Contract**") and a Maintenance Service Agreement dated June 20, 2008 ("**Maintenance Contract**") with the 2nd Defendant (a Spanish entity).

The Maintenance Contract provided for resolution of disputes through arbitration in London in accordance with the rules of International Chamber of Commerce, Paris. Subsequently, the 2nd Defendant executed an Assignment Agreement dated May 17, 2010 ("**Assignment Agreement**") with the 1st Defendant (an Indian entity) in relation to the Maintenance Contract whereby the rights and obligations of the 2nd Defendant were transferred to the 1st Defendant.

Subsequently, due to certain disputes arising between the parties, the 1st and 2nd Defendant commenced arbitration as per the arbitration clause incorporated under the Maintenance Contract.

PLAINTIFF'S CASE

The Plaintiff opposing the commencement of the arbitration proceedings filed an anti-arbitration suit before the Hon'ble High Court of Delhi on the principal basis that due to the assignment agreement, the Maintenance Contract stood novated. Thereby the arbitration agreement stood only between the 1st Defendant and the Plaintiff. Accordingly, as both 1st Defendant and the Plaintiff were companies incorporated in India, they could not have chosen a foreign seat for the arbitration and thereby derogate from the Indian laws.

DEFENDANT'S CASE

The Defendants *inter alia* contended that the arbitration agreement remained a tripartite agreement and 2nd Defendant, a foreign party, continued to remain a party having obligations under the Maintenance Contract and that the Assignment Agreement was only a supplemental agreement.

JUDGMENT

The Court thus considered that for the purpose of determination whether two Indian Parties could choose a foreign seat for arbitration, it first had to reach a conclusion that the 2nd Defendant did not remain a party to the arbitration agreement and that the Maintenance Contract stood novated by the Assignment Agreement.

Accordingly, from a perusal of the provisions of the Maintenance Contract and the Assignment Agreement the Court took note of the following:

- The Maintenance Contract permitted the 2nd Defendant to assign or sub-contract its obligations to a wholly owned subsidiary i.e. the 1st Defendant without any consent of the Plaintiff;
- Recitals of the Assignment Agreement indicated that the Assignment Agreement was for the purpose of implementing the terms and conditions of the Maintenance Contract. The recitals provided that:

"*During the negotiations held between CAF and the Project Company, prior to the execution of the Maintenance Agreement, both parties agreed on the convenience of having maintenance services out by a local subsidiary of*

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CAF, in India, due to operative and tax-legal reasons."

- 2nd Defendant was not completely discharged from its obligations and liabilities towards the Plaintiff. Article 2.3 of the Assignment Agreement provided that:

"*However, notwithstanding the assignment of the Maintenance Agreement to CAF India, CAF shall continue to be responsible and liable to Project Company for the Maintenance Services under the Maintenance Agreement.*"

In light of the aforesaid findings, the court noted that the 2nd Defendant, a foreign party, continued to remain a party to the contractual arrangement and thus the arbitration agreement could not be said to be purely between two Indian entities. Further, with regard to Section 62 of the Indian Contract Act, 1872, the Court noted that the execution of the Assignment Agreement would not amount to novation of contract. The Court noted that even if some performance had been altered and assigned to the 1st Defendant, dispute resolution clause being a separable agreement would not perish on account of the alteration in certain terms.

Lastly, the court noted that the Assignment Agreement would have an effect of both the 1st and 2nd Defendant being co-promisors qua their obligations to be performed under the Maintenance Contract and the Assignment Agreement, which concept is also recognized under section 43 of the Indian Contract Act, 1872.

CONCLUSION

The Court thus concluded that the parties could continue with the arbitration proceedings pending before the arbitral tribunal at London.

ANALYSIS

The legal position on two Indian parties choosing a foreign seat remains untested under Indian Law. This case evidences that the defendant may always try to use this grey area in the law to his advantage and attempt to stall the entire arbitration process or at least delay it.

The Court in the present case approached the issue from the perspective of the persons who remained parties to the arbitration agreement and held that the arbitration continued to remain in the nature of an international commercial arbitration.

Another approach which could have been adopted was to determine if two Indian parties could choose a foreign seated arbitration. If the answer was in affirmative it would then make the determination of whether the 2nd Defendant continued to remain a party to the arbitration agreement moot. However, there has been much debate on the subject and with no clear answer. The approach adopted by court seems to suggest that a straight conclusion may not be possible and the answer could be in the negative.

Thus, to avoid obstacles during arbitration, it is advisable for two Indian parties to avoid choosing a foreign seat till there is some clarity on this issue from the courts.

– Ashish Kabra, Prateek Bagaria & Vyapak Desai
You can direct your queries or comments to the authors

[1] I.A. No. 10776/2014 in CS(OS) 1678/2014

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