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Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/Rev.3). CLOUT documents are available on the UNCITRAL website at: https://uncitral.un.org/en/case_law.

Each CLOUT issue includes a table of contents on the first page that lists the full citation of each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the court or arbitral tribunal. The Internet address (URL) of the full text of a decision in its original language is included in the heading to each case, along with the Internet addresses, where available, of translations in official United Nations language(s) (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, all Internet addresses contained in this document were functional as of the date of submission of this document, but websites do change frequently). Abstracts on cases interpreting the UNCITRAL Model Law on International Commercial Arbitration include keyword references which are consistent with those contained in the Thesaurus on the Model Law, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available on the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

The abstracts are prepared by National Correspondents designated by their Governments, by individual contributors, or by the UNCITRAL secretariat itself. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

Cases relating to the Model Law on International Commercial Arbitration (MAL)

Case 1888: MAL 6; 34(1); 34(2)(a)(iv)
Colombia: Council of State, Administrative Division, Section Three, plenary
File number: 11001-03-26-000-2018-00012-00 (60714)
*China United Engineering Corporation and Dongan Turbine Co. Ltd. Consortium (CUC-DTC Consortium) v. Sociedades Generadora y Comercializadora de Energía del Caribe (GECELCA) S.A. E.S.P and GECELCA 3 S.A.S. E.S.P.*27 de febrero de 2020
Original in Spanish
Published in Spanish: https://jurisprudencia.ramajudicial.gov.co/

Abstract prepared by Adriana Castro Pinzón and Juan Diego Polo Salazar

[**Keywords**: court involvement; applicable law; arbitration proceedings; recourse against award]

The Council of State ruled on recourse against an international arbitral award in relation to a dispute arising in the context of a State turnkey contract for the construction of a thermal power plant (see art. 6 MAL).

The application for setting aside was made by the company that was the respondent and counterclaimant in the arbitral proceedings. The appellant claimed, inter alia, that the arbitral tribunal had deviated from the procedure agreed upon by the parties (art. 34(2)(a)(iv) MAL) by preventing the respondent from submitting an expert report as part of its counterclaim, despite the fact that it had been expressly agreed that if either party were to submit an expert report with its rejoinder, the other party would be entitled to contest that report through the submission of its own expert report within a fixed time frame, and by allowing the claimant to submit a new report at the hearing stage, even though the parties had agreed that no additional evidence could be submitted after the written stage.

The Council of State found that the arbitral tribunal had incorrectly interpreted one of the procedural rules agreed in the relevant procedural order and that the procedure was therefore not in accordance with the agreement of the parties (art. 34(2)(a)(iv) MAL). In the opinion of the Council of State, the report submitted with the rejoinder could have been contested regardless of whether that report contained new information relevant to the dispute. The fact that it had not been possible to contest that report therefore invalidated the final award.

Demonstration of failure to follow a rule agreed upon in an arbitral process is a necessary and sufficient condition for the setting aside of an award. It was not expressly or specifically established that the admissibility of an application for setting aside (art. 34(2)(a)(iv) MAL) would depend in any way on the conduct of the arbitrator or that the appellant would be obliged to prove that the alleged violation had affected the entire process or that it was a serious violation in the sense that, had it not been committed, the decision reflected in the award would have been different. The Council of State found that any such assessment or determination would necessitate a review of the substance of the decision, which would exceed the jurisdiction of the court considering the application for setting aside (art. 34(1) MAL).

An award may be set aside on the basis of article 34(2)(a)(iv) of the MAL when it is evident that an agreed procedural rule has not been followed, without it being necessary to assess the conduct of the arbitrators or determine whether the impact of the procedural error on the award was material, substantial or serious.

Case 1889: MAL 1(3)
Greece: Areios Pagos
Case No. 764/2019
Limited liability company "… S.A." v. Greek State
26 February 2019
Original in Greek
Available at: http://www.dsanet.gr; http://www.areiospagos.gr

[**Keywords**: habitual residence; internationality; place of business]

The case concerns the characterization of an arbitral procedure as "international" under MAL.

A limited liability company governed by Greek law and the Greek State concluded in 2006 a concession contract regarding the construction and operation of a submerged tunnel.

An arbitral award was rendered in 2010 that ordered the Greek State to pay damages arising from delays in the execution of the contract to the operating company. Various actions were brought to challenge the award, lastly in 2019 before the Areios Pagos (the Hellenic Supreme Court of Civil and Penal Justice – the "Supreme Court") against a decision of the Court of Appeal annulling the award on the basis of article 49, paragraph 1, of the Hellenic Code of Civil Procedure, which sets forth certain requirements for the Greek State to be bound by an arbitral agreement or to appoint arbitrators. However, article 49, paragraph 1, does not apply when arbitral proceedings arise from a contract between the Greek State and foreign natural or legal persons (art. 8, para. 1, of Law Decree 736/1970). The operating company alleged that article 49, paragraph 1, had been wrongly applied by the Court of Appeal when deciding upon the annulment of the arbitral award as the latter was international in character.

After noting that the arbitration was international when "parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States" (art. 1(2) Law Decree No. 2735/1999, enacting art. 1(3) MAL), the Supreme Court examined the factual elements and noted that: (a) the contracting parties had their places of business in Greece; (b) the place of the arbitration was situated in Greece; (c) the place of execution of the concession contract was in Greece; and (d) there was no agreement between the parties that the arbitral proceedings were related to a foreign country.

The Supreme Court further noted that the fact that two of the three shareholders of the limited liability company "… S.A." had their seat in the Netherlands did not imply internationality of the arbitration since those shareholders had ceased being parties to the concession contract in 2007 and were not participating in the arbitral proceedings. Moreover, the Supreme Court noted that the reference within the concession contract to ICC Arbitration Rules did not result in the characterization of the arbitration as international, because, in line with the said contract, these Rules applied only in the absence of any conflict with domestic Greek Law and the concession contract.

The Supreme Court concluded that the arbitration was not international and upheld the decision of the Court of Appeal that annulled the arbitral award.

Case 1890: MAL 16, 34
Hong Kong Special Administrative Region (China): High Court of Hong Kong, Court of First Instance
Case No. HCCT 31/2019
X v. Jemmy Chien
4 March 2020
Published in English: [2020] HKCFI 286
Available at: https://legalref.judiciary.hk

[**Keywords**: arbitration agreement; jurisdiction; award – setting aside; public policy]

The plaintiff and the defendant entered into a service agreement whereby the defendant agreed to provide certain product and marketing services in exchange for a commission on the sales of the plaintiff. Under the service agreement, the parties agreed to refer all disputes relating to the service agreement to arbitration in Hong Kong. A dispute arose over payment of outstanding commissions under the agreement, and the arbitral tribunal ruled in favour of the defendant. In the award on merits, the tribunal dealt with the plaintiff's challenge to its jurisdiction on the basis that there was no valid arbitration agreement between the parties because the defendant had signed the agreement as an agent for C, who was the true party to the agreement. The plaintiff claimed that the service agreement was in truth a sham to conceal the involvement by C, who was the vice president of a third-party company (TP), as the performance of the service agreement by C himself would be in conflict with his duties to TP.

The plaintiff applied to the Court to set aside the award on the grounds that: (i) there was no valid arbitration agreement between the plaintiff and the defendant; and (ii) the award would be in conflict with the public policy in Hong Kong. The defendant filed a cross-application to enforce the award.

The Court, quoting Z v. A (unreported, HCCT 8/2013), emphasized that the reviewing court had a narrow role in respect of a jurisdiction challenge under sec. 34 of the Arbitration Ordinance and article 16 MAL. The scope of the review must be limited to true questions of jurisdiction, and the Court must be cautious not to stray into the merits of findings of fact and law made by the tribunal. The Court held that the question on whether the defendant was a party, on construing the agreement as a whole, was a finding of law made on the basis of the facts found by the arbitrator. The Court was unable to conclude that the arbitrator had made any mistake in finding that there was a valid agreement between the plaintiff and the defendant personally.

Further, the Court was not of the view that the award should be set aside on the ground of public policy. It stressed that this ground had always been narrowly construed and non-enforcement of the award had to be balanced against other public policy interests of upholding parties' agreement to arbitrate their dispute, facilitating enforcement of arbitral awards, and observing obligations assumed under the Convention on Recognition and Enforcement of Foreign Arbitral Awards. On the available evidence, there was no clear expert opinion that criminal offences or illegal acts were involved. The Court also noted that, even if the agreement was a sham to hide the true transaction between the plaintiff and C, this occurred with the agreement of the plaintiff acting in concert with the defendant, and hence setting aside the award would mean to allow the plaintiff to rely on its own wrongdoing to avoid payment for services, which would hardly be consistent with public policy interests.

The Court accordingly dismissed the plaintiff's application to set aside the award and allowed the defendant's application for leave to enforce the award.

Case 1891: MAL 1(2)
India: High Court of Calcutta
Arbitration Petition No. 20 of 1997
East Coast Shipping Ltd. v. M.J. Scrap Pvt. Ltd.
19 February 1997
Published in English: 1997 1 Cal HN 444
Available at: http://scconline.com

Abstract prepared by: Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents

[**Keywords**: territorial application]

This judgment examined the difference in scope between article 1(2) MAL and section 2(2) of the Indian Arbitration and Conciliation Act, 1996 (the "1996 Act").

In this case, the arbitration was seated in London. The petitioner (East Coast Shipping Ltd.) filed an application before the Calcutta High Court seeking interim relief under sections 8 and 9 of the 1996 Act. The Respondent (M.J. Scrap Pvt. Ltd.) objected to the maintainability of the application on the ground that section 2(2) of the 1996 Act was only applicable to arbitration proceedings seated in India and excluded the applicability of sections 8 and 9 to arbitrations seated outside India.

According to article 1(2) MAL, the provisions of articles 8, 9, 35 and 36 MAL would apply even if the place of arbitration was not within the territory of the particular State. The High Court ruled that there was no provision equivalent to article 1(2) MAL in the Indian Arbitration Act, and that section 2(2) provided that part I of the 1996 Act (which contained sections 8 and 9) applied where the place of arbitration was in India. Accordingly, it was held that sections 8 and 9 of the 1996 Act did not apply and the application for interim relief was dismissed.

A contrary view was taken by the subsequent decision of the Supreme Court of India in Bhatia International v. Bulk Trading SA (CLOUT case 1618), which was in turn overruled by the larger bench decision in Bharat Aluminium Co v. Kaiser Aluminium Technical Services (CLOUT case 1424). In 2015, section 2(2) of the Act was amended to make it consistent with article 1(2) MAL.

Case 1892: MAL 8(1)
India: Madras High Court
A. No. 178 of 2007 in C.S. No. 924 of 2006
Andritz Oy. v. Enmas Engineering Pvt. Ltd.
5 June 2007
Published in English: 2007 SCC OnLine Mad 461; 2007 3 Arb.LR 545
Available at: https://indiankanoon.org

Abstract prepared by: Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents

[**Keywords**: severability; arbitration agreement]

In this case, the High Court of Madras was required to decide an application under section 45 of the Arbitration and Conciliation Act, 1996, seeking to refer parties to arbitration in accordance with a Joint Venture Agreement between the plaintiff and the respondent.

The plaintiff and the respondent (a Finnish company having its principal place of business in Helsinki) had entered into a joint venture agreement to engage in the engineering, sourcing, supply, sale, marketing and distribution of recovery island equipment for the pulp and paper industry and the supplies of such equipment in India. The arbitration clause in the agreement provided that the arbitration would be held in Paris and would be conducted according to the rules of the International Chamber of Commerce, Paris. A dispute arose out of the defendant's attempt to increase its stake

in the joint venture in order to become a majority shareholder and the plaintiff's resistance to the same.

Before the High Court, the plaintiff argued that the agreement between the parties was void and therefore the matter could not be referred to arbitration.

The Court noted that a court could decline to refer parties to arbitration under the New York Convention and the Indian Arbitration Act only if the agreement was null and void, inoperative or incapable of being performed. Any ground other than those specifically enumerated in section 45 could not be used to refuse a reference to arbitration. In particular, non-availability of the original agreement or non-availability of certain exhibits would not fall within the scope of enquiry under section 45.

The Court also noted that it was only required to form a prima facie conclusion on the basis of the parties' submissions, and if the prima facie conclusion was that the contract was null and void or inoperative or incapable of being performed, then it ought to afford a full opportunity to the parties to lead oral and documentary evidence. On the facts of the case, the Court held that the plaintiff had failed to prove that the agreement was void, inoperative or incapable of being performed. Therefore, the application under section 45 was allowed.

Case 1893: MAL 1(1)
India: Supreme Court of India
Arbitration Petition No. 17 of 2007
Comed Chemicals Ltd. v. C.N. Ramchand
6 November 2008
Published in English: (2009) 1 SCC 99
Available at: https://main.sci.gov.in

Abstract prepared by: Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents

[**Keywords**: commercial; internationality; jurisdiction]

The applicant, a company incorporated in India, entered into a memorandum of understanding (MoU) with the respondent for the development, manufacturing and marketing of products by a subsidiary company of the applicant that had been specifically established for this purpose. Pursuant to the MoU, the respondent was appointed as the Director in the subsidiary company and was required to serve the company for a minimum period of eight years.

Within a year of joining, the respondent resigned from the company. This led to a dispute between the two parties. The MoU provided for the resolution of all disputes through arbitration. Since both parties were unable to jointly appoint an arbitrator, the applicant approached the High Court of Gujarat for appointment of an arbitrator. Before the High Court, the respondent contended that since he was a British national, the dispute fell within the definition of the term "international commercial arbitration", in which case (as per the relevant provisions of the Indian Arbitration & Conciliation Act, 1996) the appropriate authority to appoint the arbitrator would be the Chief Justice of India. The applicant refiled the application before the Supreme Court of India. Before the Supreme Court, the respondent disputed the maintainability of the application on the basis that the dispute related to the supply of technical know-how and expertise that could not be termed as being "commercial" in nature.

The Supreme Court rejected the contention and relied on its earlier decision in RM Investment & Trading Co. Pvt. Ltd. v. Boeing Co. & another, (1994) 4 SCC 541 (CLOUT case 1760), in which the Court had observed that, "while construing the expression 'commercial relationship' in Section 2 of the Act, aid can also be taken from the Model Law prepared by UNCITRAL". The Court also referred to the definition of the term "commercial" as contained in the footnote to article 1(1) MAL and held that the expression ought to be interpreted in broad terms. The Court allowed the application filed by the applicant and appointed a sole arbitrator.

Case 1894: MAL 13
India: High Court of Delhi
Case No. 297 of 2006
Progressive Career Academy Pvt. Ltd. v. FIIT JEE Ltd.
16 May 2011
Published in English: 180 (2011) DLT 714; 2011 2 ArbLR 323
Available at: http://lobis.nic.in

Abstract prepared by: Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents

[**Keywords**: arbitral tribunal; arbitrators – challenge of; challenge; courts; judicial assistance; judicial intervention; procedure]

This case was decided by a Division Bench (two judges) of the Delhi High Court because of the existence of divergent views of single judges of the Delhi High Court, on the question of whether a court could terminate the authority of an arbitrator and replace the arbitrator, prior to the passing of an award, under section 13 of the Indian Arbitration Act, (corresponding to article 13 MAL) for the grounds stated in section 12 (consistent with article 12 MAL).

The Court noticed the difference between section 13 and article 13 MAL. Section 13 of the 1996 Act has no provision equivalent to article 13(3) MAL for requesting a court or other authority to decide on the challenge. Section 13 specifically provides that if a challenge is not successful, the arbitral tribunal shall make an award, and such an award could be challenged under section 34 of the 1996 Act, which corresponds to article 34 MAL. The Delhi High Court held that it was not permissible for a court to replace an arbitrator prior to the passing of an award under section 13. After taking recourse to section 13, the challenge to the independence or impartiality of an arbitrator by an unsuccessful party could only be made at the time of challenging the award under section 34.

Case 1895: MAL 7(2)
India: Supreme Court
Civil Appeal No. 1695 of 2019
Giriraj Garg v. Coal India Ltd. and Ors.
15 February 2019
Published in English: 2019 SCC Online SC 212; 2019 (2) ArbLR 69 (SC)
Available at: https://main.sci.gov.in

Abstract prepared by: Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents, and Ishita Mishra

[**Keywords**: arbitration clause; incorporation by reference]

Coal India, the respondent, floated a scheme in 2007 (the 2007 Scheme) under which coal distribution was carried out through an e-auction for buyers who were otherwise unable to source coal through existing mechanisms. The 2007 Scheme contained an arbitration clause for settling of disputes "arising out of the Scheme or in relation thereto in any form whatsoever." The appellant, Giriraj Garg participated in the e-auction for purchase of coal for several sale orders issued under the 2007 Scheme. The appellant was successful in the auction and various sale orders were issued. Subsequently, certain disputes arose between the parties. The appellant invoked the arbitration clause under the 2007 Scheme. The respondent failed to appoint an arbitrator as per the 2007 Scheme. Consequently, the appellant filed an application under section 11 of the Arbitration and Conciliation Act, 1996 before the High Court of Jharkhand for the appointment of an independent arbitrator. The High Court rejected the application on the ground that the disputes related to different transactions and that there was no incorporation by reference of the arbitration clause within the 2007 Scheme into the individual sale orders.

The issues were whether the arbitration clause, contained in the 2007 Scheme, stood incorporated by reference in each of the sale orders. The Court referred to section 7(5) of the Arbitration Act which states that the reference in a contract to a document containing an arbitration clause, constitutes a valid arbitration agreement. The Court noted that section 7(5) closely replicates article 7(2)(2) MAL as it stood prior to the 2006 amendment, and referred to academic commentaries and to the travaux préparatoires of the MAL indicating that the reference to the document was sufficient and that specific mention of the arbitration clause was not necessary.

The Court then referred to the theory of incorporation, as adopted by the Supreme Court in Inox Wind v. Thermocables (2018) 2 SCC 519, and applied it to the case. The Court held that an arbitration agreement need not necessarily be in the form of a clause in the substantive contract and that even a general reference to a standard form contract of one party, along with those of trade associations and professional bodies, would be sufficient to incorporate the arbitration agreement.

The Court concluded that the High Court of Jharkhand had erroneously taken the view that the arbitration clause would not stand incorporated in the individual sale orders entered into by the respondent and the appellant. Reversing its decision, it allowed the appeal and appointed an independent arbitrator.

Case 1896: MAL 34; 34(2)(a)(ii); 34(2)(a)(iii); 34(2)(b)(ii); NYC V; V(2)(b)
India: Supreme Court
Civil Appeal No. 4779 of 2019
Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India
8 May 2019
Published in English: (2019) 15 SCC 131; 2019 (3) ArbLR 152 (SC)
Available at: https://main.sci.gov.in

Abstract prepared by: Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents

[**Keywords**: arbitration agreement; award; award – setting aside; notice; ordre public; procedure; public policy; remission – of award; severability; subject matter arbitrability]

Ssangyong Engineering & Construction Co. Ltd. (the petitioner), a Korean entity, was the successful bidder in a tender issued by the National Highways Authority of India (NHAI, the respondent) for the construction of a highway. The contract provided for price adjustment on the basis of various factors, including the wholesale price index for cement published prior to the submission of the bids by the Government of India. This price index was referred to as the "old series". While the contract was being executed, there was a change in the methodology adopted for calculating the wholesale price index, which resulted in indices referred to as the "new series". The NHAI issued a policy circular by which a linking factor was applied to connect the "old series" and the "new series". The unilateral application of this circular by NHAI led to a dispute which was referred to arbitration. The majority award held that the circular could be applied based on certain guidelines available on a website and the price could be adjusted accordingly. The Delhi High Court rejected the challenge to the award filed by the petitioner under section 34 of the Indian Arbitration and Conciliation Act, 1996. (Section 34 of the Indian Arbitration Act corresponds to article 34 MAL.) The petitioner appealed to the Supreme Court of India.

The Supreme Court examined the various grounds of challenge, taking into account the amendments made in 2015 to the Indian Arbitration Act. In light of the 2015 Amendment, it was held that challenge to the award on the ground of "patent illegality", which had been read into "public policy of India" under section 34(2)(b)(ii) (corresponding to article 34(2)(b)(ii) MAL) by the earlier Supreme Court decision in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd., would not be available as the arbitration was an international commercial arbitration. The Supreme

Court noted that the amendments to the 1996 Act had restricted the application of the "patent illegality" ground to non-international commercial arbitration awards.

The Supreme Court interpreted section 34(2)(b)(ii) (mirroring article 34(2)(b)(ii) MAL) consistently with section 48(2)(b)(ii) of the 1996 Act (mirroring article V(2)(b) of the New York Convention), while citing various international authorities including the UNCITRAL Secretariat Guide on the New York Convention. The Supreme Court held that section 34 did not entail a review on merits of an award i.e., even an erroneous decision on facts or law would not be sufficient to justify the setting aside of an award.

Applying these principles, the Court held that the reasoning of the majority of the arbitrators was not supported by evidence or disclosed by the arbitral tribunal, and the parties had not been provided an opportunity to comment on these matters. The award was therefore liable to be set aside under section 34(2)(a)(iii). It was held that the challenge under section 34(2)(b)(ii) would succeed because the circular was issued by the respondent unilaterally, and could not bind the petitioner. The award was contrary to a fundamental principle of justice in India, i.e., that a contract cannot be altered unilaterally and foisted on an unwilling party.

It was however clarified that awards could be set aside on this ground only in exceptional circumstances. Setting aside of the award would normally require the parties to commence a new arbitration for resolution of their disputes.

The Court set aside the decision of the majority of the arbitrators but noted that requiring the parties to commence arbitration afresh would be contrary to one of the main objectives of the Indian Arbitration Act, viz. speedy resolution of disputes. The Supreme Court therefore invoked special powers conferred on it to do "complete justice" and ordered the enforcement of the minority decision as the arbitral award that would be binding on the parties.

Case 1897: MAL 1(2); 6; 20; 31; 34
India: Supreme Court
Civil Appeal No. 9307 of 2019
BGS SGS Soma JV v. NHPC Ltd.
10 December 2019
Published in English: 2019 SCC Online SC 1585; 2019 (6) ArbLR 393 (SC)
Available at: https://main.sci.gov.in

Abstract prepared by: Gourab Banerji, Promod Nair, Manisha Singh, George Pothan Poothicote, Arjun Krishnan, Sriharsha Peechara, Ajay Thomas, National Correspondents, and Ishita Mishra

[**Keywords**: jurisdiction; territorial application; courts; judicial assistance; forum; place of arbitration; arbitral awards]

BGS SGS Soma JV, the appellant, and NHPC Ltd., the respondent, entered into a contract for the construction of a hydro-electric power project on the river Subansri located in the Indian States of Assam and Arunachal Pradesh. The agreement provided for resolution of disputes through arbitration proceedings to be held "at New Delhi/Faridabad, India". Disputes arose between the parties with regard to payment of compensation for losses suffered by the appellant on account of abnormal delays and additional costs incurred by the appellant. The arbitral proceedings were held at New Delhi, and an award was passed at New Delhi in favour of the appellant. Subsequently, a rectification order was also passed at New Delhi.

The respondent challenged the award before the District and Sessions Judge, Faridabad, Haryana, India under section 34 of the Indian Arbitration and Conciliation Act, 1996 (the "1996 Act"), corresponding to article 34 MAL. The appellant challenged the jurisdiction of the Haryana courts, and argued that the petition ought to have been filed in New Delhi. The appellant's request was allowed by the Special Commercial Court, Gurugram, Haryana. An appeal was preferred by the Respondent before the High Court of Punjab and Haryana. The High Court allowed the appeal

reasoning that the arbitration clause did not refer to the "seat" of arbitration, but only refers to the "venue" of arbitration, and since a part of cause of action had arisen in Faridabad, Haryana and the Faridabad Commercial Court was approached first, the Haryana Court alone had jurisdiction over the arbitral proceedings and not the courts at New Delhi. The appellant filed an appeal before the Supreme Court.

The Supreme Court took note of the fact that the Indian Arbitration Act, 1940 had been repealed by the 1996 Act, based on the MAL, and that the concept of "place" or "seat" of the arbitral proceedings, as stated in articles 1(2), 2(c), 6, 20(1), 20(2) and 31 MAL, had been adopted in the 1996 Act. Section 20 (replicating article 20 MAL) provided for the "place" of arbitration and section 31(4) (replicating article 31(3) MAL) provided for the form and contents of arbitral award. However, section 2(1)(e) defining the term "court" remained substantially unamended as it appeared in the 1940 Act. Thus, the concept of juridical seat of arbitral proceedings and its relationship to the jurisdiction of courts was developed in accordance with international practice on a case-by-case basis by the Supreme Court.

While revisiting the Constitution Bench decision in Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services, Inc. (CLOUT Case 1424), the Supreme Court observed that the 1996 Act accepted the territoriality principle in section 2(2) (mirroring article 1(2) MAL). Hence, where parties selected the seat of arbitration in their agreement, such selection would amount to an "exclusive jurisdiction" clause indicating that the courts at the "seat" would alone have jurisdiction to entertain challenges against the arbitral award made at the seat. The Supreme Court disagreed with the view that both the courts where the cause of action for the arbitration was located and those courts where the arbitration took place (i.e. seat of arbitration) had jurisdiction.

The Supreme Court referred to its decisions in Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd., Roger Shashoua v. Mukesh Sharma and the various judgments relying on them, to conclude that whenever there is only the designation of a "venue" in an arbitration clause, the "venue" is really the "seat" of the arbitral proceedings. The Court also declared the recent decision of another three-judge bench of the Supreme Court in Union of India v. Hardy Exploration & Production (India) Inc., as not being good law, being contrary to the Constitution Bench judgment in Bharat Aluminium Co v. Kaiser Aluminium Technical Services.

On the facts, the Supreme Court reversed the judgment of the Punjab and Haryana High Court and held that since the arbitration proceedings were held at New Delhi and the award was signed in New Delhi, and not at Faridabad, both the parties had chosen New Delhi as the "seat" of arbitration. Therefore, the courts at New Delhi alone would have the exclusive jurisdiction over the arbitral proceedings.

Case 1898: MAL 8(1); NYC II(1)
Ireland: Irish High Court
Case No. 541 S. of 2018
XPL Engineering ltd. v. K & J Townmore Construction ltd.
11 October 2019
Published in English: [2019] IEHC 665
Available at: https://www.courts.ie

[**Keywords**: arbitration agreement; procedure]

This case deals with the determination of the existence of a dispute between the parties for the purposes of the arbitration agreement and the time limit to make an application for arbitration.

The defendant, a construction company, engaged the plaintiff, an engineering company, as a subcontractor to provide mechanical works on the basis of two subcontracts each containing an arbitration clause. Shortly after the commencement of both subcontracts, the plaintiff claimed that monies were owed by the defendant under both subcontracts. The plaintiff referred to court proceedings against the

defendant, which the latter asserted to have arisen out of disputes that the underlying subcontracts required to be referred to conciliation or arbitration. The plaintiff contended that the requirements set forth in article 8(1) MAL as incorporated into Irish law by section 6 of the Arbitration Act, 2010 for the referral of the dispute to arbitration had not been complied with by the defendant because: (a) there was no dispute between the parties for the purposes of the arbitration agreement; and (b) the defendant requested referral to arbitration after its first statement on the substance of the dispute.

In determining whether a dispute exists, and relying also on English case law, the High Court stated that the role of a court was not to assess the merits of the parties' pleadings. It added that the mere making of a claim did not amount to a dispute and that a dispute would be held to exist once it could reasonably be inferred that a claim was not admitted by the other party. The Court suggested that, in case the parties disagreed as to the existence of a dispute, a court should lean in favour of its existence.

The Court also indicated that article 8(1) of the MAL did not set out any particular time limit within which an application for reference to arbitration should be made. What was required was that the request was made no later than the "first statement on the substance". Likewise, an unreasonable delay in making such application to the court, which might cause prejudice and abuse of process, could prevent the party from relying on the arbitration agreement and obtaining an order under article 8(1) MAL. Absent an express time limit in making the said application, it fell within the discretionary power of the court to rule on that issue and the procedural law of the jurisdiction of the court first seized.

In conclusion, the Court ruled that the defendant had demonstrated that the prerequisites of article 8(1) of the MAL had been satisfied by making its request for the referral to arbitration not later than the relevant point in time and that a dispute indeed existed between the parties.