Arbitration Case *Insights*

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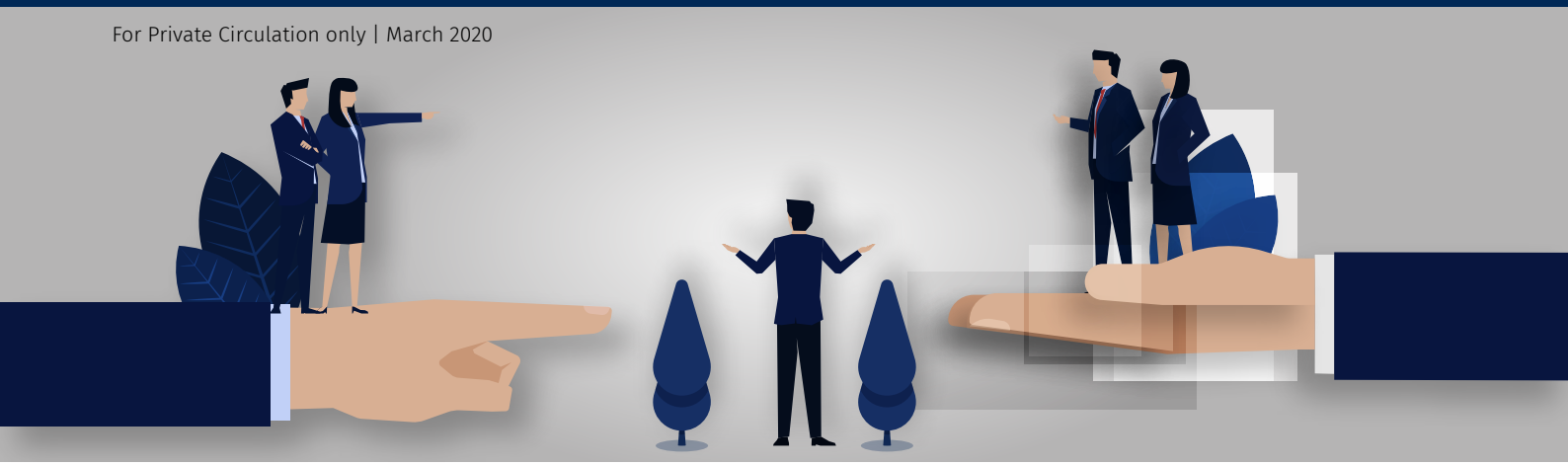

Supreme Court refuses to appoint an arbitrator in international commercial arbitrations with a foreign seat[1]

In this Issue

Brief Facts

Mankastu Impex Private Limited ("**Petitioner**"), incorporated in India, and Airvisual Limited ("**Respondent**"), incorporated in Hong Kong, entered into a memorandum of understanding ("**MoU**"), which provided for arbitration by a sole arbitrator. The arbitration clause stipulated that the governing law of the MoU would be laws of India and the "place of arbitration" will be Hong Kong.[2]

When disputes arose between the parties, the Petitioner sent a notice of arbitration to the Respondent proposing the appointment of Hon'ble Mr. Justice R.C. Chopra as the sole arbitrator. The Respondent, however, disagreed with this approach and stated that the arbitration should be referred to an arbitration institution in Hong Kong and that such institution would be responsible for constitution of the arbitration tribunal. Given the disagreement between the parties over constitution of the tribunal, the Petitioner filed a petition ("**Petition**") under Section 11(6) read with Section 11(9) of the Arbitration and Conciliation Act, 1996 ("**Act**") before the Supreme Court ("**Court**"). In the Petition, the Petitioner prayed for appointment of an arbitrator.

Issues

Issue (i): Whether Hong Kong is the seat of arbitration?

Issue (ii): Whether a case had been made out for the Supreme Court to appoint an arbitrator under Section 11(6) of the Act?

Judgment

Issue (i): The Court noted that the arbitration clause does not explicitly mention any place as the seat of the arbitration. The Court observed that words "*place of arbitration*" used in Clause 17 of the MoU are not dispositive of the intention of the parties with regard to selection of the seat of the arbitration. Rather, the parties' intentions would have to be determined by looking at the arbitration agreement in its entirety. In this regard, the Court found the phrase "*finally resolved by arbitration administered in Hong Kong*" used in the arbitration agreement to be particularly instructive. By agreeing that the arbitration will be "*finally resolved*" and "*administered*" in Hong Kong, the Court held, the parties must have intended Hong Kong to be the seat of the arbitration.

Issue (ii): The Court held that the Petition under Section 11(6) was not maintainable since the arbitration was seated in Hong Kong and therefore, Indian courts had no role to play in appointment of arbitrators. Such supervisory jurisdiction lay with the courts of Hong Kong.

The Court specifically relied on the decision in *Bharat Aluminium Company v. Kaiser Alumnium Technical Services Inc.*[3] to reiterate the well-established position that Part I of the Act has no

application to arbitrations seated outside India. It further relied on ***Enercon (India) Limited and others v. Enercon GmBH and Another***[4] and ***Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd. and Others***[5] to conclude that the laws of Hong Kong (and not laws of India) will govern the arbitration proceedings in the present case. Lastly, the Court noted that the proviso to Section 2(2) of the Act (inserted by the Arbitration and Conciliation (Amendment) Act, 2015), which allows application of some sections of Part I of the Act to foreign seated arbitrations, does not include Section 11 in the list of exceptions. In other words, there is no basis under the Act for Indian courts to appoint arbitrators in foreign seated arbitrations. Accordingly, the Court rejected the Petition for want of jurisdiction.

However, the Court permitted the Petitioner to approach the Hong Kong International Arbitration Centre for appointment of the arbitrator, should it wish to do so.

Analysis

The Supreme Court's decision confirms the position that Indian courts cannot appoint arbitrators in foreign seated arbitrations. Instead, where parties cannot reach agreement on constitution of the arbitral tribunal, courts at the seat of the arbitration or an institution designated in the arbitration law at the seat (in this case, the Hong Kong International Arbitration Centre) would be responsible for appointment.

The decision in this case is certainly a welcome one. It is of course another reiteration of India's pro-arbitration stance. The Court rightly exercised restraint by refusing to appoint an arbitrator in a foreign seated dispute and directed the parties to approach the relevant arbitral institution for the appointment of an arbitrator.

In this Issue

1 Authored by Rishab Gupta, Partner; Rishabh Jogani, Senior Associate, and Ritika Bansal, Associate; *Mankastu Impex Private Limited v. Airvisual Limited.*, Arbitration Application No. 32 of 2018, Supreme Court of India, 2020 SCC OnLine SC 301, judgment dated 5 March 2020.

Quorum: R. Banumathi, A.S. Bopanna and Hrishikesh Roy, JJ.

2 Clause 17 of the MoU provides that: "*This MoU is governed by the laws of India, without regards to its conflict of laws provision and courts at New Delhi shall have the jurisdiction. Any disputes, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong. The place of arbitration shall be Hong Kong...*"

3 (2012) 9 SCC 552.

4 (2014) 5 SCC 1.

5 (2017) 7 SCC 678.

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