



High Court of Delhi holds that foreign law can govern an arbitration between two Indian parties¹

Brief Facts

Dholi Spintex entered into a sale contract with Louis Dreyfus for supply of 600 metric tonnes of American imported raw cotton in bales to Dholi Spintex. Since the shipment and delivery of the raw cotton bales was delayed, Dholi Spintex refused to take delivery of the goods, pursuant to which, Louis Dreyfus initiated arbitration proceedings before the International Cotton Association (“ICA”) under Clause 6 of the contract. Arbitration under the ICA byelaws is conducted under the English Arbitration Act, 1996. Dholi Spintex sought an anti-arbitration injunction before the High Court of Delhi and objected to the arbitration on the following grounds: (i) the contract was between two Indian companies and was to be performed in India. Therefore, the law governing the contract must be Indian law; (ii) Clauses 6 and 7 of the contract made it clear that by conferring exclusive jurisdiction upon the courts of New Delhi, the parties intended for Indian law to govern the arbitration proceedings; and (iii) byelaw 200 of the ICA byelaws is opposed to and directly contravenes Indian public policy, which envisages that Indian parties cannot contract out of Indian law.

Issues

Issue (i): Whether two Indian parties can choose a foreign law as the substantive law of the contract?

Issue (ii): Whether the express designation of a court under Clause 7 of the contract providing for exclusive jurisdiction at New Delhi is determinative of the seat of arbitration?

Issue (iii): Whether the petition is maintainable under Section 45 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”)?

Judgment

Issue (i): The Court held that even though an agreement to refer disputes to arbitration may be a part of the substantive contract, the said agreement is independent of the substantive contract and survives despite termination or repudiation or frustration of the substantive

In this Issue

Brief Facts

Issues

Judgment

Analysis





contract. The arbitration agreement/clause does not govern the rights and obligations of the parties under the substantive contract and is only concerned with the manner of settling disputes. Therefore, the arbitration agreement can be governed by a proper law of its own, which is not the same as the law governing the substantive contract as it is an independent agreement.

The Court also stated that the general practice for trading in American cotton is parties subjecting themselves to arbitration under the ICA byelaws and consequently, two Indian parties cannot be barred from entering into an agreement for a foreign seated arbitration. In the presence of a foreign element in the agreement, the parties could definitely agree to international commercial arbitration governed by the laws of England. Therefore, Clause 6 of the contract is not null and void.

The Court referred to the Supreme Court's decisions in: (i) **Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd.**,² which stressed on party autonomy in arbitration and held that it is a virtual backbone that allows parties to choose foreign law as proper law for arbitration; and (ii) **Technip SA v. SMS Holding Pvt. Limited & Ors.**,³ wherein it was held that applicability of foreign law can be objected to only in cases where the law amounts to flagrant or gross breach of morality and justice, and that foreign law cannot be discarded only because it is contrary to Indian statute, as the same would defeat the basis of private international law.

Issue (ii): The Court held that the express designation of the court having jurisdiction under Clause 7 of the contract is not definitive of the seat of arbitration. Even though the term "venue" has been used by the parties in Clause 6 of the contract, they have agreed to conduct the arbitration in accordance with the ICA rules and agreed for the seat of arbitration to be London and not New Delhi. The Court held that Clause 7 of the contract, wherein the parties agreed that the substantive law governing the contract is Indian Law and jurisdiction is with an Indian court, would be relevant only when the parties, through an agreement, decide not to settle their disputes through arbitration but by approaching Indian courts.

Issue (iii): It was held that the Court can interfere in an international arbitration only to the extent of determining whether a valid arbitration agreement exists between the parties and whether the agreement is null, void, inoperative or incapable of being performed. The Court cannot enter into a full-fledged inquiry into the merits of the matter. Therefore, the Court dismissed the suit as not being maintainable and refused to grant an anti-arbitration injunction.

Analysis

In the present case, the High Court of Delhi has allowed Indian parties to choose a foreign law to govern an arbitration between them, *inter alia*, on the principles of party autonomy and conflict of laws. Reliance was also placed on the decision of the Supreme Court in the case of **Reliance Industries & Anr. v. Union of India**,⁴ wherein it was held that when there is a foreign element involved in the contract, three sets of law may apply to the arbitration:

In this Issue

Brief Facts

Issues

Judgment

Analysis



(i) law governing the substantive contract; (ii) law governing the arbitration agreement and performance of that agreement; and (iii) law governing the conduct of the arbitration. The decision is in line with the pro-arbitration approach being adopted by Indian courts and categorically rules out attempts at post-fact rewriting of contracts entered into with open eyes.

In this Issue

Brief Facts

Issues

Judgment

Analysis

Endnotes

- 1 Authored by Smarika Singh, Partner, Saifur Rahman Faridi, Senior Associate and Yashna Mehta, Associate; *Dholi Spintex Pvt. Ltd. v. Louis Dreyfus Company India Pvt. Ltd.*, C.S. (COMM) No. 286 of 2020, High Court of Delhi, 2020 SCC OnLine Del 1476, judgment dated 24 November 2020.

Coram: Mukta Gupta, J.

- 2 (2017) 2 SCC 228.
- 3 (2005) 5 SCC 465.
- 4 (2014) 7 SCC 603.

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