“REPORTABLE”

THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Arbitration Petition No. 5 of 2008

M/s Dozco India P. Ltd. … Petitioner

Versus

M/s Doosan Infracore Co. Ltd. … Respondent

J U D G M E N T

V.S. SIRPURKAR, J.

1. This is a petition under section 11(6) of the Arbitration and Conciliation Act (hereinafter called ‘the Act’). While the petitioner is registered under the Companies Act, 1956, the respondent is a company incorporated in Seoul, South Korea with its principle place at Seoul. The disputes have arisen in between these two companies out of a Distributorship Agreement which was entered between the parties on 2.2.2004. By this, the petitioner was to be the exclusive distributor of the respondent in India and Bhutan for its products like Excavators, Wheel Loaders etc. Article 23 of the Distributorship Agreement provides

for the resolution of disputes by arbitration. Since the disputes have arisen in between the two companies and since one of the companies is based in Seoul, South Korea, the present petition has been filed treating this to be an international arbitration. There is no dispute between the parties that this will be the international arbitration on the basis of the arbitration Clause being Article 23 of the Distributorship Agreement.

2. There is also no dispute that the disputes have arisen between the parties on account of which the respondent purported to terminate the Agreement entered into between them. In pursuance of the disputes, the petitioner issued notice dated 01.09.2007 for appointment of an Arbitrator to resolve the disputes arisen between the parties. However, that not having been done, the present petition is necessitated.

3. Since the parties have not disputed about the existence of the arbitration clause, a live issue on account of the existence of the disputes, there would be no question of recording any finding. However, for putting the record straight, the issues as raised by the petitioner are as follows:

"1. whether the premature and whether allegedly premature and unilateral termination of the distributorship agreement by the respondent is valid in law.

2. whether the various contentions raised by respondent for terminating the distributorship agreement are valid in law

3. whether the respondent are right in unilaterally raising the price of the products in the middle of the year

4. whether the respondent is right in unilaterally controlling the supplies to the petitioner

5. whether the respondent is stopped from its promise to the petitioner to appoint them as national dealer for 10 years

6. whether the respondents are liable for damages to petitioner for breach"

4. The petition is countered on behalf of the respondent who opposes the same on account of maintainability. According to the respondent, only the Rules of Arbitration of International Chamber of Commerce would apply in accordance with the Agreement between the parties. It is contended by the respondent that this Court will have no jurisdiction much less under Section 11(6) of the Act to appoint Arbitrator, particularly, because it has been specifically agreed in Article 22 and 23 which are as under:

> "**Article 22. Governing Laws – 22.1** : This agreement shall be governed by and construed in accordance with the laws of The Republic of Korea.
>
> **Article 23. Arbitration - 23.1 :** All disputes arising in connection with this Agreement shall be finally settled by arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement then in force of the ***International Chamber of Commerce*** (emphasis supplied)"

5. The respondent, therefore, contended that the petitioner would not be entitled to maintain the present proceedings in India by invoking the provisions of the Act. The respondent specifically disputes the stand of the petitioner that there is nothing in the Agreement to deny the applicability of Indian procedural law seeking appointment of Arbitrator. The respondent also specifically contended that there is express exclusion of Indian Courts and/or the applicability of the Act. Their basic contention was that under the relevant clauses the jurisdiction of the Indian Courts is specifically outstayed. This is particularly because it is specifically provided in Clause 33 that there is an express agreement to get the disputes settled by arbitration in Seoul in terms of the Rules of Arbitration of Indian Chamber of Commerce,

Paris. The respondent in its Counter has relied on Article 4 of the Rules of Arbitration of International Chamber of Commerce.

6. It seems that previously an application was filed under Section 9 of the Act before the Madras High Court seeking interim injunction restraining the respondents, their men and agents from in any manner dealing with their products in India directly till the conclusion of the arbitral proceedings. It was pointed out that there was an *ex parte* order of ad interim injunction by the High Court on 8.5.2008. However, when the respondent moved an application for vacating the *ex parte* order, the respondent had specifically contended that the Courts at Chennai had no jurisdiction to entertain the application. It was pointed out that the respondent's application for vacating the injunction was allowed by the Madras High Court by its order dated 9.6.2008. However, in its order, it seems that the Madras High Court clarified that the question relating to the jurisdiction of the Court was left open by the parties to be decided at a later stage. It also recorded a finding that it was not necessary for it to go into the question of jurisdiction for the purpose of

considering the injunction application. The respondent has filed the said order before this Court along with the application under Section 9.

7. From the rival contentions raised, the only issue is whether this Court would be justified and would have the jurisdiction to appoint an Arbitrator under Section 11 (6) of the Act.

8. Ms. Mohana, learned Counsel appearing on behalf of the petitioner, heavily relied on a few judgments of this Court, namely, ***Bhatia International v. Bulk Trading S.A. & Anr. [2002(4) SCC 105], Indtel Technical Services Private Ltd. v. W.S. Atkins Rail Ltd. [2008 (10) SCC 308]*** and ***Citation Infowares Ltd. v. Equinox Corporation [2009 (7) SCC 220]***. All these cases, according to her have settled the law holding that even in case of international commercial arbitration which are to be held out of India and to be governed by foreign law, the provisions of Part I of the Act would still apply unless the parties by agreement, express or implied, excludes all or any of provisions of Part I of the Act. She has also drawn the attention of the Court to another decision of this Court in ***National Thermal Power Corporation v. Singer Company & Ors. [1992 (3)***

SCC 551]. The attention of the Court was also invited to the language of the decision in ***CMC Ltd. v. Unit Trust of India & Ors. [2007 (10) SCC 751].*** There are some other rulings which are relied upon by the learned Counsel. The main contention, however, is based on paragraph 32 of the decision in ***Bhatia International v. Bulk Trading S.A. & Anr. (cited supra)*** as also paragraph 36 of the decision in ***Indtel Technical Services Private Ltd. v. W.S. Atkins Rail Ltd. (cited supra)***, where reliance was placed on the decision in ***Bhatia International v. Bulk Trading S.A. & Anr. (cited supra)*** which is decision rendered by a Three Judge Bench. The attention of the Court was also invited to paragraphs 30, 31 and 36 as also to paragraphs 35, 38 of that judgment where the decision in ***Bhatia International v. Bulk Trading S.A. & Anr. (cited supra)*** was relied upon. From all these three judgments, it becomes clear that unless the jurisdiction of the Indian Courts is not specifically excluded at least Part I of the Act whereunder there is a power to appoint Arbitrator is covered by Section 11 (6) of the Act, this Court would have jurisdiction to appoint an Arbitrator even if the arbitration is to be governed by foreign law.

9. Shri Gurukrishna Kumar, learned Counsel for the respondent, however, while opposing this plea urged that in this case and, more particularly, in paragraph 23 such exclusion can be specifically seen. He has compared the language of Clause 23, more particularly, with the jurisdictional cause which had fallen for consideration in ***Citation Infowares Ltd. v. Equinox Corporation (supra)***. The learned Counsel also argued that the bracketed portion in Article 23 cannot be interpreted so as to mean that the seat of arbitration could be anywhere else as per the choice of the parties. He pointed out that the bracketed portion is only for the purpose of providing the convenience of holding proceedings of the arbitration else where than Seoul. However, that cannot be allowed to override the main Clause of Article 23. The learned Counsel has contended that the law laid down in ***Bhatia International v. Bulk Trading S.A. & Anr. (cited supra)*** and the subsequent decisions would not be applicable. The learned Counsel relied on ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Ors. [1998 (1) SCC 305].*** He also relied on a decision reported as **Naviera *Amozonica Peruana S.A. v. Compania Internationacional De Seguros Del Peru [1998] Vol.1 Lloyd's Law Reports.***

10. The learned Counsel earnestly argued that there is distinction between a legal seat of the arbitration and geographically convenient location for holding proceedings and that is a common feature of international arbitration. He also relied on a passage in *Redfern and Hunter* which runs as under:

> "The preceding discussion has been on the basis that there is only one 'place' of arbitration. This will be the place chosen by or on behalf of the parties and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other was as the place of 'seat' of the arbitration. This does not mean, however, that the arbitral Tribunal must hold all its meeting or hearings at the place of arbitration. **International commercial arbitration often involves people of many different nationalities, from different countries. In these circumstances, it is by no means unusual for an arbitral Tribunal to hold meeting- or even hearing – in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses…** It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country – for instance for the purpose of taking evidence … **In such circumstances, each move of the arbitral Tribunal does not if itself mean that the seat of arbitration changes. The seat of the arbitration remain the place initially agreed by or on behalf of the parties**" (Emphasis supplied)

11. According to him, as per the Agreement between the parties, it is clear that the parties have chosen the

proper law of contract as also the arbitration agreement to be Korean law with a seat of arbitration in Seoul, South Korea and the arbitration law being conducted in accordance with exhaustive Rules of the International Chamber of Commerce.

12. On the backdrop of these conflicting claims, the question boils down to as to what is the true interpretation of Article 23. This Article 23 will have to be read in the backdrop of Article 22 and more particularly, Article 22.1. It is clear from the language of Article 22.1 that the whole Agreement would be governed by and construed in accordance with the laws of The Republic of Korea. It is for this reason that the respondent heavily relied on the law laid down in ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd. & Ors. (cited supra)***. This judgment is a complete authority on the proposition that the arbitrability of the dispute is to be determined in terms of the law governing arbitration agreement and the arbitration proceedings has to be conducted in accordance with the curial law. This Court, in that judgment, relying on *Mustill and Boyd (the Law and Practice of Commercial Arbitration in England, 2nd Edition)*, observed in

paragraph 15 that where the law governing the conduct of the reference is different from the law governing the underlying arbitration agreement, the Court looks to the arbitration agreement to see if the dispute is arbitrable, then to the curial law to see how the reference should be conducted and then returns to the first law in order to give effect to the resulting award. In paragraph 16, this Court, in no uncertain terms, declared that the law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement. The Court relied on the observations in *Mustill and Boyd* to the effect:-

"It may, therefore, be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws -

1. The proper law of the contract, i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.

2. The proper law of the arbitration agreement, i.e. the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.

3. *The curial law, i.e. the law governing the conduct of the individual reference.*

xxxxx xxxxx xxxxx

1. *The proper law of the arbitration agreement governs the validity* of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the Constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.

2. *The curial law governs; the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.*

3. The proper law of the reference governs: the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute." (Emphasis supplied)

The following paragraph from *Mustill and Boyd* is extremely important for the decision of this case:-

"In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e. the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate."

In paragraphs 15 and 16, this Court has heavily relied on the observations quoted above. If we see the language of Article 23.1 in the light of the Article 22.1, it is clear that the parties had agreed that the disputes arising out of the Agreement between them would be finally settled by the arbitration in Seoul, Korea.

Not only that, but the rules of arbitration to be made applicable were the Rules of International Chamber of Commerce. This gives the prima facie impression that the seat of arbitration was only in Seoul, South Korea. However, Ms. Mohana, learned Counsel appearing on behalf of the petitioner drew our attention to the bracketed portion and contended that because of the bracketed portion which is to the effect "or such other place as the parties may agree in writing", the seat could be elsewhere also. It is based on this that Ms. Mohana contended that, therefore, there is no express exclusion of Part I of the Act. It is not possible to accept this contention for the simple reason that a bracket could not be allowed to control the main clause. Bracketed portion is only for the purposes of further explanation. In my opinion, Shri Gurukrishna Kumar, learned Counsel appearing on behalf of the respondent, is right in contending that the bracketed portion is meant only for the convenience of the arbitral Tribunal and/or the parties for conducting the proceedings of the arbitration, but the bracketed portion does not, in any manner, change the seat of arbitration, which is only Seoul, Korea. The language is clearly indicative of the express exclusion of Part I of the Act. If there is

such exclusion, then the law laid down in ***Bhatia International v. Bulk Trading S.A. & Anr. (cited supra)*** must apply holding:-

"In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case, the laws or rules chosen by the parties would prevail. Any provision in Part I, which is contrary to or excluded by that law or rules will not apply."

Even in ***Indtel Technical Services Private Ltd. v. W.S. Atkins Rail Ltd. (cited supra)***, the parties had not chosen the law governing the arbitration procedure including the seat/venue of arbitration and it was, therefore, that the Court went on to exercise the jurisdiction under Section 11(6) of the Act. It was specifically found therein that there was no exclusion of the provisions of the Act by the parties either expressly or impliedly, which is clear from the observations made in the paragraph 37 of that judgment.

13. Ms. Mohana, learned Counsel appearing on behalf of the petitioner, however, very heavily relied on the decision in ***Citation Infowares Ltd. v. Equinox Corporation (cited supra)***. There also, the parties had agreed to be governed by the laws of California, USA.

The learned Counsel invited our attention to the Clause 10.1 of the agreement therein, which runs as under:-

> "**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."

Ms. Mohana further submitted that the language of this Clause is quite comparable to Article 23.1 of the Distributorship Agreement between the parties in this case, whereas, Shri Gurukrishna Kumar, learned Counsel for the respondent contended that there is essential difference in the language of both the Clauses. He pointed out that the language of Article 23.1, in contradistinction with the Clause 10.1 in the case of ***Citation Infowares Ltd. v. Equinox Corporation (cited supra)***, clearly spells out that the seat of the arbitration was agreed to be in Seoul, Korea and thereby, there would be express exclusion of Part I of the Act. In my opinion, there is essential difference between the clauses referred to in the case of ***Citation Infowares Ltd. v. Equinox Corporation (cited supra)*** as also in ***Indtel Technical Services Private Ltd. v. W.S. Atkins Rail Ltd. (cited supra)*** on one hand and Article

23.1 in the present case, on the other. Shri Gurukrishna Kumar rightly pointed out that the advantage of bracketed portion cannot be taken, particularly, in view of the decision in **Naviera *Amozonica Peruana S.A. v. Compania Internationacional De Seguros Del Peru (cited supra)***, wherein it was held:-

"All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law: (a) the law governing the substantive contract; (2) the law governing the agreement to arbitrate and the performance of that agreement; (3) the law governing the conduct of the arbitration. In the majority of the cases all three will be the same, but (1) will often be different from (2) and (3) and occasionally, but rarely, (2) may also differ from (3)".

That is exactly the case here. The language of Article 23.1 clearly suggests that all the three laws are the laws of The Republic of Korea with the seat of the arbitration in Seoul, Korea and the arbitration to be conducted in accordance with the rules of International Chamber of Commerce. In respect of the bracketed portion, however, it is to be seen that it was observed in that case:-

"…. It seems clear that the submissions advanced below confused the legal "seat" etc. of an arbitration with the geographically convenient place or places for holding hearings. This distinction is nowadays a

common feature of international arbitrations and is helpfully explained in Redfern and Hunter in the following passage under the heading "The Place of Arbitration":

The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal *must* hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings - or even hearings - in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses…….

It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country – for instance, for the purpose of taking evidence….. In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.

These aspects need to be borne in mind when one comes to the Judge's construction of this policy."

It would be clear from this that the bracketed portion in the Article was not for deciding upon the seat of the arbitration, but for the convenience of the parties in case they find to hold the arbitration proceedings somewhere else than Seoul, Korea. The part which has been quoted above from the decision in **Naviera *Amozonica Peruana S.A. v. Compania***

Internationacional De Seguros Del Peru (cited supra) supports this inference. In that view, my inferences are that:-

1. a clear language of Articles 22 and 23 of the Distributorship Agreement between the parties in this case spell out a clear agreement between the parties excluding Part I of the Act.

2. the law laid down in ***Bhatia International v. Bulk Trading S.A. & Anr*****. (cited supra)** and ***Indtel Technical Services Private Ltd. v. W.S. Atkins Rail Ltd. (cited supra)***, as also in ***Citation Infowares Ltd. v. Equinox Corporation (cited supra)*** is not applicable to the present case.

3. Since the interpretation of Article 23.1 suggests that the law governing the arbitration will be Korean law and the seat of arbitration will be Seoul in Korea, there will be no question of applicability of Section 11(6) of the Act and the appointment of Arbitrator in terms of that provision.

14. In terms of what is stated above, the petition is dismissed, but without any costs.

……J.
(V.S.Sirpurkar)

New Delhi;
October 8, 2010.