

The Indian Supreme Court upholds competence-competence

In *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Ltd*, the Supreme Court of India held that issues of fraud should properly be dealt with initially by the arbitral tribunal in accordance with the arbitration agreements entered into between the parties, and not initially by the courts, departing from an earlier controversial line of Indian case law that had held otherwise.

A similar decision was reached just days before by the Bombay High Court in *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd and others*.

Following the groundwork laid by the Supreme Court of India in cases such as *Bharat Aluminum Co Ltd v Kaiser Aluminum and Shri Lal Mahal v Progetto Grano Spa*, the most recent decisions show a developing judicial maturity on the part of the Indian courts not to interfere with the international arbitral process and to be willing to uphold valid international arbitration agreements between parties.

Clifford Chance LLP acted for HSBC PI (Mauritius) Holdings and instructed local counsel to appear on its behalf before the Bombay High Court in *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd*.

World Sports Group (Mauritius) Ltd v MSM Satellite (Singapore) Ltd

The Supreme Court of India reversed an anti-arbitration injunction that had previously been granted by the Bombay High Court in favour of MSM Satellite,¹⁰ ("MSM") against WSG (Mauritius), and held that MSM's dispute with WSG (Mauritius) should properly be referred to ICC arbitration in Singapore.

Brief facts

The case involved a dispute over the media rights for the Indian Premier League. In 2008, WSG won the global media rights tendered by the Board of Control for Cricket India (BCCI) for the Indian Premier League for a ten-year period. MSM claimed that under a pre-bid arrangement it was meant to get media rights for the Indian sub-continent for first two years of the ten-year period. However, after the first season, BCCI terminated its agreement with MSM and commenced negotiations with WSG (India). MSM initiated injunction proceedings against BCCI.

In 2009, WSG (Mauritius) entered into a INR 4.7 billion (US\$90 million) facilitation agreement with MSM under which WSG (Mauritius) relinquished its Indian sub-continent media rights and enabled MSM to obtain those rights directly from the BCCI. The facilitation agreement provided that all disputes should go to ICC arbitration in Singapore.

MSM made three payments to WSG (Mauritius) under the agreement but failed to pay the balance. Accusing WSG (Mauritius) of misrepresentation and fraud, MSM rescinded the agreement and applied to the Bombay High Court for a declaration that the facilitation agreement was void. WSG (Mauritius) requested arbitration before the ICC in Singapore, but, in the meantime, MSM sought a temporary injunction from the Bombay High Court, claiming that as WSG (Mauritius) had rescinded the agreement, it was not entitled to rely upon the arbitration clause in the agreement.

The Bombay High Court granted MSM's application for an anti-arbitration injunction to restrain the arbitration proceedings. WSG (Mauritius) appealed to the Supreme Court of India.

The Supreme Court of India's Findings

The Supreme Court of India found that:

- the courts are obliged to refer the parties to arbitration unless they find that the arbitration agreement between the parties is "null and void, inoperative or incapable of being performed";
- pursuant to the New York Convention, 11 provisions of which are also in the Indian Arbitration and Conciliation Act, 12 an arbitration agreement does not become "inoperative or incapable of being performed" simply because the dispute may involve allegations of fraud;
- the courts cannot refuse to refer the parties to arbitration on the ground that allegations of fraud have been made by one party;
- the arbitration clause in the specific facilitation agreement between the parties was wide enough to bring the dispute within the scope of arbitration;
- it is not only the courts which can decide issues of allegations of fraud and serious malpractice; such issues can also properly be dealt with by arbitrators.

HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz (Singapore) Ltd Ltd

Brief facts

HSBC PI Holdings ("HSBC"), an investment holding company for the Asia Division of HSBC, sought interim injunctive relief and related orders before the Bombay High Court in support of Singapore arbitration proceedings to compel Avitel and related respondents ("Avitel") to deposit monies and/or security to the extent of HSBC's original investment of US\$60 million in a failed project.

Various endorsements that had been made about Avitel's business were discovered by HSBC to have been fraudulent.

Avitel claimed that the agreement was governed by Indian law and that since an issue of fraud was not capable of settlement through arbitration under Indian law, HSBC's petition was therefore without any foundation.

The High Court of Bombay's Findings

The Bombay High Court, finding in favour of HSBC, held as follows:

- the parties had expressly chosen Singapore as the seat of arbitration, therefore Singapore law governed the arbitration agreement;

Key issues

- Trend of "pro-arbitration" shown by Indian higher courts in two recent cases
- Indian courts uphold underlying arbitration agreements
- Allegations of fraud can be dealt with by arbitrators not only by courts

- under Singapore law, the arbitral tribunal can decide claims involving allegations of fraud and fabrication if any, and there was no bar to these issues being decided by an arbitrator;
- the agreement to arbitrate in Singapore had "a real and closer connection with the place where the parties had chosen to arbitrate"; thus the arbitration agreement was governed by Singapore law and not Indian law;
- the Singapore arbitral tribunal had jurisdiction to deal with allegations of fraud and fabrication;
- the argument raised by Avitel that, under Indian law, the arbitral awards by the Singapore arbitral tribunal, would conflict with the "public policy of India" was not correct;
- HSBC was entitled to seek orders for interim measures and other relief against Avitel;

The Bombay High Court's prima facie view was that HSBC's allegations of false representations by Avitel on various issues were of "substance". Accordingly, the interim measures and relief sought by HSBC against Avitel were granted.

It is not yet known whether Avitel will appeal the High Court of Bombay's decision to the Supreme Court of India.

Conclusion

Echoing findings of the Supreme Court of India in its earlier decision of *Bharat Aluminum, both HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd and World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Ltd*, show the Indian higher courts being prepared to uphold the underlying arbitration agreements between the parties in the face of fierce opposition from respondents. In particular, where allegations of fraud and malpractice are raised by one party, the cases demonstrate that Indian courts are now firmly of the view that such issues are arbitrable by the arbitral tribunal concerned, not only by the courts. This bodes well for a continuing trend of pro-arbitration by Indian courts in the international context.

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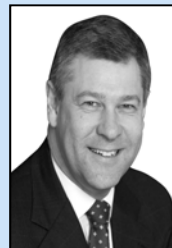
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