

Two recent pro-arbitration cases from Indian courts continue the judicial trend towards recognition of arbitral independence

In two pro-arbitration decisions issued only days apart, the Bombay High Court in *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd and others*¹ and the Supreme Court of India in *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Ltd*², both held that issues of fraud should properly be dealt with by the arbitral tribunal in accordance with the arbitration agreements entered into between the parties, and not by the courts, departing from an earlier controversial line of authority from India which had held otherwise.³

Following the groundwork laid by the Supreme Court of India in cases such as *Bharat Aluminium Co Ltd v Kaiser Aluminium*⁴ and *Shri Lal Mahal v Progetto Grano Spa*⁵, the two cases discussed in this briefing 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.

HSBC PI Holdings (Mauritius) Ltd. v Avitel Post Studioz Ltd and others

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.

¹ Arbitration Petition No. 1062/2012, High Court of Bombay, India, 22.01.14

² Civil Appeal No. 895/2014, Petition for Special Leave to Appeal (Civil) No(s).34978/2010, Supreme Court of India (unreported), 24.01.14, Supreme Court of India.

³ See *N. Radhakrishnan v Maestro Engineers & Ors* (2010) 1 SCC 72; *India Household Healthcare v LG Household Healthcare* (2007) 5 SCC 510; *Hindustan Petroleum v Pink City Midway Petroleums* (2003) 6 SCC 503.

⁴ *Bharat Aluminium Co Ltd v Kaiser Aluminium Technical Service Inc* (2012) 9 SCC 649, overruling the much-criticised case of *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105. See

http://www.cliffordchance.com/publicationviews/publications/2012/09/indian_supreme_courtscalesbackintervention.html

⁵ (2013) (8) SCALE 480, Civil Appeal No. 5085/2013, 3.07.13. See

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HSBC had invested US\$60 million in Avitel on the basis, *inter alia*, of representations and undertakings by Avitel that the monies would be used to purchase specialized film equipment, enabling Avitel's subsidiary to service a contract with the BBC, said to be worth between US\$1 billion to US\$1.3 billion. A Share Subscription Agreement (SSA) was duly signed between the parties. The SSA provided, *inter alia*, that the agreement would be construed in accordance with the laws of India and that any arbitration would be conducted under the Singapore International Arbitration Centre ("SIAC") Rules in Singapore.

It subsequently emerged that there were serious doubts over the legitimacy of Avitel's business and its customers. An earlier meeting between the parties with a person said to have been a "BBC representative", in order to provide supposed endorsement by the BBC of its contract with Avitel's subsidiary, was discovered by HSBC to have been fraudulent. HSBC commenced SIAC arbitration proceedings against Avitel.

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

The High Court of Bombay's Findings

HSBC brought a petition⁶ in the Bombay High Court seeking orders against Avitel requiring the deposit of HSBC's original investment of US\$60 million and/or alternatively security for the investment that had seemingly vanished. 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 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;
- 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;⁷
- HSBC was entitled to seek orders for interim measures and other relief against Avitel;⁸

⁶ Section 9 of the Arbitration and Conciliation Act 1996 (India).

⁷ The "public policy of India" ground under s. 48 of Part II of the Arbitration and Conciliation Act (India) 1996 for resisting the enforcement of foreign arbitral awards on the basis that to do so would be, *inter alia*, contrary to fundamental policy of India, has been given a narrow meaning by the SCC in the recent case of *Shri La Mahal Ltd v Progetto Grano Spa* (2013) (8)SCALE 489, Civil Appeal No. 5085/ 2013.

⁸ Section 9 of the Arbitration and Conciliation Act 1996 (India).

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 of US\$60 million against Avitel were granted. The Bombay High Court also ordered that in the event that Avitel's bank accounts were found to hold less than US\$60 million, any shortfall was to be deposited by Avitel within one month following judgment.⁹

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

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

In the second recent pro-arbitration case from India, 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*";

⁹ Para. 101 of the judgment, *supra*.

¹⁰ Judgment and Order dated 17/09/2010 in AL No. 534/2010, NOM No. 1809/2010 and SN No. 1828/2010, High Court of Bombay, India.

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- 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;¹³
- 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.¹⁴

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 Studios 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.

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 Studios Ltd*.

¹¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (New York)

¹² Sections 44 and 45 of Chapter 1, Part II of the Arbitration and Conciliation Act (India)

¹³ The SCC quoted *Redfern and Hunter*, *International Arbitration*, 5th edition, page 134, para. 2.141

¹⁴ The Supreme Court clarified the meaning of section 45 of the Arbitration and Conciliation Act (India): see paras. 29,20,32 of its judgment.

Supra.

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