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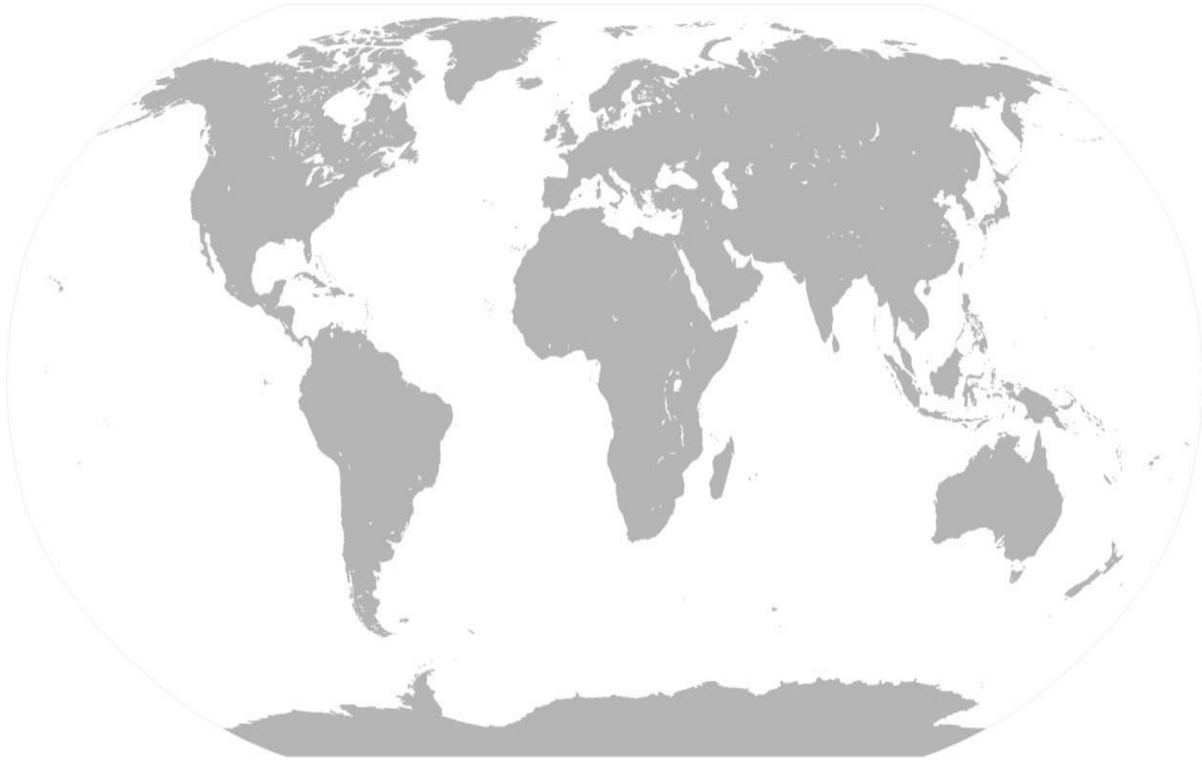

Important decisions on Arbitration in 2020

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1. ***Arbitral award allowing reimbursement for fuel-price increase in a fixed-term contract set aside by the Supreme Court.*** *[South East Asia Marine Engineering and Constructions Ltd. (SEAMEC LTD.) v. Oil India Limited, Civil Appeal No. 900 Of 2012, Supreme Court of India, 11.05.2020]*

Facts:

SEAMEC Ltd ("Appellant") was awarded a work order by Oil India Limited ("Respondent") for well drilling and other auxiliary operations. During the term of the contract, there was an increase in the price of High-Speed Diesel ("HSD"), an essential material for carrying out the drilling operations. The Appellant raised a claim that an increase in the price of HSD, an essential component for carrying out the contract triggered the "change in law" clause under the contract (i.e., Clause 23). Clause 23, which provided for 'Subsequently Enacted Laws provided that any additional or reduction in cost to the contractor which was a result of change in enactment of any law subsequent to the bid opening would be reimbursed to the contractor. The tribunal, while giving a wide interpretation to Clause 23, held that although an increase in HSD price through a circular issued under the authority of State or Union was not "law" in the literal sense, it still had the "force of law" and thus fell within the ambit of Clause 23. An award was passed in favour of SEAMEC Ltd. In an appeal filed under Section 37 of the Arbitration Act, the Gauhati High Court set aside the award passed by the Arbitral Tribunal with the view that interpretation of the terms of the contract by the Arbitral Tribunal is erroneous and is against the public policy of India as a change in law clause was akin to a 'force majeure' situation.

Decision:

The Supreme Court dismissed the appeal and set aside the arbitral award. It was held that the contract was a fixed price contract and that if the purpose of the tender was to limit the risks of price variations, then the interpretation placed by the Arbitral Tribunal was not possible as it would completely defeat the explicit wordings and purpose of the contract. The Court noted that the Tribunal, while construing the scope of the Change in Law clause widely, had ignored the thumb rule of interpretation that a document embodying the contractual terms, had to be read as a whole and the terms of such agreement had to be mutually explanatory. It observed that a prudent contractor would have considered the price fluctuation and its impact on margin while bidding for tender and held that such price fluctuations could not be brought in the clause relating to change in law unless specific language pointed to such inclusion. Though, the Supreme Court did not interfere with the decision of the High Court, it did not subscribe to the view of the High Court that a subsequent change in law envisaged in Clause 23 of the contract, was akin to force majeure and such clause was inserted in furtherance to the doctrine of frustration under the Indian Contract Act.

2. ***Relationship between a client and foreign law firm 'commercial in nature' for the purpose of Sections 44, 45 Arbitration Act: Delhi High Court*** *[Spentex Industries vs. Quinn Emanuel Urquhart & Sullivan LLP, CS(OS) 568/2017, Delhi High Court, 12.05.2020]*

Facts:

The Plaintiff, Spentex Industries Limited and its subsidiary, Spentex Netherlands BV had entered into investment transactions with the Republic of Uzbekistan. When certain disputes arose between the two entities and Uzbekistan, the Plaintiff Company approached a US based law firm, Emanuel Urquhart & Sullivan LLP ("Defendant"), for representation in the arbitration proceedings. The Defendant-firm's Engagement Letter, which contained an arbitration clause, was signed by the Plaintiff and its subsidiary. Certain disputes arose with respect to payment of invoices and arbitration was invoked by the Defendant and apropos the agreement JAMS served notice for tripartite arbitration. The Plaintiff abstained from the arbitration proceedings and an award was passed against them. Subsequently, it filed an application under section 45 of the Arbitration and Conciliation Act, 1996 ("the Act") seeking a declaration of the arbitration clause in the Engagement Letter as null and void, and against the public policy of India.

Decision:

The High Court observed that allegations of the arbitration agreement being null and void, inoperative or incapable of being performed were premised on the claim that the provisions of Sections 44 and 45 of the Act did not apply to the agreement between the two companies and the Defendant. It was held that transactions relating to services for valuable consideration would establish a commercial legal relationship between the transacting parties, and therefore it would be covered by section 44 of the Act. The Court rejected the argument that the profession of an advocate had to be distinguished from a commercial activity as the Defendant, being a foreign law firm, was not governed by the statutory regime in India relating to advocates. It was concluded that as the proceedings were substantially for recovery of money, the same would tantamount to a "commercial relationship" as per section 45 of the Act.

3. ***Waiver of Right to Object in Arbitral Proceedings*** *[Quippo Construction Equipment ltd vs. Janardan Nirman Pvt. Ltd Appeal (Civil), 2378 of 2020, 29.04.2020*]

Facts:

The present case involved four agreements containing arbitration clauses between two parties, of which three agreements designated New Delhi as the venue, whereas one agreement stated Kolkata as the place of arbitration. When disputes arose between the two parties, a sole arbitrator was appointed to conduct arbitration proceedings in New Delhi. One of the parties Janardan Nirman Pvt. Ltd ("Respondent"), however, had objections to the conduct of these arbitral proceedings and chose to move civil proceedings in this regard before civil courts. The arbitral proceedings continued without the participation of the Respondent and culminated in an ex-parte

award being passed in the opposite party's favour (i.e., Quippo Construction Equipment ltd, "Appellant") in March 2015. Notably, this was a common award covering the claims in respect of all four agreements between the two parties. Initially, the Calcutta High Court declined to intervene in the matter, dismissing a challenge preferred by the Respondent to the common award in July. A subsequent plea was moved by the Respondent before the District Court, contending, inter alia, that one of the four agreements designated Kolkata as the venue of arbitration. This plea was eventually dismissed, prompting a challenge before the Calcutta High Court. In February 2019, the Calcutta High Court gave a ruling favourable to the Respondent, resulting in the Appellant to challenge the same before the Supreme Court.

Decision:

Before the Supreme Court, the Respondent objected to the passage of a common award for all four agreements, arguing that each agreement ought to have resulted in independent arbitral proceedings. Further, it was pointed out that Kolkata was the stated venue of arbitration in one of the agreements, whereas the arbitral proceedings were conducted in New Delhi. The Supreme Court ruled that the Respondent would have no case at this stage since, at no stage, were the aforesaid objections raised by them before the Arbitrator. Rather, it was noted that Respondent let the arbitral proceedings conclude and culminate in an ex-parte award. It is not as if there were completely different mechanisms for the appointment of Arbitrator in each of the agreements. The only distinction is that according to one of the agreements the venue was to be at Kolkata. The specification of "place of arbitration" may have special significance in an International Commercial Arbitration, where the "place of arbitration" may determine which curial law would apply. However, Apex Court observed that applicable substantive, as well as curial law, would be the same. On the circumstances, the Apex Court observed that "the respondent is now precluded from raising any submission or objection as to the venue of arbitration".

4. ***Foreign Awards Passed Against The Fundamental Policy Of Indian Law Are Not Enforceable*** [*National Agricultural Cooperative Marketing Federation of India (NAFED) v. Alimenta S.A. Civil Appeal No. 667 of 2012, delivered on 22.04.2020*]

Facts:

National Agricultural Cooperative Marketing Federation of India ("NAFED") was required to supply Alimenta with 5,000 MT of a commodity, under a standard Federation of Oils, Seeds and Fats Associations Ltd (FOSFA) contract. NAFED was a canalizing agency of the Government of India and hence required permission for export of the Commodity from the Ministry of Agriculture, Government of India. Owing to a cyclone which damaged crops, NAFED was able to supply only 1900 MT of the Commodity (for which permission was granted by the Ministry). The parties entered into two addendums for NAFED to supply the balance amount in the subsequent year, i.e. 1980-81. Although NAFED applied for approval for the export at the agreed price to Alimenta, this was refused (on account of the increase in prices in the subsequent year). The Ministry, in fact, prohibited NAFED from shipping any left-over quantities from the previous years. Consequently,

NAFED was unable to fulfil the contract and informed Alimenta of the Ministry's refusal. Alimenta treated this as NAFED's default and invoked arbitration before FOSFA in London. Ultimately, FOSFA passed an award against NAFED on November 15, 1989, which was upheld in an appeal on May 14, 1990. NAFED was directed to pay USD $4,681,000 as damages (along with interest), to Alimenta (the "Award"). Alimenta applied for enforcement of the Award before the Delhi High Court. After a series of proceedings and appeals, the High Court ultimately held that the Award was enforceable and converted it into a decree of the Court (as required under the old arbitration regime). NAFED went on to appeal to the Supreme Court.

Decision:

Supreme Court observed that NAFED's was unable to fulfill its contractual obligations in view of Government's refusal to permit it to export the Commodity, and accordingly, the contract became void and unenforceable in view of Clause 14 of the FOSFA Contract. Consequently, NAFED could not have been held liable to pay damages to Alimenta. Supreme Court distinguished between a contingent contract which becomes void in the event of the contingency, and frustration, where the contract becomes void on account of the impossibility of performance. The Bench stridently dealt with the interpretation and consequences of Clause 14 of the contract, which provided that in the event of any prohibition by the Government on export, the unfulfilled part of the contract shall be cancelled. Owing to the Government's refusal, NAFED was not permitted to export the balance Commodity and was justified in not making the supply under the Contract as it would have violated the Export Control Order. The Court held that a possible prohibition on export having been specifically envisaged, it was a contingent contract, and once that contingency arose, i.e. the refusal to allow NAFED to export the Commodity, the Contract was required to be cancelled. The principle of frustration did not apply given that Clause 14 explicitly provided for the event preventing NAFED from performing its obligations. Supreme Court concluded that it would be against the fundamental public policy of India to enforce the Arbitral Award given the facts and circumstances of the case. The Court reasoned that as per the law applicable in India, no export could have taken place without the permission of the Government, and given the refusal, NAFED could not have supplied the Commodity.

5. ***Indian Courts have no jurisdiction when arbitration "seated" outside India*** *[Mankastu Impex Private Limited Versus Airvisual Limited: Arbitration petition No. 32 of 2018, Supreme Court, 05.03.2020]*

Facts:

Supreme Court, in this case, has distinguished the full bench decision in BGS SGS SOMA JV v. NHPC Ltd. on the issue of whether the "venue of arbitration" is the "seat of arbitration". The judgment arises out of a sale-purchase agreement entered into between the Mankastu Impex Private Limited ("Petitioner") and Airvisual Limited ("Respondent"). The dispute arose out of a shift in the management of the Respondent, and the resultant back and forth over the renewal of terms of the original agreement. The Petitioner invoked the arbitration clause and submitted to the jurisdiction

of the Delhi High Court by filing an application for interim relief under section 9 of the Arbitration Act. The contention of the Respondent was that the clause in the agreement mentioned Hong Kong as the venue for arbitration. The matter reached the Supreme Court by virtue of a section 11 application filed by the Petitioner for the appointment of a sole arbitrator.

Decision:

While agreeing with the reasoning in BALCO, the Supreme Court reiterated that the difference between the terms "venue" and "seat" are crucial and that they cannot be used interchangeably. The judgment re-affirmed the reasoning of Hardy Exploration, in that surrounding factors and holistic reading of the arbitration clause in the agreement must be taken into consideration to determine what the "seat" of arbitration is. The bench went one step ahead to hold that the intention of the parties with regards to the applicable law (seat) is to be determined from their conduct as well as the other clauses of the agreement. Eventually, the Supreme Court observed that on a reading of the agreement, it is apparent that the parties intended Hong Kong to not only be the "venue" of arbitration but also the "seat". Thus, relying on Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., it was held that since the "seat" of arbitration proceedings in Hong Kong, the applicable law is the law of Hong Kong, and a section 11 application does not lie with the Supreme Court of India. The applicable law clause, which stated that the governing law for the agreement shall be Indian law, was distinguished on the construction of the clause and due to section 2(2) of the Act, which excludes the application of section 11 to international commercial arbitrations seated outside India.

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