INDIALAW

ARBITRATION AND CONCILIATION

Eitzen Bulk A/S v. Ashapurna Minechem Ltd. & Anr. : Choosing juridical seat of arbitration attracts law applicable to chosen location

AUTHOR Gayatri Mohapatra, Arjun Sathees

PUBLISHED 19 May 2016

In a recent judgement passed by the Supreme Court in ***Eitzen Bulk A/S v. Ashapurna Minechem Ltd. & Anr.***,[1], Justices S. A. Bobde and Fakhir Mohammed Ibrahim Kalifulla, deliberated on the question of applicability of Part-I of the Arbitration and Conciliation Act,1996 ("**Arbitration Act**"), in a scenario where the seat of arbitration was set outside India.

In the present case, there was a Contract of Affreightment (C.O.A.) entered into by the parties which carried an arbitration clause as follows:

"*Clause No. 28 – Any dispute arising under this C.O.A. is to be settled and referred to Arbitration in London. One Arbitrator to be employed by the Charterers and one by the Owners and in case they shall not agree then shall appoint an Umpire whose decision shall be final and binding, the Arbitrators and Umpire to be Commercial Shipping Men. English Law to apply. Notwithstanding anything to the contrary agreed in the C.O.A., all disputes where the amount involved is less then USD 50,000/- (fifty thousand) the Arbitration shall be conducted in accordance with the Small Claims Procedure of the L.M.A.A.*"

A mere perusal of the above clause clarifies the intention of the parties. If and when arbitration was to be initiated, it was to be conducted in London. The clause also expressly states that the "English law is to apply" ruling out any questions in that regard. In the case at hand, arbitration proceedings were conducted over a dispute that had arisen, and an arbitral award was passed, the award being in favour of Eitzen Bulk A/S. Etizenwent on to enforce this award in various countries where it was duly enforced by the respective Courts.

Before Eitzen could enforce the award in India, Ashapura Minechem filed an application for injunction in a District Judge's Court in Gujarat. The matter came before the High Court of Gujarat. The issue at hand was, Ashapura had challenged the foreign award under Section 34 of Arbitration Act. Eitzen contended that the foreign award couldn't be challenged in India because Section. 34, falling under Part-I of the Arbitration Act would not have any effect in cases where the seat of arbitration was outside India. The Hon'ble Gujarat High Court held that Ashapura was entitled to challenge the award.

Subsequently, Eitzen had filed for enforcement of the foreign award before the Bombay High Court, within whose jurisdiction Ashapura carries on business and has a registered office. Ashapura responded by citing Section 42 of Arbitration Act, whereby Bombay High Court would have no jurisdiction as proceedings had already been initiated before the Gujarat High Court. The Bombay High Court ruled that Part-I was excluded by the parties by having decided that the seat of arbitration be set in London. Thereby the question of Section 42 would not arise, and further allowed for the enforcement of the award. This contradictory stand of the High Courts brought the matter before the Supreme Court. The Supreme Court decided that the main question to be addressed was whether Part-I of Arbitration Act is excluded from its operation in case of a foreign award where the arbitration is not held in India and is governed by foreign law.

Referring to the Clause 28 (arbitration clause) in the Contract of Affreightment, the Supreme Court was of the view that since there was express mention that English Law would apply, there was no question of the applicability of the Indian law on arbitration. Thus, there was an express exclusion to the applicability of Part-I to the current arbitration, as per the contract entered into by the parties.

The Supreme Court further went on to say that, "it has been settled law for quite some time that Part-I is excluded where parties choose that the seat of arbitration is outside India and the arbitration should be governed by the law of that foreign country".

The Supreme Court further clarified that, "mere choosing of the juridical seat of Arbitration attracts the law applicable to such location." This inference can be appreciated by considering a simple illustration. If a citizen of India were to go to Italy and drive a car there, the traffic rules of Italy would apply automatically. There will be no question of choice in such a scenario. Similarly, if London were to be chosen as the seat for Arbitration, it would necessarily imply that English Law would be applicable, *ipso jure*.

The Hon'ble Court aptly reproduced the following passage from Redfern and Hunter on International Arbitration which contains the following explication of the issue:

"*It is also sometimes said that parties have selected the procedural law that will govern their arbitration, by providing for arbitration in a particular country. This is too elliptical and, as an English court itself held more recently in Breas of Doune Wind Farm it does not always hold true. What the parties have done is to choose a place of arbitration in a particular country. That choice brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration. To say that the parties have 'chosen' that particular law to govern the arbitration is rather like saying that an English woman who takes her car to France has 'chosen' French traffic law, which will oblige her to drive on the right-hand side of the road, to give priority to vehicles approaching from the right, and generally to obey traffic laws to which she may not be accustomed. But it would be an*

odd use of language to say this notional motorist had opted for 'French traffic law'. What she has done is to choose to go to France. The applicability of French law then follows automatically. It is not a matter of choice. Parties may well choose a particular place of arbitration precisely because its lexarbitri is one which they find attractive. Nevertheless, once a place of arbitration has been chosen, it brings with it its own law. If that law contains provisions that are mandatory so far as arbitration are concerned, those provisions must be obeyed. It is not a matter of choice any more than the notional motorist is free to choose which local traffic laws to obey and which to disregard."

Accordingly, Ashapura's petition was set aside and the decision to enforce the foreign award by the Bombay High Court was upheld by the apex court.Thus the Supreme Court has put to rest the dispute over applicability of Part-I of the Arbitration Act over foreign awards – if the seat of arbitration was any place but India, laws of that chosen place would apply.

It can very well be interpreted that when parties agree to a particular location as seat of arbitration, whether within or outside India, then necessary inference must be drawn that all other courts and applicability of arbitration laws of all other locations is ex juris. Though this judgment has reiterated the earlier position of law relating to international arbitration awards, it will have an implication on arbitration proceedings under the Arbitration Act, more specifically, the proceedings under S.9 and Sec.11 of the Act. Thus, irrespective of where the registered office or place of business of parties is located or the occurrence of cause of action, the proceeding for interim measures under Sec.9 of the Arbitration Act will lay only before the court where the juridical seat of arbitration is agreed to between the parties.

[1] *Civil Appeal Nos. 5131-33 of 2016*