



ARBITRATION AND CONCILIATION

Section 9 of the Arbitration and Conciliation Act, 1996 would apply to International Commercial Arbitration, where the place of Arbitration is outside India: States Calcutta High Court

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In a recent judgment¹, the [Calcutta High Court](#) held that even if the parties select the arbitration to be foreign seated, the intelligible comprehension cannot be that expressly or impliedly, merely by such selection, powers of Indian Courts under section 9 of the Arbitration and Conciliation Act, 1996 (“[Arbitration Act](#)”) are ousted. **Justice Shekar B. Saraf** termed this Section 9 as a ‘provision in aid of arbitration proceedings’ as the same is available at the pre-arbitration stage, before any arbitral proceedings, and could be subject to supervision by any judicial forum.

Facts of the case:

The petitioner entered a sales contract with respondent no.1 for purchase of crude oil as per certain specifications. The payment was agreed to be made by way of an irrevocable letter of credit (“L.C.”) which that petitioner opened in the favour of respondent no.1. with respondent no. 2, an issuing bank. The L.C. was to be honoured within 90 days from the date of issuance. Subsequently, the respondent no.1 shipped the agreed quantity of the crude glycerine along with the bill of lading dated 31st July, 2022.

The petitioner was thereafter informed by an officer of the respondent no.1, through an email, that the crude glycerine was 81.10% pure instead of 85% purity which was agreed. He further informed the Petitioner that instead of Formic Acid, it contained NaCl or Sodium Chloride as the salt. Both the specifications were not as per the contractual specifications agreed. The Petitioner vide email dated 5th September, 2022 set out his inability to accept the crude glycerine due to non-conformity of the quality as per contract, however, in spite of attempts to stop and return the crude glycerine, the forwarder continued the transit.

Upon receipt of forms and documents from the respondent no.2, it came to the knowledge of the petitioner that the certificate of the analysis presented by respondent no.1 for invocation was incorrect as it represented that the crude glycerine met the contractual specifications.

The petitioner approached the HC seeking ad-interim relief since the respondent no.2 refused to accept the petitioner’s pleas about the faulty/erroneous nature of the documents filed by respondent no.1 and proceeded to invoke the L.C.

Contentions

Learned counsel Mr. Krishnaraj Thakker, on behalf of the petitioner contended that unless specifically excluded, interim relief can be granted even in foreign seated arbitrations, in the light of Section 2(2) of the Arbitration Act. Further, he contended that Section 9 is included in Part-I of the Act which applies to even foreign seated arbitration unless specifically excluded. He also stated that the terms ‘seat’ and ‘venue’ are used interchangeably with respect to provisions in aid of arbitration proceedings.

Learned counsel Mr. Jishnu Chowdhury, on behalf of respondent no.1, contended that the applicability of Part-I is excluded completely, by express or implied waiver where the arbitration is foreign seated.

Observations of the Court

The Court observed that *“by not specifically stating that Part I does not apply to international commercial arbitrations outside India, the legislature intended its applicability unless the parties exclude it by agreement.”*

The Court further observed that *“That the recommendations of the Law Commission indicate, unmistakably, that the decision to exclude, generally from the ambit of Section 2(2), applications seeking prearbitral interim reliefs, for securing the assets constituting subject matter of the [arbitration](#), was that, where the assets were located in India and there is likelihood of dissipation thereof, the party, seeking a restraint there against, would “lack an efficacious remedy if the seat of the arbitration is abroad”.”*

The court further held that *“Expressed otherwise, as the proviso makes Section 9 of the 1996 Act applicable even in the case of foreign seated arbitrations; any “agreement to contrary” would, therefore, have to expressly stipulate that Section 9 would not apply in that particular case. Absent such a specific stipulation, the beneficial dispensation, contained in the proviso, cannot stand excluded.”*

The court observed that *“However, the records nowhere reflect an express exclusion of Section 9 of the Act. Therefore, this Court reserves the power to grant interim relief.”*

The court observed, that the seat of arbitration in the present case is Singapore, and that if an interim order granting injunction order restraining the L.C being invoked is not granted the petitioner would suffer irreparable loss.

Accordingly, the court extended the direction of ad-interim relief to the respondent no.2 to not encash the L.C for a further period of twelve weeks or until further order, whichever is earlier. Liberty was granted to Respondent no.1 to file a vacating application.

Also, affidavit – in -opposition was directed to be filed within period of five weeks from the date of the order.

1 Chemex Oil Private Limited v. Seastarr International Pvt. Ltd. AP 707 of 2022