ARTICLE · 4 SEPTEMBER 2017

Supreme Court Clarifies Scope Of Challenge To The Arbitral Tribunal Under The Arbitration And Conciliation Act, 1996 Post 2015 Amendment

KC Khaitan & Co LLP

On 31 August 2017, the Supreme Court put to rest the controversy surrounding the course to be adopted in case of circumstances giving rise to justifiable doubts as to the independence or impartiality of an arbitrator.

India Litigation, Mediation & Arbitration

Your Author LinkedIn Connections

On 31 August 2017, the Supreme Court put to rest the controversy surrounding the course to be adopted in case of circumstances giving rise to justifiable doubts as to the independence or impartiality of an arbitrator. The Supreme Court examined if the same would render the arbitrator ineligible to act and in what circumstances would the grounds as referred to in Fifth and Seventh Schedule to the Arbitration and Conciliation Act, 1996 ("Act") render an arbitrator *de jure* unable to perform his functions and result in termination of the mandate of the arbitrator in terms of Section 14(1) of the Act as amended by the Arbitration and Conciliation (Amendment Act), 2015 (2015 Amendment). More particularly, the Supreme Court examined the issue as to whether an arbitrator, who has previously acted as an arbitrator in an arbitration between the same parties arising out of the same contract and involving the same issue, can be said to be independent/impartial.

Background

- Gail (India) Limited (GAIL) entered into a by-product supply agreement (Agreement) with HRD Marcus (HRD), a company incorporated in the United States for a period of 20 years. The agreement contains a clause for fixation of

prices every 3 years and an arbitration clause in Article 14 (under the aegis of the International Centre for Alternative Dispute Resolution). Disputes arose on the issue of pricing and alleged withholding of product and consequently, HRD invoked the arbitration clause.

- The disputes were referred to an arbitral tribunal comprising of Justice A.B. Rohatgi (Retired) (since deceased), presiding arbitrator, Justice J.K. Mehra (Retired) and Justice N.N. Goswamy (Retired)(since deceased). The said tribunal gave an award on 8 April 2006 directing specific performance of the Agreement and accordingly, the price mechanism laid down in the Agreement was to be followed.
- Thereafter, when disputes arose for a subsequent 3-year period, the same arbitrators constituted a new tribunal. However, while the proceedings were pending, Justice Goswamy expired. Thereafter, in a petition filed under Section 15 of the Act, the Supreme Court, by an order dated 23 March 2012, appointed Justice Tejinder Singh Doabia, to fill the vacancy.
- During the pendency of the disputes with respect to the third reference to arbitration, Justice Rohatgi tendered his resignation on 17 February 2013 due to ill health. The vacancy so caused was filled by Justice Doabia and Justice Mehra jointly nominating Justice S.S. Chadha as the presiding arbitrator. These arbitral proceedings culminated into two separate awards which have been challenged by HRD and are pending adjudication before the Delhi High Court.
- For the 4th 3-year period, the price demanded was again challenged and consequently, HRD filed a petition under Section 9 of the Act, seeking interim directions. The petition was disposed of with directions to the parties to nominate their respective arbitrators.
- GAIL and HRD appointed Justice Doabia and Justice Mukul Mudgal as their respective nominee arbitrators. Subsequently, both the arbitrators appointed Justice K.K. Lahoti (Retired) as the presiding arbitrator.
- Before the preliminary hearing before the arbitral tribunal, HRD filed an application under Sections 12(3), (5), 13 and 14 of the Act read with the ICADR Arbitration Rules, 1996 praying that the mandate of Justice Doabia, as an arbitrator, be terminated since he had been appointed as an arbitrator on more than one occasion by GAIL. It was alleged that J Doabia had been rendered ineligible in view of Clause 16 of Seventh Schedule read with Sections 12(5) and 14, and there was a doubt regarding his independence and impartiality in view of Clauses 22 and 24 of the Fifth Schedule read with Sections 12 (5) and 13(1) of the Act.
- Subsequently, on 24 November 2016 during the course of hearing of HRD's application under Section 12 of the Act, copies of the letters of disclosure furnished by Justice K.K. Lahoti and Justice Doabia, which were not furnished to HRD earlier by an admitted oversight of ICADR, were handed over to HRD's counsel.
- Thereafter, HRD filed another application under Section 12 of the Act praying for termination of the mandate of Justice Lahoti as the presiding arbitrator on the ground that J Lahoti was an "advisor" to GAIL since GAIL has obtained a

legal opinion from him in an unrelated matter. Thus, it was HRD's case that J Lahoti has been rendered ineligible to act as an arbitrator in view of Section 12 read with Clause 1 and 20 of the Fifth Schedule and read with Section 12 (3) of the Act and Clause 1 of Seventh Schedule read with Sections 12(5) and 14(1) of the Act.

- The arbitral tribunal rejected HRD's application seeking termination of the mandate of Justice Doabia (ratio of 2:1, with Justice Mudgal dissenting) and Justice Lahoti (unanimously), against which HRD filed petitions under Sections 14 and 15 of the Act before the Delhi High Court seeking termination of their mandate on the grounds mentioned below.
- The High Court dismissed the petitions holding *inter alia* that
    - Any challenge laid to an arbitrator on the grounds that there are circumstances that gave rise to justifiable doubts as to his independence or impartiality under Sections 12(5) and 13 read with the Fifth Schedule is required to be adjudicated before the arbitral tribunal and if such a challenge is rejected the unsuccessful party has to await the delivery of the award.
    - So far as Section 12 (5) read with Seventh Schedule is concerned, the matter stands on a different footing and recourse to Courts under Section 14 is not precluded.
    - The High Court, in any event, proceeded to examine the independence and impartiality of the arbitrator under grounds raised in Fifth Schedule and the alleged *de jure* ineligibility to act on the grounds raised under Seventh Schedule of the Act and held against HRD.

Main arguments raised on behalf of HRD

On the appointment of Justice Doabia-

- The fact that an arbitrator had expressed opinion in respect of the controversy in another identical case on the same issues between the same parties, rendered him ineligible to act as an arbitrator under Section 12(5) of the Act and Clause 16 of the Seventh Schedule.
- A disclosure lacking the mandatory details gave rise to justifiable doubts as to his independence or impartiality as an arbitrator. It was contended that Justice Doabia's disclosure did not mention his association with GAIL as an arbitrator in the previous arbitration and that it did not mention whether there existed any circumstances which were likely to affect his ability to devote sufficient time to the arbitration.
- When an arbitrator had been appointed as an arbitrator on more than one occasion by a party, such appointment fell foul of Clauses 22 and 24 of the Fifth Schedule and therefore it was justified to doubt his impartiality.

On the appointment of Justice Lahoti

- The fact that an arbitrator has provided an opinion to a party on an unrelated matter in the past attracted application of Section 12 read with Clauses 20 and 1 of the Fifth Schedule and Clause 1 of the Seventh Schedule.
- It was contended that there were concealments in even Justice Lahoti's disclosure which gave rise to justifiable doubts as to his independence or impartiality as an arbitrator. In this context it was mentioned that Justice Lahoti had failed to disclose that he had been inducted on a panel of arbitrators which was maintained by GAIL.
- The name of an arbitrator featuring on the panel of arbitrators maintained by GAIL also gave justifiable doubts as to his independence or impartiality and attracted their disqualification in light of the observations of the Supreme Court in *Voestalpine Schienen Gmbh v. Delhi Metro Rail Corpn. Ltd 2017 (4) SCC 665* (Voestalpine)
- If Justice Doabia's mandate was terminated then the appointment of the presiding arbitrator co-appointed by him shall also be terminated.

Main arguments raised on behalf of the GAIL

- A petition under Section 14 of the Act seeking termination of the mandate of the arbitrator on account of a challenge under Section 12 (3) read with Fifth Schedule is not maintainable on the following grounds:
    - The legislative scheme does not permit recourse to courts at an interim stage. On a reading of Section 13 (5) which provides for the procedure to challenge the appointment of an arbitrator, the legislative intent is clear that Parliament did not want to clothe the courts with the power to annul an arbitral tribunal on the ground of bias at an interim stage.
    - The Act has differed from the UNCITRAL Model Law in as much as Article 13 (3) enables the party challenging the decision of the arbitral tribunal to approach the court on the subject of bias or impartiality of the arbitral tribunal. As per Sections 13 (4) and 13 (5), if a challenge to appointment of arbitrator is dismissed, a party may raise the said issue only once award is delivered in accordance with Section 34 of the Act. This provision also differs from the provisions in the arbitration statutes of various other foreign jurisdictions which provide for a recourse to courts even after dismissal of an application under Section 13.
    - With respect to Sections 16 (5) and (6) of the Supreme Court has in the case of *A. Ayyasamy versus A. Paramasivam & Others 2016 (10) SCC 386* held that a party is not allowed to rush to the court on rejection of a challenge to jurisdiction and has to raise the same in the objections filed under Section 34.

      Sections 16 (5) and (6) are similar to Sections 13 (4) and (5), in terms of dealing with rejection of challenges to certain preliminary pleas raised before the arbitrator and therefore the aforesaid observations would be applicable to the interpretation of the latter provisions as well.

        - There are various other provisions like Sections 5, 9(3) and 11(6A) which show the intent of the legislative to minimize the intervention of the Courts.

- Despite the amendment bringing in changes to Sections 12 and 14 there is no change in the scheme of the Act since Section 13 has not been amended.
- Challenge to the mandate of Justice Tejinder Singh Doabia (Retired)
    - The petitioners emphasized on the ineligibility allegedly brought about by Clause 16 of the Seventh Schedule which provides "The arbitrator has previous involvement in the case". The wordings of Clause 16 have been kept identical to the Clause 16 under Fifth Schedule. Clause 16 is part of a broader heading being *relationship of the arbitrator to the dispute* consisting of Clause 15 & 16. The *previous involvement* as mentioned in Clause 16 has to be akin to the involvement as provided for in Clause 15.
    - Thus, *involvement* as prescribed under Clause 16 cannot be considered to include involvement as an arbitrator as the same has been specifically dealt with in Clauses 20 to 24 which deals with involvement as a counselor arbitrator of the Fifth Schedule and the legislation has not deemed fit it to be included in the more serious sub-set, i.e., the Seventh Schedule.
    - Since the 246th Law Commission Report, had drawn guidance from the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") to frame Fifth Schedule and Seventh Schedule of the Act; and reliance was placed on the same to contend that

- Justice Doabia's alleged involvement does not fall in the *non-waivable red list* of the IBA Guidelines which are based on the principle that no person can be a judge in their own cause. Entry 16 is akin to Entry 2.1 of the waivable red list, as opposed to non-waivable red list (where conflict cannot be cured).
- Further Entry 3.5.2 which provides that arbitrator has publicly advocated a position on the case, whether in a published paper, or speech or otherwise has been excluded and expressing opinion in an award would fall in the said category.
- Non-disclosure cannot by itself make an arbitrator partial or lacking independence; only the facts and circumstances that he or she failed to disclose can do so.
- Similarly, providing an opinion in the past does not fall in the category of Clause 1 and 20 of Seventh Schedule since they envisage an ongoing relationship and by merely giving an opinion he cannot be categorized as an advisor.

- In this context, reliance was placed on the recent Queen's Bench Judgment in *H v L [2017] EWHC 137 (Comm)* and *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2005] 1 All ER 723* wherein it has been held that the mere fact that a tribunal has previously decided a similar issue between the same parties is not sufficient to justify a conclusion of apparent bias.
- On the question of failure to disclose whether the arbitrator was in a position to devote ample time to the arbitration, it was contended that the fact that the disclosure letter was silent on such front, implied that the arbitrator did not have any reason to be unable to devote sufficient time. Further, the arbitrator had been deeply involved in the ongoing arbitration till date. Further, it was highlighted that the disclosure being improper for the absence of such information was contended for the first time before the Supreme Court as an afterthought.

- Challenge to the mandate of Justice K.K. Lahoti (Retired) based on Entry 8 of the Seventh Schedule.
  - Clauses 1, 8 and 15 of the Seventh Schedule cites examples of an arbitrator's relationship with a party that are mutually exclusive. Entries 1 and 8 hint at an ongoing and/or a fairly regular relationship. Clause 15 on the other hand, specifically deals with expert opinions which have been deliberately put on a different footing from regular advisory and has to pertain to the dispute in question.
  - Further in the case of Voestalpine the Court had directed formation of a broad based panel which included persons other than retired employees. Merely being on the panel could not give rise to doubt on impartiality and independence.
  - The allegations against Justice Lahoti, i.e., granting an opinion in an unrelated matter and featuring on one of the party's panel could at best fall within the Green List of IBA Guidelines which do not even mandate a disclosure.

Judgment

The Supreme Court while dismissing the petition filed by HRD laid down the following important principles of law:

- The challenge to the appointment of arbitrators contained in the Fifth Schedule will be gone into only after the arbitral tribunal has given an award.
- Clauses 1 to 19 appearing in the Fifth Schedule are same as that of the Seventh Schedule only for the purpose of making a disclosure.
- Since the Clauses in the schedule owe their origins to the IBA guidelines, they have to be construed in the light of the principles laid down therein that every arbitrator shall be impartial/independent at the time of his/her appointment and doubts are justifiable only if a third person would reach a conclusion that an

arbitrator would be influenced by factors other than the merits of the case. This test requires taking a broad common-sensical approach to the Schedules – a fair construction neither tending to enlarge or restrict unduly.

- Giving an expert opinion at an arms' length in an unrelated case to a party to an arbitration cannot be construed to mean that the arbitrator is an advisor, in the sense of having a business relationship.
- Merely passing an award between the same parties in an earlier arbitration concerning the same disputes for an earlier period is not hit by Clause 16 since the involvement under Clause 16 is not as an arbitrator and further involvement has to mean in the very dispute contained in the present arbitration.

Comment

The judgment delivered by the Supreme Court puts to rest the uncertainties that had crept up on the question of the challenge to the mandate of an arbitrator with the 2015 Amendment and which delayed the arbitration proceedings. It is clarified that the 2015 Amendment has not changed the legislative policy of minimizing judicial intervention in arbitral proceedings. However, it clarified that the termination of the mandate of the arbitrators on account of Section 12(5) read with Seventh Schedule of the Act, could not be rejected at the threshold as falling outside the scope of Section 14 of the Act. Thus, the Supreme Court *vide* the present judgment has established that in case of d*e jure*, parties may not lose in terms of time and resources to await the outcome of the arbitration. However, in case of frivolous challenges to the mandates of arbitrators to delay arbitrations, the policy of minimal interference by the courts still holds good.

Authors

Vanita Bhargava

Abhisaar Bairagi