

Territorial Jurisdiction of Supervising Courts in Arbitration Matters - Provisions of the Contract Supreme – High Court of Delhi (India)

In a recent detailed and well-reasoned judgment dated 27th February 2015 (**Nexus Design Project Pvt. Ltd., Vs Travel Food Services (Delhi Terminal .3) Private Limited**), Justice Mr. Muralidhar of Delhi High Court reconfirmed the Supremacy of the provisions of the contract between the parties and the intention of the parties at the time of signing of the contract, with regard to determining of the appropriate courts having supervisory jurisdiction over the proposed arbitration proceedings, including the powers to entertain an application under S.11 of the Arbitration and Conciliation Act, 1996 seeking to appoint an arbitrator.

The Petitioner filed a petition under S.11(6) of the Arbitration and conciliation Act,1996 in the Delhi High Court seeking to appoint an arbitrator to resolve the disputes arose between the parties with regard to a cause of action which partly arose from Delhi. The contract clause provided that all disputes shall be subject to Mumbai jurisdiction only, which is produced below:

22. Settlement of Disputes:

The parties shall attempt to amicably settle all dispute concerning this Agreement and the obligations there under (the 'Dispute') through negotiations and consultations with each other. In the event, the Dispute is not settled amicably, either party may give written notice of dispute to the other party within ten (10) days of such non-settlement of the dispute

a. *Thereupon the parties shall nominate a person mutually agreed, to attempt amicable settlement of the Dispute within five (15) days of such notice and such attempt will be commenced immediately.*

b. *If such Dispute arising between the parties is not amicably settled as stated above in clause 22a, such Dispute shall be referred to arbitration. The said arbitration shall be conducted under the provisions of the Indian Arbitration and Conciliation Act, 1996 and the rules framed there under from time to time. The Parties agree:*

(i) That the arbitration proceedings will be conducted in Mumbai and proceedings shall be in English language; and (ii) the arbitration shall be referred to a sole Arbitrator and in case the parties fail to agree to the name of the sole Arbitrator, the parties may refer to a panel of

arbitrators consisting of three **(iii)** members, one each appointed by the parties and the third appointed by the nominee arbitrators by consensus.

c. The decision of the arbitrators on the dispute shall be final and binding on the parties.

d. Notwithstanding the commencement of any dispute resolution, the parties must without delay continue to perform their respective obligations under this Agreement in accordance with its provisions except, where a party has acted reasonably and bona fide in relation to the dispute or difference, to the extent that the matter, which is the subject of the dispute or difference and matters necessarily dependent on it cannot be proceeded with until the dispute or difference has been determined.

e. The competent courts at Mumbai alone shall have jurisdiction to entertain and try all matters, if any, arising out of the arbitration proceedings.”

The contention of the petitioner was on two grounds **(i)** the cause of action arose in Delhi **(ii)** appointment of an arbitrator is not a judicial powers of the court, it is only administrative and hence jurisdiction mentioned in the contract does not apply to the application under S.11(6) of the Act. In India Jurisdiction of the legal proceeding has to be determined as prescribed in S.20 of the Code of Civil Procedure. As per the said Code, the place in which the cause of action arose is an indicator to determine the jurisdiction of the court. Here in the present case part cause of action arose in Delhi and hence as per the Code, jurisdiction can be in Delhi. But the intention of the parties while signing the contract was to give the jurisdiction to Mumbai.

Swastik Gases Pvt. Ltd. Vs Indian Oil Co. Ltd., (2013) 8 SCALE 433 dealt with a similar situation and gave a finding that once parties have chosen a Jurisdiction and incorporated into a contract, then it excludes all other Jurisdictions. Till this Judgment there was a doubt whether such a selection of jurisdiction excludes the other jurisdictions or not, which was settled by this Judgment of the Supreme Court of India. Moreover there were judgments stating that if the parties wish to exclude all other jurisdictions then they should express it by using words like **“only” “alone” or similar**, which was also held unnecessary by this Judgment of the Supreme Court. It has given the at most importance to the intention of the parties at the time of signing of the contract. The relevant paragraphs are extracted and reproduced below:

30. *When it comes to the question of territorial jurisdiction relating to the application under Section 11, besides the above legislative provisions, Section 20 of the Code is relevant. Section 20 of the Code states that subject to the limitations provided in Sections 15 to 19, every suit shall be instituted in a Court within the local limits of whose jurisdiction **(a)** the Defendant, or each of the*

Defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the Defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the Defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or (c) the cause of action, wholly or in part arises. The explanation appended to Section 20 clarifies that a corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

31. *In the instant case, the Appellant does not dispute that part of cause of action has arisen in Kolkata. What Appellant says is that part of cause of action has also arisen in Jaipur and, therefore, Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the Appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(b) and Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of Clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the jurisdiction of Chief Justice of the Rajasthan High Court has been excluded. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like ‘alone’, ‘only’, ‘exclusive’ or ‘exclusive jurisdiction’ have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties-by having Clause 18 in the agreement - is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the **maxim expressio unius est exclusio alterius** comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. **By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither***

forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.” (emphasis supplied)

Replying on the above said judgment and holding that “**all matters arising out of**” also includes [appointment of arbitrator](#) and dismissed the application.

Comments of the Author: Even though the issue of “Whether the powers of the Courts under S.11(6) of the Arbitration and Conciliation Act are judicial or administrative?” was not discussed and decided in the above said judgment, the author wishes to inform the readers that the said issue is already settled by the Supreme Court of India in **SBP & Co. Vs Patel Engineering and another** as reported in 2005(8) SCC 618. In the above said judgment the Supreme Court of India held that powers of the courts under S.11(6) of the Act are not administrative and they are Judicial in nature. Because of the said finding Supreme Court of India further stated that the courts must see **(1) Limitation (2) Jurisdiction (3) Whether the person filed the application is a party to the agreement? (4) Whether there is live dispute subsisting, before appointing an arbitrator.** Even though some commentators are critical about the said view of the Supreme Court, it is the settled law in India.

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