

## Supervisory Jurisdiction of Courts and Seat of Arbitration

**S Ravi Shankar<sup>1</sup>**

Arbitration agreement should be simple and covering all the essential factors to avoid intervention of courts. Even today drafting of international arbitration agreements are not properly by parties even after many years of arbitration practice is in place throughout the world. The essential factors that are to be included in an international arbitration clause are as follows;

- a Number of arbitrators
- b Appointment procedure
- c Seat of Arbitration
- d Name of the arbitral Institution
- e Language of arbitration

In addition to the above, the arbitration agreement should not have any conflicting or confusing statements that would affect the clarity of the arbitration agreement. For example, some parties use the word venue instead of seat which can be interpreted in different ways in different countries. In some arbitration agreements, they incorporate a 'seat' from one country and mention the jurisdiction of courts of a different country. In such a situation, the arbitration clause loses its clarity. In a recent case<sup>2</sup> filed before the Supreme Court of India the parties decided this seat of arbitration as Hong Kong and subjected the agreement to the jurisdiction of the courts in Delhi.

In the said case, the petitioner company incorporated in India was conducting business under the brand name of "Atlanta healthcare" and is in the business of air quality management and supply of air purifiers, car purifiers, anti-pollution masks and air quality monitors. The respondent is a company incorporated under the laws of Hong Kong and is in the business of manufacture and sale of air-quality monitors as well as air-quality information. A memorandum of understanding dated 12.09. 2016 was entered into between the parties under which the respondent agreed to sell to the petitioner the complete line of the respondent's air-quality monitors and other products for onward sale. As per the terms of the agreement the petitioner was appointed as an exclusive distributor for the products for sale within India. Additionally, non-exclusive rights were given to the petitioner who are distribution for sales in Sri Lanka, Bangladesh and Nepal. This agreement was to continue for a period of five years from the starting date which date was to commence from the date of delivery of the first lot of air quality monitors in India that is 3.10. 2016 or 01.11.2016 whichever was later. As per the petitioner it has invested various amounts in promoting and creating a brand value for the products in India.

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<sup>1</sup> The author is an international arbitration lawyer and Senior Partner of Law Senate law firm having its offices in Mumbai and Delhi

<sup>2</sup> Mankastu Impex Private Limited Vs Airvisual Limited (2020) SCC Online SC301

Suddenly the petitioner received an email from the respondent that the technology and assets of the respondent company is acquired by another company namely M/S. IQAir AG. It further stated that it discontinued the product AirVisual Node and it is in the process of launching of a new improved product branded as IQAir AirVial Pro and quoted a higher price than agreed. The said letter, further stated that IQAir AG will not assume any contracts or legal obligations of the respondent and will work on a case to case basis with retailers to negotiate new contracts and that products will be made available under separate dealer agreements.

In such a situation, the petitioner filed a petition under section 9 of the arbitration and conciliation act 1996 in the High Court of Delhi and got an injunction restraining the respondent from selling any material in India. The arbitration clause provided in the contract is extracted reproduced below:

### **17. Governing Law and Dispute Resolution**

*17.1 This MOU is governed by the laws of India, without regard to its conflicts of laws provisions and courts at New Delhi shall have the Jurisdiction.*

*17.2 Any dispute, controversy, difference or claim arising out of or relating to this MOU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong.*

*The place of Arbitration shall be Hong Kong. The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language.*

*17.3. It is agreed that a party may seek provisional, injunctive or equitable remedies, including but not limited to preliminary injunctive relief, from a court having jurisdiction, before, during or after the pendency of any arbitration proceeding.*

The petitioner contended that the Indian court has the jurisdiction to appoint arbitrators since the courts in Delhi are given jurisdiction by the parties in the arbitration agreement. Hence the petitioner filed an application under section 11 of the arbitration and conciliation act seeking the Supreme Court of India to appoint an arbitrator. But the Supreme Court of India rejected the above said application stating that the seat of arbitration is Hong Kong and hence Indian courts do not have the jurisdiction to appoint arbitrator under the above said provision. It also clarified that the Delhi courts have jurisdiction only to grant interim orders on the request of parties since clause 17.1 and 17.3 have to be read together to understand the intention of the parties. In a foreign seat at Arbitration the Indian courts do not have jurisdiction to appoint arbitrators. The Court relying on Enercon case<sup>3</sup> held that the seat besides which could have supervisory power over the arbitration proceedings and further held that the seat normally carries with it the choice of that countries Arbitration/ crucial law.

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<sup>3</sup> Enercon (India) Limited Vs Enercon GMBH, (2014) 5 SCC 1

It also further held that as a matter of fact mere choosing of a jury Bekal seat of arbitration attracts the law applicable to such a location. Relying on Eitzen case<sup>4</sup> it would not be necessary to specify which law would apply to the arbitration proceedings, since the law of the particular country would apply is perjure.

The court the court relied on section 2 of the act<sup>5</sup> to hold on that the courts in India are not empowered to exercise their jurisdiction under section 11 of the act if the arbitration is seated outside India. The above said section is produced below:

“2. Definitions:-

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(2) This part shall apply where the place of Arbitration is in India: provided that subject to an agreement to the contrary, the provisions of Sections 9,27 and clause (a) of sub-section (3) of Section 37 shall also apply to international commercial arbitration, even if the place of arbitration

Hence, Court concluded by holding that the application filed under S.11 is not sustainable in law since the seat is Hong Kong, only the Courts in Hong kong has the supervisory jurisdiction.

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<sup>4</sup> Etizen Bulk A/S Vs Ashapura Minechem Ltd (2016)11SCC 508.

<sup>5</sup> Arbitration and Conciliation Act,1996