

10th June, 2020

CONCEPT OF CONTENDING PARTY IN INTERNATIONAL COMMERCIAL ARBITRATION IN INDIAN JUDICIARY

A Introduction:

- ¹ International Commercial Arbitration (in short “ICA”) in layman language, is an alternative dispute resolution arising under international commercial contract.
- ² In the case of Perkins Eastman Architects DPC -vs- HSCC (India) Ltd, 2019 SCC OnLine SC 1517 (for short ‘Perkins Case’), the Hon’ble Supreme Court clarified the issue as to under what circumstances an agreement will be held to be international commercial agreement when one of the party is a Consortium and that members of the consortium comprises of both Indian and Non-Indian entity.
- ³ Section 2 (1) (f) of the Arbitration and Conciliation Act, 1996 (in short “the Act”) defines ICA:
 - a There must be a commercial relationship under Indian Law
 - b At least one (1) party is resident or incorporated in a country outside India.
 - c This irrespective of seat of the arbitration as such.
- ⁴ An ICA shall be subject to Part I of the Act, if, parties have agreed to a seat in India. If, an ICA is held outside India, then it shall be subject to Part II of the Act.
- ⁵ In case of *BALCO v. Kaiser Aluminium Technical Services*, (2012) 9 SCC 552, the Hon’ble Supreme Court held that Part-I of the Act shall have no applicability, if, any ICA held outside India. Part-I of the Act shall only be applicable to Arbitrations (Domestic or International) which shall have a seat in India. The Hon’ble Court has also made it clear that if an ICA held outside India, application for Interim Relief under Section 9 of the Act shall not be applicable to Part-I of the Act. The provisions contain in Part-I cannot be overlapped or intermingle with the provisions contain in Part-II of the Act.

B Facts:

- ¹ A contract was entered between Consortium of Appli-

cants i.e. (i) Perkins Eastman Architects DPC (in short “Perkins”) and (ii) Edifice Consultants Private Limited (in short “Edifice”) (together called as “Consortium Applicants”) and Hospital Services Consultancy Co. (India) Ltd. (in short “HSCC”).

- ² Perkins, an Architectural firm - registered office - New York, USA and Edifice has its office in Mumbai, India.
- ³ The bid was submitted by the Consortium Applicants on 28.09.2016 and the Letter of Award was issued to the Consortium Applicants on 22.02.2017 for an Order of Rs. 15.63 Crores.
- ⁴ “Disputes Resolution” being Clause 24, broadly stated:
 - a Arbitration before a Sole Arbitrator, to be appointed by the Chief Managing Director or the Chairman of HSCC
 - b To be conducted as accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification and re-enactment thereof.
- ⁶ An Arbitrator was appointed by the Chief General Manager of HSCC on 30.07.2019. However, as per the Arbitration Clause of the Contract, only the Chief Managing Director of HSCC can appoint an Arbitrator for adjudication of any dispute under the Arbitration Clause. Therefore, the Consortium Applicants challenged the appointment before the Hon’ble Supreme Court since such appointment was not according to the arbitration clause.

C Issues:

The Hon’ble Supreme Court formulated the following issues:

- a Whether the Arbitration in the instant case would be considered as ICA?
- b Whether a case is made out for the Hon’ble Supreme Court to exercise its power under the Act to appoint a Sole Arbitrator?



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For the present purpose, we are dealing with only the issue no. (i) dealt by the Hon'ble Supreme Court

D Finding:

- ¹ The Consortium Agreement, defines Perkin as “lead member” of the Consortium.
- ² The Consortium Applicants had submitted a “Declaration for lead Member of the Consortium (Form E)”, confirming the lead partner as Perkins.
- ³ Perkins is a non-Indian entity i.e. incorporated and registered in New York, USA.
- ⁴ Perkins being the Lead Member, was responsible for all necessary actions in relation to the completion of the contract.
- ⁵ The Consortium Applicants though being jointly and severally liable, the fact that Perkins was the lead member of the Consortium Agreement cannot be changed and its responsibility cannot be diluted.
- ⁶ Differentiated the case of Larsen and Turbo Limited SCOMI Engineering BHD vs. Mumbai Metropolitan Region Development Authority, (2019) 2 SCC 271. In this case the agreement was held not to be ICA because the lead partner was an Indian Company and non-lead partner was Malaysian entity.

E Conclusion:

- ¹ Section 2 (i) (f) of the Act states that an ICA is a commercial arbitration, wherein one party is a resident or incorporated in a country outside India. A question arise here is that can the Hon'ble Supreme Court go outside the purview of the legislature and decide who is the lead member and who is not the lead member, for an arbitration agreement to be called an ICA.
- ² An application under Section 11 (6) of the Act is for an appointment of an Arbitrator. The Court is not to go into the merits of the case at the stage of appointment of an arbitrator. It is up to the Arbitral Tribunal to decide which party is a lead member.

- ³ In order to confine the power of the Hon'ble Supreme Court and the power of Hon'ble High Courts, Section 11 (6A) of the Act was inserted upon the recommendation of the Law Commission of India in its 246th Report through 2015 Amendment, which stated that power of the Hon'ble Supreme Court and the Hon'ble High Court was only confined to examined the existence of the Arbitration Agreement and nothing else.
- ⁴ Prior to 2015 Amendment and insertion of Section 11 (6A) to the Act, Hon'ble Courts had substantiable amount of authority and power to decide the validity of an arbitration agreement under Section 11 of the Act. Section 11 (6A) was inserted with the sole purpose to limit the powers of the Hon'ble Court only to appointment of the Arbitrator when there is prima facie exist an arbitration agreement between the parties to the dispute.
- ⁵ On the other hand, it can be said that when there is an arbitration clause and the same is before the Hon'ble Supreme Court under section 11 (6) of the Act, then the status of the agreement becomes relevant and as such court has to be satisfied whether the agreement is international or not, which is a condition precedent. In case when there is a consortium party having one of its members an Indian entity, the Court has to look into the same. If both member of consortium are international, then court will automatically appoint.
- ⁶ Indian Judiciary has refrained itself from interfering with the arbitral process in the cases where the parties chose to settle disputes amicably through Arbitration to give effect to the preferred choice of the parties. The 2015 Amendment and the 2018 Amendment of the Act, has now confined the supervisory roles of the Courts and encourages institutional arbitration for speedy settlement of disputes. Perkins case should be an exception to this.