



NO BINDING AGREEMENT FOR PLACE OF ARBITRATION. COURTS WHERE THE CAUSE OF ACTION PARTIALLY AROSE HAVE TERRITORIAL JURISDICTION.

OK PLAY AUTO PVT. LTD. V. INDIAN COMMERCE & INDUSTRIES CO. PVT. LTD. (25 APRIL 2018)

Introduction

1. Following a tender notice inviting bids for construction works, the parties exchanged a series of correspondence which culminated into a final agreement. While the parties agreed to arbitration as the mode for resolution of disputes, the parties continuously negotiated the terms for constitution of the tribunal and the venue of arbitration. As a result, three distinct arbitration clauses were put forth before the court. The issue for consideration was which arbitration clause constituted a binding agreement between the parties. The court examined the provisions of the Indian Contract Act, 1872 ("**Contract Act**") and the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") to determine the dispute.

Factual Matrix

2. OK Play Auto Pvt. Ltd. ("**Play Auto**") issued a tender notice inviting bids ("**Tender Notice**") for construction works in Tamil Nadu. Indian Commerce & Industries Co. Pvt. Ltd. ("**ICI**") issued a proposal dated 20 August 2011 ("**Proposal**") to bid for the tender. Accordingly, Play Auto issued a job order dated 29 August 2011 ("**Job Order**") in terms of the Proposal made by ICI. ICI accepted the Job Order by a letter dated 2 September 2011 ("**Letter of Acceptance**").
3. The arbitration clause in the Tender Notice provided that the venue of the arbitration would be Chennai and courts at Chennai would be vested with territorial jurisdiction ("**First Arbitration Clause**"). Subsequently, a fresh arbitration clause was provided in the Job Order issued by Play Auto ("**Second Arbitration Clause**"). While ICI accepted the Job Order under the Letter of Acceptance, it disagreed with the Second Arbitration Clause and proposed an alternate arbitration clause ("**Third Arbitration Clause**").
4. When disputes arose between the parties, ICI filed a civil suit against Play Auto for recovery of monies before the Madras High Court ("**Madras HC**") and Play Auto filed an application for reference of disputes to arbitration. By order dated 3 August 2016, the Madras HC noted that the existence of an arbitration clause was not in dispute and consequently, allowed the application for reference of disputes to arbitration.
5. On 15 September 2016, ICI filed an application before the Madras HC for constitution of the tribunal. The Madras HC dismissed the petition because on 11 August 2016 Play Auto had already filed a similar application before the Delhi High Court ("**Delhi HC**"). Since, the venue in the First Arbitration Clause was Chennai ICI challenged the territorial jurisdiction of the Delhi HC.
6. As 3 arbitration clauses were exchanged between the parties, the issues for consideration before the Delhi HC were (i) which arbitration clause constituted a binding arbitration agreement between the parties and (ii) whether the Delhi HC had territorial jurisdiction to appoint an arbitrator.

Observations and Findings

Binding Arbitration Agreement

7. Considering the principles of the Contract Act, the Delhi HC found as follows:
 - i. Tender Notice, which contained the First Arbitration Clause with the venue of arbitration, was a notice inviting tender which as per settled law constituted an 'invitation' seeking offer.
 - ii. The Proposal given by ICI pursuant to the Tender Notice constituted an 'offer'.
 - iii. Since Play Auto accepted the Job Order with a fresh arbitration clause (i.e. Second Arbitration Clause), the Second Arbitration Clause constituted a 'counter offer'.

- iv. Issuance of Letter of Acceptance to the Job Order but with a revised arbitration clause i.e. the Third Arbitration Clause constituted another counter offer. Since there was no further communication between the parties about the arbitration clause, the court concluded that there was no agreement between the parties on the Third Arbitration Clause.
8. Pertinently, while the Delhi HC noted that it is possible to conclude that the parties accept arbitration agreements by conduct, in the present case, because neither party placed any communication on record to show acceptance of the Third Arbitration Clause by conduct, it concluded that the Third Arbitration Clause was not accepted by conduct.
9. The Delhi HC found that there was a consensus between the parties that in case there were disputes between them it would be referred to arbitration. The court noted that *“They have not been able to agree on the mechanism of appointment of an arbitrator as spelt out in the three clauses that were exchanged. There is no equivocal acceptance.”* and parties have *“... failed to reach consensus ad idem on the seat of arbitration”*.

Territorial Jurisdiction

10. Having concluded that there was no consensus between the parties regarding appointment of arbitrator and seat of arbitration, the Delhi HC dealt with ICI's contention that the Delhi HC did not have jurisdiction to appoint an arbitrator as no cause of action arose in Delhi. The court observed that a suit arising in relation to a contract may be filed at the place where the contract was made.
11. Since in the present case the Job Order was issued from Delhi and delivered in Chennai, the question was at which place was the contract made? After examining the law on this point, the Delhi HC concluded that the contract is made at the place the letter of acceptance is posted. In the present case, since the Letter of Acceptance was posted in Delhi the court concluded that a part of the cause of action arose in Delhi.
12. In the absence of an agreement regarding the seat of arbitration, the Delhi HC applied Section 2(e)(1) of the Arbitration Act and concluded that as part of the cause of action arose in Delhi the courts in Delhi would have territorial jurisdiction to adjudicate the disputes between the parties.

Conclusion

13. Based on the above findings, the Delhi HC appointed a sole arbitrator. In the absence of an agreement on the mechanism of the arbitration, the court held that the arbitration would be conducted under the aegis of the Delhi International Arbitration Centre.
14. The present decision highlights and reiterates the seat-centric policy followed in Indian arbitrations practice. In the present case, the Delhi HC first sought to ascertain the existence of an agreement between the parties regarding the seat of arbitration. Upon finding that no such agreement existed, did the Delhi HC, place reliance on the definition of 'Court' under Section 2(e) of the Arbitration Act to determine its jurisdiction to appoint an arbitrator.

Disclaimer: The information provided in this update is intended for informational purposes only and does not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided herein. This update is not intended to address the circumstances of any particular individual or corporate body. There can be no assurance that the judicial/ quasi judicial authorities may not take a position contrary to the views mentioned herein.



**ECONOMIC
LAWS
PRACTICE**
ADVOCATES & SOLICITORS

MUMBAI
mumbai@elp-in.com

AHMEDABAD
ahmedabad@elp-in.com

NEW DELHI
delhi@elp-in.com

PUNE
pune@elp-in.com

BENGALURU
bengaluru@elp-in.com

CHENNAI
chennai@elp-in.com

© Economic Laws Practice 2018