



Arbitration Weekly Update

September 24, 2018

SC RULES: WHEN A DISPUTE RESOLUTION CLAUSE PROVIDES THAT DISPUTES MAY BE RESOLVED EITHER BY ARBITRATION OR BY THE COURT, THE PARTIES CAN CHOOSE THEIR PREFERRED FORUM OF DISPUTE RESOLUTION

Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd v. M/s Jade Elevator Components 1 (September 14, 2018)

INTRODUCTION

1. In an application under Section 11 of the Arbitration and Conciliation Act, 1996 (“**the Act**”) for the appointment of an arbitrator, the Supreme Court (“**the Court**”) examined a dispute resolution clause which stipulated that disputes between the parties shall be referred to the ‘arbitration body for arbitration or the court’. The issue before the Court was whether such a clause constituted an arbitration agreement. Considering the wordings of this dispute resolution clause and the intention of the parties, the Court concluded that the parties had a choice to resolve their disputes either by arbitration or by referring the disputes to court.

FACTUAL BACKGROUND

2. Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd., a company incorporated under the laws of the People’s Republic of China, (“**Petitioner**”) and M/s Jade Elevator Components, a partnership firm based in India (“**Respondent**”) entered into a contract for supply of certain products (“**Contract**”).
3. Disputes arose between the parties which led to the Petitioner invoking the dispute resolution clause in the Contract. The Petitioner nominated a sole arbitrator by a notice of arbitration and called upon the Respondent to confirm the nominee within a period of thirty days from the receipt of the said notice. The Respondent refused to consent to the appointment of the sole arbitrator. Further, through the said letter, the Respondent held that the Petitioner’s claims were beyond the purview of the Contract.
4. In the circumstances, the Petitioner was constrained to file an application under section 11(5) of the Act before the Court for the appointment of an arbitrator. The issue which arose for consideration before the Court was whether, in light of the option available under the dispute resolution clause, a valid arbitration agreement existed between the parties or whether the Petitioner is bound to approach the competent court for determination of its disputes.

OBSERVATIONS OF THE COURT

5. Upon translating the dispute resolution clause to English, the clause *inter alia* provided that “*Common processing contract disputes, the parties should be settled through consultation; consultation fails by treatment of to the arbitration body for arbitration or the court.*” The Petitioner contended that in terms of the dispute resolution clause, upon failure to resolve disputes by consultation, the matter could be referred to arbitration and the clause was not categorical that the disputes had to be adjudicated in a court of law.
6. The Court referred to the decision of *INDTEL Technical Services Pvt. Ltd. v. W.S. Atkins Rail Ltd.*², which concerned an agreement containing two modes of dispute resolution i.e. the disputes could be referred to an adjudicator or to the courts. In the said case, the Court observed that the parties intended to have their disputes resolved by arbitration and proceeded to appoint an arbitrator.

Based on the above decision, the Court concurred that emphasis must be laid on the intention of the parties to have their disputes resolved by way of arbitration. The Court held that the parties in the present case had an option to resolve their disputes either by arbitration or before a court, and since the Petitioner invoked the arbitration clause, the Court can proceed to appoint an arbitrator.

CONCLUSION

7. This decision clarifies that optional arbitration clauses akin to the clause in the present case are enforceable in Indian law, and it upholds the choice of parties to decide their preferred forum for dispute resolution once the dispute has arisen. Therefore, in light of this ruling, future contracting parties have the option to keep their dispute resolution clauses open ended by providing for both arbitration and court adjudication.

8. However, an issue to consider is whether, once a party opts for one form of dispute resolution under the clause, it is bound by the same even with respect to subsequent disputes arising under the contract.

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¹ Supreme Court of India, Arbitration Petition (Civil) No. 22 of 2018

² *INTEL Technical Services Private Limited v. W.S. Atkins Rail Limited*, (2008) 10 SCC 308