



Indian arbitration moves backwards

A recent decision of the Supreme Court of India has underscored the importance of carefully drafted arbitration agreements for foreign parties doing business in India. This briefing provides an overview of the Court's decision, analyses its effect on arbitration in India and describes the manner in which foreign parties can protect themselves from its consequences.

In a further setback for the arbitration of disputes in India, the Supreme Court of India has recently held that allegations of financial malpractice can be determined only by Indian courts. In doing so, the Supreme Court endorsed the practice of some lower courts in India of refusing to refer disputes to arbitral tribunals – notwithstanding the existence of a valid and binding arbitration agreement – if they raised ‘serious questions of law or complicated questions of fact adjudication of which would depend upon detailed oral and documentary evidence’.

Background

In the case of *N Radhakrishnan v M/S Maestro Engineers and others* (22 October 2009), the Indian engineer appellant had entered into a partnership with the Indian respondents operating under the name ‘Maestro Engineers’. The partnership agreement provided for the resolution of any disputes between the partners by arbitration in India.

Trouble soon arose, with the appellant claiming that the other partners had misappropriated partnership funds, forged the firm’s accounts and driven away his clients. He offered to resign from the partnership subject to being paid his salary and share of the profits.

His partners, however, countered by starting civil proceedings before the District Court, seeking a declaration that the appellant had effectively resigned from the partnership (despite not being paid his alleged dues) and an injunction preventing him from interfering

with the partnership. Given the existence of an arbitration agreement in the partnership deed, the appellant sought a stay of the civil proceedings under section 8(1) of the Indian Arbitration and Conciliation Act 1996 (the Arbitration Act), which provides:

‘A judicial authority before which an action is brought in a matter, which is the subject of an arbitration agreement, shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.’

Notwithstanding the mandatory nature of the legislation (ie ‘shall’), the appellant’s application for a stay was dismissed. His subsequent appeal to the Madras High Court was also unavailing. Undeterred, he appealed to the Supreme Court of India, claiming that the Arbitration Act required the District Court to refer the parties’ dispute to arbitration.

In a decision dated 22 October 2009 (some three years after the respondents had first sought to bypass the parties’ arbitration agreement), the Supreme Court held that although ‘the dispute squarely fell within the purview of the arbitration clause of the partnership deed’ an arbitrator was not ‘competent to deal with the dispute raised by the parties’. In the Court’s view:

‘the facts of the present case does [sic] not warrant the matter to be tried and decided by the Arbitrator, rather for the furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such a complicated matter involving various questions and issues raised in the present dispute.’

Analysis

Although the *Maestro Engineers* decision relates to a domestic arbitration, it contradicts the prevailing international view that, subject to a few notable exceptions, any dispute that is capable of resolution by the judge of a national court is capable of being resolved by an arbitral tribunal. Not only is it increasingly rare for a national court to question the professional competence of arbitral tribunals in the way that the Indian Supreme Court has done, but there is now a general recognition that the determination by an arbitral tribunal selected for its particular expertise and experience is often to be preferred.

This most recent anti-arbitration decision by the Supreme Court comes hot on the heels of its disquieting 2008 ruling in *Venture Global Engineering v Satyam Computer Services Ltd*. In that case, the Court applied the broader grounds for setting aside a domestic arbitration award to an international arbitral award on the basis that the parties had not explicitly excluded the application of part 1 of the Indian Arbitration Act (intended to apply to arbitration proceedings that take place in India) from application to proceedings that had taken place elsewhere.

Together, these recent decisions suggest that it is now more important than ever for foreign parties doing business in India when entering into an arbitration agreement to designate a non-Indian seat for their arbitrations and include in their arbitration agreements express language that excludes the application of part 1 of the Indian Arbitration Act.

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