DUA ASSOCIATES

IN BRIEF

THE EVER-EVOLVING LAWS OF AN INTERNATIONAL COMMERCIAL ARBITRATION – GOVERNING LAW PERSPECTIVE

Introduction

Over the years, arbitration has firmly established itself as a quick and cost-effective alternate dispute resolution mechanism to decide both domestic as well as international disputes. As the world continues to shrink, more and more parties are opting for arbitration, more so in international contracts, to settle their disputes. Parties are at liberty to choose the law that they would want to apply to the disputes.

In the Indian context, the term 'international commercial arbitration' has often been misinterpreted to mean an arbitration conducted outside India. The same is, however, not necessarily the case. An international commercial arbitration is an arbitration proceeding wherein one of the parties to the arbitration is of a different nationality or habitually resident in any country other than India, or is incorporated outside the territory of India, etc. It is not concerned with the seat of the arbitration.

For instance, if party X is a company incorporated in the Dominican Republic (or any other country apart from India), and party Y is a company incorporated in India, and the parties engage in arbitration proceedings to resolve commercial disputes between them, the arbitration between the two parties would be dubbed an international commercial arbitration. The seat of the arbitration would only be relevant in determining whether the award passed in the proceedings would be considered a domestic award, in the event the seat is in India, or a foreign award, in the event the seat of arbitration is outside India.

Laws of Arbitration

There are generally considered to be 3 (three) basic laws that apply to any arbitration proceeding, more so in the case of international arbitrations, namely: (i) the *lex arbitri* or the law governing the arbitration agreement; (ii) the *lex contractus* or the law governing the substantive contract (the governing law); and (iii) the *lex fori* or the curial law or the law governing the procedure of the arbitration.

The *lex arbitri* or the law governing the arbitration agreement is the law that governs the validity and interpretation of the arbitration agreement itself. This includes the choice of the seat of the arbitration. This chosen law determines the validity, scope and interpretation of the agreement to arbitrate. The jurisdiction of the arbitral tribunal is determined by the *lex arbitri*.

The *lex contractus* or the law governing the substantive contract is the substantive law that applies to the dispute between the parties. In other words, the dispute between the parties will be decided by the arbitral tribunal by applying the governing law chosen by the parties.

The l*ex fori* or the curial/ procedural law is the law that concerns itself with the arbitration procedure. In other words, the *lex fori* determines the framework of conducting the arbitration proceedings, amongst other procedural aspects.

The illusion of choice: The Hon'ble Supreme Court's interpretation

There has been much international debate and discussion regarding the distinctions between these *"three distinct legal systems which come into play when a dispute occurs".* Recently, the Hon'ble Supreme Court of India had cause to revisit these distinctions and sought to clarify them, through a three-judge bench decision in *Disortho S.A.S v. Meril Life Sciences Private Limited*[1]. The proceedings had arisen out of a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, for the appointment of an arbitrator. The dispute pertained to an exclusive distributor agreement (Agreement) between the Bogota-based Petitioner and the Gujarat-based Respondent, wherein the former had acquired the exclusive right to

[1] Disortho S.A.S v Meril Life Sciences Private Limited, 2025 SCC OnLine SC 570.

distribute the latter's products in Colombia. The subject of controversy was the apparent conflict between Clause 16.5 of the Agreement, which stated that the agreement as well as any disputes arising out of it would be governed by the Indian law and subject to the jurisdiction of courts in Gujarat, and Clause 18 of the Agreement, which directed that disputes, if not settled by way of conciliation, would be subject to arbitration before the Arbitration and Conciliation Center of the Chamber of Bogota DC, with the arbitration taking place in Bogota and the award being in consonance with applicable Colombian law.

The Hon'ble Supreme Court opined that when parties agree to arbitrate, there are 4 (four) choices of law that come into play:

"(i) the law governing the arbitration, (ii) the proper law of arbitration agreement, (iii) the proper law of contract, and (iv) the procedural rules which apply in the arbitration."

A "subtle distinction" was drawn between the proper law of the arbitration agreement, being the law governing the agreement to arbitrate, and the law governing the arbitration as a whole. Where the former determines the validity, scope and interpretation of the agreement, the latter determines which court has supervisory jurisdiction over arbitration, which includes conduct of the arbitration, the rules governing interim measures, and the provisions under which the court may exercise its supervisory authority, such as in the removal of arbitrators.

The Hon'ble Supreme Court held that the fact that Clause 16.5 of the Agreement conferred exclusive jurisdiction on courts in Gujarat, and expressly mentioned Indian law as the governing law, the same would be sufficient to infer that the arbitration agreement was governed by Indian law. It was held that although Clause 18 of the Agreement provided that the procedure followed by the arbitral tribunal would be that of the Chamber of Commerce of Bogota, this choice of venue, in absence of further factors, would be insufficient to override the presumption that the *lex contractus* ought to be considered the governing law, which is a presumption rebuttable only by certain circumstances as outlined in the judgment, such as if the arbitration agreement is rendered non-arbitrable under Indian law.

It was further reiterated that the supervisory jurisdiction of courts is distinct from the procedural rules of arbitration. It was also clarified that a reading of Clause 18 of the Agreement would only indicate that the arbitral award and proceedings must conform to the Colombian law.

Conclusion

In any event, during the course of the hearing, the parties having mutually consented to initiate arbitration in India before a sole appointed arbitrator, it was directed that Delhi International Arbitration Centre Rules applicable to international arbitrations were to be followed, with the venue of the arbitration being left to the discretion of the parties and the tribunal. The matter was thus allowed and disposed of.

The decision provides an in-depth examination of crucial judicial principles in interpreting arbitral agreements, more so in the context of governing law.

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