

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 03.08.2011**

% **O.M.P. 528/2011 & I.A. No. 11308/2011**

AASTHA BROADCASTING NETWORK LIMITED Petitioner

Through: Mr. Sudhir Nandrajog, Senior Advocate, with Mr. Vivek Chib & Mr. Joby P. Verghese, Advocates.

versus

THAICOM PUBLIC COMPANY LTD Respondent

Through: Mr. Sanjay Jain, Senior Advocate, with Ms. Ruchi Jain, Mr. Nikhil Nayyar & Mr. Arun Himatlal Mehta, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? : **No**
2. To be referred to Reporter or not? : **Yes**
3. Whether the judgment should be reported in the Digest? : **Yes**

VIPIN SANGHI, J. (Oral)

1. I have heard learned senior counsels for the parties on the issue as to whether or not the present petition under Section 34 of the

Arbitration & Conciliation Act, 1996 (the Act) is maintainable before this court to assail the arbitral award dated 03.04.2011 passed by the Arbitral Tribunal consisting of three learned Judges in an international commercial arbitration.

2. The submission of the respondent is that the arbitration in question is an International Commercial Arbitration and the application of Part-I of the Act (which contains Section 34 of the Act) stands excluded in the present case. For this purpose, the respondent relies upon Clauses 13 & 14 of the agreement dated 29.05.2000, which read as follows:

“13. GOVERNING LAW

This Agreement, and the rights and responsibilities of the parties hereunder, and any dispute, controversy or claim arising out of or in relation to this Agreement, or the breach, termination or invalidity thereof, shall be subject to and construed in accordance with the laws of the Republic of Singapore. Customer hereby agrees that this Agreement is entered into for commercial purposes and hereby waives for itself and for its assets any claim of immunity to which it is or may be entitled in respect of, from any suit or proceeding brought in respect of this Agreement.

The expression “customer” in the aforesaid clause has been used in relation to the petitioner herein.

14. ARBITRATION

Any dispute arising from the interpretation or from any matter relating to the performance of this Agreement or relating to any right or obligation herein contained which cannot be resolved by the parties shall be referred to and finally resolved by arbitration under the rules of the United Nations Commission on International Trade Law

("UNCITRAL"). The arbitration shall be held in Singapore and shall be in the English language. The arbitrator's determination shall be final and binding between the parties and the parties waive all rights of appeal or objection in any jurisdiction. The costs of the Arbitration shall be shared by the parties equally."

3. The respondent's submission is that the governing law applicable to "this agreement" and to the rights & responsibilities of the parties under the agreement, and to any dispute, controversy or claim arising out of or in relation to the agreement, or the breach, termination or invalidity thereof is the law of the Republic of Singapore. It is, therefore, argued that the substantive law applicable to the agreement is the law of Singapore. Clause 14 is the arbitration agreement between the parties which provides that the disputes arising out of the agreement shall be finally resolved by arbitration under the Rules of UNCITRAL and the arbitration shall be held in Singapore.

4. In support of his submission Mr. Jain, learned senior counsel for the respondent, has placed reliance on a Division Bench judgement of this court in **Max India Limited Vs. General Binding Corporation**, 2009 (3) Arb. L.R. 162 (Delhi) (DB) and on a Supreme Court decision in **Videocon Industries Limited Vs. Union of India & Another**, 2011 (5) Scale 678.

5. On the other hand the submission of Mr. Nandrajog, learned senior counsel for the petitioner, is that the parties have neither

expressly, nor impliedly, excluded the application of part-I of the Act. He submits that the respondent had also understood the agreement between the parties to mean that Part-I of the Act is not excluded, and this is evident from the fact that the respondent had approached the Chief Justice of India for filling the vacancy created upon the resignation of the petitioner's nominated Arbitrator under Section 11(6) of the Act by filing Arbitration Petition No.6 of 2010 titled "Thaicom Public Co. Ltd. v. M/s. Aastha Broadcasting Network Ltd.". This petition was allowed by Hon'ble Mr. Justice Dalveer Bhandari on 06.08.2010. The review petition preferred by the petitioner was also dismissed by his Lordship on 19.07.2011.

6. In support of his submissions Mr. Nandrajog has placed reliance upon ***Citation Infowares Limited Vs Equinox Corporation***, (2009) 7 SCC 220; ***Venture Global Engineering Ltd. Vs. Satyam Computer Services Ltd.***, (2008) 4 SCC 190; ***Indtel Technical Services Private Limited Vs. W.S. Atkins Rail Limited***, (2008) 10 SCC 308; ***National Thermal Power Corporation Vs. Singer Company & Others***, (1992) 3 SCC 551. And; ***Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd.***, AIR 1998 SC 825.

7. In ***Max India*** (supra), the Division Bench took note of the Supreme Court judgment in ***Singer Company*** (supra). The principles that the Division Bench, inter alia, culled out from the said judgment

read as follows:-

a)

b)

c)

d)

e) Proper law of arbitration agreement is normally the same as the proper law of contract. It is only in exceptional cases that it is not so even where the proper law of contract is expressly chosen by the parties. Normal presumption is that the law of a country where the arbitration is agreed to be held is the proper law of arbitration agreement, though it is rebuttable presumption.

f) Importantly, the validity, effect and interpretation of the arbitration agreement are governed by its proper law.

g) The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing arbitration as well as the procedural law governing the conduct of the arbitration.

h) Where the proper law of contract is expressly chosen by the parties such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral and ancillary to the main contract, is nevertheless part of such contract.

i) The arbitration proceedings are to be conducted in accordance with the law of the country in which the arbitration is held unless the parties have specifically chosen the law governing the conduct and procedure of arbitration. Normally, the appropriate courts of the seat of arbitration will have jurisdiction in respect of procedural matters concerning the conduct of arbitration.

j) The overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All the matters in respect of arbitration agreement fall within the conclusive competence of the courts of the country whose laws govern the arbitration agreement. The concept of party autonomy in international contracts is restricted by all systems of law so far as it is not compatible with the proper law of the contract or the mandatory procedural rules of the place where the arbitration is agreed to be conducted or any overriding public policy.

k) The award rendered in the territory of a foreign State may be regarded as a domestic award in India where it is sought to be enforced by reason of Indian law being the proper law governing the arbitration agreement in terms of which the award was made.

l)" "

8. The Division Bench rejected the reliance placed by the appellant on ***Bhatia International Vs. Bulk Trading S.A & Anr.***, (2002) 4 SCC 105 (in para 35 of the decision) by relying upon para 32 of the said decision which, inter alia, records:

"32. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

9. There is one distinction between the clauses of the agreement in the present case, and that considered by the Division Bench in **Max India** (supra). While in **Max India** (supra), the agreement specifically vested jurisdiction in the Courts at Singapore, the agreement in the present case is silent in this regard. However, this to my mind makes no difference in the facts of this case. As noted by the Division Bench in **Max India** (supra), the Singapore Arbitration Act, 2001 gives jurisdiction to the Courts of Singapore to pass orders granting interim measures to the parties as the place of arbitration is in Singapore. Therefore, even if the agreement in **Max India** (supra) had been silent, and had not specifically provided that the Courts at Singapore would have jurisdiction, that would have made no difference to the decision of the Court, as that statement was nothing more than an expression of the legal consequence which would flow from the facts that: the substantive law applicable to the contract was the law of Singapore; there was nothing to rebut the presumption that the parties had agreed that the proper law of arbitration would be the law of Singapore, or to demonstrate the intention of the parties that the proper law of the contract would be the Indian law, and; the arbitration had been agreed to be held in Singapore under the Rules of SIAC.

10. In **Videocon Industries** (supra), Article 33.1 of the agreement in question provided that, subject to the provisions of Article 34.12, the

contract shall be governed and interpreted in accordance with the laws in India. Article 34.12 provided that the venue of arbitration proceedings shall be Kuala Lumpur, Malaysia. It was also provided that, notwithstanding the provisions of Article 33.1, the arbitration agreement contained in Article 34 shall be governed by the laws of England. Therefore, though the substantive law applicable to the contract was the Indian law, the law of arbitration had been agreed between the parties to be the law of England.

11. The Supreme Court considered the decision in ***Bhatia International*** (supra) and also considered the judgment of the learned single Judge of the Gujarat High Court in ***Hardy Oil and Gas Ltd. vs. Hindustan Oil Exploration Co. Ltd & Ors***, 2006 (1) GLR 658.

12. In ***Hardy Oil*** (supra), the agreement provided that the said agreement shall be governed by, and construed in accordance with the substantive laws in India. Disputes were to be resolved through arbitration under the rules of the London Court of International Arbitration. The place of arbitration had been agreed as London and the law governing arbitration was agreed to be the England law. The learned single Judge, after referring to ***Bhatia International*** (supra), upheld the order of the learned District Judge whereby he held that the Civil Court had no jurisdiction to entertain a petition under Section 9 of

the Act, as the provisions of the Act could not be invoked to question the arbitration proceedings, or the award. The Supreme Court in paragraph 18 of its decision approved the decision of the Gujarat High Court in **Hardy Oil** (supra), on the basis that the parties had agreed that the law governing the arbitration will be the English law. This necessarily implied that the parties had desired to exclude the provisions of Part I of the Act.

13. Consequently, in **Videocon Industries** (supra), it was held that the High Court of Delhi did not have jurisdiction to entertain the petition under Section 9 of the Act, and the mere fact that the appellant had earlier filed a similar petition was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents.

14. Therefore, even where the substantive law applicable to the contract was agreed to be the Indian Law, the Court held that the Law of Arbitration need not necessarily be the Indian Law, and the parties had the right to prescribe a separate system of law for application to the arbitration agreement.

15. I may now deal with the decisions of the Supreme Court in **Bhatia International** (supra), **Indtel Technical Services Private Limited** (supra) of Hon'ble Mr. Justice Altamas Kabir, and **Citation Infowares Limited** (supra) of Hon'ble Mr. Justice V.S. Sirpurkar. The

latter two decisions have been rendered by the Hon'ble Judges acting as the designate of the Chief Justice of India while dealing with applications under Section 11(5) of the Arbitration & Conciliation Act, 1996.

16. In my view, the decision in ***Bhatia International*** (supra) does not advance the case of the petitioner. In that judgment, the Supreme Court held that in cases of international commercial arbitration held out of India, provisions of Part-I would apply, unless the parties by agreement express or implied, exclude all or any of its provisions. If Part-I of the Act is excluded, the laws or rules chosen by the parties would prevail. Any provision in Part-I, which is contrary to or is excluded by that law or rules would not apply. ***Bhatia International*** (supra) did not hold that in respect of all international commercial arbitrations held out of India, the provisions of Part-I would peremptorily apply. If the agreement of the parties expressly or impliedly excludes the application of Part-I, or any of its provisions, Part-I or the excluded provisions would not apply. In the facts before the Supreme Court in ***Bhatia International*** (supra), the Supreme Court found, as a matter of fact, that the provisions of Part-I of the Act had not been excluded by the parties, either expressly or impliedly and, therefore, it was held that Section 9 of the Act could be invoked by the parties before the Indian Courts.

17. The issue arising for consideration before me is whether it can be said (in the light of the aforesaid clauses of the agreement contained in Clauses 13 & 14), that the parties have excluded the application of Part-I of the Act, either expressly or impliedly. Obviously, there can be no quarrel with the legal proposition laid down by the Supreme Court in **Bhatia International** (supra). But it needs to be examined in the facts of each case, whether or not Part-I, or any of its provisions, have either expressly or impliedly been excluded by agreement of parties. The issue is whether the test laid down by the Supreme Court in **Bhatia International** (supra) is satisfied, one way or another, in the facts of this case.

18. In **Indtel Technical Services Private Limited** (supra), the Court in paragraphs 36 and 37 of its decision, inter alia, observed as follows:

“36. It is no doubt true that it is fairly well-settled that when an arbitration agreement is silent as to the law and procedure to be followed in implementing the arbitration agreement, the law governing the said agreement would ordinarily be the same as the law governing the contract itself. The decisions cited by Mr. Tripathy and the views of the jurists referred to in the National Thermal Power Corporation case (supra) support such a proposition. What, however, distinguishes the various decisions and views of the authorities in this case is the fact that in the Bhatia International case (supra) this court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996, indicating that Part-I of the said Act would apply where the place of arbitration is in India, even in respect of International Commercial agreements, which are to be

governed by laws of another country, the parties would be entitled to invoke the provisions of Part-I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable.

37. The decision in Bhatia International case has been rendered by a Bench of three Judges and governs the scope of the application under consideration, as it clearly lays down that the provisions of Part I of the Arbitration and Conciliation Act, 1996, would be equally applicable to international commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication, which is not so in the instant case."

19. From the aforesaid extract, it is clear that the Court while deciding **Indtel Technical Services Private Limited** (supra) did not doubt the correctness of the view of the Supreme Court in **NTPC Vs. Singer Company** (supra). Rather the said view was taken as the settled view. However, the Supreme Court proceeded on the basis of its later decision in **Bhatia International** (supra).

20. The Court does not say that there is, and, as a matter of fact there is no conflict between the decisions in **NTPC Vs. Singer Company** (supra) and **Bhatia International** (supra). They deal with different aspects. To determine whether or not the test laid down by **Bhatia International** (supra) (in respect of an International Commercial Arbitration where the place of arbitration is not in India) is satisfied, i.e., whether Part-I or any of its provisions of the Act stand expressly or impliedly excluded, **NTPC Vs. Singer Company** (supra) becomes relevant.

21. From the aforesaid extract, it appears that while paraphrasing the ratio of the decision of the Supreme Court in **Bhatia International** (supra), in para 36, the Court missed out the crucial words of the judgment in **Bhatia International** (supra) found in para 32 of that decision. The relevant extract from para 32 of **Bhatia International** (supra) reads as follows:

*“32. In cases of international commercial arbitrations held out of India provisions of Part I would apply **unless the parties by agreement, express or implied, exclude all or any of its provisions.** In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.”* (emphasis supplied)

22. The issue as to whether or not there was an express or implied exclusion of the application of Part-I, or any of the provisions of the Act, though determined by the Court in **Indtel Technical Services Private Limited** (supra) in para 37, the said determination appears to be without any discussion or reasons. With the utmost respect, to me, it appears that for the aforesaid reason, the decision in **Indtel Technical Services Private Limited** (supra) does not constitute a binding precedent. **NTPC Vs. Singer Company** (supra) and **Bhatia International** (supra), being decisions of larger benches, I am inclined to follow those decisions.

23. The decision in **Citation Infowares Limited** (supra) can be distinguished from the facts of the present case, as in **Citation**

Infowares Limited (supra), according to the Court, the place of arbitration had not been specifically agreed to and that was a relevant consideration. In contradistinction, in the present case, the place of arbitration has been agreed to as Singapore. The Court while deciding **Citation Infowares Limited** (supra) heavily places reliance on the decision in **Indtel Technical Services Private Limited** (supra). As I have already held that **Indtel Technical Services Private Limited** (supra) does not advance the case of the petitioner, in my view, the decision in **Citation Infowares Limited** (supra) also does not come to the aid of the petitioner. I do not consider it necessary to elaborately deal with the judgment in **Venture Global** (supra), as that judgment essentially follows the decision in **Bhatia International** (supra).

24. The petitioner has also placed reliance on **Sumitomo Heavy Industries Ltd.** (supra) (a 3-Judge Bench decision). This decision, in fact, supports the case of the respondent and not the petitioner. Clause 17 of the agreement in that case read as follows:

“17.0 Laws/Arbitration

17.1 Applicable Laws

All questions, disputes or difference arising under, out of or in connection with this Contract shall be subject to the laws of India.

17.2 Arbitration If any dispute, difference or question shall at any time hereafter arise between the parties hereto or their respective representatives or

assigns in respect of the construction of these presents or concerning anything herein contained or arising out of these presents or as to the rights, liabilities or duties of the said parties hereunder which cannot be mutually resolved by the parties, the same shall be referred to arbitration, the proceedings of which shall be held at London, U.K. Within 30 days of the receipt of the notice of intention of appointing arbitrators each party shall appoint an arbitrator of its own choice and inform the other party. Before entering upon the arbitration, the two arbitrators shall appoint an umpire. In case the parties fail to appoint its arbitrator within 30 days from the receipt of a notice from the other party in this behalf of if any dispute in selection of umpire, the president of International Chamber of Commerce, Paris, shall appoint the arbitrator and/or or the umpire as the case may be.

The decision of the arbitrators and failing to an agreed decision by them, the decision of the umpire shall be find and binding on the parties.

The arbitration proceeding shall be held in accordance with the provision of International Chamber of Commerce and the rules made thereunder as amended from time to time. The arbitration proceedings shall be conducted in English language.”

25. After noticing the fact that in an international commercial arbitration there could be three different systems of law operating simultaneously, namely, (i) the proper law of contract, i.e., the law which governs the contract; its interpretation and the substantive rights of the parties in respect of which the disputes has arisen; (ii) the proper law of arbitration agreement, i.e., the law governing the application of the parties to submit their dispute to arbitration; and to honour the award of the tribunal, and, (iii) the curial law, i.e., the law governing the conduct of individual reference, the Supreme Court in

Paragraph 16 held as follows:

*“The law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement. **Having regard to the clear terms of Clause 17 of the contract between the appellant and the first respondent, we are in no doubt that the law governing the contract and the law governing the rights and obligations of the parties arising from their agreement to arbitrate, and, in particular, their obligations to submit disputes to arbitration and to honour the award, are governed by the law of India; nor is there any dispute in this behalf.**”* (emphasis supplied)

26. Therefore, the Supreme Court held on a reading of the aforesaid Clause 17 that since the substantive law of contract was the Indian law the proper law of arbitration would be the Indian law even though the proceedings had been agreed to be held at London, U.K. in accordance with the provisions of the ICC. The language of Clauses 13 & 14 in the present case is *para materia* with the clauses considered by the Supreme Court in **Sumitomo Heavy Industries Ltd.** (supra).

27. I may also refer to my own decision in **Resolution India Ltd. Vs. One Chrome LLC & Others**, O.M.P. No. 280/2011 decided on 02.08.2011, wherein I considered an agreement with similar clauses and concluded that the applicability of Part-I of the Act stood excluded. In that decision, I have noticed another decision of the Supreme Court (of Hon’ble Mr. Justice V.S. Sirpurkar) in the case of **M/s Dozco India P. Ltd V. M/s Doosan Infracore Co.Ltd**, Arb.P.No.5/2008 decided on

08.10.2010, whereby he rejected a petition preferred under Section 11(6) of the Act.

28. In that case, Articles 22 and 23 of the contract read as follows:-

“Article 22. Governing Laws - 22.1: *This agreement shall be governed by and construed in accordance with the laws of The Republic of Korea.*

Article 23. Arbitration - 23.1: *All disputes arising in connection with this Agreement shall be finally settled by arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement then in force of the International Chamber of Commerce”*

29. On the basis of the aforesaid clauses, the submission of the respondent was that the Courts in India did not have jurisdiction as the parties had excluded the application of Part I of the Act. The Court considered various decisions, including the decision in ***Bhatia International*** (supra) and concluded that the language of Articles 22 and 23 of the agreement between the parties spelled out a clear agreement between them to exclude Part I of the Act. It was held that ***Bhatia International*** (supra) and the other decisions relied upon by the petitioner were not applicable to the case. It was also held that Article 23.1 suggests that the law governing the arbitration will be the Korean Law and the seat of arbitration will be Seoul in Korea. Consequently the petition was dismissed by the Supreme Court.

30. The submission that the respondent had earlier preferred a

petition under Section 11 of the Arbitration & Conciliation Act, 1996 before the Chief Justice of India, being Arbitration Petition No. 6/2010 titled '*Thaicom Public Co. Ltd. Vs. Astha Broadcasting Network Ltd.*', which was entertained and allowed by the Supreme Court of India and the petitioner's application for review was also rejected on 19.07.2011 does not advance the case of the petitioner either. A perusal of the order dated 06.08.2010 passed in Arbitration Petition No. 6/2010 shows that the issue with regard to the applicability of Part-I of the Act was not gone into by the Hon'ble Supreme Court while deciding the said petition. In fact, even at the stage of review this issue was not raised by the petitioner herein. The review petition was dismissed on account of inordinate delay of 262 days and also on merits. The Supreme Court in ***Videocon Industries*** (supra) dealt with the similar submission and rejected the same.

31. In ***Singer Company*** (supra), the Supreme Court has held that the proper law of arbitration is normally the same as the proper law of contract. Normal presumption is that the law of the country, where the arbitration is agreed to be held, is the proper law of arbitration agreement. Where the proper law of contract is expressly chosen by the parties, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement. All the matters in respect of arbitration agreement fall within the conclusive competence

of the Courts of the country whose law govern the arbitration agreement.

32. In the present case, the petitioner has not been able to point out any fact or circumstance, or any clause of the agreement to even remotely suggest (far from unmistakably suggest) that the parties ever intended that the proper law of arbitration would be the Indian law and not the substantive law of the contract.

33. For the reasons aforesaid I hold by agreement of parties that Part-I of the Arbitration & Conciliation Act, 1996 stands excluded and, therefore, this court does not have jurisdiction to entertain this petition.

34. Dismissed.

A copy of this order be given dasti under the signature of the Court Master.

VIPIN SANGHI, J

AUGUST 03, 2011

'BSR'/SR