

# Dispute Resolution Hotline

January 21, 2013

## LAW OF LIMITATION: PROCEDURAL NOT SUBSTANTIVE

The recent judgment by the Delhi High Court ("**Court**") on the petitions<sup>1</sup> filed between Aargus Global Logistics Pvt. Ltd ("**Aargus**"), an Indian company and NNR Global Logistics (Shanghai) Co. Ltd. ("**NNR**"), incorporated in China for challenging the foreign award (petition made by Aargus) and enforcement of the foreign award (petition made by NNR) in India throws some light on the fate of international commercial arbitration agreements executed prior to the ruling of the Supreme Court in the Bharat Aluminium Co. v/s. Kaiser Aluminium Technical Service, Inc<sup>2</sup> and whether the Law of Limitation is a procedural law or a substantive law.

## BACKGROUND AND FACTS

An Agency Agreement was entered into between Aargus and NNR in 2003 ("**Agreement**"), both being engaged in the business of freight forwarding and associated international cargo services. As per the terms of the Agreement, both parties were to act as each other's non-exclusive agents, increase air freight and ship freight shipments and promote and develop related activities between the two territories. The substantive law governing the Agreement was Indian law and any dispute amongst the parties was to be settled under the rules of conciliation and arbitration of the International Chambers of Commerce ("**ICC**"). However, there was no agreement on the place of arbitration.

The shipments continued up to 2007. In July 2010 NNR invoked the arbitration clause in the Agreement raising claims relating to various outstanding invoices. As the clause was silent on the place of arbitration, NNR suggested Kuala Lumpur ("**KL**") in Malaysia as a neutral place of arbitration, which was opposed by Aargus. However, the ICC fixed the seat of arbitration in KL under the ICC Rules.

The ICC passed an award dated October 14, 2011 in favour of NNR and NNR filed a petition under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 ("**Act**") to enforce the said award, while Aargus filed its objections under Section 48 of the Act as well as another petition under Section 34 of the Act to set aside the award.

## ISSUES

1. The first issue to be addressed was whether Aargus' petition under Section 34 of the Act to set aside a foreign award was maintainable.
2. The other point of contemplation was that whether the Indian Limitation Act ("**ILA**") or the limitation law in Malaysia ("**MLA**") should apply to the Agreement.

## ARGUMENTS BEFORE THE HIGH COURT

### Aargus' contentions

1. Aargus put forth the argument that since the substantive law governing the contract was Indian law, a petition filed under Section 34 of the Act was very much maintainable and relied on the decisions in Bhatia International v. Bulk Trading S. A.<sup>3</sup> and Venture Global Engineering v. Satyam Computer Services Ltd.<sup>4</sup> as part 1 of the Act would continue to apply to such arbitrations wherein the governing law (substantive) was Indian Law.
2. Aargus objected to the claims put forward by NNR on the grounds that they were barred by the ILA, thereby making any claim for an invoice three years earlier to the date of arbitration in 2010, invalid. As Indian law was applicable to the contract, the ILA would be a substantive law and not a part of the curial law. A reference was made to Thirumalai Chemicals Limited v. Union of India.<sup>5</sup>

### NNR's contentions

1. NNR argued that in order for a petition under Section 34 of the Act to be maintainable, the place of arbitration must be India, failing which, the curative law of the seat of arbitration (KL), Malaysian law should apply. Reliance was placed on the decisions in Videocon Industries Limited v. Union of India<sup>6</sup> and Yograaj Infrastructure Limited v. Ssang Yong Engineering and Construction Company Limited.<sup>7</sup>
2. It was further submitted by NNR that in the mails exchanged between the two companies in 2007 regarding the outstanding payments, Aargus responded to the mails and even made a payment towards one of the invoices which amounts to an acknowledgment of the debt. Also, part payment of a debt even by reference to a single invoice is sufficient to extend the period of limitation.
3. It was also contended that since the seat of arbitration was Malaysia, the Malaysian curial law would apply.

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Limitation being a matter of procedure, the ILA would not apply. Alternatively, even if it were to apply, most of the outstanding payments were not due until 31st July, 2010 thereby ensuring that they are not time barred.

## JUDGMENT

The Court rejected the petition filed by Aargus and the objections raised by them in the petition filed by NNR were rejected with costs of 20,000 to be paid to NNR within four weeks. The Court had made the following observations:

1. The Court concluded that the decision of the Arbitrator regarding non application of the ILA to the Agreement was a sound one. The Court concurred with the Award of the Arbitrator that the applicable Curial Law would be the Law of Malaysia. In coming to the said decision the Court relied upon the decision of the Supreme Court in *Thirumalai Chemicals Limited v. Union of India* wherein it was declared that even though the right of appeal is a substantive right, the law of limitation is procedural as it establishes a mechanism for determining rights and liabilities. The enforcement of rights exists under substantive law. The Court also referred to the 193rd report of the Law Commission of India on 'Transnational Litigation - Conflict of Laws - Law of Limitation' wherein the Law Commission had discussed how in the context of expansion of international trade it has become necessary to take notice of the fundamental changes in the law of limitation in all common law countries. While recommending that India should adopt the practice in civil law countries, it was in the said report that as of now the law of limitation was considered in India as part of the procedural law and not the substantive law.

The Court further held that the same legal position is acknowledged even in *Bharat Aluminium Co.'s* case and this legal position would not change even if the petition filed by Aargus under section 34 of the Act is considered on merits.

2. The Court held that the petition filed by Aargus under Section 34 was maintainable. For coming to this conclusion the Court relied upon the decision of the Supreme Court in case of *Bhatia International v. Bulk Trading S.A.* and *Venture Global Engineering v. Satyam Computer Services Ltd.* wherein the Supreme Court had held that Part I of the Act applies to the impugned foreign Award since the substantive law governing the contract was Indian law. The Court observed that in *Bharat Aluminium Co.'s* case, the Supreme Court had held that a petition under Section 34 could not be maintainable if the award in question was a foreign award - by virtue of the seat of Arbitration being outside India, but the Supreme Court had further clarified that the decision of the Supreme Court in *Bharat Aluminium Co.'s* case would only be applicable to arbitration agreements executed after September 6, 2012.
3. However, the Court held that even upon considering the petition under Section 34 on merits the challenge to the Award in respect of compound interest awarded to NNR by the learned Arbitrator (8% interest compounded annually which works out to only 8.66% simple interest over three years) .cannot per se be said to be opposed to the public policy of India. Even in the context of an Award under the Arbitration Act. In coming to this conclusion the Court followed the decision of the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.*<sup>8</sup> wherein the Supreme Court had held that the award of compound interest or costs consistent with the terms of the contract cannot be said to be opposed to the public policy of India.
4. The Court clarified that under Section 48 (2) (b) of the Act, it was given a discretionary power to refuse enforcement of an award which is contrary to public policy. Enforcement of an award which is in the form of a money decree is not opposed to public policy.

## ANALYSIS

The conclusions of the Court in this case which bear notice and bring a small but important element of clarity especially in the back drop of the prospective applicability of the judgment of the Hon'ble Supreme Court in *Bharat Aluminium Co.* are as under:

1. The seat of the Arbitration would determine the procedural law applicable to the Arbitration.
2. The Law of Limitation is a procedural law and not a substantive law.
3. An arbitration seated outside India, arising out of a contract which may be governed by Indian law (i.e. Indian law being the substantive law governing the contract) but is seated outside India would have to comply with the law of the seat to determine whether or not a claim is within or beyond limitation. The laws with respect to limitation can defer from country to country.
4. Award of Compound interest cannot be held to be against the public policy of India.
5. Enforcement of an Award which is in the form of a monetary decree cannot be held to be against the public policy of India.

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You can direct your queries or comments to the authors

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<sup>1</sup> O.M.P. No. 61 of 2012 and O.M.P. No. 201 of 2012

<sup>2</sup> 2012 (8) SCALE 333

<sup>3</sup> 2002 (4) SCC 105

<sup>4</sup> 2008 (4) SCC 190

<sup>5</sup> 2011 (6) SCC 739

<sup>6</sup> 2011 (6) SCC 161

<sup>7</sup> 2011 (9) SCC 735

<sup>8</sup> 1994 Supp (1) SCC 644

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