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Neutrality v. Nationality

Sonal Sharma · Tuesday, April 8th, 2014

The most quintessential element of international arbitration is an impartial, independent and neutral tribunal. Where impartiality and independence of the arbitrators is equated with direct relation to or bias towards one of the parties, neutrality is related to the nationality of the arbitrator. In international sphere, the "appearance of neutrality" is considered equally important, meaning an arbitrator is neutral if his nationality is different from that of the parties. Nationality generally, is not an issue if the parties have agreed to appoint an arbitrator of the same nationality as that of one of the parties but it has a different impact when national courts acts as the appointing authority.

The Supreme Court of India recently in *Reliance v. Union of India* dealt with this issue in a petition for the appointment of an arbitrator in an international commercial arbitration. The judgment is important for couple for reasons, firstly to see what role nationality of arbitrators play when international commercial arbitration is seated in India with applicable law of the contract and curial law as India Law, secondly for the effect of inclusion of UNCITRAL Rules in the contract and thirdly, how relevant subject matter and convenience of the parties are. Even though the court emphasised on the importance of the nationality for the purposes of neutrality, it did not accept it as a mandatory rule.

The dispute arose between parties about disallowance of cost recovery of the expenditures incurred by the contractor due to the fact of decreased production level from the gas fields. Reliance industries, BP and subsidiary of Niko resources (Petitioners) issued a notice for arbitration to Union of India (Respondent) under the Production Sharing Contract and both the parties nominated the party appointed arbitrators who happens to be Indian nationals, were accepted by both the parties without any objections. The two appointed arbitrators could not reach the consensus to appoint the chair, hence Petitioner approached the court under section 11 (6) of the Arbitration Act, 1996.
The question before the court was to decide if the contract provides for appointment of a neutral foreign national or Indian national to be the presiding arbitrator of the tribunal.

The court rejected the Respondent's contention, that the dispute is raised by the Indian party and not by the other two petitioners who are foreign companies, making it an Indian arbitration with no question for appointing a foreign arbitrator, in view of the correspondence between the parties which indicates that the respondent approved and recognised the assignment of the rights by the Petitioner no.1 to 3 and that the Petitioner no. 1 is the operator on behalf of all the three contractors and hence the nationalities of the parties involved is different.

The parties did not expressly agree to appoint a foreign national but the Petitioner relied on inclusion of UNCITRAL Rules, 1976 in the contract and argued that the procedure for constitution of the arbitral tribunal under UNCITRAL Rules, 1976 should be followed and that it would not give the appointing authority the option to appoint an Indian arbitrator and it has to be a foreign national.

The main contentions raised by the Respondent against the appointment of a foreign national as presiding arbitrator were that under the contract parties did not expressly agree to appoint a foreign national, the UNCITRAL Rules, 1976 will become relevant only after the tribunal is constituted and because the law governing the arbitration agreement is Indian Law, the seat of arbitration is India which makes the Indian law the curial law of arbitration and the law governing the contract is Indian Law, hence the presiding arbitrator ought to be of Indian nationality. It further argued that as the subject matter of the contract is situated in India, it would involve complex questions of law and facts relating to Indian Laws, the parties deliberately refrained from requiring a foreign national to be the presiding arbitrator and the appointment of third arbitrator is left entirely to the two party nominated arbitrators.

The court while taking into consideration the contentions of the parties, discussed the issue of neutrality of the arbitrator at large. It quoted the discussion in *Gary Born*'s International Commercial Arbitration, Volume I (2009) regarding the impact of UNCITRAL Rules and Model Law in appointment of third or sole arbitrators.
Respondents argued that the contract does not specifically mentions requirement for the appointment of third foreign arbitrator signifying that "only" an Indian arbitrator can be appointed.

The Court refused to accept both the views as being extreme and held that under the contract the arbitrator can be an Indian national but the view that "only" an Indian national can be appointed is not acceptable. It held that the contract requires the appointing authority to appoint an arbitrator, under Arbitration Act, 1996 who would be neutral, impartial and independent from anywhere in the world including India. Further, it observed that Section 11 of the Act provides that a person of any nationality can be appointed unless otherwise agreed by the parties. In this case, parties did not agree to appoint only an Indian national as arbitrator and the mere fact the two party appointed arbitrators are Indian national does not *ispo facto* concludes that parties ruled out the appointment of the third arbitrator from a neutral nationality.

After relying on its own precedent where it interpreted Section 11 (9) after taking into consideration the position taken by the other countries which adopted UNCITRAL model law/rules, the court reasoned that the appointing authority under section 11 (6) would be guided by the relevant provisions under Arbitration act, UNCITRAL Model Laws, and the UNCITRAL Rules if the parties accepted its applicability. It also reiterated that Article 6(4) of the UNCITRAL rules 1976 only speaks of "taking into account" the nationality as one of the factors and the arbitrator can not be disqualified just because he belongs to the nationality of one of the parties, hence ruling out that under UNCITRAL rules, 1976 the court can only appoint an arbitrator of nationality other than the parties. The court applied the same interpretation to the word "may" used in Section 11 (9) and held that is not used in the sense of "shall" and the provision is not mandatory. It provides discretionary power to the appointing authority and it is not mandatory to appoint an arbitrator of different nationality.

So, the *ratio decidendi* of the case is that Article 11 (9) of the Arbitration Act, 1996 and UNCITRAL rules, 1976 both provide *discretion* to the appointing authority on the nationality of

the arbitrators and the court is free to take into consideration if there will be an advantage to both the parties if arbitrator having knowledge of the applicable law is appointed. But even though neutral nationality is no guarantee of impartiality or independence, it is important as a generally followed practice.

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