

(2012) 05 DEL CK 0088
In the Delhi High Court
Case No : O.M.P. 287 of 2011

Indiabulls Financial Services Limited (India)	APPELLANT
Vs	
Amaprop Limited (Cayman Islands) and Anr	RESPONDENT

Date of Decision : 18-05-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 12, 13, 2(1)
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
International Chamber of Commerce Arbitration Rules, 1998 — Rule 57(2)
Singapore International Arbitration Centre Rules, 2010 — Rule 32

Citation : (2012) 192 DLT 338

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Rajiv Nayar, with Ms. Mamta Tiwari, Ms. Veronica Mohan and Mr. Rishi Agarwala, for the Appellant; T.R. Andhyarujina and Mr. Pradeep Sancheti s with Mr. Vishal Maheshwari, Lokesh Bhola and Mr. Vishnu Anand, Advocates for R-1/Amaprop, for the Respondent

Final Decision : Dismissed

Judgement

Justice S. Muralidhar

1. Indiabulls Financial Services Limited (India) ("IFSL") has filed this petition u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act"), challenging an Award dated 21st March 2011 of the International Arbitral Tribunal ("Tribunal") under the International Centre for Dispute Resolution in the dispute between IFSL and Respondent No. 1 Amaprop Limited (Cayman Islands) ("Amaprop").

Background Facts

The disputes between IFSL and Amaprop arose out of a Share Subscription and Shareholders Agreement dated 31st May 2005 ("Agreement") entered into by them in terms of which Amaranth LLC, a company incorporated under the Laws of Cayman Islands, the predecessor-in-interest of Amaprop, acquired 47.5% shareholding in Indiabulls Finance Company Private Limited (India) ("IFCPL") an

unlisted company registered under the Indian Companies Act, 1956. The agreement gave a right to Amaprop to cause IFSL to purchase the aforementioned stake of Amaprop in IFCPL (the "Put Right") at the price to be calculated in terms of the Agreement (the "Put Price") subject to mandatory approvals under the Indian laws.

2. According to IFSL, both IFCPL and IFSL are subject to foreign exchange regulatory controls, and any transfer of their respective shares is subject to Indian laws. In the present proceedings, IFCPL has been arrayed as proforma Respondent No. 2.

3. It is stated that on 6th June 2005 an Amendment Agreement was entered into between IFSL, Amaranth LLC, Amaprop and IFCPL so as to replace Amaranth LLC with Amaprop as a party to the Agreement. On 26th June 2005, a Second Amendment Agreement was entered into between IFCPL, IFSL and Amaprop for further amendment in respect of "Key Man" u/s 13.1 of the Agreement; "Officer in Default" u/s 5 of the Agreement; Section 8.1 concerning "Investor Nominee Director"; Section 8.2 concerning "Parent Nominee Directors" and Section 8.3 concerning "Board Composition".

4. On 19th January 2010, Amaranth Advisors LLC issued a Put Notice calling upon IFSL to purchase the entire stake of 47.5% of IFCPL at the Put Price. According to IFSL, since the Put Price demanded by Amaprop was higher than the valuation prescribed under the Circular No. 16 dated 4th October 2004 of the Reserve Bank of India ("RBI") as well as the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 ("FEMA"), mandatory approval of the RBI was required for completion of the transaction at the agreed Put Price. Accordingly, IFSL applied to the RBI on 15th February 2010 seeking such approval. According to IFSL, the RBI rejected its application as a result of which IFSL could not transfer the shares at the Put Price as had been sought by Amaprop. This prompted Amaprop to seek reference of the disputes to arbitration in terms of the Agreement.

5. IFSL filed a suit in the Bombay High Court seeking to injunct the arbitral proceedings and an ad-interim stay was granted by Bombay High Court. However, Amaprop filed proceedings in the New York Court for a stay of legal proceedings in India. The Court of the Southern District of New York ("SDNY") granted an injunction against the proceedings in India. Meanwhile the RBI rejected the application filed by IFSL which then withdrew the suit from the Bombay High Court and joined the arbitration proceedings. IFSL states that it took the position that the Put Option could be performed at the Put Price consistent with the FEMA regulations and no higher, and that the contractual price was not capable of being paid by IFSL.

6. Before the Tribunal it was contended by Amaprop that IFSL could have paid it the Put Price without seeking any permission of the RBI. Amaprop also contended that IFSL was in breach of the Representations and Warranties under

the contract and had misrepresented that the put contract which was lawful and enforceable under the Indian law. Amaprop claimed, therefore, that IFSL was liable for damages for breach of Warranty.

Award of the Tribunal

7. In the impugned Award dated 21st March 2011 the Tribunal accepted the plea of IFSL that the mandatory foreign exchange laws of India would apply. However, it took the view that IFSL was under a contractual obligation to pay the Put Price and that the Tribunal could "craft" its Award to achieve the contractual intent. The Tribunal then relied on the Valuation Report of KPMG, a firm of Chartered Accountants engaged by IFSL to undertake the valuation of the equity shares of IFCPL which gave the valuation of the Put Shares at Rs. 368 per share. The Tribunal observed that in terms of the RBI Circular No. 49 IFSL could purchase the Put Shares at that value without permission of the RBI. In para 152 of the impugned Award it observed that if the parties indeed prepared and presented a new application to the RBI for permission at the Put Price of Rs. 593.75 per share, RBI could reject such an application or authorize a price anywhere between Rs. 368 to Rs. 593.75 per share, and if RBI authorized the sale of Put Shares at a price higher than Rs. 368 per share, then the Tribunal's "dispositive conclusions" would be adjusted pro tanto.

8. The Tribunal then divided the operative "dispositive conclusions" into six segments. In para 175 the Tribunal explained that it was doing so "anticipating that the one enunciated in Para 217 may not be enforceable in India" and that "doing so will not be violative of the rule against indirection in Indian law" i.e. the rule which prohibits one to accomplish indirectly what the law forbids doing directly. First, the Tribunal dismissed Amaprop's claim against IFCPL. Secondly, it declared that IFCPL was contractually indebted to Amaprop for a sum of Rs. 1,92,00,07,000 calculated at 32,33,696 equity shares of IFCPL at the Put Price of Rs.593.75 per share. Thirdly, the parties were directed to proceed to carry out, not later than thirty days of the final Award, the Put Closing as directed in Section 7.7.(d)(i)(B) and Section 7.7.(d)(iii)(A) and (B) of the Agreement at the price of Rs. 368 per share, for a total amount of Rs. 1,190,000,128. Fourthly, IFSL was directed to pay Amaprop the above sum within thirty days together with pre-Award interest at 14% as well as post-Award interest at 12% per annum till the date of payment. Fifthly, IFSL was directed to pay Amaprop a further sum of Rs. 73,00,06,872 together with interest at 14% per annum for the period 18th February 2010 to 20th April 2011 as well as post-Award interest at 12% per annum. Sixthly, the fees and expenses were directed to be shared equally by the parties. IFSL was asked to reimburse Amaprop a sum of USD 11,645.99 within thirty days. In para 219, the Tribunal directed the parties to present a new application to the RBI pursuant to the Circular No. 49 and if the RBI authorized the sale of Put Shares at a price higher than Rs. 368 per share, then the directions in the earlier paragraphs of the "dispositive conclusions" were to be adjusted pro tanto.

9. After the Award, by a letter dated 13th April 2011 IFSL requested RBI to amend its earlier decision stating that the price of the shares of IFCPL was Rs. 225 per share as calculated by KPMG using the Discounted Free Cash Flow Method under A.P. (DIR Series) Circular No. 49 dated 4th May 2010 and that it should be permitted to remit Amaprop an amount of Rs. 2,18,88,24,148 towards the aggregate consideration for transfer of 32,33,696 equity shares of IFCPL at a price of Rs. 676.88 per equity share.

Proceedings in the present petition

10. IFSL filed the present petition on 18th April 2011. It was listed first for hearing on 19th April 2011 when this Court took note of the above application by IFSL to the RBI but expressed its doubts about the appropriateness of the said application considering that the RBI had already rejected the application of IFSL valuing the share price at Rs. 593.75 per share. The Court felt that IFSL should approach the RBI seeking approval on the value determined by the Tribunal which was Rs. 368 per share which was likely to be accepted by the RBI as it was in compliance with the Circular No. 49 dated 4th May 2010. The Senior Counsel appearing for IFSL agreed to the said suggestion and stated that IFSL would approach the RBI in seeking aforementioned terms and within thirty days also filed a compliance affidavit.

11. This Court was informed at the subsequent hearing on 23rd May 2011 that pursuant to the order dated 19th April 2011 of the Court an application had been filed by IFSL with the RBI on 21st April 2011. In the said letter addressed by IFSL to the RBI it was stated that in the event RBI was not inclined to permit the transfer of shares in terms of the application dated 13th April 2011 then in the alternative, permission could be granted to IFSL to purchase the shares of IFCPL from Amaprop at Rs. 368 per share, which was the figure arrived at by KPMG following the Net Asset Value ("NAV") method for valuation of the shares of IFCPL.

12. On 24th June 2011, RBI wrote to IFSL and advised that "the parties to the agreement may arrive at mutually agreed price in accordance with the extant provisions of FEMA, 1999 rules/regulations/guidelines issued thereunder, within a reasonable time, say three months and carry out the transaction accordingly". Consequent thereto, counsel for IFSL wrote to the counsel for Amaprop requesting it to nominate a representative to get in touch with its Indian counsel "in order to settle the dispute and conclude the transaction before the three months period granted by RBI which period expires on September 23, 2011". On 22nd August 2011 Amaprop's counsel wrote to counsel for IFSL stating that in the event IFSL proposed to carry out a put closing at Rs. 225 per share by paying a sum of Rs. 1,19,24,25,400 plus interest at 1% per month from 18th February 2010 till the date of payment, they were "certainly willing to discuss such a proposal".

13. Even prior to the filing of the present petition on 23rd March 2011 Amaprop

filed proceedings before the United States District Court, SDNY for confirmation of the Award. It was during the pendency of those proceedings for confirmation of the Award that the present petition was filed by IFSL on 18th April 2011. Simultaneous with the present petition, IFSL filed a suit, CS (OS) No. 899 of 2011 seeking an anti-suit injunction restraining Amaprop from continuing the aforementioned confirmation proceedings or seeking enforcement of the Award. An application for interim relief being IA No. 5913 of 2011 was also filed in the said suit.

14. Although notice was issued in the present petition on 19th April 2011 and notices were served on Amaprop on 3rd May 2011, the summons in the suit were not received on that date. Consequently on 13th May 2011 counsel for Amaprop wrote to the counsel for IFSL seeking clarification on the scope of the present petition. On 20th May 2011 counsel for IFSL informed the counsel for Amaprop that the present petition concerned only the enforcement of Award in India.

15. On 25th May 2011 Amaprop's counsel in India received a copy of the plaint in CS (OS) No. 899 of 2011. Soon thereafter Amaprop instituted anti-suit injunction proceedings in the New York Court in which a temporary restraint order was passed. Thereafter on 17th June 2011 a consent order was passed in the said proceedings in the New York Court in the following terms:

1. The Respondent (IFSL) shall not take any further action in the Indian Injunctive Action now pending in the New Delhi Court, except that it shall permanently withdraw that action at the next regularly scheduled sitting of the New Delhi Court, which is July 4, 2011, at which point the Indian Injunctive Action will be terminated, and no relief may be granted thereon.

2. The Respondent, together with its officers, agents, servants, employees and attorneys, and all other persons who are in active concert or participation with the Respondent or any of its officers, agents, servants, employees or attorneys, are permanently restrained and enjoined from commencing or prosecuting any action or proceeding in the Republic of India; (a) that seeks to prevent, enjoin, restrain or interfere with the prosecution of the Confirmation Proceeding by Petitioner (Amaprop); or (b) that seeks to enjoin, annul, vacate, modify or otherwise affect, in any manner whatsoever, the recognition, enforcement or confirmation of the Award in any jurisdiction other than the Republic of India.

3. By their signature below, the attorneys for the Respondent confirm that they are duly authorized to enter into this stipulation and order for permanent injunction on Respondent's behalf. The Respondent agrees that, having authorized its attorneys to enter into this stipulation and order for permanent injunction, it is subject to the personal jurisdiction of this Court in any action or proceeding to enforce the terms of this stipulation and order for permanent injunction.

4. For the avoidance of doubt, nothing contained in this Stipulation and order (a) requires dismissal of the Indian Section 34 Proceeding, or (b) shall have any

effect on the rights, claims and defences of any party to that proceeding with respect to the enforceability of the Award within the Republic of India.

16. On 8th July 2011, IFSL withdrew the suit, CS (OS) No. 899 of 2011. Thereafter by an order dated 9th September 2011 the New York Court confirmed the Award. Consequently, a judgment was entered in favour of Amaprop on 14th September 2011.

17. In accordance with the applicable arbitral rules of the New York Court, Amaprop served on IFSL restraining notices and information subpoenas dated 4th October 2011 issued by the New York Court. Amaprop also served a restraint notice and subpoena dated 14th October 2011 on IFSL's counsel in USA. Subsequently, with the confirmation order dated 18th October 2011 of the New York Court, Amaprop also served notices on IFSL through courier. At this stage, IFSL filed CCP No. 101 of 2011 against Amaprop in this Court in which on 19th October 2011 notice was directed to be issued. This resulted in Amaprop again moving the New York Court for an anti-suit injunction vis-?-vis the contempt proceedings. The New York Court on 26th October 2011 granted a temporary injunction. By a stipulation dated 31st October 2011, IFSL's counsel in the USA consented to the restraint/injunction order continuing till the matter was heard by the New York Court on 7th /8th or 9th December 2011.

18. On 8th November 2011 IFSL stated before this Court that in view of Amaprop having instituted anti-suit proceedings in the New York Court, it was not pressing the contempt petition. Consequently, the contempt petition was disposed of as such.

Submissions of Counsel

19. Mr. T. R. Andhyarujina, learned Senior counsel for Amaprop, first raised an objection to the maintainability of the present petition u/s 34 of the Act. He submitted that under Sections 12.10 and 12.11 of the Agreement, the parties had agreed to the jurisdiction of the New York Court and thus had excluded the application of the Indian law not only on the substance of the dispute but also on the conduct of arbitration. Moreover, the venue of the arbitration was also outside India. It is submitted that IFSL's right to get the Award, which was agreed to be final and binding on the parties, modified or vacated should be made before the New York Court. It is further submitted that in terms of the consent order between the parties, all disputes arising thereunder or in relation to the Agreement had to be resolved only through arbitration at New York. By an order dated 9th September 2011 passed by the New York Court, the Award stood confirmed and a judgment was also entered in the said terms in favour of Amaprop. The said consent order contemplated a possible action by Amaprop to seek enforcement of the Award in India and the question of IFSL raising an objection as to the Award being opposed to the public policy of India u/s 48 of the Act would if at all arise only at that stage and not earlier.

20. Mr. Rajiv Nayar, learned Senior counsel appearing for IFSL, contended that in

view of the decisions of Supreme Court in *Bhatia International Vs. Bulk Trading S.A. and Another*, and *Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another*, , the present petition is maintainable u/s 34 of the Act. A reference is also made to Article V (2) (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention") which categorically laid down that the recognition or enforcement of an arbitral award may be refused, if the competent authority of the country where recognition or enforcement is sought, comes to the conclusion that such recognition or enforcement of the award could be contrary to the public policy of that country. Mr. Nayar referred to Sections 12.10 and 12.11 of the Agreement and submitted that there is no implied exclusion of Part-I of the Act much less an express exclusion of the jurisdiction of Indian courts. He laid emphasis on the expression "non-exclusive jurisdiction" in Article 12.11 of the Agreement and urged that the parties never intended to exclude the jurisdiction of Indian courts. He referred to the decisions in *Dozco India P. Ltd. Vs. Doosan Infracore Co. Ltd.*, *Videocon Industries Limited Vs. Union of India (UOI) and Another*, *Yograj Infrastructure Ltd. Vs. Ssang Yong Engineering and Construction Co. Ltd.*, and a decision of this Court in *Aitreja Limited Vs. Dans Energy Pvt Ltd and Others*,

21. Mr. Nayar further submitted that the impugned Award is opposed to the public policy of India. While on the one hand the Award recognized that the transaction of transfer of shares of IFCPL would be subject to the FEMA as well as the RBI Circular, on the other hand the Tribunal proceeded to "craft" its Award which was totally opposed to that Circular. The impugned Award required IFCPL to apply before the Closing Date to the RBI for permission to transfer the shares in question at a price higher than that permitted by the RBI guidelines. Further the direction of the Tribunal to IFSL to pay Amaprop a further sum of Rs. 73 crores, i.e., equal to the difference between the contract price and the permissible price paid by IFSL as a money claim, was violative of the FEMA and, therefore, was in the teeth of the foreign exchange laws as well as public policy of India. It is contended that the Tribunal in para 131 of the impugned Award virtually compelled IFSL to transgress the applicable Indian law.

22. Countering the above contentions, Mr. T.R. Andhyarujina, learned Senior counsel for Amaprop, submitted that there was an implied exclusion of the Indian Courts. The proper law of the contract was the law of New York. The words "non-exclusive jurisdiction" in Sections 12.10 and 12.11 of the Agreement did not relate to the arbitral proceedings as such but to the Agreement. He referred to the decision in *Highland Crusader Offshore Partners v. Deutsche Bank AG* (2009) EWCA Civ 725 and submitted that there was no clause in the Agreement which conferred any jurisdiction on Indian Courts. The parties had acted on the consent terms agreed between them in the New York Court pursuant to which IFSL had withdrawn its suit i.e. CS(OS) No. 899 of 2011.

Applicability of Part I of the Act to foreign Awards

23. The preliminary issue that requires to be decided is whether the present

petition u/s 34 of the Act challenging the impugned foreign Award dated 21st March 2011 of the Tribunal is maintainable as such.

24. The question of applicability of Part-I of the Act to foreign arbitral proceedings was considered in *Bhatia International v. Bulk Trading S.A.* In the said case the contract between the parties contained an arbitration clause in terms of which the arbitration had to be as per the rules of the International Chamber of Commerce ("ICC"). Parties agreed that the arbitration could be held at Paris (France). Disputes were referred by the ICC to the sole Arbitrator. The Respondent in the said case, i.e., Bulk Trading SA filed an application u/s 9 of the Act before the Court of III Additional District Judge, Indore (MP) ("Civil Court") against the appellant Bhatia International and the second Respondent in the said case seeking interim reliefs. The objection raised by Bhatia International as to the maintainability of the petition u/s 9 of the Act was rejected by the Civil Court. Bhatia International then filed a writ petition in the High Court which came to be dismissed. Before the Supreme Court, learned Senior counsel for Bhatia International pointed out that Part-II of the Act would not apply to an international commercial arbitration which took place in a non-convention country. The Court then observed that the Act nowhere provided that its provisions were not to apply to international commercial arbitrations which took place in a non-convention country. Section 2 (1) (f) of the Act which defined an international commercial arbitration made no distinction between international arbitrations held in India or outside India. It was observed in para 21 of the judgment that "by omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India." It was observed that in respect of arbitrations which took place outside India even the non-derogatory provisions of Part I would be applicable. However, the agreement to this effect by the parties could be either express or implied. It was clarified in Para 26 that "the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties". Thereafter it was concluded in Para 32 as under (SCC @ p.121):

32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. 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.

25. The facts in *Bhatia International* required the Court to consider specifically whether a petition u/s 9 is maintainable. The question of maintainability of a

petition u/s 34 did not arise. The Supreme Court observed that under Article 23 of the ICC Rules even before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, "the parties may apply to any competent judicial authority for interim or conservatory measures". Consequently, it was concluded in (SCC para 34) that "in such cases an application can be made u/s 9 of the said Act".

26. In the cases decided by it after Bhatia International, the Supreme Court has had to examine whether there was an express or implied agreement to exclude jurisdiction of the Indian Courts. The decision in each case depended on the answer to that question. Thus in Venture Global Engineering v. Satyam Computer Services Ltd., the Court went by the shareholders' agreement which expressly provided that the laws in force in India including the Companies Act would apply. This was held to be in the nature of a non-obstante clause which "would override the entirety of the agreement including sub-section (b) which deals with the settlement of the dispute by arbitration and, therefore, section 3 would apply to the enforcement of the Award. In such event, necessarily enforcement has to be in India as declared by the very section which overrides every other section". Significantly, in that case the foreign Award went against the Appellant ("Venture") which was directed to transfer the shares to Respondent No. 1 Satyam Computer Services Ltd. ("Satyam"). Satyam had filed a petition "to recognize and enforce the award" before the United States District Court, Eastern District Court of Michigan ("US Court") in which Venture appeared and had filed a cross petition. It was contended by Venture that the enforcement of the Award was in violation of the FEMA. Venture also filed a suit in the Court of the 1st Additional Chief Judge, City Civil Court, Secunderabad seeking a declaration that the award was illegal. The City Civil Court initially passed an ad-interim ex parte order restraining Satyam from seeking or effecting the transfer of shares either in terms of the Award or otherwise. The said interim order was challenged by Satyam in the High Court which admitted the appeal and directed interim suspension of the order of the City Civil Court. Thereafter the trial court allowed Satyam's application under Order VII Rule 11 CPC and rejected Venture's plaint. Venture's appeal was dismissed by the High Court which held that the Award could not be challenged even if it was against the public policy. Venture then appealed to the Supreme Court. The matter was remanded by the Supreme Court to the City Civil Court for adjudication of Venture's suit on merits holding that Part-I of the Act was applicable to a foreign Award.

Interpretation of the Clauses in the Agreement

27. Turning to the case on hand, it is necessary to examine whether the relevant clauses of the Agreement envisage any express or implied exclusion of the jurisdiction of Indian courts. Sections 12.10 and 12.11 of the Agreement read as under:-

Section 12.10: Governing Law; Jurisdiction; Waiver of Jury Trial

(a) This Agreement shall be governed by and construed in accordance with the laws of the State of New York, United States of America, without regard to the conflicts of law principles of such State.

(b) Each of the Company, Parent and each Investor hereby (i) agrees that any Action with respect to this Agreement or any Transaction Document may be brought in the courts of the State of New York located in New York, (ii) accepts for itself and in respect of its property, generally and unconditionally, the non-exclusive jurisdiction of such courts, (iii) irrevocably waives any objection, including, without limitation, any objection to the laying of venue or based on the grounds of forum non conveniens, which it may now or hereafter have to the bringing of any Action in those jurisdiction, and (iv) irrevocably consents to the service of process of any of the courts referred to above in any Action by the mailing of copies of the process to the parties hereto as provided in Section 12.6. Service effected as provided in this manner will become effective ten (10) calendar days after the mailing of the process.

(c) Each of the company, parent and each investor hereby waives any right to a trial by jury in any action to enforce or defend any right under this agreement or any transaction document or any amendment, instrument, document or agreement delivered or to be delivered in connection with this agreement or any transaction document and agrees that any action will be tried before a court and not before a jury.

Section 12.11: Arbitration

(a) Arbitration. Any Action arising relating to this Agreement or the other Transaction Documents shall be settled by arbitration in the State of New York in accordance with the rules of the American Arbitration Association; provided, however, that a party, without prejudice to these procedures may seek a preliminary injunction or order provisional relief if, in its judgment, such action is deemed necessary to avoid irreparable damages or to preserve status quo. The costs and expenses of the arbitration, including the arbitrator's fees and expenses ("Arbitration Costs"), shall be borne by the parties as determined by the arbitrator to be fair and reasonable; provided, however, that each party shall pay for and bear the cost of its own experts, evidence and counsel. No award of punitive damages may be rendered by the arbitrator in such proceeding.

(b) Arbitration Procedures. Any arbitration hereof shall be conducted in accordance with the following procedures:

(i) Any party (the "Requesting Party") demanding arbitration hereunder shall give a written notice of such arbitration demand ("Arbitration Notice") to the other parties which Arbitration Notice shall describe in reasonable detail in the nature of the claim, dispute or controversy and any relief or remedy sought.

(ii) Within fifteen (15) calendar days after the receipt of an Arbitration Notice, the Requesting Party, on the one hand, and the other parties (the "Requesting

Party") on the other hand, shall mutually select and designate in writing one reputable, independent, disinterested individual (a "Qualified Individual") willing to act as an arbitrator of the claim, dispute or controversy in question. In the event that the Requesting Party and the Responding Party are unable to agree on a Qualified Individual within the 15-day period referred to above, then, the Requesting Party and the Responding party shall each appoint a Qualified Individual as an arbitrator and the arbitrators so appointed will select and appoint a third Qualified Person as an arbitrator.

(iii) The presentations of the Requesting Party and the Responding Party in the arbitration proceeding shall be commenced and completed within sixty (60) days after the selection of the arbitrator pursuant to this clause (b) above, and the arbitrator shall render its decision in writing within thirty (30) days after the completion of such presentations.

(c) Binding Character. Any decision rendered by the arbitrator pursuant to this Section 12.11 shall be final and binding on the parties thereto, and judgment thereon may be entered by any state or federal court of competent jurisdiction.

28. Section 12.10 (a) makes it clear that the Agreement was to be governed by the laws of the State of New York (USA), "without regard to the conflicts of law principles of such State". Any action in respect of the Agreement had to be brought in the courts of the State of New York and each party accepted unconditionally "the non-exclusive jurisdiction of such courts" and irrevocably waived any objection to the bringing of any action in those jurisdictions.

29. The expression "non-exclusive jurisdiction" was discussed in the decision of the Court of Appeal in Highland Crusader Offshore Partners v. Deutsche Bank. It was explained in paras 64 and 86 as under:

It stands to reason that by agreeing to submit to the non-exclusive jurisdiction of State X the parties implicitly agree that X is an appropriate jurisdiction, and therefore either party should have to show a strong reason for later arguing that it is not an appropriate jurisdiction. The cases support this approach: see Cannon Screen Entertainment Limited v. Handmade Films (Distributors) Limited (July 11, 1989, Commercial Court, unreported), S & W Berisford PLC v New Hampshire Insurance Co (1990) 1 Lloyd's Rep 454, British Aerospace PLC v Dee Howard & Co (1993) 1 Lloyd's Rep 368, 376 and Ace Insurance SA-NV v Zurich Insurance Co (2001) EWCA Civ 173, (2001) 1 Lloyd's Rep 618, para 62. On the other hand, a non-exclusive jurisdiction clause self evidently leaves open the possibility that there may be another appropriate jurisdiction.

The degree of appropriateness of an alternative jurisdiction must depend on all the circumstances of the case. In addition to the usual factors, the wording of the non-exclusive jurisdiction clause may be relevant, because of the light which it may throw on the parties' intentions...

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86.Cheshire North and Fawcett on Private International Law (14th Ed, 2008) adopt a similarly cautious approach to Sabah. They say at 474:

Where the agreement provides for the non-exclusive jurisdiction of the English courts there is no breach of agreement in bringing proceedings abroad and therefore an injunction will not be granted on the basis of breach of an agreement. However, if one party (A) by way of a pre-emptive strike seeks an injunction abroad whereby the other party (B) will be permanently restrained from making any demand under a contract (containing a non-exclusive English jurisdiction clause) in the hope of preventing B from starting proceedings in England, this is a breach of contract and vexatious. An injunction restraining A from continuing the proceedings abroad will then be granted on the basis of vexation or oppression. Moreover, the nature of the jurisdiction clause may be such that, although not exclusive, it does not contemplate parallel proceedings and pursuing proceedings abroad would be vexatious and oppressive. Normally, though, a non-exclusive jurisdiction agreement will contemplate the possibility of simultaneous trials in England and abroad and, if trial is pursued abroad, there will not only be no breach of agreement but also no vexatious or oppressive conduct.

(emphasis supplied)

30. Consequently, the use of the words "non-exclusive jurisdiction" in Section 12.10 would not ipso facto imply that the parties have agreed to submit to the jurisdiction of Indian courts. The absence of an express exclusion of the jurisdiction of Indian courts is apparent. The question whether there is an implied exclusion has to be discerned from a collective reading of Section 12.10 and 12.11. Section 12.11 (c) which is titled "Binding Character" states that the Award shall be final and binding and "the judgment thereon may be entered by any state or federal court of competent jurisdiction." Given the context of the place of arbitration being New York and the jurisdiction of the courts in New York being expressly mentioned in Section 12.11, the words "state or federal court" has to necessarily imply courts in the U.S.A. It also requires to be seen if the intention was to avoid parallel proceedings in more than one jurisdiction. When the present petition was filed by IFSL u/s 34 of the Act, Amaprop had already filed the proceedings for confirmation of the Award which was pending in the SDNY. After receiving the notice in the suit CS (OS) No. 899 of 2011 filed by IFSL, Amaprop filed anti-suit injunction proceedings in New York Court in which a consent order was passed on 17th June 2011. The preamble to the said Order shows that the motion brought by Amaprop for anti-suit injunction was inter alia to restrain IFSL "from commencing or prosecuting any action or proceeding in India" that sought to prevent the prosecution of the confirmation proceeding. It was in the above context that it was agreed between the parties that at the next hearing of CS (OS) No. 899 of 2011 the said suit would be permanently withdrawn by IFSL. The fact that parties did not require the present petition u/s 34 to be dismissed did not mean that Amaprop had conceded to the jurisdiction

of this Court to entertain the petition. On the other hand, IFSL appears to have accepted the continuation of the confirmation proceedings in the New York Court. In Clause 4(b) of the consent order it was clarified that the said consent order would not "have any effect on the rights, claims and defenses of any party to that proceeding with respect to the enforceability of the Award within the Republic of India".

31. The proceedings for confirmation i.e., for recognition of the Award under the laws of New York were akin to the procedure that was prevailing under the Arbitration Act, 1940. This was also consistent with what was stated in Article V (2) (b) of the New York Convention which is incorporated as such in the Schedule to the 1996 Act. IFSL was aware of the consequence of permitting the proceedings for recognition/ confirmation of the Award to continue in the New York Court. With IFSL having withdrawn the anti-injunction suit filed by it in this court questioning the continuation of the confirmation proceedings, there was no restraint as far as those proceedings were concerned. In terms of the New York law as well as New York Convention, it was open to IFSL to point out to the New York Court in the confirmation proceedings that recognition ought not to be granted since the Award was opposed to the public policy of India. IFSL did not avail of such opportunity. It was noted by the New York Court in the order dated 9th September 2011 confirming the Award that: "As of today's date, Indiabulls has filed no opposition papers. Accordingly, the Court will treat the petition as unopposed." This therefore meant that IFSL had an opportunity to question the Award which it did not avail of. The said order of the New York Court became final and judgment was entered by the New York Court on 14th September 2011. Thereafter the question of there being parallel proceedings in this Court u/s 34 of the Act to challenge the Award did not arise. Going by the interpretation of the expression "non-exclusive jurisdiction" in *Highland Crusader Offshore Partners v. Deutsche Bank* as well as the discussion in *Cheshire North and Fawcett on Private International Law* (14th Ed, 2008), it appears that the parties understood that there ought not be parallel proceedings to challenge the Award as that could be "vexatious and oppressive". The other interpretation, as suggested by learned Senior counsel for Amaprop, and which seems plausible, is that the words "non-exclusive jurisdiction" have been used in the context of the steps that were contemplated for effecting the transfer, if any, of shares pursuant to the exercise of the put option and not in the context of the further stages of the arbitral proceedings. The fact remains that IFSL did not question the proceedings in the New York Court for confirmation/recognition of the Award. It could not now be heard to object to the said Award in separate proceedings in this Court u/s 34 of the Act.

32. A combined reading of Sections 12.10 and 12.11 of the Agreement leads to the position that although there was no express exclusion of the jurisdiction of the Indian courts, the parties intended that the further proceedings concerning the challenge, if any, to the Award had to take place in the New York Courts and that the judgment concerning the recognition of the Award may be entered by

"any state or federal court of competent jurisdiction." The seat of arbitration being New York also had a bearing on the issue as is seen from the following passages from the treatise "Dicey Morris & Collins" on "The Conflict of Laws":

Prior to the entry into force of the 1996 Act there were potential problems concerning the borderline between issues of substance determined by the law governing the arbitration agreement and issues of procedure governed by the procedural law of the arbitration. Such problems are avoided under the 1996 Act, which clearly determines the scope of each of the various provisions of Part I. Although the general rule is that Part I applies in cases where England is the seat of the arbitration, it is also expressly provided that, where the seat is outside England or where the seat has not been determined or designated, Section 7 (which provides, subject to the parties' contrary agreement, that an arbitration agreement is to be treated as distinct from any contract of which it forms a part) and Section 8 (which provides that, unless the parties agree otherwise, an arbitration agreement is not discharged by the death of a party) are applicable if English law is the law governing the arbitration agreement.

The arbitral process is an exercise of party autonomy, which nevertheless can only proceed (and subsequently be enforced) to the extent permitted by national law. Two trends in modern arbitration law have led to a convergence between party autonomy and state control. The first has been an acceptance in many modern arbitration laws of a much wider scope for the operation of party autonomy to choose the procedures applicable to an international commercial arbitration. This trend is exemplified by the Model Law, and is reflected in the 1996 Act. The second element has been a renewed explicit acceptance of the rule set out in Rule 57(2), namely that it is the law of the seat of the arbitration which governs the arbitral procedure.

Where, as in the case of the 1996 Act (or other Commonwealth legislation giving effect to the Model Law), the law of the seat in fact accords considerable freedom to the parties to choose their procedure and imposes few mandatory provisions upon it, the control of the law of the seat will be in practice limited, and its provisions are unlikely to be brought into conflict with arbitration procedures chosen by the parties. Nevertheless, the law of the seat will still perform vital functions: in supplementing the procedural rules chosen by the parties where these are incomplete; in supporting the arbitral procedure when the coercive powers of the state are needed; and in providing a forum for challenging arbitral awards, especially where they are said to exceed the jurisdiction vouchsafed to the arbitrators by the parties under the arbitration agreement, or where there has been a serious irregularity in the arbitral procedure. Finally, it is the law of the seat which endows the arbitral award with its binding character upon which enforcement may be sought internationally under the provisions of the New York Convention. The international arbitral institutions, which have developed to a considerable extent the autonomy of the arbitral procedure, also recognise the ultimately controlling function of the law of the seat.

33. The Court proposes to briefly discuss the other judgments cited by the parties each of which turned on its own facts. In *Yograj Infrastructure Limited v. Ssang Yong Engineering & Construction Company Limited*, there was an express exclusion of the Indian courts in view of Rule 32 of the Singapore International Arbitration Centre ("SIAC") Rules which was made applicable to all arbitrations which took place in Singapore. Therefore, applying the law explained both in *Bhatia International* as well as *Venture Global Engineering*, it was held that the Indian courts do not have jurisdiction. In *Videocon Industries Limited v. Union of India*, the Court came to the definite conclusion in para 33 that the parties had in terms of the arbitration agreement in that case impliedly agreed to exclude the provisions of Part I of the Act. Consequently, it was held that the Indian courts did not have the jurisdiction. In *Dozco India Pvt. Ltd. v. Doosan Infracore Co. Ltd.* it was held that the language of the clauses of the Agreement in that case were clearly indicative of the express exclusion of Part-I of the Act. Following the dictum in *Bhatia International*, it was held that the Indian courts had no jurisdiction. In *Aitreyia Limited v. Dans Energy Pvt. Ltd.*, it was held that there was no implied exclusion of Indian law inasmuch as Clause 14.8 of the Investment Agreement in that case stated that "the parties shall have the right to approach any court or competent jurisdiction at any point of time for suitable interim relief, including injunction". Consequently, it was held that the Section 9 petition was maintainable in this Court. The judgment of the Court of Appeal in *Abner Soleimany v. Sion Soleimany QBENI 97/0882 CMSI*, which turned on its own facts, dealt with the question of enforcement of a foreign Award whereas the present proceedings are not u/s 48 of the Act seeking enforcement of a foreign Award.

34. For the aforementioned reasons, this Court is of the view that IFSL cannot invoke jurisdiction of this Court u/s 34 of the Act to challenge the impugned Award. Consequently, the Court does not consider it necessary to examine the question whether the Award is opposed to the public policy of India. It leaves the said contention to be decided at the appropriate stage as and when Amaprop seeks enforcement of the Award in India under the Act.

Conclusion

The petition is accordingly dismissed with costs of Rs. 50,000 which should be paid by IFSL to Amaprop within four weeks from today.