Between the lines...

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Highlights

I. MP High Court on foreign seated arbitration

The division bench of the Madhya Pradesh High Court upheld an arbitration agreement which mandated two Indian Parties to take recourse to a foreign seated arbitration while applying foreign substantive law.

The Appellant, Sasan Power Limited ("Sasan Power"), which is a wholly owned subsidiary of Reliance Power Ltd. and the Respondent, North American Coal Corporation India ("NACC-India") a company incorporated in India, had entered into an association agreement for mine development and operation. NACC-India is a subsidiary of North America Coal Corporation, U.S., which had originally signed an Memorandum of Understanding with Reliance Power Ltd. The original agreement inter alia, provided for resolution of disputes by way of arbitration to be administered by ICC in London, England, under laws of the United Kingdom.In 2011, NACC-US vide an assignment agreement assigned all its rights, liabilities and obligations under the original association agreement to NACC-India.

In 2014, NACC-India terminated the agreement and filed a request for arbitration claiming compensation. Sasan Power objected to the request for arbitration and filed a suit seeking an anti-arbitration injunction before the District Court, which was subsequently granted. NACC-US filed another request for arbitration before the ICC.Sasan Power filed a second suit inter alia challenging the request for arbitration as filed by NACC-US. NACC-India filed applications requesting the District Court to reject the plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 and invoked Section 45 of the Arbitration and Conciliation Act, 1996. NACC - India also requested the Court for vacation of the anti-arbitration injunction. The District Court allowed this and dismissed the suit filed by Sasan Power. Sasan Power subsequently challenged the order of the District Court in an appeal to the High Court. A variety of issues were put before the court, but one with utmost importance was whether two Indian Parties could choose a foreign seat of arbitration applying foreign substantive law.

The High Court relied on the judgment in, Atlas Exports Industries v. Kodak and Company("Atlas Exports") where it was held that Section 28 read with Exception 1 of the section, does not have the application of putting a bar on foreign

seated arbitration and therefore, the agreement in the present case is not void. The court also said that in a case where two Indian parties freely enter into an agreement which provides for arbitration at a foreign seat as the means of dispute resolution, this does not render the agreement void or make it opposed to public policy as held in TDM Infrastructure (P) Ltd. Vs. UE Development India (P) Limited.

The court refused to rely on TDM Infrastructure judgment on the grounds that Atlas Exports was delivered by a larger bench and that the scope of TDM Infrastructure was limited to Section 11 of the Arbitration and Conciliation Act, 1996, which was clarified by the Supreme Court by means of an Official Corrigendum. The court also held that the scheme of the Arbitration and Conciliation Act, 1996 indicated that for classifying arbitration proceeding as an international commercial arbitration depends only on the nationality of the parties which is relevant only for the appointment of arbitrator(s) under Section 11 of the Act. The court was of the view that the nationality of the parties would not influence the applicability of Part II of the Act as it depends only on the seat of arbitration. The High Court further observed that where the parties had agreed to resolve their disputes using arbitration, it is the duty of the courts to give effect to the intention of the parties to the agreement and interference would be appropriate only in cases where the agreement was found to be null, void or inoperative. The Court finally observed that, when the parties have decided to resolve their disputes by arbitration and chose to have a foreign-seatedarbitration i.e., arbitration in foreign country, then Part I of the Act would not be applicable. Further, in cases where the agreement in question fulfils the requirements under Section 44 of the Act, Part II of the Act would be applicable.

Source: First Appeal 310 of 2015, Madhya Pradesh High Court

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The judgment does aid many foreign subsidiary companies, incorporated in India, who would want to arbitrate issues in a foreign country especially issues that are not arbitrable in India. However, till such time this issue is finally decided by the Supreme Court of India, one needs to proceed with caution in deciding whether two Indian parties can agree to have a foreign seated arbitration.

II. Government passes ordinance to reform arbitration laws

On October 23, 2015, the President of India has promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015 to amend the provisions of Arbitration and Conciliation Act, 1996. Some of significant changes are as follows:

1. The provisions of Section 9 (interim measures by court), 27 (court assistance in taking evidence) and 37 (1)(a) (appeal from order granting or refusing interim measure by courts or setting aside or refusing to set aside and arbitral award under Section 34) and 37(3) (no second appeal to lie from an order passed in appeal) will apply to international commercial arbitration even if the place of arbitration is outside India and the arbitral award made or to be made is enforceable under Part II of the Arbitration and Conciliation Act, 1996.

2. If, under Section 9 of the Arbitration and Conciliation Act, 1996 the court passes any interim measure of protection then, the arbitral proceedings must commence within 90 days of the court doing so or within such further time as the court may determine.

3. Once the arbitral tribunal is constituted, the court shall not entertain an application for interim measures under sub-section (1) of Section 9 unless the court finds that circumstances exists which may not render the remedy provided under section 17 efficacious.

4. The orders passed by the arbitral tribunal under Section 17 is deemed to be an order of the court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an order of the court.

5. Section 29A provides that an award shall be made by the arbitral tribunal within the period of twelve months from the date the arbitral tribunal enters upon the reference. This period may be extended for a period not exceeding six months with the consent of the parties.

6. If the award is not made within 12 months or within the extended period as specified, the mandate of the arbitrator(s) shall terminate unless the court has either prior to or after the expiry of the period so specified, extended the period. However, if the court finds that the arbitral proceedings have been delayed for reasons attributable to the arbitral tribunal then the court may order reduction of fees of arbitrator(s) by not exceeding 5% for each month of such delay. Further, it is open to the court to substitute one or all of the arbitrators while extending the period to complete the arbitration proceedings. It is clarified that the when the court substitutes one or all of the arbitrators then the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the evidence and material.

7. Section 29B provides that the parties to an arbitration agreement, may, at any stage either before or at any time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure which include among others that the arbitral tribunal may decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing.

8. An arbitral award will be in conflict with the public policy of India, only if-

   a) The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 (Confidentiality) or Section 81 (Admissibility of evidence in other proceedings); or

   b) It is in contravention with the fundamental policy of Indian law; or

   c) It is in conflict with the most basic notions of morality or justice.

   An arbitral award arising out of arbitrations, other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award provided it shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence.

The Ordinance clarifies that the test as to whether there is a contravention with the fundamental policy of India law shall not entail a review on the merits of the dispute.

Source: http://lawmin.nic.in/la/Arbitration.pdf

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The Ordinance will have to be placed as a Bill before parliament and only if approved will be converted into an Act. However, if the Bill is not approved by the parliament then the Government of India can re-promulgate the Ordinance. The Ordinance reflects the intent of the Government of India to ensure that there is a quick redressal of the dispute and this is evident from the fact that specific timelines are specified in the Ordinance with respect to initiation of the arbitral proceeding and the time by which the arbitral proceeding should conclude. Also, there is emphasis to ensure that spiralling costs of arbitration should not deter parties to resort to arbitration as a means of dispute resolution therefore this intent is seen by introducing a Model Fee Schedule in the Fourth Schedule of the Ordinance.

III. IRDA guidelines for Indian-owned and controlled insurance companies

The Insurance Laws (Amendment) Act, 2015, passed during Parliament's budget session, allowed insurance companies to raise their foreign ownership from 26% to 49%, with the requirement that the company be Indian owned and controlled. Indian ownership is defined by way of Indian Insurance Companies (Foreign Investment) Rules, 2015. This was subsequently amended by Indian Insurance Companies (Foreign Investment) Amendment Rules, 2015. Control can be exercised by the virtue of (a) Shareholding; or (b) Management rights; or (c) Shareholders agreements; or (d) Voting agreements; or (e) Any other manner as per applicable laws.

Now, the insurance regulator IRDA has brought a new set of rules to define "Indian control" on insurance companies in India. These rules, framed as Guidelines for "Indian Owned and Controlled" insurance companies, were notified by IRDA on October 19, 2015 ("Control Guidelines").

The Indian insurance company shall ensure the following:

i. Majority of the directors excluding independent directors should be nominated by the Indian promoter(s) / Indian investor(s);

ii. Appointment of key management person including Chief Executive Officer/ Managing Director /Principal officer should be through the Board of Directors or by the Indian promoter (s) and / or Indian investor (s). However, key management person(s) excluding CEO may be nominated by the foreign investor provided that the appointment of such key management person is approved by the Board of Directors, wherein majority of the directors excluding independent directors are the nominees of Indian promoter(s) / Indian investor(s).

iii. The Indian shareholder(s) of Indian insurance companies must have control over the formulation of significant policies of the insurance company and the overall management of the company, subject to approval of the Board of Directors, provided that the constitution of the Board is compliant with para (I) above.

iv. Where the Chairman of the Board is having a casting vote, such Chairman should be nominated by the Indian promoter(s) and / or Indian investor(s);

v. Quorum shall mean and include presence of majority of the Indian directors irrespective of whether a foreign investor's nominee is present or not. The right of a foreign investor's nominee to constitute valid quorum for meetings is only a protective right and to that extent would not amount to control as long as the presence of nominees of Indian Promoter(s)/ Investor(s) are also mandatorily taken into account for the purposes of quorum. The provisions of Companies Act, 2013 shall come into force in case of an adjournment.

In order to ensure that the Indian insurance companies are in compliance with the Control Guidelines, IRDA has come out with an additional requirement of filing an undertaking duly signed by CEO and CCO. Such undertaking needs to be appended with a CTC of board resolution and amended certified copy of agreement/ JV agreement, if applicable. Companies existing prior to issuance of Control Guidelines are required to comply within a period of 3 months and companies existing post issuance of Control Guidelines are required to comply before grant of certificate of registration.

Source: https://www.irda.gov.in/ADMINCMS/cms/frmGuidelines_Layout.aspx?page=PageNo2644&flag=1

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In view of the requirements of the Control Guidelines, existing shareholder agreements in Indian insurance companies will need to be reviewed carefully in respect of shareholder and other rights of foreign investors and will need to be structured appropriately to ensure that such rights are not in contravention of the IRDA Control Guidelines.

IV. Apex Court's decision on arbitration clauses in insurance dispute

In the dispute between Essar Steel India Limited ("ESIL") and New India Assurance Company (NIAC), the Supreme Court has ordered the insurance company to honor the arbitration clause in the agreement and appoint an arbitrator to adjudicate the dispute between the parties.

The facts of the dispute lie in the Naxal attacks on a pipeline of ESIL in 2010. ESIL had an insurance cover of Rs 19,000 crore on the pipeline, covering the business loss in case of any such disruption. ESIL claimed a total property loss of Rs. 9.79 crore and a business interruption loss of ₹ 881 crore.

But NIAC turned down the claim saying that there was an earlier Naxalite attack on the company site which it did not disclose while taking the policy. The company then approached the Bombay High Court and argued that it had a natural calamity policy which was rejected by the insurance company, citing the incidence of terrorism and directed it to buy a specific terrorism cover. The Bombay High Court ruled in favor of ESIL and directed both parties to appoint arbitrators. The insurance company then challenged the high court order in the apex court, which was also of the view that it would be open to the arbitrators to decide all issues, including the issues regarding the alleged fraud. The apex court dismissed the plea filed by NIAC.

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The ruling is likely to set a precedent in similar cases where insurance companies are refusing to consider the arbitration clause, citing various reasons for not honouring claims even after collecting huge premium.

V. Liberalization of FDI in White Label ATM companies

White-label ATM operators are non-bank companies who own and run ATMs as a business. Their revenue is mainly from inter-change fee and advertisements. White Label ATM operators are authorized under Payment & Settlement Systems Act, 2007 by the Reserve Bank of India.

The government has allowed 100 per cent foreign direct investment (FDI) under the automatic route for white-label ATM companies. The 100 per cent FDI under the automatic route is subject to the condition that any non-bank entity planning to set up white-label ATM should have a minimum net worth of ₹ 100 crore, maintainable at all times. In the case of entities operating in any other 18 non-banking finance companies (NBFC) activities, foreign investment in white-label ATMs should comply with the sectoral minimum capitalization norms.

Source: http://dipp.nic.in/English/acts_rules/Press_Notes/pn11_2015.pdf

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