

Dispute Resolution Hotline

October 14, 2015

TWO INDIAN PARTIES OPTING FOR FOREIGN-SEATED ARBITRATION: NO BAR?

- Madhya Pradesh High Court upholds arbitration agreement mandating two Indian Parties to take recourse to a foreign-seated arbitration with foreign substantive law;
- Holds that the resultant award would be a 'foreign award', as envisaged under Part II of the Arbitration & Conciliation Act, 1996;
- This is a step forward in the longstanding debate on whether arbitration proceedings between two Indian entities can be seated in a foreign country.

BACKGROUND

The Madhya Pradesh High Court ("**Court**") in its recent decision in *Sasan Power Ltd v. North America Coal Corporation India Pvt Ltd*¹ has held that two Indian parties may conduct arbitration in a foreign seat under English law.

The Court relied upon an earlier decision of a Division Bench of the Supreme Court of India ("**Supreme Court**") in *Atlas Exports Industries v. Kotak & Company*² ("**Atlas Exports**") wherein the Supreme Court, under the Arbitration Act, 1940 ("**1940 Act**"), had held that it was not against the public policy of India when two Indian parties contract to have a foreign-seated arbitration.

Whilst this judgment provides certain answers in the longstanding and yet inconclusive debate on the issue of whether two Indian parties can seat their arbitration abroad, it also throws up larger questions.

FACTUAL MATRIX

Sasan Power entered into an association agreement with North American Coal Corporation-US ("**NACC-US**") in 2007 ("**Agreement**"). The 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 assigned its rights, liabilities and obligations under the Agreement to the Respondent - North America Coal Corporation India Pvt Ltd. ("**NACC-India**") by way of an Assignment Agreement. Interestingly, whilst an assignment to NACC-India was conducted, it appears that the obligations and liabilities of NACC-US under the Agreement continued.

In 2014, NACC-India terminated the Agreement and filed a request for arbitration claiming compensation of INR 1,82,59,301. Sasan Power filed its objection to this request for arbitration. Sasan Power, thereafter, filed a suit before the District Court and sought an anti-arbitration injunction. The injunction was granted by the District Court.

A second request for arbitration was filed by NACC-US before the ICC. Sasan Power filed a second suit challenging the request for arbitration filed by NACC-US.

NACC-India filed applications for rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 ("**Code**") read with Section 45 of the Arbitration & Conciliation Act, 1996 ("**Act**") and vacation of the anti-arbitration injunction granted by District Court ("**Applications**"), before the District Court. The District Court allowed the Applications moved by NACC-India and dismissed the suit filed by Sasan Power. Consequently, Sasan Power filed this appeal under Section 96 of the Code.

ISSUES

The Court, amongst other things, considered:

1. Whether the appeal filed by Sasan Power was maintainable in light of Section 50 of the Act?
2. Whether two Indian parties could choose to seat their arbitration in a foreign country?

GIST OF ARGUMENTS

Sasan Power contended that *TDM Infrastructure* did not permit two Indian parties to derogate from Indian law by agreeing to conduct arbitration with a foreign seat and a foreign substantive law. Further, reliance on *Atlas Exports* was erroneous since it was a judgment under the 1940 Act and only the Act would be applicable to the present case. The mandate of Section 45 of the Act would not be attracted since an arbitration clause contemplating a foreign seated arbitration between two Indian parties was invalid; hence Applications based on such a void, null and inoperative arbitration clause would not be maintainable.

NACC-India argued that that no appeal laid against an order passed under Section 45 of the Act. Further, it was

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argued that *TDM Infrastructure* was limited in scope to appointment of an arbitrator during proceedings under Section 11(6) of the Act, where the seat of arbitration was India. The provisions of Section 28(1) of the Act were not applicable in the present situation since the seat of arbitration was England. *Atlas Exports*, wherein it was stated that by virtue of the Exception 1 to Section 28 of the Contract Act, two Indian parties could have a foreign seated arbitration; would apply. Given that *Atlas Exports* was passed by a two-judge bench, it would be considered precedent even assuming *TDM Infrastructure* were to apply not only in cases related to Section 11(6) of the Act.

HIGHLIGHTS OF THE JUDGMENT

- The Court saw no reason to interfere with the impugned judgment which referred the parties to arbitration under Section 45 of the Act and dismissed the appeal, while providing the following reasons:
- I. The Court observed that only orders refusing to refer parties to arbitration could be appealed as per Section 50 of the Act.
 - II. The Court, while, placing reliance on the judgment in *Atlas Exports*, observed that Section 28 of the Indian Contract Act, 1872 read with the Exception 1 would not be a bar to a foreign seated arbitration. Further, it was observed that when two Indian parties had willingly entered into an agreement in relation to arbitration, the contention that a foreign seated arbitration would be opposed to Indian public policy was untenable.
 - III. The Court stated that the principle laid down in *Atlas Exports* (that was by a larger bench than *TDM Infrastructure*) would, in light of the decision in *Fuerst Day Lawson Ltd v. Jindal Exports*³, wherein it was observed by the Supreme Court that there was not much difference between provisions of the Act and 1940 Act; be binding precedent in relation to the issue at hand.
 - IV. The Court noted that in *TDM Infrastructure* the Supreme Court had clarified by way of an Official Corrigendum that:

“It is, however, made clear that any findings/observations made hereinbefore were only for the purpose of determining the jurisdiction of this Court as envisaged under Section 11 of the 1996 Act and not for any other purpose.”
 - V. The Court observed that the scheme of the Act indicated that the classification of an arbitration as an international commercial arbitration depended only on the nationality of the parties, which is only relevant for the appointment arbitrators as contemplated under Section 11 of the Act.
 - VI. The Court opined that the nationality of the parties would not influence the applicability of Part II of the Act, the applicability of which would flow depending on the seat of arbitration.
 - VII. The Court, relying upon *Enercon (India) Private Limited v. Enercon GMBH*⁴ and *Chatterjee Petroleum v. Haldia Petro Chemicals*⁵, was of the opinion that where the parties had agreed to resolve their disputes through arbitration, the courts were to give effect to the intention of the parties and interfere only when the agreement was null or void or inoperative.
 - VIII. The Court observed that once parties by mutual agreement had agreed to resolve their disputes by a foreign-seated arbitration, Part I of the Act would not apply. Further where the agreement fulfilled the requirements of Section 44, provisions of Part II of the Act would apply. It was held that a court, under Section 45, would have to refer parties to arbitration where it was found that the agreement was not null or void or inoperative.

ANALYSIS

This judgment interprets the scheme of the Act, whereby it clarifies that applicability of Part II of the Act is not based on the nationality of the parties but on the basis of where the arbitration is “seated”. If arbitration is seated outside India, irrespective of the nationality of the parties involved, it will be considered to be a “foreign award”.

The issue before the court was whether two Indian parties could seat an arbitration in a foreign country with foreign law as the substantive law governing the dispute. The concern with allowing the same has been the permissibility for Indian parties to be governed by laws other than the laws of India. The consequence of such an act, allowing Indian parties to expressly contract out of Indian law, being arguably against Indian public policy; is a matter of concern since it would impact the enforceability of the award.

The present judgment applies *Atlas Exports*, while restricting the applicability of *TDM Infrastructure* to issues related to Section 11(6) of the Act, to reiterate the legality of two Indian parties choosing to seat their arbitration in foreign country. An argument was raised that such arbitrations would be limited by the restriction contained in Section 28(1) of the Act and parties would not be permitted to choose a foreign substantive law when only parties having Indian nationality were involved. The court clarified the same stating that when the seat of arbitration is outside India, the conflict of law rules of the country in which the arbitration takes place would have to be applied and it would not be an arbitration under Part I of the Act.

That being said, the restrictive interpretation of *TDM Infrastructure* adopted by the Court may, in effect, be a reading down of a judgment that categorically states that Indian parties cannot derogate from Indian law, as a matter of public policy. The resultant issues that it raises, needing further consideration, are (i) whether Indian parties would be allowed to choose a foreign substantive law; and (ii) whether, as held in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc*⁶, by choosing a foreign seat the non- derogable substantive provisions of Part 1 would not be available to parties, thereby denying access to Indian courts.

This issue may require greater clarity from the Supreme Court in light of a recent decision of the Bombay High Court in *M/s Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt Ltd*⁷ which interpreted a vague arbitration clause which provided for “Arbitration in India or Singapore and English law to be apply” between two Indian parties. The court found that the clause to mean arbitration in India with Indian law applicable taking a view that arbitration would have to be conducted in India and making English law applicable would make the clause pathological. However, the Court also noted that position was qualified with a statement that “if the seat of arbitration

would have been at Singapore, certainly English law will have to be applied". It is pertinent to note that this was in relation to an application for appointment of arbitrators under Section 11, therefore, the Bombay High Court was bound by the decision of the Supreme Court in TDM Infrastructure.

Should this judgment be upheld, another potential issue that may arise is that since the arbitrability of a dispute is determined by the law of the seat, it would not be unimaginable for Indian parties to refer disputes, which would otherwise not be arbitrable in India, to binding arbitration merely by choosing foreign seat.

In the meanwhile, this judgment would come as some relief for Indian companies (especially subsidiaries of foreign companies) that may have unwittingly entered into arbitration agreements providing for a foreign seat and a foreign substantive law, with other Indian parties; perhaps unaware of the complexities surrounding this issue. At the very least, enforcement of such award still remains untested and may prove to be a challenge. In light of the contentious point of law and the various issues, it is expected that this matter may find its way before the Supreme Court in due course. The judgment of the Supreme Court is eagerly awaited in this respect.

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¹ First Appeal 310 of 2015

² (1999) 7 SCC 61

³ (2011) 8 SCC 333

⁴ 2014 (5) SCC 1

⁵ 2013 ARBLR 456 (SC)

⁶ (2012) 9 SCC 552

⁷ Arbitration Application 197 of 2014

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