Legal alerts

Litigation

Whether two Indian parties can choose a foreign seat of arbitration? An unsolved mystery.

On August 24, 2016, the Hon'ble Supreme Court upheld the judgment of the High Court of Madhya Pradesh in the case of *Sasan Power Limited versus North America Coal Corporation India Private Limited*[1] that allowed two Indian parties to choose a seat of arbitration outside India.

The judgment of the Supreme Court pertains to the much debated arbitration clause in the agreement entered into between Sasan Power Limited (Sasan), North American Coal Corporation (NAC) and its wholly owned Indian subsidiary North America Coal Corporation India Pvt Ltd (NACC). The clause provides for the seat of arbitration and the governing law of the contract to be of United Kingdom (UK).

Pursuant to the disputes between the parties, NACC requested for reference of disputes to arbitration in the year 2014. However, Sasan filed a suit in the District Court for passing a decree of declaration that the governing law and arbitration agreement be declared as null, void, inoperative and unenforceable as the agreement is governed by a foreign law. The Court dismissed the Suit and referred the dispute to arbitration in accordance with the arbitration agreement.

Aggrieved by the said order, Sasan appealed before the High Court of Madhya Pradesh. The High Court considered the nature of the agreement, whether it could be termed as an agreement pertaining to an international commercial arbitration subject to jurisdiction of the High Court or the Courts in India or an arbitration covered under the provisions of Part II of the Arbitration Act, in which case Section 45 of the Arbitration Act would apply. Further, the Court considered the principle of party autonomy, the basic principle on which the law of arbitration resides. The Court observed that merely because the arbitrators are situated in a foreign country, cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. The Court observed that the present arbitration is neither a domestic arbitration nor an international commercial arbitration, and therefore Section 28 of the Arbitration Act cannot be relied upon. The Court further observed that once the parties choose to have the seat of arbitration in a foreign country, then in view of the provisions of Section 2(2) of the Arbitration Act, and Section 28 of the Arbitration Act, Part I of the Arbitration Act will not apply and where the arbitration is not an international commercial arbitration. If Part I of the Arbitration Act does not apply, and if the agreement in question fulfils the requirement of Section 44 of the Arbitration Act, then Part II of the Arbitration Act would apply. The High Court observed that in view of the seat of arbitration, so also the nationality of parties, the arbitration is classified to be an 'international arbitration', and the governing law is also determined on the basis of the seat of arbitration. Therefore, the Court held that based on the seat of arbitration, the two Indian companies/parties could arbitrate outside India, and accordingly dismissed the appeal.

Thereafter, Sasan approached the Supreme Court. The Supreme Court upheld the judgment of the High Court but did not provide an in-depth analysis for upholding this ruling. The Supreme Court simply observed that the agreement in dispute was a tri-partite agreement between Sasan, NAC and NACC. Since NAC was not discharged of its rights and obligations under the original agreement and it being a foreign party, there is a "foreign element" in the said agreement.

Though, the Supreme Court did uphold the judgment of the High Court but restricted its judgment to the nature of the agreement in the present dispute and hence did not settle the issue in hand. Therefore, there is still an uncertainty as to whether two Indian parties can have a seat of arbitration outside India and whether they can be governed by the law of any other country except India.

[1] First Appeal No : 310 of 2015

***M/s. Industrial Promotion & Investment Corporation of Orissa Ltd. v. New India Assurance Company Ltd. & Anr.*, Civil Appeal No. 1130 of 2007, decided by the Supreme Court of India on 22 August 2016**

Brief Facts:

1. The Appellant had entered into contracts of insurance with the Respondent Insurance Company for insuring the assets taken over from another company which had failed to repay the loan extended to it. The policy which was called into question in this case was the Burglary and House Breaking Policy for which the Appellant had insured itself for a sum of INR 46,00,000.
2. When the seized assets were put for auction by the Appellant, it was found that some parts of the plant and machinery were missing from the factory premises and an FIR was registered for the same. The Appellant also informed the Respondent Insurance Company and claimed the loss caused to it. The Respondent Insurance Company repudiated the claim on grounds that the said loss did not fall within the purview of the insurance policy.
3. Accordingly, the Appellant moved a compensation application under the Monopolies and Restrictive Trade Practices (MRTP) Act which was rejected by the MRTP Commission. It was against this order of the MRTP Commission that the Appellant filed an appeal before the Supreme Court of India.

Judgment:

After deliberating upon the facts of the case and the precedents on the issues raised in the instant case, the Hon'ble Supreme Court opined as below:

1. The Apex Court agreed with the arguments raised by the Respondent Insurance Company and upheld the order passed by the MRTP Commission wherein the Appellant's claim was rejected. This was because the Appellant had not placed anything on record to prove that the theft in the instant case was preceded by violence which is a prerequisite as per the precedents. The Hon'ble Court relied on the well settled principle of law that there is no difference between a contract of insurance and any other contract, and that it should be construed strictly without adding or deleting anything from the terms thereof.
2. With regards, to the rule of '*contra proferentem*', the Hon'ble Court observed that the Common Law rule of construction '*verba chartarum fortius accipiuntur contra proferentem*' means that ambiguity in the wording of the policy is to be resolved against the party who prepared it. The Hon'ble Court reiterated the position of law as laid down by the Apex Court in the judgment of **General Assurance Society Ltd. vs. Chandmull Jain and Anr. [1966] 3 SCR 500** wherein it was held that there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of *uberima fides*, i.e. against the company in case of ambiguity or doubt. It was further held in the said judgment that the duty of the Court is to interpret the words in which the contract is expressed by the parties and it is not for the Court to make a new contract, however reasonable.
3. Finally, the Hon'ble Court, relying on the judgment of **United India Insurance Co. Ltd. vs. Orient Treasures (P) Ltd. (2016) 3 SCC 49**, held that that since there was no ambiguity in the relevant clause of the insurance policy, the rule of '*contra proferentem*' was not applicable in the instant case.