TWO INDIAN PARTIES CAN NOW HAVE A FOREIGN SEAT OF ARBITRATION – WILL THIS HOLD!

Sasan Power Limited v. North America Coal Corporation

The often debated question of whether two (or more) Indian parties can opt for a foreign seat of arbitration has surfaced again. The Madhya Pradesh High Court (the "**MP HC**") has, in the case of *Sasan Power Limited v. North American Coal Corporation* (the "**Sasan Case**"), held in the affirmative. The Sasan Case pertains to a dispute which arose from the termination of a contract, facts of which are briefly stated below:

- Sometime in 2009, Sasan Power Limited ("**Sasan Power**"), an Indian company engaged in the business of generating electricity through an electric power plant in Sasan, Singrauli District, Madhya Pradesh, India, entered into an "Association Agreement" (the "**Agreement**") with the North American Coal Corporation ("**NACC-US**"), an American company, for the purposes of mine development and operation. The Agreement, *inter alia*, provided that the governing law would be that of the United Kingdom, and any disputes touching the Agreement would be resolved by arbitration under the rules of the International Chamber of Commerce ("**ICC**") with the seat being London.

- Sometime in 2011, NACC-US assigned all its rights and liabilities under the Agreement to its Indian subsidiary, North American Coal Corporation India Private Limited ("**NACC-India**").

- In 2014, certain operational disputes arose as regards the activities stipulated under the Agreement, and NACC-India terminated the Agreement and filed a request for arbitration with the ICC claiming a compensation of INR18,259,301.

- In response, Sasan Power filed its objection to the initiation of the arbitration by NACC-India.

- Additionally, Sasan Power filed a suit before the District Court in Singrauli (the "**District Court**") seeking an anti-arbitration injunction to restrain NACC-India from continuing the arbitration proceedings filed with the ICC. The District Court granted the interim injunction. Apparently, the injunction was granted by the District Court *qua* NACC-India, although this is not fully clear from the MP HC's decision.

- Thereafter, NACC-US filed another request for arbitration with the ICC, and consistent with its previous stance, Sasan Power again opposed the request for arbitration and applied to the District Court for an extension of the interim injunction granted in its favour *qua* NACC-US. The District Court extended the interim injunction.

- Subsequently, NACC-India filed an application with the District Court, under Section 45 of the Arbitration and Conciliation Act, 1996, (the "**1996 Arbitration Act**") requesting a dismissal of the suit filed by Sasan Power. In addition, NACC-India filed an application for revocation of the interim injunction under which NACC-India was restrained from continuing with the arbitration instituted before the ICC.

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- The District Court allowed the applications filed by NACC-India and vacated the interim injunction. In addition, the suit filed by Sasan Power was also dismissed, and the parties were directed to have the dispute resolved through the mutually agreed arbitration procedure under the Agreement. Aggrieved by the foregoing decision of the District Court, Sasan Power filed an appeal before the MP HC.

In the appeal, Sasan Power, *inter alia*, argued that the judgment of the District Court ought to be overturned on the ground that the arbitration clause in the Agreement (after being assigned to NACC-India) automatically stood invalidated as two (2) Indian parties could not (allegedly, under India's public policy) be permitted to choose a foreign seat of arbitration.

According to Sasan Power, the order of the District Court dismissing the suit was premised on an invalid arbitration clause and lacked legal sanctity.

On the other hand, NACC-India, *inter alia*, argued that the judgment of the District Court merited no intervention. NACC-India's contention rested on the foundation that two Indian parties could choose a foreign seat for arbitration and, as such, neither the public policy of India nor any rule embodied in the 1996 Arbitration Act, was violated.

After hearing various submissions made by both sides, the MP HC ruled in favour of NACC-India and upheld the decision of the District Court.

Our Comments on the MP HC's Findings

There is no bar (express or implied) either under the Arbitration Act or any other Indian law which prohibits two (or more) Indian parties from choosing a foreign seat of arbitration. In fact, the Arbitration Act provides ample room for parties to act autonomously in this regard.

The arguments advanced by Sasan Power before the MP HC were based on the decision of a single judge of the Supreme Court of India (the "**Supreme Court**") in *TDM Infrastructure v. UE Development India Pvt. Ltd.* ((2008) 14 SCC 271) (the "TDM Case"). In the TDM Case, all the parties to the arbitration agreement were Indian, and the seat of arbitration was New Delhi. Here, it was, *inter alia*, held that when the seat of arbitration is within India and if all the parties to the arbitration agreement are Indian, the parties cannot derogate from the substantive laws of India; an admittedly correct restatement of the law contained in Section 28(1) of the 1996 Arbitration Act. Therefore, the Supreme Court did not have to decide on the issue whether it was permissible for two Indian parties to choose a foreign seat, and this matter remained open. The TDM Case veered more towards deciding the application of Section 28(1) of the 1996 Arbitration Act based on the nationality of the parties in view of the *prima facie* facts placed before the Supreme Court, and did not have any application or correlation to the facts and circumstances of the Sasan Power case before the MP HC.

As a contra, NACC-India premised its submissions before the MP HC by relying on the decision of the Division Bench of the Supreme Court in *Atlas Export Industries v. Kotak and Co.* (AIR 1999 SC 3286) albeit under the Arbitration Act, 1940 ("**1940 Arbitration Act**"), wherein it was held that an arbitration agreement between Indian parties was not void for want of conformity with Indian public policy merely because it provided for the arbitration to be conducted abroad.

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Relying on: (i) the decision of the Supreme Court in the case of *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* ((2011) 8 SCC 333) which draws a comparison between the 1996 Arbitration Act and the 1940 Arbitration Act and concludes that there is not much difference in the two (2) statutes; and (ii) the law of precedence as provided by the Supreme Court in the case of *R. Antulay v. R.S. Nayak* ((1988) 2 SCC 602), the MP HC followed the Supreme Court's decision in *Atlas Exports* and concurred with the argument propounded by NACC-India.

It is also relevant to note that in *Reliance Industries Limited v. Union of India* (AIR 2014 SC 3218), all the parties to the arbitration agreement were Indian; however, the seat of arbitration was London. In this case, no arguments were raised as regards the impermissibility of two (2) Indian parties choosing a foreign seat of arbitration. Further, even the Supreme Court did not make any observation on this issue. If the idea of having a foreign seated arbitration between Indian parties was so averse to the collective conscience of the Indian State, then the Supreme Court would have certainly taken cognizance and would have recorded its demurral. That, however, has not been the case, as yet.

Therefore, until there is a decision from the Supreme Court ruling to the contrary or the Parliament makes legislative changes declaring that, by law, foreign seated arbitrations between Indian parties are illegal, in our view, Indian parties can choose a foreign seat of arbitration.

Notwithstanding, it is hereby clarified that if a contract (whose terms are to be performed in India) is exclusively entered into between Indian parties, then the substantive law governing such contract must mandatorily be Indian law. This is because a contract cannot be performed in India in (possible) violation of its own laws (as was decided in the case of *Societa Anonmina Lucchesse Olli E Vini Lucca v. Gorakhram* (AIR 1964 Mad 532).) In other words, even if the arbitration (between two Indian parties) is to be seated outside India, the governing law of such contract cannot be a foreign law. Although the MP HC is silent on this issue in the Sasan Case, in our view, the MP HC ought to have clarified on this point as well, especially because the Agreement between Sasan Power and NACC-India, despite having to be performed in India, was governed by English law. This raises doubts about the eventual enforcement of the award in India, and it is quite likely that an Indian court may refuse to enforce the award because the enforcement of the award may be seen as a submission of the Indian legal system *qua* the Indian entities to a foreign law. In other words, if a court enforces the award, it will, effectively, endorse the application of the laws of a foreign country to a contract to be performed in India and purely between Indians. Such an endorsement may run contrary to the sovereignty of India, which requires that the performance of contracts between Indian parties on its soil must mandatorily be governed by its own laws.

Therefore, although NACC-India may have succeeded in its case before the MP HC; the success may only be transitory.

Implications

This decision of the MP HC is a welcoming one for foreign entities that have subsidiaries incorporated and controlled in India. Such Indian subsidiaries of foreign entities can choose to elect a foreign seat of arbitration when contracting with an Indian party.

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The main advantage of submitting to a foreign seat (for e.g., Singapore, London, Paris, etc.) is the efficiency, sophistication and the state-of-the-art infrastructure provided by those jurisdictions for holding and conducting institutional arbitrations. Moreover, choosing a foreign seat can also help in avoiding frivolous litigation before Indian courts, which can be time consuming. Besides this, challenging the arbitral award under Section 34 (in Part-I) of the 1996 Arbitration Act impedes the enforcement of the arbitral award because Section 36 (in Part-I) of the 1996 Arbitration Act provides for a self-operating stay on the execution of an award if such a challenge is made. On this issue, the Arbitration and Conciliation (Amendment) Ordinance, 2015 (the "**Arbitration Ordinance**") promulgated by the President of India on 23 October 2015 has altered this position to some extent. The Arbitration Ordinance, which amends the 1996 Arbitration Act, provides that a challenge to the arbitral award under Section 34 of the Arbitration Act will *per se* not operate as a self-operating stay on the enforcement of the award. There are other changes that have been brought about by the Arbitration Ordinance, which we will cover in our next update.

It should be noted that the Arbitration Ordinance which has been promulgated by the President of India during the recess of the Parliament will lapse if it is not accepted/passed by both houses of the Parliament within a period of six (6) weeks from the start of its next session. This essentially means that, if the Arbitration Ordinance is not passed/accepted by the Parliament within the requisite time, it will lapse; thus reviving the position that existed prior to the Arbitration Ordinance. On the other hand, if the Arbitration Ordinance is passed by the Parliament, this will certainly improve the arbitration regime in India; boost the sentiment of foreign investors; and make India an arbitration friendly jurisdiction. However, to make India a truly world-class arbitration hub, in addition to statutory changes, we require (i) institutional rules, (ii) arbitration centers and institutions, (iii) an eminent panel of arbitrators associated with institutions, and (iv) sophisticated infrastructure and facilities. The government and the Indian legal fraternity will have to focus on all of this if it wants to improve the ease of doing business in India.

Our disputes partner, Neerav Merchant, has discussed the Sasan Case on a leading business news channel.

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