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The Dilemma: Can Two Indian Parties Choose a Foreign Seat of Arbitration?

Introduction

In an Arbitration proceeding, there are generally three branches of law that apply. First, the substantive law, that governs the contract between the parties. Second is the procedural law, that guides the procedure of arbitration. Third is the law which governs with the arbitration agreement. Even though the procedural law and the law governing the arbitration agreement stem from the same legislation i.e. The Arbitration and Conciliation Act, 1996, it is important to divide them into categories for a better analysis of this unsettled issue. Almost every country has their own set of rules for arbitration. It is well settled law under Article 20 of the UNCITRAL model law that the curial law or the procedural law shall apply of that nation where the place (seat) of arbitration lies. It is also settled that if it is a case of international commercial arbitration then it is for the parties to choose the seat of their choice. But it is not settled due to certain conflicting decisions of the court that, whether two Indian parties could choose a foreign seat of arbitration or not. A recent controversy came into light when Supreme Court in a case called *Sasan Power Limited v. North American Coal Corporation India Pvt.* Ltd[1] when asked the question that whether two Indian parties could be allowed to choose a foreign seat of arbitration, refused to comment upon the question stating that it was not the issue in the present case and the same had found its way into the written submissions by oversight.[2] The decision has been criticized by various scholars who say that it was a good opportunity for the Supreme Court to settle the issue and put it to bed but the court failed to do so.

I shall now discuss what the position of Indian courts is regarding this issue and base my discussion on two judgements one of the Bombay High Court[3] and the other of Madhya Pradesh High Court.[4] I shall analyze the two judgements and then present my comments on the issue.

Bombay High Court

The Bombay High Court in *Addhar Mercantile Pvt. Ltd. v Shree Jagdamba Agrico Exports Private Ltd.*[5] held that two Indian parties could not choose a foreign seat of arbitration. The arbitration clause read "Arbitration in India or Singapore and English law to be (sic) apply." The court while arriving at its decision relied heavily on the decision of *TDM Infrastructure Pvt Ltd v. UE Development India Ltd*[6] which said that if two Indian parties choose a foreign seat of arbitration it would go against public policy and therefore the parties should not be allowed to do the same. One can infer from the decision that the court while stating that because the agreement was void due to it going against public policy. One has to note that Section 23 of the Indian Contract Act prohibits any contract which goes against the public policy.[7] Therefore one can infer that the court tried to state that Arbitration agreements are subject to the Indian Contract Act, 1872, however one will need more explicit ruling by the court to assert this proposition.

The basic flaw with relying on the decision of *TDM Infrastructure* is that the issue raised in this case was an issue related to Section 11 of the Arbitration and Conciliation Act 1996 and it has been clearly held by the Supreme Court in *State of West Bengal v Associated Contractors*[8] that any decisions made with regards to Section 11 of the act would have no precedential value as it would not be a decision by a court of record.[9] Also India follows the tradition of precedents i.e. the decisions have to be read in the context of questions raised before it. The issue in *TDM Infrastructure* was never whether two Indian parties could choose a foreign seat or not, the issue was only regarding the appointment of an arbitrator. Hence the dicta in *TDM Infrastructure* regarding the seat of arbitration is not ratio but only obiter and hence not binding. Another reason why *TDM Infrastructure* could not be followed is because the decision in that Reliance Industries v. Union of India, (2014) 7 SCC 603e laid emphasis on Section 28 of the Arbitration Act. However, it has been made clear in the *BALCO*[10] judgement that Section 28 deals with the substantive aspect of the contract and has no relation to the seat of arbitration.

Madhya Pradesh High Court

As recently in September 2015, In *Sasan Power v. North American Coal Company*,[11] the issue came up before the Madhya Pradesh High Court that weather two Indian parties could choose a foreign seat of arbitration..

The court in this case held that the two Indian parties could choose a foreign seat of arbitration. The court here said that the Indian Arbitration Act follows a seat-centric approach rather than a party-centric approach. The court said in a party centric approach the nationality of the party matters but in a seat centric approach it is the choice of the seat which matters and the nationality of the parties whether Indian or not does not matter.

While arriving at its decision the court firstly pointed out the reasons why *TDM Infrastructure* could not be followed. The reasons given by the court were same as discussed in the previous Section. Further the court relied on *Atlas Exports v. Kotak Company*[12] where both the parties were Indian and the arbitrator was situated in London. The court in the case gave importance to the principle of freedom of contract and held that if the parties had made the decision regarding the arbitration agreement without coercion then the agreement would be valid enough. The court in this case said, "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"[13]. But there is also an anomaly with this decision. This was a decision made in accordance with the 1940 Act and there have been substantial changes in the 1996 Act if compared to the 1940 Act. However, in *Fuerst Day Lawson Ltd. v Jindal Exports*[14], it has been held that cases decided in the context of the 1940 Act can be used for the purpose of interpreting the 1996 Act. On the free will of parties I would like to list another decision here i.e. *Chatterjee International v Haldia Petrochemicals*[15] where the court held that the court should always try to give importance to the free will of the parties. The subject matter in our case might be very much different but as regards to free will is concerned, it is a common law principle which the courts should try to stick to.

But there is a serious concern with the applicability of *Sasan Power* decision as it was this decision only which was challenged in the Supreme Court and the refused to answer this question stating that this issue never arose in the first place. The Supreme Court has defended the doctrine of merger in a number of cases where it has said that when a decision from a lower court is challenged in the higher court, the verdict of the higher court is to be taken as the only verdict in the case. So when we apply doctrine of merger to the present Madhya Pradesh High Court case i.e. *Sasan Power*, the case holds no precedential value.

The Reliance Judgement

It is important to bring at this point the judgement in *Reliance Industries v. Union Of India*[16]. The agreement was actually a tripartite agreement with one of the three parties being foreign. The contract provided for the seat to be London and the substantive law to govern the contract to be Indian.

A dispute arose between the Union of India and Reliance Industries. It was contended that, with both the parties being Indian an arbitration agreement allowing London seated arbitration for two Indian parties would go against the public policy of India and hence should be void. It was contended that, with both the parties being Indian an arbitration agreement allowing London seated arbitration for two Indian parties would go against the public policy of India and hence should be void. The court in this case once again gave primacy to the principle of freedom of contract and held that even though the parties were Indian arbitration would take place according to English Laws because the seat of arbitration is in London. It is important to note that in this case the court also held the substantive law to be Indian and said that the London court will have to apply the Indian Substantive law.[17] With regards to enforcement the court went on to state and rejected the conclusion of the High Court that since the Indian substantive law has to be applied, Part I of the Act will apply therefore giving the Indian Courts enforcement jurisdiction. The court stated that that an application regarding enforcement would be made in the jurisdiction where the seat is located. The same award could be then enforced in India as a foreign award. Therefore the enforcement jurisdiction lies where the seat of the arbitration is located or in other words according to the law governing the arbitration agreement.

Conclusion

It appears that currently there is no answer to this question. One concrete case which held that the two parties could choose a foreign seat if arbitration was *Sasan Power* (High Court) but the same holds no precedential due to the application of doctrine of merger. One cannot be sure of the application of the *Reliance* judgement because the agreement was a tripartite agreement even though the dispute was between two Indian parties. On the other side various decisions in *Addhar, TDM Infrastructure* have many concrete flaws in their application. In my view when there is no clarity on an issue such as this one should resort to the starting point. The starting point of the present legal structure is the common law. So when an answer is not found in case laws, as Dworkin said in his book "Law's Empire"[18] the answer to these question lies in general common law principles. To tackle this particular question one should give importance to the common law principle of freedom of contract. So it should be free for the parties which procedural law they want to follow. Also the point of the seat-centric scheme of the act mentioned in the *Sasan Power* holds relevance while looking at the overall framework of the act. Also it is important to notice the pessimistic and lethargic approach of the Supreme Court which refused to answer the question and lost an opportunity to settle the matter once and for all. The uncertainty regarding this point of law leaves hanging the faith of numerous contracts which have been entered by Indian parties while they have chosen the seat to be outside India to settle any dispute.

The *Reliance* judgement tried to settle the matter to an extent by explicitly allowing the foreign seated arbitration. But as discussed above that also leaves scope for ambiguity as the agreement was a tripartite one in which one of the parties was a foreign entity which could have had a major impact on the way the Supreme Court approached the issue. An authoritative ruling on the same issue is awaited.

In my opinion the court should not repeat what it did in the case *Sasan Power* (Supreme Court) i.e. lose out on an opportunity to settle the matter when the High Court had shown the way for the same. Considering the ethos of the law of arbitration which is freedom of parties I think the court will allow Indian parties to choose a foreign seat of arbitration. As arbitration is contract based dispute settlement mechanism, the concept of freedom of contract should be given utmost importance and the parties should be free to choose the seat of arbitration.

But as time has progressed there have been various changes in the Indian law. The object of the 2015 amendment was to make India an arbitration favorable jurisdiction. The reason why Indian parties wanted to choose a foreign seat of arbitration was due to the inefficiency the old act possessed but with substantial amendments with the 2015 amendments, the legislature has tried to make India an arbitration friendly jurisdiction and we can hope that in the future Indian would not want to choose any other place as the seat of arbitration. One must understand that choosing a foreign seats of arbitration has its own logistical costs attached to it which the parties might not want to incur if an arbitration friendly environment can be available in India.

Endnotes –

1. Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd, (2016) 10 SCC 813
2. Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd, (2016) 10 SCC 813, 830
3. Addhar Mercantile Pvt. Ltd. v Shree Jagdamba Agrico Exports Private Ltd, (2015) SCC OnLine Bom 7752
4. Sasan Power v. North American Coal Corporation India Pvt. Ltd, (2015) SCC OnLine MP 7417
5. Addhar Mercantile Pvt. Ltd. v Shree Jagdamba Agrico Exports Private Ltd, (2015) SCC OnLine Bom 7752
6. TDM Infrastructure Pvt Ltd v. UE Development India Ltd, (2008) 14 SCC 271
7. TDM Infrastructure Pvt Ltd v. UE Development India Ltd, (2008) 14 SCC 271, 279
8. State of West Bengal v Associated Contractors, (2015) 1 SCC 32
9. State of West Bengal v Associated Contractors, (2015) 1 SCC 32, 43
10. Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc. etc. (2012) 9 SCC 552
11. Sasan Power v. North American Coal Company, (2015) SCC OnLine MP 7417
12. Atlas Exports v. Kotak Company, (1999) 7 SCC 61
13. Ibid.
14. Fuerst Day Lawson Ltd. v Jindal Exports, (2001) 6 SCC 356
15. Chatterjee International v Haldia Petrochemicals, (2014) 14 SCC 574
16. Reliance Industries v. Union Of India, (2014) 7 SCC 603
17. Reliance Industries v. Union Of India, (2014) 7 SCC 603, 639
18. Ronald Dworkin, Law's Empire (1988).