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WHETHER INDIAN PARTIES CAN CHOOSE FOREIGN LAW TO SETTLE DISPUTES?

The question of whether or not Indian parties can choose foreign law to resolve disputes through arbitration has been much debated. While some argue that this is possible since the choice of the party to determine the choice of law must be recognised; the more conservative argument has been that Indian parties cannot agree to resolve disputes choosing a foreign law, as that would mean contracting out of Indian Law, and therefore opposed to public policy. There has been no conclusive judgment deciding this specific issue, though there has been some observations in this regard in the case of **TDM Infrastructure Private Limited v UE Development India Private Limited**, (2008) 14 SCC 271, ("**TDM Infrastructure case**"). Recent judgment of the Bombay High Court in the case of **Addhar Mercantile Private Limited v Shree Jagdamba Agrico Exports Pvt Ltd** (Arbitration Application No 197 of 2014 along with Arbitration Petition No 910 of 2013) has considered this pertinent issue.

Addhar Mercantile Private Limited("**Addhar**") had filed an application seeking appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996, (the "**Act**") as well as Section 9 of the Act for interim relief(s) against Shree Jagdamba Agrico Exports Pvt Ltd ("**Jagdamba**") before the Bombay High Court. The arbitration clause read as follows "23 Arbitration in India or Singapore and English Law to apply". Jagdamba opposed the applications contending that the parties are governed by English Law and the venue of arbitration should be Singapore and that therefore Bombay High Court had no jurisdiction to decide the applications. It was argued that if Bombay High Court exercised jurisdiction it would be violative of Section 28 (1) (a) of the Act. It was contended that two Indian parties could agree to resolve the dispute through foreign law. Addhar on the other hand contended that since the arbitration clause stated that the arbitration could take place in India or Singapore and considering the fact that both parties are Indian, Bombay High Court would have the jurisdiction. It was argued that two Indian parties could not derogate from Indian Law and submit to a foreign law to resolve disputes in a foreign territory and that this would be opposed to public policy.

The Bombay High Court considered the arguments and on facts held that since the arbitration clause stated that arbitration could take place in India or Singapore, and since the both the parties are from India and the agreement was executed in India, the disputes would have to resolved through arbitration in India. Interestingly, while dealing with the arguments of both parties on the issue of whether two Indian parties can agree to foreign law, the court relied on some observations in the TDM Infrastructure case, and held that since both the parties are Indian, they cannot derogate from Indian Law. Therefore, the choice of two Indian parties to choose foreign law in a foreign seated arbitration was not recognised.

This judgment may not be conclusive as there are other judgments of the Supreme Court recognising foreign seated arbitration between Indian parties. This issue needs to be decided by the Supreme Court to give clarity and finality to this issue.

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