Another Milestone For Foreign Seated Arbitration

The Hon'ble Supreme Court of India paves further impediment to foreign seated arbitration by clarifying that the plea of fraud cannot operate as a bar to foreign seated arbitration.

The Supreme Court in its earlier decision of N. Radhakrishnan v. Masestro Engineers &Ors[1] (**Masestro**) had taken a view that where the case relates to allegations of fraud and serious malpractices, in such a situation, the issue can be resolved settled in Court through furtherance of detailed evidence by either parties and such a situation cannot be adjudicated by an Arbitrator.

The Hon'ble Supreme Court recently in the case of World Sport Group (Mauritius) Ltd ("**WSG**") v. MSM Satellite (Singapore) Pte. Ltd ("**MSM**")[2] has restricted the aforesaid view only to domestic arbitration and has held that allegation of fraud in a foreign seated arbitration cannot operate as a bar to refer the parties to arbitration. Further, the Court held that in case of a foreign seated arbitration, the Court is obliged to refer the parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed[1].

Briefly the facts in the case was that there was a Deed for Provision of Facilitation Services between WSG and MSM. As per the arbitration agreement, the Felicitation Deed was governed by English Law. The arbitration was to be seated in Singapore under the ICC Rules. MSM terminated the contract on ground of fraud and misrepresentation and filed the Suit before the Bombay High Court inter alia for recovery of the amounts from WSG. ICC issued notice to MSM on request of WSG. MSM filed anti-arbitration injunction on ground of fraud vitiating the arrangement between MSM and WSG. The learned Single Judge of the Bombay High Court dismissed the application for temporary injunction of MSM saying that it would be for the arbitrator to consider whether the Facilitation Deed was void on account of fraud and misrepresentation and that the arbitration must, therefore, proceed and the Court could not intervene in matters governed by the arbitration clause. MSM challenged the order of the order of the learned Single Judge before the Division Bench of the Bombay High Court and by the impugned order, the Division Bench of the Bombay High Court allowed the appeal, set aside the order of the learned Single Judge and passed an order of temporary injunction restraining the arbitration by ICC.

The Supreme Court relying upon Section 45 of the Arbitration Act read with the jurisprudence on the New York Convention Awards stated that as the very language of Section 45 of the Act clarifies the word "agreement" would mean the agreement

referred to in Section 44 of the Act. Clause (a) of Section 44 of the Act refers to " agreement in writing for arbitration to which the Convention set forth in the First Schedule applies. The First Schedule of the Act sets out the different Articles of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 Thus, from clauses 1, 2 and 3 of the New York Convention as set out in the First Schedule of the Act that the agreement referred to in Section 44 of the Act is an agreement in writing under which the parties undertake to submit to arbitration all or any differences which havearisen or which may arise between them. Thus, the court will decline to refer the parties to arbitration only if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

This is a positive judgment as in case of International Commercial Arbitration. Earlier an Indian Party, relying upon Masestro, could succeed in seeking the anti-arbitration injunction. This judgment is a positive development and will restore the faith of foreign investors in the arbitration process in India.

1. (2010) 1 SCC 72
2. Civil Appeal No. 895 of 2014 (Arising out of S.L.P. (C) No. 34978 of 2010)
3. Section 45 of the Arbitration and Conciliation Act, 1996.

Damages Under The Indian Laws

Under the Indian laws a contract is defined as "*an agreement enforceable by law*"[4]. One of the important Latin principles on which the law of contract is based is '*Consensus ad idem*' which means meeting of minds. A contract cannot be treated as complete unless there is an '*offer*' by one party and an '*acceptance*' by the other party. If the parties to a contract abide by all the terms and conditions of the contract, a cause of action for breach would never arise. Breach often occurs due to the failure of one party to perform its obligations under a contract. In such a scenario the party committing the breach is required to pay damages to the aggrieved party. Damages under the Indian laws are governed by the Indian Contract Act, 1872 (the "ICA"). The word 'Damages' means "*amonetary compensation that is awarded by a court in a civil action to an individual who has been injured through the wrongful conduct of another party*"[5].

Damages may be calculated on the basis of legal principles enacted in the statute or even the parties may during the execution of a contract decide that in case of a breach, the defaulting party shall be liable to pay a stipulated amount or forfeit the amount which the defaulting party would have already deposited with the injured party. The amount decided shall be a reasonable compensation and a genuine "*pre-estimate of damages*" known as 'Liquidated Damages'. The whole idea behind awarding such damages is to put the aggrieved party in the same position as it would have enjoyed if the contract had been performed.

In India, principlespertaining to assessment and award of compensation in case a breach of contract are laid down in Sections 73 and 74 of the ICA.

Section 73 of the ICA provides for "*Compensation for loss or damage caused by breach of Contract"* which means that in the event of a breach of contract the aggrieved party is entitled to be compensated by the party causing such breachbut the breach should have arisen as a natural consequence or the parties had expected such a situation to arise while entering into the contract. Under this Section the compensation is not provided for any remote or indirect loss or damage caused to a party.

Illustration

A contracts to make some repairs in B's house in a specific manner as stated in the contract. B pays an advance to A for starting the work. After completion of the work B observes that the work does not conform to the specifications stated in the contract. Therefore, A is liable to pay B the cost of repairs in order to conform it to the specifications of the contract.

The Supreme Court of Indiain *Murlidhar Chiranjilal v. Harish Chandra Dwarkadas*[6]*,*set out principles based on which damages shall be calculated in the event of a breach of a contract for sale of goods. It was held –

"(1) that it is well settled that the two principles relating to compensation for loss or damage caused by breach of contract as laid down in s. 73 of the Indian Contract Act, 1872, read with the explanation thereof, are (i) that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed, but (ii) that there is a duty on him of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps."

In *Pannalal Jankidas vs Mohanlal*[7]*,* Patanjali Sastri J. of the Supreme Court of India observed that "*the party in breach must make compensation in respect of the direct consequences flowing from the breach and not in respect of loss or damage indirectly or remotely caused*". He further provided that "*the rule is based on the broad principle of restitutio in integrum, that is to say, that the party who has suffered the loss should be placed in the same position, as far as compensation in money can do it, as if the party in breach had performed his contract or fulfilled his duty*".

Section 74 of the ICA provides for "*Compensation for breach of contract where penalty stipulated for"*which means that when a specific amount is mentioned in a contract as the amount payable in the event of breach or any other stipulation

regarding a penalty is provided in a contract then the aggrieved party is entitled t get the amount without proving the actual loss or damage caused. But the compensation awarded should be reasonable and in no way it should exceed the amount mentioned in the contract. Section 74 of the ICA makes an attempt to cut across the general principle in the English Common Law where a genuine pre-estimate of damages by mutual consent is considered as liquidated damages and penalty is considered as a an act of terrorizing. Hence, the courts refuse to enforce it, awarding the aggrieved party just the reasonable compensation. The Indian courts on the contrary do not distinguish between liquidated damages and penalty by just awarding a reasonable compensation to the aggrieved party which shall not exceed the amount mentioned the contract.

The Supreme Court of India in the landmark judgment of *Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.*[8]laid down certain guidelines for deciding a reasonable compensation in the event of breach of a contract, which are reproduced as follows:

"*(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;*
(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.
(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.
(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

In *Steel Authority of India Vs. Gupta Brothers Steel Tubes Ltd.*[9], the Supreme Court of India observed that"*There is noimpediment nor we know of any obstacle for the parties to a contract to make provision of liquidated damages for specific breaches only leaving other types of breaches to be dealt with as unliquidated damages. We are not aware of any principle that once the provision of liquidated damages has been made in the contract, in the event of breach by one of the parties, such clause has to be read covering all types of breaches although parties may not have*

intended and provided for compensation in express terms for all types of breaches."

The purpose of putting liquidated damages clause in contracts is to ascertain a fixed and reasonable compensation at the time of drafting of the contract and reduce the burden and expense of assessment of actual damages. It also gives an assurance to the parties to the contract that the obligations under the contract will be complied with.There are many landmark judgments which lay down rules and guidelines for providing a reasonable compensation under Sections 73 and 74 of the ICA. Both the sections should be read in conjunction while awarding damages under a contract. It should also be noted that as far as possible the aggrieved party should be placed in the same position as it would have enjoyed if the contract had been performed and reasonable steps should be taken to mitigate the losses.

4. Section 2(h) of the Indian Contract Act,1872
5. http://legal-dictionary.thefreedictionary.com/damages
6. Murlidhar Chiranjilal v. Harish Chandra Dwarkadas (1962) 1 SCR 653
7. AIR 1951 SC 144, 153
8. AIR 2003 SC 2629
9. (2009) 10 SCC 63

Now Indian Companies Can Issue Equity Shares Against Its External Commeercial Borrowings

According to the latest circular issued by the RBI, Indian company who wanted to explore the international market through External Commercial Borrowings (ECB), can now issue equity shares against ECB. However this move come with conditions and pricing guidelines prescribed by RBI from time to time.

The RBI, with regard to pricing guidelines, arrived at a reference rate of exchange to be applied to the amount in foreign currency borrowed or owed by the resident. The liability sought to be converted by company into equity shares must apply an exchange rate prevailing on the date of agreement. Borrower can issue equity shares for a rupee amount less than that arrived by mutual agreement with the ECB lender. The date of conversion of Rupee and a foreign currency can only apply to working out the fair value of equity shares to be issued.

RBI made clear that Indian company whose payable/liability lump sum such as fees royalties are also permitted to be converted into equity shares or other securities to be issued to non- resident, shall apply the principle of calculation of INR equivalent for liability denominated in foreign currency subject to the conditions of respective regulations. The directions contained in this circular have been issued under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act, 1999 (42 of 1999) and is without prejudice to permissions/approvals, if any, required under any other law.

New Corporate Governance Norms Announced By SEBI

The Securities and Exchange Board of India (SEBI), in the year 2013 published a consultative paper on Review of corporate Governance Norms in India which analysed and compared various corporate governance norms listed in Clause 49 of the Listing agreement with the provisions under the Companies Bill, 2012. Since then the Companies Act, 2013 has been enacted and many provisions have been give effect.

In February 2014, SEBI issued further changes to be incorporated in the Listing agreement in order to bring it further in conformity with the provisions of the Companies Act, 2013 and bring in important features relating to board independency, regulating related party transactions with greater stringency, mandating a whistle-blower policy and enhancing disclosure requirements.

The recommendations sought to be implemented by SEBI are outlined hereunder:

Tenure, Appointment of Independent Directors

To begin with the term Nominee directors will no longer be included in the definition of Independent directors under the Companies Act.

Further, presently, as per clause 49, Independent Directors may have a tenure not exceeding, in the aggregate, a period of nine years, on the Board of a company. However, this is only a non-mandatory requirement. Over a period of time, an independent director may develop a friendly relationship with the company and the board and may develop a casual approach, which may affect his envisaged role.

As per voluntary guidelines issued by MCA, an Individual may not remain as an Independent Director in a company for more than six years. A period of three years should elapse before such an individual is inducted in the same company in any capacity. No individual may be allowed to have more than three terms as Independent Director. As per the Companies Act 2013, Independent Directors shall hold office for a term up to 5 consecutive years on the Board of a company, but shall be eligible for re- appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report. He shall hold office for not more than two consecutive terms, but such independent director shall be eligible for appointment after the expiration of three years of ceasing to become an independent director; During the said period of three years, he shall not be appointed in or be associated with the company in any other capacity, either directly or indirectly. According to the reforms announced by SEBI in Feb 2014, this tenure of independent Directors **cannot exceed two 5 year terms**.

Presently the Companies Act provides that a person can hold the position of an

Independent Director in not more than 15 Public Companies. However, having regard to the great degree of commitment expected of this position SEBI proposes that the number of public companies that an individual can be appointed to as an independent director be **limited to 7**. In addition Companies shall disclose the appointment and resignation of all Independent Directors.

Clause 49 of Corporate Governance states that shareholders' resolution shall specify the limits for the maximum number of stock options that can be granted to non-executive directors, including independent directors, in any financial year and in aggregate. However the SEBI reforms plans to stipulate that Independent Directors shall not be eligible to accept stock options from them.

In addition, if an individual is a whole time Director in a listed Company he can only be a Director on 3 boards.

The Reforms also clearly state that the Directors to be appointed by the Promoters cannot be classified as Independent Directors on the Board to avoid conflict of interest and in the interest of ensuring that an objective criteria for their appointment is followed and restricting the influence of promoters and major stakeholders in the decisions taken by the Board of Directors.

Mandatory Disclosure of Remuneration

The Companies Act 2013 makes provisions for a certain limit on managerial remuneration. To prevent exorbitant remuneration in Indian Companies SEBI provides for mandatory disclosure of the Remuneration provided to CEOs and executive directors and related party transactions in conformity with the Companies bill. In order to implement the above provision a Compensation Committee shall be established which is to be led by an Independent Director and is to design a specific Remuneration Policy to be strictly adhered to.

Mandatory Whistleblowing Policy

SEBI has also made it mandatory for companies to put in place an orderly succession plan for appointments to the senior managerial levels and to enact a whistleblowing policy or a vigil mechanism in accordance with the Companies Act to enable the Directors and other employees to report any genuine concerns or malpractices and adequate safeguards against victimization of any such individual who use such mechanism. This will enable greater efficiency and transparency and help protect the interests of the minority of shareholders.

The above reforms are likely to be implemented with effect from October 2014 by SEBI and are of utmost importance for the purpose of achieving global standards of transparency and business ethics in the Indian market and empowering minority shareholders to oversee and approve various policies and transactions.

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Clarification with regard to Section 185 of the Companies Act, 2013

Section 372A of the Companies Act, 1956, specifically exempts any loans made, any guarantee given or security provided or any investment made by a holding company to its wholly owned subsidiary. However, Section 185 of the Companies Act, 2013 prohibits guarantee given or any security provided by a holding company in respect of any loan taken by its subsidiary company except in the ordinary course of business. Vide General Circular No 03/2014, Dated 14/2/2014, the Ministry of Corporate Affairs has clarified that any guarantee given or security provided by a holding company in respect of loans made by a bank or financial institution to its subsidiary company, exemption as provided in clause (d) of sub-section (8) of Section 372A of the Companies Act, 1956 shall be applicable till Section 186 of the Companies Act, 2013 is notified. This clarification will, however, be applicable to cases where loans so obtained are exclusively utilized by the subsidiary for its principal business activities.

Interim Budget 2014 passed in Lok Sabha

The Finance Minister of India presented the Interim Budget 2014 in the Lok Sabha. He said that the

current financial year will end on a satisfactory note with the fiscal deficit at 4.6% and the revenue deficit at 3.3%. There are no substantial changes in the Tax Laws. Excise duty for automobile industry and mobile handsets has been reduced. To encourage domestic production of soaps and oleochemicals, it is proposed to rationalize the customs duty structure on non-edible grade industrial oils and its fractions, fatty acids and fatty alcohols at 7.5%. Inter alia, in order to promote entrepreneurship among the scheduled castes and to provide concessional finance to them, IFCI will set-up a Venture Capital Fund of Rs. 200 crore, which can be supplemented every year.

Government approves M&A Guidelines for Telecom Sector

The government liberalised the merger and acquisition (M&A) guidelines for the telecom sector on allowing telecom companies with a combined market share of 50 per cent to enter such deals paving the way for consolidation in the crowded space. As per new guidelines, the cap for market share has been increased from 40 % to 50 % in a particular circle giving more flexibility to telecom companies to enter into M&As. According to the new norms, acquirers of companies holding 4.4 MHz spectrum allocated at old rate will have to pay to the government the difference between the initial amount and the market

rate determined through the latest auction.

Increase in FDI in Pharmaceutical Sector

The FDI Policy in India authorizes a 100 % FDi in Pharmaceutical Sector both in the automatic route for Greenfield investment as well as in the government route for brownfield investment.

FDI in the Pharmaceutical sector has increased by 86.42%. As compared to US $ 80.32 million in April – October – 2012 period, it is US $ 1081.81 million in April – October 2013.

When seen from the FIPB approval route the FDI inflow has increased from US$ 134.62 Million and US$ 1073.67 Million in April – October 2012 and 2013 respectively.

The Government has taken various measures to ensure affordability of common and generic drugs and to sustain a reasonable level of expenditure on quality research and development in the industry. It has provided for appropriate conditionalities for approval under the government approval route and established mechanisms such as Drug Price Control Order and the National Pharmaceutical Pricing Authority.

Delhi High Court holds "Microsoft" a well- known trademark

The Delhi High Court has ruled that the trademark "Microsoft" is a well-known trademark thereby permanently injuncting others from using the said trademark in relation to similar or dissimilar business. The judgment was delivered by the Delhi High Court in a petition filed by Microsoft Corporation (Microsoft) against Kurapati Venkata Jagdeesh Babu for permanent injunction, restraining infringement and dilution of trademarks, passing off and damages against the Defendant. The Hon'ble High Court further awarded damages to Microsoft amounting to Rs. 5 lakhs.

Liberalizing FDI Policy

The Government has liberalized the FDI Policy opening up various sectors and allowing 100% FDI through automatic route making the Indian market more investor friendly. Government has amended the sectoral caps and/or entry routes in some sectors viz. petroleum & natural gas; commodity exchanges; power exchanges; stock exchanges; depositories and clearing corporations; asset reconstruction companies; credit information companies, tea sector including tea plantations; single brand product retail trading; test marketing; telecom services; courier services and defence.

Government to Allow FIIs, NRIs to invest in insurance sector

Foreign institutional investment and

Non- resident Indian can now invest in the insurance sector, the cap to invest is set to 26% the investment can be done through automatic route. Apart from insurance company the relaxation would apply to third party administrator and insurances broker this was stated in the circular of Department of industrial policy and promotion (DIPP)

SEBI may decide companies should plan succession

The Securities and Exchange Board of India (SEBI) is likely to take decisions regarding succession in companies so thatcompanies should have a succession plan in place and disclose it to shareholders. The decisionmay include rules like the company board should periodically review the plan. The rationale is to ensure thatthere is orderly succession at board and senior management levels. It was noticed that after the death of TATA motor Managing director (MD) Karl Slym there was a sudden drop of shares of about 6%.SEBI aims to ensure that investor do not suffer due to sudden unplanned gap in leadership.

India received $28-billion FDI in 2013

FDI inflow grew 17% in 2013 despite unexpected capital outflow in the middle of the year,India ranked 16th amongst the top 20 global market racing higher

FDI.Global FDI increased by 11% in 2013 to 1.46 trillion $, The United Nation conference of trade and development (UNCTAD) has said that the grown of capital inflow would gradually increase in 2014 and 2015 to 1.6 trillion dollar India being the hot spot for growth and skilled work force will be able to attract greater investment, The consensus building amongst the people for more economic development parallel to the political will and a stable government will be a greater and an additional advantage to attract more Global Capital inflow

Bill for Tribunal rules uniformity

A bill to make tribunal tenure, allowances and appointments uniform and governed by a single law, has been introduced in the Rajya Sabha. Currently Tribunals in India are governed by more than 20 different statutes.