Review of ONGC v Saw Pipes and Phulchand by SC – raising public policy against enforcing enforcement of foreign awards not easy anymore

The Supreme Court of India in the case of *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[1], has narrowed the scope of the expression, "public policy" under Section 48(2)(b) of the Arbitration and Conciliation Act, 1996 ("Act") and thus had laid an easier path for enforcement of the foreign awards.

Relying on *Renusagar Power Co. Limited v. General Electric Company*[2] where the Supreme Court had held that the Courts can refuse to enforce foreign awards only if such enforcement would be contrary to (i) fundamental policy of Indian law; (ii) the interests of India; or (iii) justice or morality. While upholding the principle enumerated in *Renusagar,* it has stated that the wider meaning given to the expression "public policy of India" occurring in Section 34 (2)(b)(ii) of the Act in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd* is not applicable where objection is raised to the enforcement of the foreign award under Section 48 (2)(b) of the Act.

Interestingly, Justice Lodha by this judgment has overruled his own judgment in the case of *Phulchand Exports Limited v. O.OO. Patriot*[3] wherein the scope of the expression "public policy" was expanded.

Overruling the Phulchand judgement, the Supreme Court has held that 'public policy' is narrower under section 48 as compared to section 34 of the Act and the Act does not provide an opportunity to have a second look at the foreign award.

This Judgement clears the path for enforcement of foreign awards in India which had come under the scrutiny of the Courts post Phulchand.

1. Judgement in Civil Appeal No. 5085 of 2013 arising from SLP(c) No. 13721 of /2012.
2. 1994 Supp (1) SCC 644
3. (2011) 10 SCC 300

Calculation of Foreign Investments in Indian Companies

The Department of Industrial Policy and Promotion ("DIPP") in 2009 issued detailed guidelines for the calculation of total foreign investment in Indian Companies, transfer of ownership/ control of Indian Company and downstream investment by Indian Companies ("Guidelines").Vide its circular no. RBI /2013-14/117 A.P. (DIR Series) Circular No 01, dated 04th July 2013 ("Circular"), the Reserve Bank of India ("RBI") has operationalized the Guidelines in line with the current Foreign Direct Investment ("FDI") policy.

The aforesaid Circular, inter alia, provides for the concept of direct and indirect foreign investment, method of calculation of foreign investments in Indian companies, transfer of ownership and control of Indian companies from a resident to non-resident, establishment of Indian companies/ transfer of ownership or control of Indian companies and downstream investment by Indian Companies, which is not owned / controlled by resident entities.

Further, for the purpose of the Guidelines, an Indian company may be said to be 'owned' by non-resident entities if more than 50% of the equity interest in it is beneficially owned by non-residents and 'controlled' by non-resident entities, if non-residents have the power to appoint a majority of its directors.

It is provided under the Guidelines that investment in Indian companies can be made by both non-resident as well as resident Indian entities. Any non-resident investment in an Indian company is direct foreign investment. Investment by resident Indian entities could again comprise both resident and non-resident investments. Thus, such an Indian company would have indirect foreign investment if the Indian investing company has foreign investment in it. The indirect investment can also be a cascading investment, i.e. through multi-layered structure. The foreign investment through the investing Indian company would not be considered for calculation of the indirect foreign investment in case of Indian companies which are 'owned and controlled' by resident Indian citizens and/or Indian Companies which are owned and controlled by resident Indian citizens. The sub-total of direct and indirect foreign investment shall be counted as the total foreign investment in Indian company.

It is contemplated under the Guidelines that for the purpose of computation of indirect foreign investment the entire indirect foreign investment by the investing company into the other Indian Company would be considered. However, as an exception, the indirect foreign investment in the 100% owned subsidiaries of operating-cum-investing/investing companies will be limited to the foreign investment in the operating-cum-investing/ investing company. This exception has been made since the downstream investment of a 100% owned subsidiary of the holding company is akin to investment made by the holding company and the downstream investment should be a mirror image of the holding company. However, this exception is strictly for those cases where the entire capital of the downstream subsidiary is owned by the holding company. It has also been clarified that methodology for calculation of total foreign investment would apply at every stage of investment in Indian companies and thus in each and every Indian company.

The Guideline also provides for establishment of Indian companies/ transfer of ownership or control of Indian companies, from resident Indian citizens and Indian companies to non-resident entities, in sectors with FDI caps. It is further clarified that these Guidelines for establishment of Indian companies/ transfer of ownership or control of Indian companies will not apply to sectors/activities where there are no foreign investment caps i.e., where100% foreign investment is permitted under the automatic route.

The Circular is available athttp://rbidocs.rbi.org.in/rdocs/notification/PDFs/01APDIR040713.pdf

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New York Convention: A Break on Myanmar's Legal Framework

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, often referred as the New York Convention, is a key convention regulating enforcement of foreign arbitral awards by preventing the signatory states from discriminating against foreign arbitral awards.

On 15 July 2013 the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards entered into force with respect to Myanmar. Accession to New York Convention might encourage the foreign investors in Myanmar as now the foreign investors can use a neutral arbitration center to resolve their disputes, removing the upper hand given to the Myanmar based entities by the Myanmar domestic laws. The draft legislation is still to be put before the parliament.

It is to bear in mind before investing in Myanmar that the companies could enter into arbitration agreement only under Myanmar Arbitration Act, 1944 and no other foreign legislation. The Myanmar Arbitration Act, 1944 does not recognize the agreement that submits the dispute to arbitration outside Myanmar. So the domestic legislation per se would be the biggest challenge to overcome, followed by lack of institutional capacity, limited judicial experience in international arbitration, etc.

Myanmar is a signatory to only a handful of International treaties and conventions, and that too with a few countries like India, China, and Philippines. Further, Myanmar is not a signatory to convention on Settlement of Investment Disputes between States and Nationals of Other States, which makes available binding arbitration for investment disputes involving individual entities and foreign states administered by the International Centre for Settlement of Investment Disputes (ICSID).

Accession to New York Convention would be an encouraging factor for investment in Myanmar but still it has a long journey to cover. Myanmar has still not given any indications regarding adoption of Convention in toto or will keep certain reservations, like India has adopted the reservation of reciprocity, i.e., only recognizing and enforcing awards made in another country that is a contracting state. So, as of now, all we could do is to wait till the devil is out.

Further Clarification on Multi Brand Retail

On August 5, 2013, the Union Cabinet vide a press release available at the website of Press Information Bureau, approved the proposal for amendment in certain provisions relating to Multi Brand Retail Trading ("MBRT") in the existing Consolidated FDI Policy, 2013. The amendment attempts to further liberalize the provisions relating to Multi Brand Retail Trading in the FDI Policy by removing some of the impediments that existed under the current regime, with a view to attract foreign investments into India.

According to the press release, the MBRT retailers shall invest at least 50% of total FDI brought in the first tranche of US$ 100 million, in back-end infrastructure. Subsequent investment in the back-end infrastructure shall be made by the MBRT retailer as needed, depending upon his business requirements. The maximum limit for an industry to qualify as a 'small scale industry' is increased from USD 1 million to USD 2 million. Under the revised Policy, the cabinet decided to acknowledge the industry as 'small scale industry', even if the industry outgrows more than USD 2 million during the course of its relationship with the MBR trader. The only criteria being that the industry is to be qualified as a 'small scale industry' at the time of its first engagement with the MBRT retailer. Further, the amendment also conferred power to the State governments to exercise discretion in opening MBRT outlets in cities which have less than 10 lakhs population.

The above amendment shall bring about more clarity and scope for the MBRT retailers who are venturing to enter Indian markets since a while now. This proactive move by the Government aims to further simplify the bottlenecks attached to FDI investment in MBRT sector. This article is a continuation of our previous article captured in our June Newslex which can be read here.

SEBI Announces New Buyback Regime

The SEBI at a board meeting approved certain changes (proposed changes) to the Securities and Exchange Board of India (Buy Back of Securities) Regulations, 1998 (Buyback Regulations). There have been three major changes in the buyback structure:

(1) Increase in mandatory minimum buy back: The mandatory minimum amount which a company is required to buy back from its existing shareholders has been increased to 50 % of the offer size, against the existing practice of 25 %.

(2) Reduction in Buy Back period: Current regulatory practices demand that a tim of 12 months (buy back period) must be given between the board meeting convened for such buy back of shares and actual buy back of shares. According to the proposed regulations, it has been reduced to a period of 6 months.

(3) Post Buyback obligations: SEBI has mandated that companies which resort to a buy-back of its shares shall not issue the same class of capital for a period of 1 year unless it is in discharge of its extant obligations (Restrictive Period). At present, the Companies Act prescribes a 6 month Restrictive Period.

Company Petition for Oppression/mismanagement can be substituted in case the original petitioners withdraw

The Supreme Court, in the matter of Bhagwati Developers Private Ltd. v The Peerless General Finance Investment Company Limited &Ors (CIVIL APPEAL NOs. 361-362 of 2005), held that Shareholders who had consented to company petition for oppression / mismanagement have a right to be substituted and transposed in place of original petitioners who have withdrawn. Said withdrawal would not render company petition non-existent or non-maintainable and having regard to Or. 23 R. 1(5) CPC, when there are several petitioners or it is a representative petition, court normally should not grant such permission for withdrawal to one petitioner without consent of other petitioners. http://judis.nic.in/supremecourt/imgs1.aspx?filename=40236

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TRAI issues the Telecommunications Mobile Number Portability (Fifth Amendment) Regulations, 2013 for corporate mobile

The Telecom Regulatory Authority of India has issued the Telecommunications Mobile Number Portability (Fifth Amendment) Regulations, 2013. According to these regulations, (1) upto 50 corporate numbers of a service provider can be ported to another service provider through letter of authorization from the authorized signatory (2) A time period of 48 hours for such porting requests for multiple numbers and a total of 24 hours for single numbers. (3) These regulations will be applicable 90 days from the issue of regulations.

Securities Laws (Amendment) Ordinance, 2013 gives wide power to SEBI

Wide powers have been given to SEBI by allowing it to also search and sieze documents. Such powers were with limited number of authorities presently. Further, by giving retrospective effect to ask for information on old cases from foreign regulators, SEBI has been given more teeth in relation to cases pending for more than 15 years.

CCEA approves continuation of national mission on food processing

The Cabinet Committee on Economic Affairs has approved the proposal of the Ministry of Food Processing Industries for continuing the Scheme of Technology Upgradation / Establishment/ Modernization of Food Processing Industries during the 12th Plan (2013-17) to meet the spillover liabilities.The scheme envisages back ended subsidy by way of grant-in-aid.

Single Window Clearance to Promote India as a Films Hub and Destination by Secretary (I&B)

The Information and Broadcasting Ministry is set to develop a dedicated online portal meant to serve as a one-stop-shop towards obtaining clearances necessary for visas and several other permissions necessary (customs clearances etc) This move comes in the light of India emerging as a potential hub for filming and other allied activity. It would also avoid other roadblocks film production houses routinely face in addition to boosting the economy.

RBI Penalises 22 Banks

The Reserve Bank of India has imposed a monetary penalty on 22 banks in India for flouting money laundering guidelines. The list of banks includes a variety of reputable banking houses and has been instructed to pay such penalty at the earliest. In addition, notices have been served to atleast half a dozen of overseas banks.

SEBI Increases Investment Limits for FIIs by USD 5 Billion

SEBI in a recent circular increased the investment limit of foreign portfolio investors in government bonds from USD 5 Billion to USD 30 Billion in an attempt to extract more foreign capital to the country. This enhanced limit would only be available, SEBI said for investments by FIIs registered with SEBI in the foreign central banks, sovereign wealth fund, multilateral agencies endowment fund, insurance fund and pension fund categories.

Supreme Court declares Section 8(4) of the Representation of the People Act Unconstitutional

The Supreme Court struck down sub section (4) of Section 8 of the Representation of the People Act, 1951 as ultra vires the Constitution. This particular section protects convicted legislators against disqualification on the ground of pendency of appeal against their conviction in the higher courts.

BCCI files petition in Supreme Court, challenging Bombay High Court order

The Board of Control for Cricket in India (BCCI) filed an appeal in the Supreme Court on Monday, challenging the Bombay High court's order deeming IPL probe panel as 'illegal and unconstitutional.' Bombay High Court last month had declared that the probe panel constituted by BCCI to look into allegations of spot-fixing was illegal and unconstitutional. This after the two-member panel - consisting of retired High Court judges - had given a clean chit to Chennai Super Kings and Rajasthan Royals, saying the two franchises and their respective owners were not guilty of spot-fixing.

Union Home Ministry issues notices to Foreign Companies for attempts to bribe

The Union Home Ministry has recently issued show cause notices to SIG SAUER, USA and San Swiss Arms AG, Switzerland, on allegations of bribing public officials. From a report prepared by the Central Bureau of Investigations (CBI), it appeared that the said Foreign Companies may have extended favours like foreign visits and dinners to Home Ministry officials and state Police officials in order to obtain some Home Ministry contracts. The issuance of show cause notices are usually the major step before black – listing or banning firms/companies from future contracts.