D. H. LAW ASSOCIATES
ADVOCATES & SOLICITORS

Exclusive Jurisdiction In Arbitration

A recent judgment passed by a three judge bench of the Supreme Court of India in the ***Swastik Gas vs Indian Oil Corporation Ltd.***[1] has intended to bring in a degree of clarity regarding the interpretation of "Exclusive Jurisdiction" clauses.

One of the relevant provisions that deal with such principles is the Section 2 (1) (e) of the Arbitration and Conciliation Act, 1996. According to the provisions enlisted therein, the appropriate "Court" for the purpose of the Act would be a court of original jurisdiction that would have the capacity to entertain the dispute if it were in the nature of a suit. The Supreme Court specifically held in the verdict that usage of words, "only", "exclusively", "alone" in jurisdiction clauses are not mandatorily required to convey intention of parties to ouster jurisdiction of courts other than courts to which jurisdiction is conferred by the parties under the agreement.

Taking the present case into account, the respondents were engaged in the business of storage, distribution, manufacture and marketing of a variety of lubricants, coolants, grease and similar products. The appellant on the other hand was their consignment agent for the area of Jaipur. In November 2003, disputes arose between the parties due to failure of sell stocks of lubricants. Accordingly, the appellant moved to the Rajasthan High Court to appoint an arbitrator in respect to the dispute arising out of their agreement. But the Clause 18 of the agreement between the parties mentioned that.

"The Agreement shall be subject to jurisdiction of the courts at Kolkata."

The issue to be addressed by the Hon'ble Apex Court in this regard was whether the Rajasthan High Court had the jurisdiction to entertain the application brought forth by the virtue of Section 11 of the Act, with reference to the above mentioned case. The Apex Court taking into account the submissions and the relevant clause held that the intention of the parties is a pivotal aspect and requires to be looked at while analyzing the ouster clauses. The parties by mentioning that courts at Kolkata will have jurisdiction in thisregard had impliedly excluded the jurisdiction of other courts. Relying on the above observations, the Supreme Court dismissed the appeal with the liberty to the Appellant to file an appeal before the Courts in Kolkata.

The Court held that the absence of the word "only", "alone", "exclusively" is neither decisive nor does it make a substantial difference in deciding the jurisdiction. The very existence of the clause clarifies the intent behind it.

Addressing a similar issue in the case of "***ABC Laminart Pvt. Ltd.***[2]" the Court elucidated that

"an agreement which purports to oust the jurisdiction of the Court absolutely is contrary to public policy and hence void. But where two Courts or more have under the Code of Civil Procedure jurisdiction to try the suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such Courts was not contrary to public policy and such an agreement did not contravene Section 28 of the Contract Act"

Hon'ble Justice while passing the Swastik Gas Judgment analysed the ABC Laminart Judgment and elucidated that the Hon'ble Supreme Court in many judgments has concluded that the parties either implicitly or explicitly in these cases conclude that irrespective of the presence of words like "only", "alone", "specifically" and etc, the court in question would have exclusive jurisdiction in dealing with the rising disputes.

The Supreme Court in its decision heavily relied upon the maxim "*Expressiouniusest exclusion alterius"* the inclusion of one refers to the exclusion of others.) The Swastik Gas Judgement has rendered clarity to this issue and served a great assistance to numerous matters that are pending in the lower court and other arbitrational tribunals all across the country. This interpretation would help clear the ambiguity relating to similar matters. Many ambiguous documents and contracts where there is no specific mention under the jurisdiction clause will now be put into such position from where there interpretation would become an easier task.

But in order to avoid the issues relating to litigation. It is always advised to maintain a level of clarity regarding such issues at the stage of drafting the agreement itself. The provisions of the Code of Civil Procedure governing such issues should be taken into account andthen a clear and unambiguous agreement should be drafted to save both the parties the unnecessary trouble to invest time and resources in the interpretation of such vague clauses.

1. (2013) 9 SCC 32
2. (1989) 2 SCC 163

"DEEMED" STATUS OF PRIVATE SUBSIDIARIES OF FOREIGN COMPANIES AND BODIES CORPORATE

The enactment of the new Companies Act, 2013 envisages several changes in various aspects of the Act. It concentrates on consolidating all sections and rules under the previous Act and introduces many new concepts in line with global requirements in the corporate sector. However, certain inadequacies have been

noticed in the new provisions when compared with the corresponding provisions the 1956 Act.

Apart from Indian companies, foreign multinational corporations and other bodies corporate are always eager to set up businesses in India in order to benefit from the growing economy and the dynamic market in the country. In order to expand their business and to make their presence in the Indian market, these foreign companies and bodies corporate set up subsidiaries in India, usually in the form of a private company as they can avail of the benefits available to private companies under the Act.

The *"deemed" public company* status of a private subsidiary of a public company was contained in section 3(1) (iv) (c) of the 1956 Act and the same is now under section 2(71) of the 2013 Act. The definition of the term 'Company' under the erstwhile Companies Act as well as the 2013 Act does not include a company incorporated outside India and other foreign bodies corporate. Hence, the "deemed" status of a private subsidiary of a public company under section 3(1) (iv) (c) does not apply to foreign holding companies and other bodies corporate. Therefore, in case of a "deemed" public company in accordance with section 3(1) (iv) (c), a private subsidiary shall have to comply with all the compliance requirements of a public company under the Act while retaining its basic private character.

However, referring to the definition of the term 'subsidiary' under section 2(87) of the new Act, it is pertinent to note that this definition contemplates not only Indian but also foreign holding companies and bodies corporate. Therefore, the meaning of 'company' in the context of subsidiaries and their holding companies would extend to foreign companies and bodies corporate as well.

This raises the logical question about the status of a private subsidiary of a foreign company or foreign bodies corporate. This position, pertaining to a private subsidiary of a foreign body corporate which if incorporated in India would be a public company, is defined under section 4(7) of the 1956 Act. It states that a private subsidiary of a foreign body corporate as above shall not be deemed to be a public company provided that the entire share capital of the private subsidiary is held by that body corporate whether alone or together with other foreign bodies corporate. In ordinary parlance, this section grants an exemption to private subsidiaries of foreign companies from the deemed status given to private subsidiaries of public companies. Consequently, a private subsidiary of foreign bodies corporate shall retain its private character for all purposes under the Act.

However, under the 2013 Act, the above exemption with respect to private subsidiaries of foreign companies or bodies corporate has been excluded. This

means that the private subsidiaries of foreign companies and bodies corporate would be “deemed” public companies and would have to comply with the compliance requirements of public companies under the Act. This has led the Ministry of Corporate Affairs to issue a circular clarifying the position pertaining to the status of subsidiaries of foreign companies and bodies corporate under the 2013 Act.

Accordingly, the MCA has issued a Circular dated 25th June, 2014 explaining that an existing company, being a subsidiary of a company incorporated outside India, registered under the Companies Act, 1956, either as private company or a public company by virtue of section 4(7) of that Act, will continue as a private company or public company as the case may be, without any change in the incorporation status of such company. However, this Circular does not adequately clarify the main point of contention which is whether the exemption under section 4(7) of the 1956 Act will be included in the new Act and instead states that the incorporation status of the subsidiaries of companies incorporated outside India will remain unchanged. In short, the MCA clarification does not capture the essence of the exemption under section 4(7) of the 1956 Act which was found to be absent in the 2013 Act and still remains ambiguous.Moreover, it limits the application of the clarification to companies incorporated outside India and thereby excludes from its ambit other bodies corporate and limited liability corporations.

ALLEGATION OF FRAUD IS ARBITRABLE

One of the defense available to a party which is averse to arbitration is to take the plea of fraud and malpractice. The Supreme Court in its earlier judgment *N. Radhakrishnan (2009 (13) SCALE 403)* held that allegations of fraud is non arbitral and can only be decided by the civil court.

Over ruling its earlier decision, the Supreme Court in *Swiss Timing Limited V. Organising Committee, Commonwealth Games 2010, Delhi (Arbitration Petition No. 34 of 2013)* has held that the N. Radhakrishnan judgment does not lay down the correct law and the plea of fraud can be decided by the arbitral tribunal.

The other two issues that were decided by the Supreme Court further in the aforesaid judgment are (a) the issue whether the contract is void or voidable can also be referred to arbitration keeping in mind the provision of Sections 5 and 16 of the Arbitration and Conciliation Act 1996 and (b) the Criminal proceedings can continue simultaneously with the arbitration proceedings.

The judgment comes as a huge relief for Indian seated arbitration and clearly conveys the message that there is minimal interference by the Court in case of the contract containing arbitration clause.

3. Civil Appeal No.7019 of 2009
4. Arbitration Petition No. 34 of 2013

News 10 @ a glance

Review of Securities and Lending (SLB) Framework by SEBI

SLB Framework has been modified by SEBI vide a circular no. CIR/MRD/DP/19/2014 issued on June 03, 2014. Para 6 of the original SLB circular has been changed which now states that the Authorised Intermediary (AIs) shall enter into an agreement with Clearing Members (CMs) instead of an agreement between AIs ,CMs and clients for the purpose of facilitating lending and borrowing of securities. The exact role of AIs/CMs vis-à-vis the clients shall be laid down in the agreement. For the purpose of lending and borrowing of securities, the AIs shall frame a rights and obligations document laying down the rights and obligation of CMs and clients. This document shall be mandatory and binding on the CMs and the clients for executing trade in the SLB framework.

Commencement of Foreign Portfolio Investor Regime

SEBI has decided to create a simplified regulatory framework with a view to harmonize different routes for foreign portfolio investments. A “Committee on Rationalization of Investment Routes and Monitoring of Foreign Portfolio Investments” comprising of various stakeholders was constituted by SEBI. The

Committee decided to create a new investor class called "Foreign Portfolio Investor" (FPI) by merging the three existing investor classes i.e. FIIs, Sub Accounts and Qualified Foreign Investors.

New Rule for appointment of Company Secretary

By making modifications in the rules under the new company's law, the Ministry Of Corporate Affairs in a Notification stated that all companies with a paid up share capital of Rs 5 crore and more will have to appoint a whole- time company secretary. Earlier, the Companies Act, 2013 had exempted all companies with a paid up capital of up to Rs 10 crore from appointing a Company Secretary. However, companies covered under the section-8 (the not for profit companies) are exempted from this requirement.

SEBI releases discussion paper on "crowdfunding" for start-ups

SEBI has released a discussion paper on "crowdfunding" for start-ups and small and medium enterprises for "crowdfunding" or collection funds through web-based platforms and social networking sites. The discussion paper suggests that only SEBI registered entities can provide "crowdfunding" platforms. Companies can raise upto Rs. 10 crore in a year through this route. The maximum number of individual investors would be limited

to 200 and the maximum investment by an individual would be limited to Rs 60,000 per issue. Only “accredited investors” like institutional investors, companies, high networking individuals (HNIs) and financially-secure retail investors advised by investment advisors or portfolio managers will be allowed to participate in “crowdfunding” activities. The companies engaged in real estate and financial sector businesses would be barred from using this route. The issuer entities and their promoters and directors would need to meet 'fit and proper' criteria of SEBI, while they cannot use multiple platforms to raise such funds within a year.

IRDA Draft Rules ban replacement of Life Insurance Policies

In order to protect the long-term interest of policyholders and to discourage intermediaries from persuading customers to surrender their policies and take up new ones, Insurance Regulatory and Development Authority (IRDA) banned replacement of life insurance policies unless in the interest of policy holders. The guidelines said insurers should make full disclosure and give transparent information to the policyholder to avoid any misrepresentation of financial consequences of replacing a life insurance policy. Replacement of a life insurance policy means an

insurer selling a new policy within six months of surrender of the earlier policy having modification in the terms which result in reduction of the benefit of the existing policy. Insurers will now have to place an agreement in the proposal form, advising the customer not to surrender an existing contract for a new one. A policyholder not properly guided by the existing life insurance company can exercise the right of restoration of the existing policy within seven days from the receipt of the new one.

Mandatory e-voting for listed companies

Listed companies will have to provide mandatory e-voting facility to all shareholder resolutions passed in general meetings according to new SEBI norms. MCA with its Circular No. 20/2014 dated 17th June, 2014 made it non mandatory for companies to provide e-voting facility to its shareholders till 31st December, 2014. Therefore there were doubts among listed companies on whether the existing SEBI norm or the latest MCA clarification would prevail. SEBI Chairman, Mr. U. K. Sinha, in his statement to Business Line on 22nd June, 2014, clarified that providing of e-voting facility is mandatory for listed companies even if the same has been made non-mandatory by the MCA.

RBI permits non-deposit taking NBFCs to work as business

correspondents of banks

RBI rules are issued for allowing banks to appoint non- deposit taking NBFCs (NBFC-ND) as their business correspondents in order to extend banking services to remote areas. Proper measures should be taken to ensure that there is no co-mingling of bank funds and those of the NBFC-NDs. There should be a specific contractual arrangement between the bank and the NBFC-ND to ensure that potential conflicts of interest are taken care of. Banks should ensure that the NBFC-ND does not adopt any restrictive practice such as offering savings or remittance functions only to its own customers and forced bundling of their services. To provide functional flexibility to banks the RBI has removed the stipulation regarding distance criteria.

Centre gives States 3 months to implement Food Security Act

Centre gives 3 months to 25 states and Union Territories to implement Food Security Act which are yet to implement this Act. In September, 2013 Parliament passed the Food Security Act that gave legal entitlement to highly subsidised food grains to two-thirds of the country's population. Each eligible person would get 5 kg of rice and wheat at Rs 3 and Rs 2 per kg respectively. The existing Antyodaya Anna Yojana (AAY) households will continue to receive 35 kg of food grains per family a month. The

implementation of the law would increase the Centre's food subsidy bill by Rs 25,000 crore to Rs 1.31 lakh crore. The grains requirement would rise by 6-8 million tonnes from the current 55 million tonnes annually.

Union Labour Ministry approves inspection scheme

Inspection Scheme aimed at simplifying business regulation and to bring transparency and accountability in the system has been approved by Union Labour Ministry. Central Analysis and Intelligence Unit (CAIU) will be set up to analyze and collect field data. The scheme will come into effect from 1st October,2014 for the Employees Provident Fund Organisation (EPFO), Employees State Insurance Corporation (ESIC), inspections under the ambit of the Chief Labour Commissioner (CLC) and the Directorate General of Mines Safety (DGMS). Different inspection guidelines for EPFO, ESIC, CLC and DGMS have been laid down. Certain guidelines for inspectors are maintaining registers, carrying out inspections in normal working hours, uploading the report within three days of inspection, etc.

Not Mandatory for Foreign Companies to register their Indian subsidiaries as a Public Company

MCA clarified that there is no compulsion on foreign firms to

register their Indian subsidiaries only as a public company. An existing subsidiary of a foreign company, registered under the Companies Act, 1956 either as a private or public company will continue as a private or public company as the case may be without any changes in the incorporation status of such company. There were apprehensions that if foreign companies were not allowed to incorporate their Indian subsidiaries as private companies under the new Companies Act, it may act as a deterrent for them to operate in the country. Mostly "private company" status is preferred for such subsidiaries due to greater compliance and disclosure requirements for public companies.