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SUPREME COURT SETTLES THE ARBITRATION LAW WITH REGARD TO SEAT OF ARBITRATION, VENUE AND ITS GOVERNING LAW

Introduction

There have been constant debates as well as different interpretations with regard to the "seat" and "venue" of arbitration and the governing law applicable to arbitration proceedings. The judicial precedents in England have evolved the concept of "juridical seat" making such concept to be equivalent to "seat", thus attracting the law of the same location/ jurisdiction where the arbitration has its seat. Likewise, the Hon'ble Supreme Court in India has also clarified such position *vide* its various judgments thus settling the position of law with regard to the aforementioned.

Judicial Precedents

The Hon'ble Supreme Court in various instances has clarified with respect to the significance of "seat" of arbitration in arbitration proceedings. As stated earlier, the concept of "juridical seat" has evolved by the courts in England and has now been firmly embedded in our jurisprudence. In the case of Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc., (2012) 9 SCC 552, the Hon'ble Supreme Court has scrutinized the relevant provisions of the Arbitration and Conciliation Act, 1996 ("***Act***") and was of the opinion that the Act identifies the court having supervisory control over the arbitration proceedings as the one having the seat of arbitration proceedings. Further, in the same case, the Hon'ble Supreme Court looked into the applicable provision of the Act pertaining to the place of arbitration and was of the opinion that the place of arbitration can be fixed by the parties as convenient to them but such place/ venue shall not have the effect of changing the seat of arbitration, thus enunciating the difference between "seat" and "venue" of arbitration proceedings. In another case of Enercon (India) Ltd. v Enercon Gmbh (2014) 5 SCC 1, the Constitution Bench of the Hon'ble Supreme Court held that it is accepted by most of the experts in the law relating to international arbitration that in almost all the national laws, arbitrations are anchored to the seat/ place/ situs of arbitration. The Hon'ble Supreme Court further noticed that it does not mean that all proceedings of arbitration are to be held at the seat of arbitration and that the arbitrators are at liberty to hold meetings at a place which is of convenience to all concerned. The Hon'ble Supreme Court, in the instant case was of the opinion that once the seat of arbitration has been fixed, it would be a nature of an exclusive jurisdiction clause as to the courts which exercise supervisory powers over the arbitration. In yet another case of Reliance Industries Ltd. v. Union of India (2014)7 SCC 603, the Hon'ble Supreme Court was of the opinion that the "juridical seat" is nothing but "legal place" of arbitration. In case of Etizen Bulk A/S v. Ashapura Minechem Limited and Another (2016) 11 SCC 508, the Hon'ble Supreme Court was of the opinion that mere choosing of the judicial seat of arbitration attracts the law applicable to such location, which means that it would not be necessary to specify which law would apply to the arbitration proceedings since the law of the particular country would apply ipse jure. In recent case of Indus Mobile Distribution Private Ltd. and Ors. v Datawind Innovations Private Ltd. and Ors. (Civil Appeal Nos. 5370-53 of 2017), the Hon'ble Supreme Court took all the aforementioned cases into consideration and *vide* its judgment dated 19th April 2017, held that the moment "seat" is determined, the fact that the seat is in Mumbai would vest the Mumbai Courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.

Conclusion

All the aforesaid case laws and findings by the Hon'ble Supreme Court in the concerned subject matter reflects that the moment "seat" is designated, it is akin to an exclusive jurisdiction clause. Unlike Code of Civil Procedure, under the Arbitration Law, a neutral venue can be chosen by the parties which need not have jurisdiction as per the applicable provision of Code of Civil Procedure but could be chosen as per the convenience of the parties. However, the "seat" will determine the jurisdiction, thus differentiating between the concept of "seat'" and "venue" under the extant applicable law.

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NON-BANKING FINANCIAL COMPANY – PEER TO PEER LENDING PLATFORM (RESERVE BANK) DIRECTIONS, 2017

The Reserve Bank of India ("RBI") *vide* its Master Direction (bearing no. DNBR (PD) 090/ 03.10.124/2017-18) dated 4th October 2017 issued directions with regard to providing a framework for the registration and operation of Non-Banking Financial Company- Peer to Peer Lending Platform ("NBFC-P2P") in India. The Master Directions clearly reflects the eligibility criteria, procedure for obtaining the registration, scope of work, operational guidelines and the norms to be followed by such NBFC-P2P.

Eligibility

1. There shall be a company incorporated in India having a net owned assets of not less than Rs. 20 million or such higher amount as RBI may specify;

2. Such company shall obtain a certificate of registration for acting as a NBFC-P2P;

3. Such company shall have the necessary and adequate expertise, resources and capital to act as NBFC-P2P and the general character of the management shall not be prejudicial to the public interest;

4. Such company shall submit a secure plan for their information technology system and shall have a viable business plan for conducting Peer to Peer Lending; and

5. Any other condition that RBI may specify from time to time.

In the event there is an NBFC-P2P company existing before issue of these Master Directions, it shall obtain a registration certificate within three (3) months from the date of these Master Directions and such existing NBFC-P2P company shall continue to operate their business until the application for obtaining the certificate of registration is rejected by RBI.

Grant of the Registration Certificate

RBI shall, upon being satisfied, grant an in-principle approval to the concerned company to act as an NBFC-P2P pursuant to which the concerned company shall within twelve (12) months of such in-principle approval put in place the required platform, fulfill all the legal documentations and all the compliances in terms of the approval given by the RBI in order to obtain a certificate of registration.

Scope of Work of the NBFC-P2P

The NBFC-P2P shall act as an intermediary by creating an online platform where the lenders and the borrower will interact. The NBFC-P2P shall undertake the due diligence, credit assessment, risk profiling of the prospective borrowers, take consent from the borrowers for gaining access to their credit information, undertake relevant documentations, provide assistance in loan repayment, and also render services for recovery of the loan, including storage of all data relating to its activities and ensuring adherence to all legal requirements applicable to it. However the NBFC-P2P shall not raise deposits, lend loans, provide for any credit enhancement or credit guarantee, hold the funds received from the lender, or permit international flow of funds.

Rules/ Norms to be applicable to the NBFC-P2P

The aggregate exposure of a lender to ***all*** the borrowers across all P2Ps shall be subject to a cap of Rs. 10,00,000.00 while the limit for aggregate amount of loan to be taken by a borrower shall be Rs. 10,00,000.00. Further, the exposure of a single lender to the same borrower shall not exceed Rs. 50,000.00 and the maturity of all such loans shall not exceed the period of 36 months. The NBFC-P2P shall have a policy approved by its Board to set out the eligibility criteria, determine the

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cost of its services, the rules for matching lenders with the borrowers.

Further, the loan to be disbursed shall be done through an escrow account mechanism that shall be operated by a trustee who shall be promoted by the bank maintaining such escrow account

The NBFC-P2P shall become member of the Credit Information Companies ("CICs") wherein all the data shall be submitted to the CICs. The NBFC-P2P shall maintain the credit information, update all such credit information, and take all such steps which may be necessary to ensure that the credit information furnished is up to date.

Transparency to be ensured

The NBFC-P2P shall ensure that transparency in the entire process is maintained, which effectively means that the NBFC-P2P shall ensure disclosure of information (*as required*) to the lender, borrower and to the public. Such information, in case of lender would include details about the borrower; credit score of borrower, etc. while in the case of borrower shall include details of lender, interest rate, etc. Other information which the NBFC-P2P needs to disclose to the public shall include overview of the credit assessment, grievance redressal mechanism, business model, etc.

Fair practices and Fit and Proper Criteria

The NBFC-P2P shall put in place a Fair Practices Code in accordance with the RBI Master Directions which shall include obtaining affirmation from the lender that the lenders are aware of the risks associated with the transactions involved herein and that the NBFC-P2P shall not be responsible for providing any assurance to the Lenders. Further, in accordance with the Fair Practices Code, the NBFC-P2P shall also ensure that the staffs are adequately trained.

Also, all the compliance related requirements and the non disclosure obligations of the NBFC-P2P shall be ensured.

Other relevant aspects to be considered by the NBFC-P2P shall be to put in place a proper grievance redressal unit and a strong safeguard for the IT systems to ensure that all the data are secure from any unauthorized usage.

The NBFC shall also be required to ensure that "Fit and Proper" criteria is met and maintained by its directors. Such criteria shall be laid down and approved by the Board.

Prior Approval to be obtained in certain cases

The NBFC-P2P shall have to submit an application to the RBI for obtaining prior approval from the RBI including but not limited to, acquisition of the NBFC-P2P, change in shareholding of the NBFC-P2P that results in acquisition of more than 26% of the paid up equity capital of the NBFC-P2P, change in management of the NBFC-P2P resulting in change of 30% of the directors, etc.

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ENFORCEABILITY OF PROVISIONS ON RESTRICTIONS ON TRANSFER OF SHARES IN THE ARTICLES OF ASSOCIATION IN CASE OF A PUBLIC LIMITED COMPANY

Introduction

Investors, investing in a company, be it a private company or a public company, generally desire/ prefer to have restrictions on transfer of shares under their respective investment agreements. The legality of such transfer of the shares in a public limited company has been in question and also been a debatable issue in light of Section 111 A (2) of the erstwhile Companies Act, 1956 wherein the law was clear that any interests in a public company shall be freely transferrable. The question which arises in such an instance is on the enforceability of contracts which is entered between the parties to record restrictions on the transferability of shares of a public company

The Debate and the Judicial Precedent

It is customary for the shareholders to enter into agreements among themselves (and often with the company as well) in order to provide greater rights and protection than those made available to them under law by the virtue of acquiring shares in a company. These shareholders agreements confer rights and create obligations that are above and beyond those provided by company law or the articles of association of the company, but within the framework of law. Such agreements between shareholders are common in joint ventures, private equity investment, venture capital investment and similar corporate investment transactions.

Since the shares of a company are recognized as movable property, the owners thereof are entitled to exercise proprietary rights over such property, which might include either the right of alienation of the shares or even to voluntarily impose fetters on their ability to alienate. Although, the procedures for transfer of shares are prescribed in the articles of association, it is a well-accepted principle of law that shareholders possess the freedom to contractually impose restrictions on transfer of shares that may operate inter-se among shareholders.

Similar to Section 111 A (2) of the erstwhile Companies Act, 1956, Section 58 (2) of Companies Act, 2013 provides that the securities or other interest of any member in a public company shall be **'freely transferable'**. However, there is a proviso which has been added to Section 58 (2) of Companies Act, 2013 which stipulates that any contract or arrangement between two or more persons in respect to transfer of securities shall be '**enforceable as a contract**'.

In the erstwhile Companies Act, 1956, there were some debatable issues with respect to the expression '**freely transferable**'. However, in the matter of ***Messer Holdings Limited vs. Shyam Madanmohan Ruia & Others (2010) 98 CLA 325 (Bom)***, the Division Bench of Hon'ble Bombay High Court held that any contract or arrangement between two or more persons with respect to transfer of securities can be enforced like any other contract and does not impede the free transferability of shares at all, thus stating that the shareholder has complete freedom to do whatever he wants to do with the shares and the shareholder can always enter into consensual agreement regarding transfer of the shares, as the shares are freely transferable. Hence, the aforesaid proviso to Section 58(2) of the Companies Act, 2013 has been incorporated expressly recognizing the significance of shareholders' agreement/ contract pertaining to transfer of shares.

Any consensual arrangement / contract providing restriction on transfer of shares or providing pre-emptive rights pertaining to transfer of shares should not be construed as violation of the expression '**freely transferable**' as mentioned under Section 58 (2) of the Companies Act, 2013. Had that not been the intention of the legislature, the proviso to Section 58(2) of the Companies Act, 2013 would not have been specifically inserted and appropriate restriction would have been placed in Companies Act, 2013 in relation to transfer of shares in terms of consensual arrangement.

Conclusion

In view of the above, any restriction on transfer of shares under the shareholders' agreement/ consensual arrangement as executed amongst the shareholders shall be valid and binding as a **'contract'** inter-se the shareholders. If any public company is also being made party to such shareholders agreement/ consensual arrangement, then such contract will also be enforceable against the public company like any other contract. In case of breach of such contract by any party, the aggrieved party may avail such legal remedies as available in case of 'breach of contract'.

Investors interested in investing in public companies may, in spite of the requirement of free transferability of shares, may potentially enter into valid private arrangements vis-à-vis the other shareholders to restrict the transfer of shares. The legal position thus, as on date, is that all such 'free transferability' of shares shall be subject to the private arrangement (if any) inter-se the shareholders, to ensure that the rights of all shareholders in a public company are protected.

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- **MCA NOTIFIES DELEGATION OF POWER TO INSOLVENCY AND BANKRUPTCY BOARD OF INDIA UNDER SECTION 247 OF COMPANIES ACT, 2013**:

  In exercise of the powers conferred by Section 458 of the Companies Act, 2013 ("**Act**") the Central Government has delegated its powers and functions as vested under Section 247 of the Act with effect from the date of its publication in the Official Gazette, that is, 23rd October 2017. The provisions of Section 247 of the Act provides for Valuation by Registered Valuers. As per the notification the powers and functions of the Central Government as vested under Section 247 has been delegated to the Insolvency and Bankruptcy Board of India ("**IBBI**"). The powers has been delegated, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers under the said Section, if in its opinion such a course of action is necessary in the public interest.
  [Source: https://www.icsi.edu/docs/webmodules/InfoCapsule/INFOCAPSULE_25102017.pdf]

- **AMENDMENT TO THE SECURITIES AND EXCHANGE BOARD OF INDIA (INTERNATIONAL FINANCIAL SERVICES CENTERS) GUIDELINES, 2015 ("SEBI (IFSC)")**

  With reference to SEBI (IFSC) notified by SEBI on 27th March 2015 and SEBI Circular SEBI/HO/CIR/P/2017/85 dated 27th July 2017 amending the guidelines, it has been decided to further amend Guideline 8(2) of the SEBI (IFSC) which shall now read as follows:

  "8 (2) Any entity based in India or in a foreign jurisdiction may form a company in IFSC to act as a trading member of a stock exchange and/or a clearing member of a clearing corporation in IFSC."

  This circular is being issued in exercise of powers conferred under Section 11 (1) of the Securities and Exchange Board of India Act, 1992, to protect the interests of investors in securities and to promote the development of and to regulate the securities market.
  [Source: https://www.icsi.edu/docs/webmodules/InfoCapsule/INFOCAPSULE_24102017.pdf]

- **DEBT RECOVERY TRIBUNALS HAVE NO POWER TO CONDONE DELAY IN FILING APPEAL**:

  The Hon'ble Supreme Court *vide* its judgment dated 24th October 2017, in the case of *International Asset Reconstruction Company Of India Limited versus The Official Liquidator of Aldrich Pharmaceuticals Limited and Others (Civil Appeal No.16962 of 2017)*, has held that the prescribed period of thirty (30) days under Section 30(1) of the Recovery of Debts and Bankruptcy Act, 1993, for preferring an appeal against the order of the recovery officer cannot be condoned by filing an application under Section 5 of the Limitation Act, 1963 ("**Act**").

  In the instant case, an appeal was preferred by the aggrieved against the order of recovery officer before the tribunal beyond the prescribed period of thirty (30) days however, the tribunal held that delay beyond the prescribed period could not be condoned. Referring to Section 5 of the Act, the Court observed that the proceedings

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under the Act being before a statutory tribunal, it cannot be placed at par with proceedings before a court and therefore, the tribunal shall have no powers to condone delay.
[Source: http://supremecourtofindia.nic.in/supremecourt/2013/25017/25017_2013_Judgement_24-Oct-2017.pdf]

- **COMMERCIAL COURTS SHOULD NORMALLY LOOK INTO EXPRESS TERMS OF A CONTRACT AND NOT INTO THE IMPLIED TERMS**:

The Hon'ble Supreme Court *vide* its judgment dated 5th October 2017 in the case of *Nabha Power Limited versus Punjab State Power Corporation Limited and Another* (*Civil Appeal No. 179 of 2017*), cautioned commercial courts against looking into the implied terms of a contract, opining that a contract should be read as it is, as per its express terms.

The Hon'ble Supreme Court observed, "*We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus a contract should be read as is, as per its express terms*."
[Source: http://naavi.org/uploads_wp/new/nabha_implied_contract.pdf]

- **FUNDAMENTAL RIGHT OF HOLDING PUBLIC MEETINGS CANNOT BE DENIED MERELY ON FEAR OF LAW & ORDER SITUATION**:

The Hon'ble Madras High Court *vide* its judgment dated 5th October 2017 in the case of Arappor Iyakkam (Petitioner) versus State of Tamil Nadu and Others. (Respondent) (W.P. No. 25998 of 2017) held that the fundamental right to hold public meetings cannot be denied merely on the apprehension of a law and order situation arising. Such public meetings can be conducted on certain conditions imposed by the Respondent.

The Hon'ble Madras High Court observed that "Since it is the fundamental right of the Petitioner to conduct such a meeting, if at all, the Respondent is of the view that they intend to instigate people and thereby create law and order problem, it was always open to them to permit the Petitioner to conduct the meeting by imposing conditions."
[Source:http://judis.nic.in/HCS/list_new2_Pdf.asp?FileName=350468&Table_Main_Txt=Chennai_Judgments_Pdfs#page=1&zoom=auto,-15,849]

- **INSOLVENCY RESOLUTION PLAN IS TO BE IN CONFORMITY WITH THE APPLICABLE LAW**:

Ministry of Corporate Affairs *vide* notification no. IBC/01/2017 dated 25th October, 2017 has clarified that the resolution plan approved by the adjudicating authority should be in conformity with applicable laws including FDI restrictions under Foreign Exchange Management Act, 1999. It also further clarified that the resolution plan, upon approval by adjudicating authority shall be binding on shareholders, corporate debtors and all stakeholders and separate approval from them shall not be required to carry out any action involved in the resolution plan.
[Source:http://ibbi.gov.in/webadmin/pdf/legalframwork/2017/Oct/Clarification%20regarding%20resolution%20plan_2017-10-26%2004:08:34.pdf]