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SCOPE OF JUDICIAL INTERFERENCE IN ARBITRAL AWARDS ON THE GROUND OF PATENT ILLEGALITY

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INTRODUCTION

Arbitration, as an alternative dispute resolution mechanism, is intended to resolve parties' disputes in a private and efficient manner. The mechanism is premised on minimal court interference during the arbitral process and ease of recognition and enforcement of arbitral awards.

The Arbitration and Conciliation Act, 1996 ("Act"), was enacted with this goal of minimizing judicial interference [1]. The scope of judicial interference after passing an award, is limited to the grounds stated under Section 34 of the Act. One such ground for domestic arbitral awards is "patent illegality".

The interpretation and scope of patent illegality, as a ground for setting aside domestic awards, has been subject to continuous and at times conflicting judicial scrutiny. This piece explores how 'patent illegality' has been interpreted by Indian courts and the circumstances which led to its introduction into the Act by way of the 2015 amendment. This piece will also explore the contentious issue pertaining to the extent of judicial scrutiny regarding the interpretation of a contract by an arbitral tribunal, as a ground to set aside an arbitral award, by Indian as well as foreign courts.

PRE-2015 AMENDMENT – THE SAW PIPES REGIME

The scope of 'patent illegality' was first propounded by the Supreme Court of India ("Supreme Court") in ONGC v. Saw Pipes ("Saw Pipes") [2]. The Supreme Court sought to include patent illegality as a subset of 'public policy', which is a ground to set aside arbitral awards under the Act [3]. While patent illegality was not clearly defined in Saw Pipes, the Supreme Court interpreted the term to mean:

a. awards passed against the terms of the contract; or

b. in contravention to the substantive provisions of the laws of India or the Act.

ABOUT THE FIRM

AKS Partners (formerly known as A.K. Singh & Co) is a law firm based in New Delhi (India) that provides a comprehensive range of legal services and solutions to domestic and international clients. The Firm offers a unique blend of the local knowledge to apply the regulatory, economic, political and cultural context to legal issues and develop case strategies. We regularly handle technically challenging and complex multi-jurisdictional matters. Our team is spearheaded by one of the highly recognised lawyers with extensive experience in international dispute resolution and strong government and diplomatic backgrounds. This experience gives us the deepest understanding of the key decision points that are critical in navigating complex & complicated matters and managing government regulations.

The broad interpretation to the term 'public policy' as provided for in Saw Pipes, reflected the intent to reiterate the principle: a wrong must not be left unredeemed and a right must not be left unenforced [4]. The Supreme Court opined that a narrow definition of the term 'public policy' under Section 34 of the Act, would be against the interest of finality of awards.

The aforesaid Saw Pipes interpretation, was often relied upon to review the merits of an arbitrator's decision. This interpretation was subsequently delineated by the Supreme Court in the Associate Builders case [5], where the scope of patent illegality was interpreted to only cover:

a. contraventions of substantive laws of India;

b. contraventions of the Act; and/or

c. interpretations of the contract in an unreasonable manner.

DEFINING THE SCOPE OF "PUBLIC POLICY" AND "PATENT ILLEGALITY": 246TH LAW COMMISSION REPORT

The Law Commission of India ("Law Commission") in its 246th Report [6], took exception to the wide interpretation given by courts to the term "public policy" under Section 34 of the Act. The Report was particularly critical of the Saw Pipes judgment. Although the said judgement was passed in the context of a domestic arbitral award, the interpretation was also being used by courts to deny the enforcement of foreign arbitral awards under Section 48 of the Act [7].

The Law Commission, was also opposed to the sub-categorization of patent illegality as a subset of public policy, particularly since such interpretation would be contrary to the best international practices. The Law Commission proposed to differentiate the scope of the term 'public policy' and 'patent illegality'. They proposed to apply patent illegality as a ground only to domestic arbitrations and not to international arbitrations, irrespective of their seat of arbitration.

Consequently, the Law Commission recommended the addition of Section 34(2A) to the Act, which allowed courts to set aside awards on the grounds of *"patent illegality appearing on the face of the award"*. This provision was to apply only to domestic arbitral awards and not to international arbitrations and foreign awards. The Law Commission was also keen to avoid the problem caused by excessive judicial intervention in domestic awards, and recommended that a clarification be made as to the scope of judicial interference under the ground of patent illegality. As a result, the Law Commission recommended that an arbitral award should not be set aside merely on the ground of erroneous application of law or by reappreciation of evidence, and the scope of interference is only in situations where there was an error apparent on the face of the award.

PATENT ILLEGALITY: 2015 AMENDMENT & BEYOND

The Act was amended in the year 2015, which came into force on 23 October 2015 [8]. Section 34(2A) was added to the Act as a separate ground for setting aside only domestic arbitral awards and not international commercial arbitration awards or foreign awards. The scope of 'patent illegality' was thus limited to the error in the domestic arbitral award being *prima facie* and on the face of the record.

These changes to the regime with respect to patent illegality, were the subject of interpretation by the Supreme Court in Ssangyong [9]. The Supreme Court in Ssangyong, reiterated the opinions of the Law Commission and held that a mere contravention of a statute or substantive law of India (not linked to public policy or public interest) could not be a ground to set aside a domestic award on the ground of patent illegality. It also reiterated the language of Section 34(2A) to deter courts from re-appreciating evidence.

Further, the scope of judicial scrutiny of contractual terms was limited and held to be exclusively within the domain of the arbitrator. Courts were required not to interfere with any contractual interpretation made by an arbitral tribunal, unless the interpretation is one which no reasonable person would make. Moreover, it was also reiterated that the arbitrator does not have the power to wander outside the contract and adjudicate on disputes not referred to him.

ANALYSIS OF COURT'S POWER TO EXAMINE CONTRACTUAL INTERPRETATION PROPOUNDED BY ARBITRAL TRIBUNAL

The importance of ensuring minimal judicial intervention in arbitral awards was highlighted in the Supplementary Report No. 246 of the Law Commission ("Supplementary Report"). As a result, after the 2015 amendment, the test to determine whether an arbitral award is contrary to the "fundamental policy of Indian law" no longer entails a review of the dispute on merits.

The Supreme Court made it clear in Ssangyong that the grounds not available for challenging an award under the ground of 'fundamental policy of Indian law' cannot be brought in through the backdoor to challenge an award under the ground of patent illegality. Doing so would amount to doing something indirectly which one cannot do directly. Various decisions have followed the interpretation as held in the celebrated decision of Ssangyong.

The interpretation of patent illegality has further been clarified by various judgements. It has been held that in the event of multiple possible interpretations to a contract, the arbitral tribunal's decision to adhere to one particular interpretation of the contract would not in itself render the award patently illegal [10]. However, if the arbitral tribunal goes beyond the terms of the contract and deals with issues extrinsic to the dispute, that would be a jurisdictional error, making the award liable to be set aside [11]. Further, the High Court of Delhi has employed this interpretation and held that the reliance placed by the arbitrator on documents extraneous to the contract for interpretation of the terms of the contract was a case of patently illegality [12].

The Supreme Court in South East Asia Marine Engineering and Constructions Ltd v. Oil India Limited ("South East Asia") [13], observed that on a holistic reading of the terms and conditions of the contract,

if the view taken by the arbitrator was not even a possible view or was perverse, then the award passed is liable to be set aside as patently illegal. The Supreme Court further held that if the construction of the contract by the arbitral tribunal was irrational upon a complete perusal of the same, then the award is liable to be set aside as patently illegal.

The decision in South East Asia appears to be contrary to the wordings of patent illegality as a ground for setting aside of the award since the view taken is that any error in interpretation not on the face of award can be reviewed by the Court under Section 34 of the Act. Such an interpretation is self-defeating more so because it fails to consider the words "on the face of the award" as set out in Section 34(2A) of the Act.
While the ground of patent illegality to set aside domestic arbitral awards was intended to govern erroneous interpretations of the law and jurisdictional issues of the award, the recent Supreme Court ruling in South East Asia, has created controversy regarding the extent of court's ability to interpret the underlying contracts while determining the ground of patent illegality for setting aside an arbitral award.

SCOPE OF COURT'S INTERFERENCE IN INTERPRETATION OF CONTRACTS BY ARBITRAL TRIBUNALS IN OTHER JURISDICTIONS

The power of the courts in foreign jurisdictions to interfere with an arbitrator's interpretation of contractual terms has been held to be extremely limited by courts.

The Supreme Court of the United States in Oxford Health Plans LLC v. Sutter [14], held that the sole question for the court to consider is whether the arbitrator interpreted the parties' contract, not whether he got its meaning right or wrong. The Supreme Court of the United States in this case stated that it was not for the court to determine whether the arbitrator had committed errors in interpretation, but to merely determine whether the arbitrator strayed from interpreting the contract at all.

Similarly, the House of Lords in Lesotho Highlands Development Authority v. Impregilo SpA and Others [15], has held that a challenge on the ground that the arbitral tribunal arrived at a wrong conclusion regarding a matter of law or fact is not permitted. In this case, a mistake in interpreting the contract was considered to be a "question of law", and thus incapable of being interfered with under setting aside proceedings. The Queen's Bench Division of the High Court in B v. A [16] similarly held that an error in the construction of a contractual provision as per the relevant rules of contractual interpretation by the arbitral tribunal was not a valid ground of challenge to the arbitral award.

Similarly, the Singapore High Court in Quanzhou Sanhong Trading Ltd v. ADM Asia-Pac. Trading Pte Ltd. [17], held that a wrong conclusion reached by the arbitral tribunal will stand as long as the issue decided was within the terms of reference to the arbitral tribunal.

CONCLUSION

The intent of the 246th Law Commission report was to reduce judicial variations in the scope and grounds to set aside arbitral awards. Based on this report, the Law Commission intended to define the contours of public policy and patent illegality as two distinct and mutually exclusive grounds for setting aside arbitral

awards. These recommendations were in fact adopted by the 2015 amendment of the Act with the intent to limit the scope of judicial interference pertaining to the merits of the dispute.

The Act now clearly recognises patent illegality to be a distinct and separate ground for setting aside arbitral awards between domestic parties, from that of public policy. The basis for invoking the ground of patent illegality is to challenge an arbitral award based on grave errors of appreciating the law of the contract for jurisdictional errors, substantive law as well as the provisions of the Act. However, it is pertinent to note that the interpretation of a contract is a matter for the arbitrator to determine [18]. Therefore, as long as the arbitral tribunal does not wander beyond the terms of the contract or beyond the disputes referred to them, the conclusion reached by the arbitral tribunal, regardless of its correctness, must be upheld.

REFERENCES

[1] Section 5, Arbitration & Conciliation Act, 1996.
[2] Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd., (2003) 5 SCC 705.
[3] Section 34(2)(b)(ii), Arbitration & Conciliation Act, 1996.
[4] Dhanna Lal v. Kalawatibi and Ors, [2002] Supp 1 SCR 19.
[5] Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.
[6] Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996, Report No. 246 (August 2014).
[7] Phulchand Exports Ltd. v. OOO Patriot, (2011) 10 SCC 300.
[8] Arbitration & Conciliation (Amendment) Act, 2015.
[9] Ssangyong Engineering & Construction Co. Ltd v. National Highways Authority of India, (2019) 15 SCC 131.
[10] Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306.
[11] MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011) 10 SCC 573.
[12] Mohan Steels Limited v. Steel Authority of India, O.M.P. 488/2015.
[13] (2020) 5 SCC 164.
[14] 569 U.S. 564, 573 (U.S. S.Ct. 2013); Jock v. Sterling Jewelers Inc., 942 F. 3d 617 (2d Cir. 2019).
[15] [2005] UKHL 43; London Steam-Ship Owners' Mutual Insurance Association Ltd v. Kingdom of Spain, [2020] EWHC 1582 (Comm).
[16] [2010] EWHC 1626 (QB); Reliance Industries Ltd v. Union of India, [2018] EWHC 822 (Comm).
[17] [2017] SGHC 199.
[18] Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission, (2003) 8 SCC 593; D.D. Sharma v. Union of India, (2004) 5 SCC 325.

NEWS AND UPDATES IN DOMESTIC ARBITRATION

LARGER BENCH OF SUPREME COURT TO DECIDE WHETHER INELIGIBLE PERSON CAN APPOINT AN ARBITRATOR:

Can a person, who is himself disqualified to be an arbitrator as per Section 12(5) of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"), appoint an arbitrator? The Supreme Court of India ("Supreme Court") in Union of India v. Tantia Constructions Ltd has referred this issue to a larger bench. The Supreme Court doubted the correctness of the decision in Central Organisation for Railway Electrification v. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, where a 2-judge bench held that such appointments by an authority who is disqualified from being an arbitrator can be valid depending on the appointment mechanism. On the other hand, an earlier decision delivered by another 2-judge bench in Bharat Broadband Network Ltd v. United Telecoms Ltd., had held that the appointment of an arbitrator by a person who himself is ineligible to be an arbitrator as per Section 12(5) of the Arbitration Act is *void ab initio*.

Therefore, the Hon'ble Chief Justice of the Supreme Court was requested to constitute a larger bench to look into the correctness of the decision in Central Organisation for Railway Electrification v. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company.

APPOINTMENT OF AUTHORITY, WHICH HAS CONTROLLING INFLUENCE OVER ONE OF THE PARTIES, AS ARBITRATOR IS INVALID:

The Supreme Court in Haryana Space Application Centre and Another v. M/s Pan India Consultants Pvt Ltd. has held that the appointment of the Principal Secretary, Government of Haryana, as the nominee arbitrator of Haryana Space Application Centre ("HARSAC") which is a nodal agency of the Government of Haryana, would be invalid under Section 12(5) of the Arbitration Act read with the Seventh Schedule. It was held that the Principal Secretary to the Government of Haryana would be ineligible to be appointed as an arbitrator, since he would have a controlling influence on HARSAC,

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being a nodal agency of the State, and that such appointment would be in direct contravention of Item 5 of the Seventh Schedule of the Arbitration Act.

ORDER OF THE SINGLE JUDGE MANDATING STATUS QUO ON FUTURE-RELIANCE DEAL STAYED BY DIVISION BENCH:

The High Court of Delhi ("Delhi High Court") in Future Retail v. Amazon.com NV Investment Holdings LLC has stayed the implementation of the learned Single Judge's status quo order on the Future-Reliance deal. The Division Bench noted that Future Retail Ltd., was not a party to an arbitration agreement with Amazon and prima facie opined that the "group of companies" doctrine could not be invoked in the present case. It was also observed that *prima facie* there was no reason to seek a status quo order before the learned Single Judge. Earlier, while reserving his order in Amazon's interim plea to stop Future Group companies and officials from relying on approvals given by statutory authorities in relation to the deal, the learned Single Judge had directed Future Retail Ltd to maintain status quo in relation to its with deal with Reliance. All statutory authorities were also ordered to maintain status quo in all matters that were in violation of the Emergency Award passed in the Amazon-Future dispute. The order passed by the Division Bench in this matter has been challenged by Amazon before the Supreme Court by way of a Special Leave Petition. The matter is currently pending before the Supreme Court.

LOK SABHA PASSES ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2021:

The Arbitration and Conciliation (Amendment) Bill, 2021 was passed by the Lok Sabha on February 12, 2021 by voice vote. The Bill replaces an Ordinance with same provisions promulgated on November 4, 2020. The Bill specifies that an unconditional stay on an arbitral award can be provided (even during the pendency of the setting aside application) if the court is satisfied that: (i) the relevant arbitration agreement or contract, or (ii) the making of the award, was induced, or effected by fraud or corruption. The aforementioned provision shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015. The Bill also removes the Eight Schedule of the Arbitration Act and states that the qualifications, experience, and norms for accreditation of arbitrators will be specified by regulations.

SUPREME COURT REFERS TWO CASES TO MUMBAI CENTRE FOR INTERNATIONAL ARBITRATION:

In a major win for institutional arbitration in India, as per the orders passed by a bench of Justice Indu Malhotra and Justice Ajay Rastogi, the Mumbai Centre for International Arbitration ("MCIA") will be adjudicating two disputes, one of which would have former Chief Justice of India, Ranjan Gogoi as the sole arbitrator. The disputes between Grasim Industries Ltd. and Visa Resources PTE Ltd., along with the dispute between MCM Service Private Limited and Ithalia Thai Development Public Company Limited, would be adjudicated by the MCIA.

PRIMA FACIE CASE OF NON-EXISTENCE OF A VALID ARBITRATION AGREEMENT HAS TO BE SHOWN FOR REJECTION OF SECTION 8 APPLICATION UNDER THE ARBITRATION ACT:

The Delhi High Court in Knowledge Podium Systems Pvt Ltd v. S M Professional Services Pvt Ltd has held that for the rejection of an application under Section 8 of the Arbitration Act, a party has to make out a *prima facie* case of non-existence of a valid arbitration agreement, by summarily portraying a strong case. The Delhi High Court, however, held that when in doubt, the court has to refer the matter to arbitration. It was also observed that the court should refer the matter to arbitration if the validity of the arbitration agreement cannot be determined on a *prima facie* basis. In this case, it was not clear whether the arbitration agreement was still valid or whether it stood novated, and since this issue required deeper consideration, the Delhi High Court opined that it was best to leave the issue to the arbitral tribunal to adjudicate upon.

UNILATERAL APPOINTMENT OF ARBITRATOR, EVEN FROM A PANEL OF ARBITRATORS, IS NOT PERMISSIBLE:

The Delhi High Court in City Lifeline Travels Private Limited v. Delhi Jal Board has reiterated that the efficacy of arbitration as an alternate dispute resolution mechanism rests on the foundation that the disputes would be adjudicated by independent and impartial arbitrators. The Delhi High Court observed that it was important to ensure that arbitrators must not be appointed by persons who are otherwise interested in the matter so as to obviate any doubt as to the impartiality and independence of the arbitral tribunal. It was held that an arbitration clause which allowed the respondent the unilateral power to appoint an arbitrator from a panel of arbitrators was not permissible and allowed the application of the petitioner for the appointment of an arbitrator by the court.

FORUM SELECTION CLAUSE OVERRIDES SEAT OF ARBITRATION IN DOMESTIC ARBITRATIONS:

The High Court at Calcutta ("Calcutta High Court") in Bowlopedia Restaurants India Ltd. v. Devyani International Ltd., held that a forum selection clause overrides the jurisdiction of the seat of arbitration in domestic arbitrations when, even otherwise, the selected forum has jurisdiction similar to Section 20 of the Code of Civil Procedure, 1908. It was observed that party autonomy being integral to the arbitral regime, it is appropriate that, in a domestic arbitration, when the parties agree to a specific forum which otherwise has jurisdiction, then such specified forum should have precedence over the seat of arbitration. This order was passed while deciding an application under Section 9 of the Arbitration Act for interim protection. The Calcutta High Court held that the seat of arbitration, in the case of a domestic arbitration, assumes significance, in the absence of a valid forum selection clause.

LOCUS STANDI OF THIRD PARTIES IN APPLICATIONS UNDER SECTION 9 OF THE ARBITRATION ACT:

The High Court of Judicature at Bombay ("Bombay High Court") in Valentine Maritime Ltd. v. Kreuz Subsea Pte Ltd. has confirmed that it is only a "party" to an arbitration agreement that can approach a court under Section 9 of the Arbitration Act seeking interim protective measures. It was also held that the power of a court entertaining an application under Section 9 of the Arbitration Act is not restricted to passing orders only against "parties" to the agreement per se, and that orders can be passed even against third parties under Section 9 of the Arbitration Act. However, it was also held that such third parties do not possess the necessary locus standi to file an application under Section 9 of the Arbitration Act.

INTERNATIONAL ARBITRATION

ARBITRATION INSTITUTIONS DEFY DISRUPTION CAUSED DUE TO THE PANDEMIC, ANNOUNCE RECORD NUMBER OF NEW CASES:

International arbitration has remained popular in 2020, despite the disruption caused by the pandemic. The International Chamber of Commerce ("ICC") recorded a total of 946 new arbitration cases in 2020 – the highest number of cases registered since 2016, when a complex cluster of small disputes effectuated a marked increase in the statistics. Of the 946 total registered cases, a record 929 were requested under the ICC Rules of Arbitration while 17 cases were filed under the ICC Appointing Authority. Meanwhile, the International Centre for Settlement of Investment Disputes ("ICSID"), which is the World Bank's investment arbitration centre, registered 58 new cases during 2020, of which 54 were under ICSID's own rules, beating the previous record of 56 cases in 2018. This means that ICSID went past 50 new cases in a year for the fifth time in nine years, having first broken the barrier in 2012.

ARBITRATION INSTITUTIONS ISSUE NEW RULES IN THE WAKE OF COVID-19:

International arbitral institutions have introduced several significant amendments to their respective arbitration rules, that accommodate the changing needs and requirements of the various stakeholders in arbitrations, especially in light of the COVID-19 pandemic. The Dubai International Financial Centre-London Court of International Arbitration ("DIFC-LCIA") Arbitration Centre has published a new set of rules ("2021 Rules") which came into effect on January 1, 2021 and will apply to any DIFC-LCIA arbitration commenced from that date. The 2021 Rules replace the 2016 Rules and mirror the newly adopted LCIA Rules of Arbitration, which came into effect on October 1, 2020.The ICC has also issued its new Arbitration Rules, which have come into force since January 1, 2021, and will apply to any arbitration commenced after that date unless otherwise expressly agreed between the parties. These amendments include provisions for virtual hearings, submission of electronic pleadings, data protection, etc.

INDIA FILES APPLICATION IN SINGAPORE HIGH COURT AGAINST ARBITRATION PANEL VERDICT IN VODAFONE TAX CASE:

The Indian government has challenged an international arbitration tribunal's award that overturned its demand for Rs. 22,100 crore in back taxes from Vodafone Group Plc before the Singapore High Court. An arbitral tribunal seated in Singapore under the auspices of the Permanent Court of Arbitration, in September 2020, had rejected the demand of Indian tax authorities for Rs. 22,100 crore in back taxes and penalties relating to Vodafone's 2007 acquisition of an Indian operator. The demand pertained to Vodafone's USD 11-billion acquisition of 67 per cent stake in the mobile phone business owned by Hutchison Whampoa.

SWISS FEDERAL SUPREME COURT ("SFSC") CONFIRMS PRINCIPLE OF 'KOMPETENZ-KOMPETENZ' AS A RULE OF CHRONOLOGICAL PRIORITY:

The Swiss Federal Supreme Court ("SFSC") has upheld an arbitral award referring to the widely recognized principle in international arbitration of 'kompetenz-kompetenz'. The dispute originated from a construction agreement between the State of Libya and a Turkish company. After disputes arose between the two parties, the Turkish company, in 2016, filed a request for arbitration with the ICC in Paris on the basis of a bilateral investment treaty. The arbitral tribunal thus formed issued an award in favour of the Turkish company, which was awarded approximately USD 22 million including interest. Parallel to the pending arbitration proceedings, the State of Libya, in 2018, initiated proceedings before a court in Tripoli, Libya regarding the subject matter of the arbitral dispute. After the court in Tripoli ruled in favour of the State of Libya, the latter filed an appeal against the arbitral award with the SFSC. The SFSC held that the arbitral proceedings were initiated prior to the state proceedings in Tripoli and thus, the arbitral tribunal – due to the chronological priority of the arbitral proceedings – was in its power to come to a decision on their own jurisdiction before any state court has rendered its decision in that regard.

SFSC UPHOLDS REQUEST FOR REVISION OF ARBITRAL AWARD BASED ON SUBSEQUENT DISCOVERY OF CIRCUMSTANCES THAT JUSTIFIED REMOVAL OF ARBITRATOR:

The SFSC has upheld a request for revision of an arbitral award of the Lausanne-based Court of Arbitration for Sport ("CAS") regarding the Chinese swimmer Sun Yang on grounds of bias and lack of impartiality of the chairman of the CAS panel. In its decision of February 28, 2020, the CAS imposed an eight-year ban on the Chinese swimmer Sun Yang for violation of doping rules. On June 15, 2020, Sun Yang filed an appeal against the CAS award with the SFSC, where he raised doubts against the impartiality of the chairman of the CAS panel, Franco Frattini. The SFSC held that firstly, Sun Yang's delay in placing the material pertaining to the arbitrator's partiality was justified, as such material was not discoverable with reasonable diligence earlier. Secondly, it was held that the use of extremely violent anti-Chinese language on several occasions by the arbitrator was sufficient to raise doubts about the arbitrator's impartiality, and accordingly, the award passed against Sun Yang was set aside.

CANADA AND EU CLOSE IN ON CANADA-EU COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT ("CETA") INVESTMENT COURT:

Canada and the European Union ("EU"), on January 29, 2021, have adopted four decisions related to the investor-state dispute resolution body established under the CETA. The parties intend to form a fully-fledged "investment court" system for the adjudication of investor-state disputes. Chapter Eight of CETA establishes a Tribunal to hear investment disputes and an Appellate Tribunal, but leaves some organizational details, including procedures for the initiation and conduct of appeals, to be decided by committees established under CETA. The adoption of these decisions will lead to an eventual Investment Court System that will be available to Canadian investors in the EU, and vice versa, under CETA.

OTHER INDIAN LEGAL UPDATES

CORPORATE LAW UPDATES

COMPANIES (ARRANGEMENTS AND AMALGAMATIONS) AMENDMENT RULES, 2021:

The Ministry of Corporate Affairs ("MCA") has notified the Companies (Arrangements and Amalgamations) Amendment Rules, 2021, thereby amending Companies (Arrangements and Amalgamations) Rules, 2016. The said amendment now provides for amalgamation and mergers of two or more 'start-up' companies, as well as for amalgamation and mergers of start-up companies with small companies.

MCA AMENDS COMPANIES (SHARE CAPITAL AND DEBENTURES) RULES, 2014:

The MCA, on February 11, 2021 has amended the Companies (Share Capital and Debentures) Rules, 2014. As per the said amendment, the minimum timeframe which companies can provide as a time limit for shareholders to accept an offer for further issue of shares, beyond which the offer will be deemed to be declined, will now be 7 days, as compared to the limit of 15 days prescribed under Section 62(1)(a)(i) of the Companies Act, 2013.

COMPANIES (SPECIFICATION OF DEFINITION DETAILS) AMENDMENT RULES, 2021:

By way of Section 469 of the Companies Act, 2013, the Central Government on February 1, 2021 has notified the Companies (Specification of Definition details) Amendment Rules, 2021. Hereby, the paid up capital and turnover for a small company has been restricted to rupees two crores and rupees twenty crores respectively.

COMPANIES (INCORPORATION) SECOND AMENDMENT RULES, 2021:

By way of Section 469 of the Companies Act, 2013, the Central Government on February 1, 2021 has amended the Companies (Incorporation) Rules, 2014. By way of the aforesaid rules, Rule 6, which provides for the conversion of a one-person company into a public or private company, and eForm No. INC-6, have been notified.

COMPANIES (CORPORATE SOCIAL RESPONSIBILITY POLICY) AMENDMENT RULES, 2021:

In exercise of the powers conferred by Sections 135 and 469 of the Companies Act, 2013, the Central Government has amended the Companies (Corporate Social Responsibility Policy) Rules, 2014 and notified the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021 on January 22, 2021. To address the pandemic, the aforesaid rules have amended the definition of corporate social responsibility ("CSR") to clarify that activities undertaken in pursuance of normal course of business of the company shall not be included under the ambit of CSR. Further, companies are now mandatorily required to constitute a CSR committee.

IBC AND OTHER UPDATES

FINANCIAL CREDITOR CAN BE EXCLUDED FROM COMMITTEE OF CREDITORS IF HE TRIES TO CIRCUMVENT BAR UNDER SECTION 21(2) OF THE IBC:

The Supreme Court in Phoenix Arc Private Limited v. Spade Financial Services Limited and Others has held that a financial creditor which is not a "related party" to the corporate debtor can also be excluded from the Committee of Creditors ("CoC") if it is established that the "related party" label was done away with to circumvent the bar under the first proviso to Section 21(2) of the Insolvency and Bankruptcy Code, 2016 ("IBC"). It was held that in cases where the related party financial creditor divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating in the CoC and sabotaging the corporate insolvency resolution process ("CIRP"), by diluting the vote share of other creditors or otherwise, it would be in consonance with the object of the first proviso to Section 21(2) of the IBC, to consider the former related party creditor, as being debarred.

SECTION 10A OF IBC BARS CIRP IN RESPECT OF DEFAULT POST MARCH 25, 2020, EVEN IF CIRP APPLICATION FILED BEFORE SECTION 10A WAS INTRODUCED:

The Supreme Court in Ramesh Kymal v. Siemens Gamesa Renewable Power Pvt Ltd has held that Section 10A of the IBC bars initiation of CIRP with respect to a default which occurred on or after March 25, 2020 even if the application for CIRP was filed before June 5, 2020, when Section 10A was inserted in the IBC. A Division Bench of the Supreme Court noted that the expression "shall ever be filed" under Section 10A of the IBC, inserted through an ordinance on June 5, 2020, was a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after March 25, 2020 for a period of six months, extendable up to one year as notified. However, it was also clarified that the retrospective bar on the filing of applications for the commencement of CIRP during the stipulated period does not extinguish the debt owed by the corporate debtor or the right of creditors to recover it.

REGISTRAR, NCLT CANNOT DETERMINE THE APPLICABILITY OF NOTIFICATION ON INCREASED IBC THRESHOLD:

The Delhi High Court in Skillstech Services Pvt Ltd vs Registrar, NCLT, New Delhi and Another has held that the issue of applicability of the notification dated March 24, 2020 to a particular case, which has increased the pecuniary threshold under the IBC to Rs. 1 crore, cannot be determined by the Registrar of the National Company Law Tribunal ("NCLT") in its administrative capacity.

It was observed that the question of jurisdiction has to be judicially determined by the appropriate NCLT bench.

RESOLUTION PROFESSIONAL CANNOT DECIDE LEGALITY OR ILLEGALITY OF RESOLUTION APPLICANT'S STATUS AS WILFUL DEFAULTER:

The National Company Law Appellate Tribunal ("NCLAT") in HS Bedi v. Oriental Bank of Commerce has held that a Resolution Professional under the IBC cannot go into the issue of legality or illegality of a resolution applicant's status as a wilful defaulter when the same is already pending before the High Court. The NCLAT observed that the High Court of Karnataka had passed an interim order merely allowing the resolution applicant to submit his resolution plan but no stay of declaration as 'wilful defaulter' was granted, and since, the writ petition was still pending before the High Court of Karnataka, the Resolution Professional could not have gone into the correctness or incorrectness of declaration of the resolution applicant as a wilful defaulter, and could have only relied on the present status of the resolution applicant.

NCLT STATUTORILY BOUND TO PASS ORDER IN INSOLVENCY PLEA WITHIN 14 DAYS OF FILING:

The NCLAT in The South Indian Bank Ltd v. Gold View Vyapaar Pvt Ltd has held that the NCLT is statutorily bound to pass an order of admission or rejection in an insolvency plea within 14 days of its filing, stating that no final hearing was postulated at pre-admission stage. The NCLAT observed that the NCLT has to be alive to the phraseology to be employed at different stages of the CIRP proceedings and not give impression of a final hearing at the pre-admission stage.

COMPANY PURCHASING COMMERCIAL SPACE FOR ITS OFFICE IS NOT A "CONSUMER" UNDER THE CONSUMER PROTECTION ACT, 2019 ("CPA"):

While considering whether a company purchasing commercial space for its office is a "consumer" under the CPA, the National Consumer Disputes Redressal Commission ("NCDRC") in Freight System (India) (P) Ltd. v. Omkar Realtors and Developers (P) Ltd. has held that a company is included in the definition of 'person' contained in Section 2(31)of the CPA, and that it is not per se precluded from being a 'consumer', provided, if, for a particular purpose, it meets the requirements of 'consumer' as defined in Section 2(7) of the CPA. The NCDRC observed that 'housing construction' under the definition of 'service' in Section 2(42) cannot be construed to include construction of a commercial complex for commercial activity; and that commercial space in a commercial complex for an office of a company engaged in a business to generate profit is for 'commercial purpose'. The NCDRC also observed that a company creating immovable capital assets in the form of lands and buildings, in its own name, for its office, is differently placed from a company buying a car, in its own name, 'solely or principally' for the personal use of its directors or employees.

DID YOU KNOW THAT ?

The first evidence of an outlined plan for the arbitration of international disputes dates back to the early fourteenth century. In 1306, Pierre Dubois, a royal advocate of Normandy, wrote a pamphlet which developed an elaborate plan for the recovery of the Holy Land. Dubois advocated arbitration as a means to settle the outstanding disputes between the various factions. The court was to consist of three ecclesiastical judges and six "others," three from each of the two parties to the dispute. From the decision of these men, there was to be one appeal - to the Pope.

The largest international arbitral award for compensation was in Yukos Universal Limited (Isle of Man) v. The Russian Federation arbitration. The claimants in the arbitration were granted compensation of $15 billion, representing the largest arbitration award in history. The claims in arbitration pertained to a series of actions undertaken by the respondent against Yukos Oil Company, which led to the bankruptcy of the company and eliminated all value of the claimant's shares in Yukos.

The International Centre for Settlement of Investment Disputes Convention ("ICSID Convention") does not permit domestic courts of States to refuse enforcement on any grounds. Article 53 of the ICSID Convention requires every contracting state to enforce pecuniary obligations imposed under an ICSID award, as final and binding, as if it were a judgement of a court in that State. The Convention has 155 contracting States. India is not a party to the ICSID Convention.

India was the among the first 10 signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention"). The other countries are Belgium, Costa Rica, El Salvador, Germany, Israel, Jordan, Netherlands, Philippines and Poland. All these countries signed the Convention on June 13, 1958. India was the 8th country to ratify the Convention.

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Historically, the great majority of arbitration cases seated in India have been ad hoc and not institutional. A 2013 PwC study found that 47% of Indian companies that had chosen arbitration as their preferred method of dispute resolution, chose ad hoc proceedings. The predominant choice of arbitrator in such cases has been, and remains, retired court judges. As a result, domestic arbitration has developed the characteristic of 'after hours' litigation with advocates conducting short hearings after the court closes in front of retired judges.

AWARDS & RECOGNITIONS

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