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India—No bar on two Indian parties in choosing a foreign seat of arbitration? (GMR Energy v Doosan Power)

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Arbitration analysis: Moazzam Khan co-head of International Dispute Resolution Practice at Nishith Desai considers the Delhi High Court decision in GMR Energy v Doosan Power Systems which follows the High Court decisions in Sasan Power and Atlas Exports that there is no prohibition on two Indian parties opting for a foreign seat of arbitration, and such an arrangement would attract Part II of the Arbitration and Conciliation Act, 1996.

Original news

GMR Energy Limited v Doosan Power Systems India Private Limited & Ors, 2017 SCC OnLine Del 11625

Background

GMR Chattisgarh Energy Limited ('GCEL') entered into three agreements with Doosan Power Systems India Private Limited ('Doosan India'), all dated 22 January 2010 ('EPC Agreements'). A separate corporate guarantee was also executed between GCEL, GMR Infrastructure Ltd ('GIL'), and Doosan India on 17 December 2013 ('Corporate Guarantee'). Thereafter, two Memoranda of Understanding were executed between Doosan India and GMR Energy Limited ('GMR Energy') dated 1 July 2015 and 30 October 2015 ('MOUs'). The EPC Agreements, Corporate Guarantee, and the MOUs became the subject matter of a dispute and Doosan India invoked arbitration proceedings against GIL, GMR Energy and GCEL seeking enforcement of certain liabilities.

GMR Energy filed a civil suit before the Delhi High Court ('Delhi HC') to restrain Doosan India from instituting or continuing or proceeding with the arbitration proceedings. In the arbitration proceedings, GMR Energy was impleaded even though it was not a signatory to the three EPC Agreements, the Corporate Guarantee, by virtue of two MOUs, family governance, transfer of shareholding and being *alter ego* of GCEL and GIL. This was challenged by GMR Energy in the civil suit which objected to being arrayed as a party and sought discharge of GMR Energy as a party, respondent and termination of reference of the arbitration proceedings.

An ad interim *ex parte* order was passed on 4 July 2017 wherein the Delhi HC directed that no arbitrator be appointed on behalf of GMR Energy until the next date of hearing.

GMR Energy also filed an urgent interim application under Order 39, Rule 1 and 2 of the Code of Civil Procedure, 1908 ('CPC'). Doosan India filed two applications (a) application under Order 39, Rule 4 to vacate the operation of the 4 July 2017 order; and (b) application under Section 45 of the Act, inviting the Delhi HC to refer the parties to arbitration.

Contentions on behalf of Doosan India

The contentions of Doosan India impleading GMR Energy in the arbitration proceedings have been summarised below:

- there exists a valid and binding arbitration agreement between Doosan India, GCEL, GIL and GMR Energy being *alter ego* and a guarantor of GCEL has been rightly impleaded in the arbitration proceedings
- the fact that:
  - GMR Energy is a holding company of GCEL and has taken over GCEL liabilities towards Doosan India
  - GMR Energy guaranteed to make payments and made certain payments on behalf of GCEL in partial discharge of the liability of GCEL, and at that relevant time GMR Energy owned 100% stakes in GCEL, co-mingled funds, run by the same family, had the same Directors and officers
  - the EPC Agreements, the Corporate Guarantee all contain arbitration clause with the intention to resolve any dispute through arbitration under the SIAC Rules and additionally the two MOUs are also governed by the same agreements, the payment obligation being undertaken by GMR Energy for assuring proper execution of three EPC Agreements between Doosan India and GCEL, the arbitration clause would also extend to GMR Energy

- it was also contended that invocation of arbitration against the *alter ego* of a signatory is a well-recognized principle not only in India (*Chloro Controls India Pvt Ltd v Severn Trent Water Purification Inc & Ors* 2013 (1) SCC 641) (not reported by LexisNexis), but also in Singapore (*Jiang Haiying v Tan Lim Hui and Anr*, [2009] SGHC 42)(not reported by LexisNexis).
- the arbitral tribunal is the appropriate forum to adjudicate the issue of *alter ego* and the same being determinable by the arbitral tribunal, this court cannot proceed with the present suit to determine whether GMR Energy is liable to be proceeded in the Arbitration Proceedings (*Integrated Sales Services Aloe Vera of America, Inc v Asianic Food (S) Pte. Ltd & Anr* 2006 (3) SGHC 78; *M/s Sai Soft Securities Ltd v Manju Ahluwalia* FAO (OS) No. 65/2016)(not reported by LexisNexis)
- the decision of the Delhi HC in *Sudhir Gopi* is not applicable in the present case, since in *Sudhir Gopi* the dispute did not pertain to international arbitration but under Part I of the Act, hence the said decision has no application to the present case

The contentions of Doosan India on the applicability of Part II of the Arbitration and Conciliation Act, 1996 ('Act') to the arbitration proceedings have been summarised below:

- relying on the decisions of the Supreme Court in *Sasan Power Limited v North American Coal Corporation (India) (P) Ltd* 2015 SCCOnline M.P. 7417('Sasan Power') and *Atlas Exports Industries v Kotak &Co* 1999 (7) SCC 61 ('Atlas Exports'), it was argued that two Indian parties can choose a foreign seat of arbitration, and such an arrangement would not be in contravention with Section 28 of the Indian Contract Act, 1872 ('Contract Act')
- GMR Energy's reliance on *TDM Infrastructure* was improper since the ruling in *TDM Infrastructure* being a decision under Section 11 of the Act cannot be treated as a binding precedent, as was held in *Associate Builders v Delhi Development Authority* 2015 (3) SCC 49.

Contentions on behalf of GMR Energy

The contentions of GMR Energy impleading GMR Energy in the arbitration proceedings have been summarised below:

- GMR Energy being a non-signatory to any of the arbitration agreements, cannot be roped into an international arbitration by applying the principle of *alter ego* or '*it being a guarantor*' without there being a written guarantee
- the principle of *alter ego* does not entitle Doosan India to invoke arbitration against GMR Energy as each company is a separate and distinct legal entity, and the mere fact that the two companies have common shareholders or common board of directors will not make the two companies a single entity (*Indowind Energy Ltd v Wescare (India) Ltd*., 2010 (5) SCC 306 and *Sudir Gopi, Balwant Rai Saluja & Anr v Air India Ltd & Ors.* 2014 (9) SCC 407)(not reported by LexisNexis).
- the basis of impleading GMR Energy on the basis of the MOUs is incorrect, as admittedly, the two MOUs stood terminated by a letter dated 3 November 2016, and which letter was not made part of the arbitration proceedings
- despite the fact that GMR Energy is not a party to the arbitration agreement, Doosan India has imposed the arbitration proceedings on GMR Energy, which is oppressive, vexatious apart from being illegal

The contentions of GMR Energy on the applicability of Part II of the Act to the arbitration proceedings have been summarised below:

- the EPC Agreements as well as the Corporate Guarantee prescribe
  - the governing law of the contract as Indian law
  - arbitration shall be conducted in Singapore, and
  - arbitration shall be as per SIAC Rules

- since the relationship between GCEL, GIL and Doosan India is domestic in nature, and hence all parties being Indian, Part I of the Act would apply in view of the recent amendment to Section 2 (1)(f)(iii) of the Act. Reliance was also placed on *TDM Infrastructure Private Limited v UE Development India Private Limited* 2008 (14) SCC 271, *Seven Islands Shipping Ltd v Sah Petroleums Ltd* 2012 MhLJ 822 ('*Seven Islands*'), *Aadhar Mercantile Private Limited v Shree Jagdamba Agrico Exports Private Ltd*. 2015 SCC OnLine Bom 7752 (not reported by LexisNexis).
- as the arbitration is between two Indian parties, it cannot be termed as international commercial arbitration and Indian substantive law cannot be derogated from by and between two Indian parties as held in *Bharat Aluminium Company and Ors v Kaiser Aluminium Technical Service, Inc and Ors*. 2012 (9) SCC 552
- since two Indian parties cannot contract out of the law of India and the Act is a substantive law, exclusion of Part I of the Act which Doosan India seeks to do would be hit by Section 28 of the Contract Act
- Part II of the Act would not apply merely because the place of arbitration is out of India. Once the arbitration is between two Indian parties, it ceases to be an 'international commercial arbitration', and therefore automatically ceases to be 'considered as commercial under the law enforced in India' which is the principle condition for defining 'a foreign award' under Section 44 of the Act. Accordingly, the Section 45 Application is not maintainable

Judgment

Delhi HC held that the Arbitration Proceedings would fall under Part II of the Act

The Delhi HC affirmed the finding of the Supreme Court of India ('Supreme Court') in *Atlas Exports*, wherein the Supreme Court had to determine whether the fact of two Indian parties having a foreign seated arbitration would be opposed to public policy under Section 23 read with Section 28 of the Contract Act. The Supreme Court answered in affirmative, meaning that there is no prohibition for two Indian parties to opt for a foreign seat of arbitration. The Madhya Pradesh High Court also affirmed the ruling in *Sasan Power* which had relied on *Atlas Exports* to reach the same conclusion.

The Delhi HC also dismissed GMR Energy's contention that the decision in Atlas Exports is under the 1940 Arbitration Act, hence not applicable under the Act. On this issue, reliance was placed on the Supreme Court's decision in *Fuerst Day Lawson v Jindal Exports Ltd* 2011 (8) SCC 333 (not reported by LexisNexis), wherein it was held that the new statute is more favourable to international arbitration than its previous incarnation.

The Delhi HC also held that the decision in *Seven Islands Shipping* and *Aadhar Merchantile* are *per incuriam* as they had not considered *Atlas Exports*.

Delhi HC held that GMR Energy was correctly impleaded in the arbitration proceedings

The Delhi HC observed that in view of the fact that:

- GCEL was a joint venture of GMR Group, and the group company did not observe separate corporate formalities and comingled corporate funds,
- GMR Energy relied on the MOUs signed and discharged liability by making part payment, and
- at the time of entering into the MOUs, GMR Energy had acquired GCEL

Doosan India has made out a case for proceeding against GMR Energy.

Before arriving at its decision, the Delhi HC considered the decision of the Supreme Court in *Chloro Control* wherein it was held that the legal bases to bind *alter ego* to an arbitration agreement are implied consent, third party beneficiary, guarantors, assignment or other transfer mechanism of control rights, apparent authority, piercing of corporate veil, agent principle relationship etc.

Interestingly, the Delhi HC while discussing the principle of *alter ego* held that the decision of Delhi HC in *Sudhir Gopi* is *per incuriam*, in so far as it failed to consider the issue of arbitrability of *alter ego* and the decision was passed without taking into consideration the decision of Supreme Court in *A Ayyasamy v A Paramasivam* (2016) 10 SCC 386 (nor reported by LexisNexis), wherein the Supreme Court carved out instances which cannot be referred to arbitration.

Practical implications

This decision, re-affirming that two Indian parties can seat their arbitration outside India and setting a non-signatory to arbitration, is yet another testament to pro-arbitration approach of Indian courts with the Delhi HC leading the charge.