**Analysis**

Can two Indian parties opt for a foreign seat of arbitration: An unresolved question!

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*With Indian Courts adopting a conflicting position on whether two Indian parties can agree to a foreign seat or foreign governing law in an arbitration, the question still remains unanswered with the Supreme court not having specifically addressed this issue in the case of Sasan Power.*

In the absence of any clear provision under the Arbitration and Conciliation Act, 1996 (*Arbitration Act*) and conflicting decisions of various High Courts and the Supreme Court, the issue of whether contracting parties, all domiciled in India, have the autonomy to choose a foreign seat for resolution of their disputes through arbitration has seen much debate.

This question was answered in the positive by the Madhya Pradesh High Court in a 2015 decision (*Sasan HC decision*), where party autonomy was held to be paramount in deciding the seat for arbitration. Therefore, there was much anticipation that the Supreme Court in the appeal to this case - *Sasan Power v North American Coal Corporation* (*Sasan SC decision*) would conclusively decide this issue.

However, the Supreme Court in the *Sasan SC decision* did not express any opinion on this issue. On the other hand, the Supreme Court found a foreign nexus to the dispute and allowed a foreign seated arbitration. Since the Supreme Court allowed the arbitration to proceed outside India, press articles have been written stating that the Supreme Court has upheld the autonomy of India domiciled parties to choose a foreign seat for arbitration. These press articles, however, are misleading as the question still remains unanswered.

**Why the question remains unanswered?**

Since the *Sasan HC decision* had upheld the autonomy of the parties, all domiciled in India, to choose a foreign seat, it was expected that the Supreme Court while deciding the appeal in this case would express their opinion on this issue and settle it finally. However, the Supreme Court, did not even consider the issue under discussion, much less provide a conclusive ruling on it. While the Supreme Court upheld the arbitration with a foreign seat in this case, the grounds for allowing it were entirely different.

The Supreme Court on the facts of the Sasan case concluded that the dispute between the parties had a *foreign element* to it. The Court noted that there were two agreements in question (a) a bi-party agreement between a foreign entity and an Indian entity; and (b) a tripartite agreement between a foreign entity and two Indian entities, wherein all rights and obligations of the foreign entity were assigned to an Indian entity, subject to certain qualifications. The Supreme Court
held that, given the nature of the agreements, adjudication of the dispute would involve examination of rights and obligations of the foreign entity, thereby giving a foreign element to the dispute. This would consequently allow the parties to choose a foreign governing law and foreign seat. Therefore, the question of autonomy of contracting parties (all domiciled in India) to agree to a foreign seat or foreign governing law in an arbitration was not addressed by the Supreme Court in this case. In fact, the Supreme Court in its judgment not only declined to address this issue, but also failed to either affirm or set aside the findings of the Madhya Pradesh High Court in the Sasan HC decision.

Prior to the Sasan HC decision, this issue was discussed in the case of TDM Infrastructure Pvt. Ltd. v UE Development India Ltd. (TDM Infrastructure) where the Supreme Court held that it appeared to be the legislature’s intention that Indian nationals should not be permitted to derogate from Indian law as this is part of the public policy of India. The decision in TDM Infrastructure was followed by the Bombay High Court in Addhar Mercantile Private Limited v Shree Jagdamba Agrico Exports Pvt. Ltd. (Addhar Mercantile). In this case, the High Court directed the arbitrating Indian parties to conduct their arbitration in India with Indian law as the substantive law of the contract even though the parties had contractually agreed to an "arbitration in India or Singapore" with English law as the substantive law.

Further, in Reliance Industries Limited & Anr. v Union of India, an award in a dispute between two Indian parties was challenged on various grounds including that the arbitration was seated outside India. While the Supreme Court in this case did not arrive at any specific finding on whether two Indian parties could have a foreign seated arbitration, it upheld the award in a foreign seated arbitration between Indian parties.

Therefore, while the decisions in TDM Infrastructure and Addhar Mercantile suggest that two Indian parties cannot arbitrate abroad, the Sasan HC decision and the decision of the Supreme Court in Reliance Industries suggest a contrary position leading to an ambiguity on the issue.

Further, the recent 2015 amendment to the Arbitration Act providing for interim reliefs by Indian courts in a foreign seated international commercial arbitration (i.e. an arbitration with at least one non-Indian party) further adds to this ambiguity as the amendment does not contemplate interim reliefs in arbitrations between two Indian parties with a foreign seat.

In light of the conflicting and, sometimes ambiguous, positions adopted by the High Courts and the Supreme Court, as well as the recent amendment on interim reliefs introduced in the Arbitration Act, the uncertainty on the position as to whether two Indian parties can have a foreign seat of arbitration continues. A conclusive finding from the Supreme Court on this issue is, therefore, much awaited.

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