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CASE IN POINT

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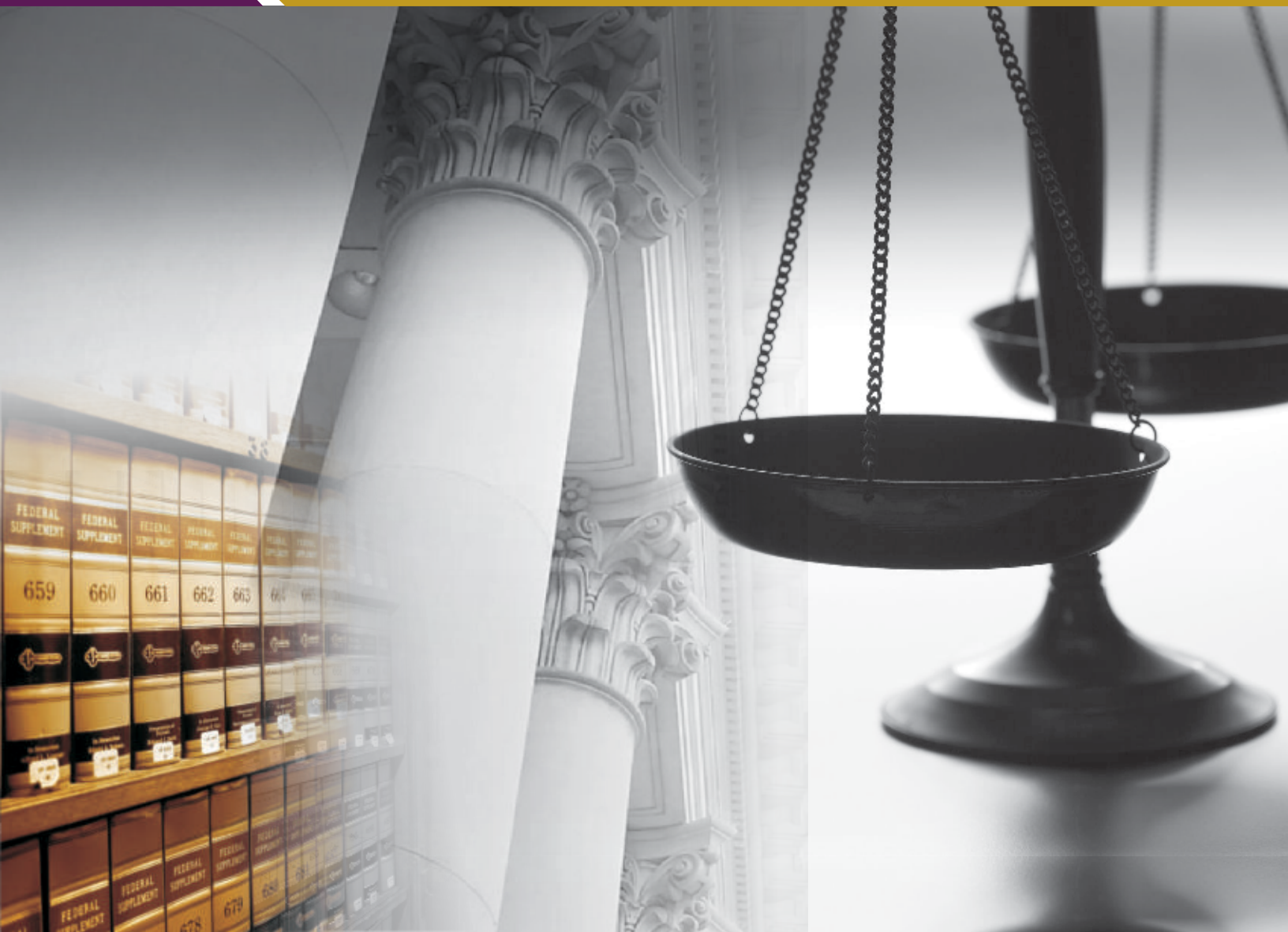

Foreword

It gives me immense pleasure to present to you the twenty third issue of Case in Point, a quarterly update on the recent legal developments in the Field of Dispute Resolution.

The lead piece in this issue focuses on anti-suit injunctions. We take a detailed look at the origin and evolution of anti-suit injunctions in the UK and its use in the EU and the United States. The articles is an essential read in understanding the anti-suit injunctions in a comparative perspective.

Next, we have examined recent legislations passed by the Indian Parliament. The last session of Parliament was one of the most productive sessions in recent times. Parliament passed the New Delhi International Arbitration Centre Act, 2019 ("**NDIAC Act**") which aims to bring targeted reforms to develop the NDIAC as a flagship institution for conducting international and domestic arbitration. Fresh amendments have also been made to the Arbitration and Conciliation Act, 1996 constituting the third major set of changes to the law. The changes aim at regulating timelines and increasing efficiency. Parliament also brought in much needed amendments to the Insolvency and Bankruptcy Code. The amendment introduces some key changes such as a maximum mandatory timeline of 330 days from commencement for conclusion of the insolvency resolution process and reintroduction of payment of liquidation value to dissenting financial creditors. The amendments should help streamline the insolvency process and bring much needed clarity to a well-intentioned but poorly implemented legislation. Parliament also passed the Supreme Court (Number of Judges) Amendment Bill, 2019, which increasing the strength of the Supreme Court to thirty-three. It is hoped that this will help the Supreme Court address the growing backlog of cases on its docket.

We have examined the recent decision of the Supreme Court in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*, wherein the Supreme Court considered the scope of review to set aside an award passed in an international commercial arbitration. In doing so, the Court has sought to clarify what constitutes public policy and fundamental policy of Indian law particularly in light of the Arbitration and Conciliation (Amendment) Act, 2015. The case also saw the Supreme Court use its power to do complete justice under Article 142 of the Constitution to convert the minority award into the binding award between the parties.

We examine the Supreme Court's decision in *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.* where the Supreme Court held that an unstamped arbitration agreement would be treated as being non-existent in law and could not therefore be acted upon by courts for the appointment of an arbitrator under section 11 of the Arbitration and Conciliation Act, 1996.

We also examine the Supreme Court's decision in *Madhav Prasad Aggarwal v. Axis Bank Ltd.* where the Court has clarified the scope of Order VII Rule 11 of the Civil Procedure Code by clarifying that a plaint can either be rejected as a whole or not at all.

Finally, the issue is concluded by the Supreme Court's decision in *Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited*, wherein the Court has clarified whether a foreign company could be impleaded as a party in an arbitration proceeding despite being a non-signatory to the arbitration agreement, solely on the basis of the "group of companies" doctrine.

Feedback and suggestions from our readers would be appreciated.

Please feel free to send in your comments to caseinpoint@cyrilshroff.com.

Regards,
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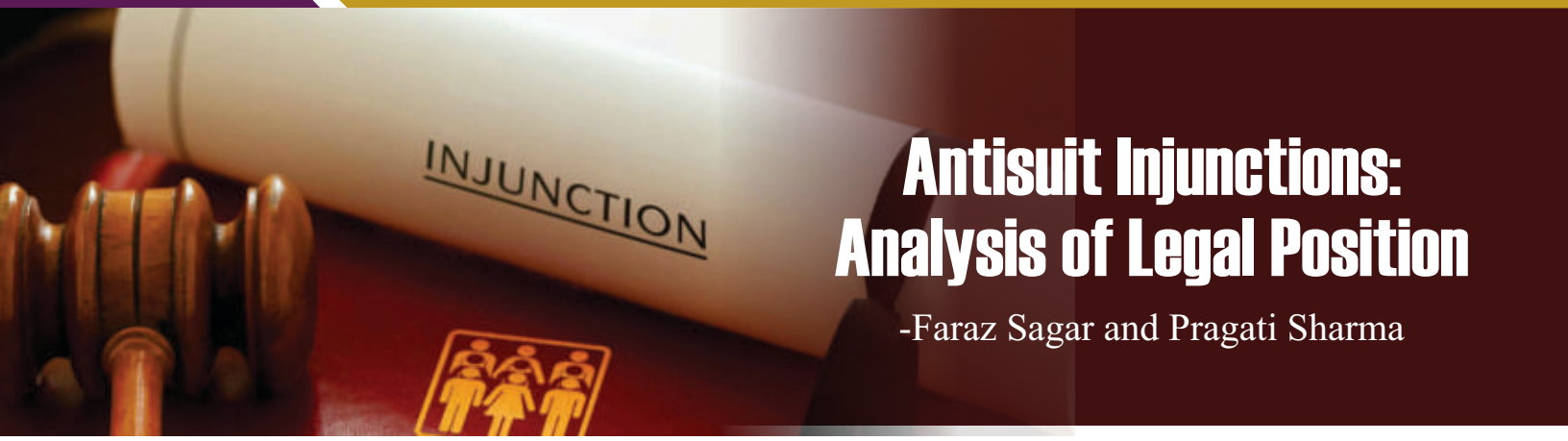

Antisuit Injunctions: Analysis of Legal Position

-Faraz Sagar and Pragati Sharma

Broadly speaking, an anti-suit injunction is an extraordinary procedure where a court issues an order to the effect that proceedings in another jurisdiction should not precede, whilst preventing an irreparable miscarriage of justice. Anti-suit injunctions are a specific form of injunctive relief and equitable relief. Commercially, an antisuit injunction is an extremely viable, and cost effective strategy where a party is facing a multi jurisdictional dispute. Furthermore, in certain jurisdictions, it may be sought to further enjoin parties and seek declaration of non-liability.

The natural use of antisuit injunctions is to prevent forum shopping in an increasingly expanding globalised business environment. Antisuit injunctions can be a powerful tool in complex transnational disputes. The issuance of an antisuit injunction greatly increases the likelihood that the issuing court will be the only court to hear a cause of action and dramatically decreases the chance that another court will pre-empt the jurisdiction of the issuing court by reaching a final judgment first. It further prevents two virtually identical causes of action from proceeding concurrently in parallel courts. From a litigant perspective, the issuance of an antisuit injunction may also influence the outcome of the cause of action: to the extent that the injunction determines the forum for litigation, it decides the choice-of law rules, and often the substantive law that will govern the case.

The courts in common law jurisdictions have given themselves an inherent jurisdiction to stay an action brought in that country or to restrain by injunction (antisuit injunction) the institution or continuation of proceedings in a foreign court, whenever it is necessary to do so in order to prevent injustice.[1] The defendant must demonstrate that another forum is "available". To determine the 'natural forum' – "*that with which the action has the most real and substantial connection"*[2], the Court will not only examine factors affecting convenience but also the law governing the transaction, and the places where the parties reside and carry on business.

Lord Goff, in *Spilada Maritime Corpn v. Cansulex Ltd,*[3] stated: "*the basic principle is that a stay will only be granted on ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action."*

Antisuit Injunction in India

In India, the courts follow the principle of comity while exercising and accepting antisuit injunctions. Although anti-suit injunctions are directed against a person, they can, in effect, cause interference in exercise of jurisdiction by another court, therefore, the power is exercised with due care and extreme caution as it involves the issue of respect for corresponding courts and international forums and hence, the courts are reluctant to grant anti-suit injunction. The Supreme Court of India held that Indian courts can grant antisuit and anti-arbitration injunctions only if it is necessary or expedient to do so to prevent injustice and it is in interest to justice[4]. In the case of *Modi Entertainment Network and Anr. v. W.S.G. Cricket PTE. Ltd*, the Supreme Court laid down the principles governing threshold for grant of antisuit injunctions as under:

> In exercising discretion to grant an anti-suit injunction, the Court must be satisfied of the following aspects, (a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the Court; (b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and (c) the principle of comity- respect for the Court in which commencement or continuance

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1 Fawcett, Declining Jurisdiction in Private International Law (Clarendon Press, Oxford, 1995); Bell, Forum Shopping and Venue in International Litigation (OUP, Oxford, 2003); Robertson (1987) 103 LQR.

2 Lord Keith in *The Abidin Daver* [1984] AC 398 at 415.

3 [1987] AC 460.

4 Oil and Natural Gas Commission v Western Company of North America (1987) 1 SCC 496.

of action or proceeding is sought to be restrained- must be borne in mind. In cases where multiple forums are available, the Indian Courts will examine as to which is the appropriate forum and may grant antisuit injunction in regard to proceedings which are oppressive or vexations or inconvenient (*forum non conveniens)*. The applicant must establish that the forum of the choice is a *forum non- conveniens* or the proceedings therein are oppressive or vexatious.

A contractually agreed Court can be declared as *forum non conveniens* only in exceptional circumstances though an anti-suit injunction by the Court of natural jurisdiction. Where one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non conveniens[5].

The underlying principle for meeting the threshold for grant of antisuit injunction is that jurisdiction is exercised over the defendant "where it is appropriate to avoid injustice" or where the foreign proceedings are "contrary to equity and good conscience".

Antisuit Injunction in the UK

The English Courts have long had the power[6] to grant antisuit injunctions) restraining a party from commencing, or continuing, proceedings in a court or tribunal overseas where those proceedings were being conducted in breach of a contractual agreement as to where disputes should be resolved (an exclusive jurisdiction or arbitration agreement).

In *Deutsche Bank AG v. Highland Crusader Offshore Partners LP* [7], the England and Wales Court of Appeal set out a summary of the correct approach on injunctions and enjoining of foreign proceedings:

a. Under English law, the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do so.

b. It is too narrow to say that such an injunction may be granted only on ground of vexation or oppression (on grounds of *forum non conveniens*), but, where a matter is justiciable in an English and a foreign court, the party seeking an antisuit injunction must generally demonstrate that proceeding before the foreign court would be or is vexatious or oppressive. The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily oppressive or vexatious.

Although arbitration is excluded from the scope of the Brussels I Regulation, the Regulation does not prevent the English Courts from granting an injunction to restrain arbitral proceedings abroad, even in another Member State. It must be demonstrated that the applicant's legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable[8]. However, that power was limited as a result of the Brussels I Regulation, which was superseded with effect from January 10, 2015 by the Recast Brussels Regulation, where the offending proceedings had been issued in the courts of another EU Member State in breach of an exclusive jurisdiction or arbitration agreement.

The English High Court in *Nori Holdings Ltd v. PJSC BOFC* [9], considered that Recital 12 of the Recast Brussels Regulation was clear and did not affect the position as set out in W*est Tankers*[10] – the courts cannot grant an antisuit injunction restraining proceedings commenced in the courts of another EU Member State in breach of an arbitration agreement.

It yet to be seen how Brexit will impact on the English Court's ability to grant antisuit injunctions against proceedings commenced/continuing in EU Member States remains to be seen. It may be probable, following the decision in *Nori Holding* that the English Courts may not need to follow *West Tankers* post-Brexit, and grant antisuit injunctions restraining proceedings brought in EU Member State Courts if the UK does not enact measures with similar effect to the Recast Brussels Regulation.

Antisuit Injunction in the EU

The Brussels I Regulation (EU Regulation No 44/2001), governs the jurisdiction of EU Member State courts over civil and commercial matters and provides guidance on

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5 The Delhi High Court, in *Piramal Healthcare v. DiaSorin SpA,* held that since the parties have agreed to submit to the nonexclusive jurisdiction of the English Courts, such jurisdiction clause indicates the intention of the parties as evidenced by their contract must be given effect to. Therefore, since the parties had agreed to resolve their disputes arising under the agreement, it evidences that they had foreseen possible breach of agreement by any of the parties and provided for the resolution of the disputes which might arise therefrom.

6 The development of the doctrine of *forum non conveniens* can be traced through a number of landmark English judgments: *The Atlantic Star* [1974] AC 436, *MacShannon v Rockware Glass Ltd.* [1978] AC 795, and *the Abidin Daver* [1984] AC 398.

7 [2009] EWCA Civ 725.

8 Claxton Engineering Services Ltd v TXM Olaj-es Gazkutato Kft [2010] EWHC 2567 (Comm).

9 Nori Holdings Ltd v PJSC BOFC [2018] EWHC 1343 (Comm) [England and Wales].

10 West Tankers Inc. v Allianz SpA (Case C-185/07) [2009] AC 1138.

resolving conflicts of jurisdiction between courts of the various Member States. While it appears to exclude arbitration from its scope, it was unclear whether the Brussels I Regulation covered or restricted antisuit injunctions issued by arbitrators (as opposed to those granted by courts).

In *West Tankers*[11], the Court of Justice had held a preliminary issue concerning the application of an arbitration agreement, including its validity, falls within the scope of the Brussels I Regulation if the main subject matter of the proceedings comes within scope, however, as a result, the Court of Justice held that it was incompatible with the Brussels I Regulation '*for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement*.'

In the case of *Gazprom*[12], the Court of Justice determined that the Brussels I Regulation: *'must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State.'* The Court of Justice of EU held that antisuit injunctions issued by arbitral tribunals are not covered by the Brussels I Regulation.

In 2012, the Brussels I Regulation was *recast* to provide unified rules on conflicts of jurisdiction in civil and commercial matters and to ensure the rapid recognition and enforcement of judgments given in Member States and includes revisions to the arbitration exception. Article 1 of the recast Brussels I Regulation continues to exclude arbitration from its scope. To address the issues raised by the *West Tankers* ruling, amongst others, the recast Brussels I Regulation clarifies (in its Recital 12) that there is an absolute exclusion of arbitration from its scope. It came into effect on January 10, 2015.

In the absence of an authoritative interpretation of the recast Brussels I Regulation, it remains ambiguous whether the recast Brussels I Regulation prohibits antisuit injunctions issued by Member State courts in support of arbitration.

Antisuit Injunction in the US

Contrary to the prevalent myth, the US courts tend to have a conservative approach towards granting antisuit injunctions. The US jurisprudence on antisuit injunctions can be traced back to medieval England, when common law courts used writs of prohibition to stop both litigants and other tribunals from proceeding with particular actions[13]. During the same time period, the courts of equity used antisuit injunctions to achieve essentially the same results, although antisuit injunctions were then and continue to be directed only at litigants, not at other tribunals[14].

The US law concerning antisuit injunction is extremely complicated with respect to proceedings involving both litigation and arbitration. The remedy is considered extraordinary and available only in the rarest of scenarios[15].

In an international setting, although parties can seek antisuit injunctions in purely domestic cases, such requests may be more likely to arise in matters involving a parallel proceeding in another country. US courts can vary greatly in how they analyse requests for an antisuit injunction. Antisuit injunctions may be granted in the following scenarios: a litigant in the US can seek to prevent the opposing party from bringing or continuing the same dispute in a foreign court or related claims may be consolidated in the moving part's preferred forum, or a party may initiate an action in the US court requesting both antisuit injunction and 'declaration of non-liability', or prevent subsequent litigation in another jurisdiction upon completion of proceedings in the US or prevent a party from obtaining an antisuit injunction in a foreign court[16].

In *Microsoft Corp v. Motorola Inc.*, the US Court of Appeals for the Ninth Circuit recognized that the availability of an antisuit injunction has never depended "on the merits of the foreign suit under foreign law"[17]. The California Supreme Court has held that the State courts have the power to issue antisuit injunctions; they can restrain litigants from proceeding in suits brought in a sister state or in a foreign nation[18].

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[11] *Ibid* at 11.

[12] Case C-536/13 Gazprom OAO v Lithuania.

[13] Jason P. Waguespack, *Antisuit Injunctions and Admiralty Claims: The American Approach*, 24 U. S.F. Mar. L.J. 293 (2011) at 294-95.

[14] Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Tech., Inc., 369 F.3d 645, 655 (2d Cir. 2004).

[15] Strong, S I, Antisuit Injunctions in Judicial and Arbitral Procedures in the United States The American Journal of Comparative Law, Volume 66, Issue suppl_1, July 2018, at 179.

[16] Strong, S I, Antisuit Injunctions in Judicial and Arbitral Procedures in the United States The American Journal of Comparative Law, Volume 66, Issue suppl_1, July 2018, at 153-56.

[17] Microsoft Corp v Motorola Inc., 696 F.3d at 888 (9th Cir. 2012).

[18] Advanced Bionics Corp v Medtronic Inc., 29 Cal. 4th 697, 712 (2002) (Moreno, J., concurring).

In contrast to obtaining antisuit injunction, in the US, parties may obtain a writ of prohibition precluding both a litigant and another tribunal from proceeding with a second action[19]. Additionally, abstention doctrines clarify the relative competence of the state and federal courts and restrict the ability of federal courts to interfere with ongoing litigation in US State courts[20]. Thirdly, the Courts are more amenable to granting consolidation and joinder of proceedings under the Civil Procedure Rules[21].

Conclusion

An antisuit injunction requires exercise of caution by the Court granting it as by definition, it involves interference with the process or potential process of a foreign court. The decision to grant an antisuit injunction involves an exercise of discretion, caution, and the principles governing it contain an element of flexibility.

Practitioners who arbitrate or litigate in multi-jurisdictional disputes, must converse themselves with exercising and defending against antisuit injunctions. It is very a powerful legal remedy if used effectively, and can make the difference between success and failure. Antisuit injunction is also a cost effective mechanism to bring strategic advantage to a party which are multi-jurisdictional and/or where there are multiple courses of action in different jurisdictions.

[19] Jason P. Waguespack, *Antisuit Injunctions and Admiralty Claims: The American Approach*, 24 U. S.F. Mar. L.J. 293 (2011) at 294-95.

[20] Margarita Treviño de Coale, *Stay, Dismiss, Enjoin, or Abstain? A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. Int'l L.J. 83 (1999).

[21] Fed. R. C iv. P. 19–20, 42. Matters may also be transferred between different federal courts "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404 (2017).

Update on laws passed by the Indian Parliament in 2019

The New Delhi International Arbitration Centre Act, 2019 ("**NDIAC Act**") received the President's assent on July 26, 2019 and has been published in the official gazette. It shall be deemed to have entered into force on the March 2, 2019. The NDIAC Act envisages the transfer and vesting of the undertakings of the International Centre for Alternative Dispute Resolution (ICADR) in the Central Government, which will subsequently vest the undertakings in NDIAC.

The NDIAC Act aims to bring targeted reforms to develop the NDIAC as a flagship institution for conducting international and domestic arbitration, by providing cost effective facilities and administrative assistance for conciliation, mediation and arbitral proceedings. The NDIAC Act also provides for the NDIAC to maintain panels of accredited arbitrators, conciliators and mediators, promote studies and training in the field of alternative dispute resolution and related matters, and to promote reforms in the system of settlement of disputes. The NDIAC will comprise seven members including: (i) a Chairperson who has been a Judge of the Supreme Court or a High Court, or an eminent person with special knowledge and experience in the conduct or administration of arbitration, (ii) two eminent persons having substantial knowledge and experience in institutional arbitration, (iii) three ex-officio members, including a nominee from the Ministry of Finance and a Chief Executive Officer (responsible for the day-to-day administration of the NDIAC), and (iv) a representative from a recognised body of commerce and industry, appointed as a part-time member, on a rotational basis.

Arbitration and Conciliation (Amendment) Act 2019 Notified

The Arbitration and Conciliation (Amendment) Act, 2019 (**"2019 Amendment"**) was published for general information by way of a notification dated August 9, 2019 in the Official Gazette after receiving presidential assent. Certain key provisions of the 2019 Amendment (including in relation to interim measures, time limits for passing of awards, and applicability of the amending Act of 2015) were brought into force with effect from August 30, 2019 by way of a notification dated August 30, 2019 in the Official Gazette.

The 2019 Amendment contemplates several significant changes to the arbitration regime, such as clarifying that the provisions of the Arbitration and Conciliation Act, 1996 *as amended in 2015* ("**Act**") shall apply *only* to (i) arbitration proceedings commenced after October 23, 2015; and (ii) to court proceedings arising out of such aforementioned arbitrations. The 2019 Amendment also provides for appointment of arbitrators by "arbitral institutions" designated for this purpose by the Supreme Court or High Court, and states that where no graded arbitral institutions are available, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institutions. Further the 2019 Amendment attempts to soften the effect of Section 29A of the Act by providing that the timelines under Section 29A shall: (i) begin to run from the date of completion of pleadings (and not from the date of constitution of the arbitral tribunal as was the case under the Act) and (ii) shall only be mandatory in arbitrations other than international commercial arbitrations, and shall be directory in nature for international commercial arbitrations. It also makes provisions for confidentiality of the arbitral proceedings and award subject to certain narrow exceptions, and also provides for the establishment of the Arbitration Council of India, having its head office at Delhi, which will grade arbitral institutions, recognize professional institutes providing accreditation of arbitrators, and maintain an electronic depository of arbitral awards.

Bill passed to bolster the bench strength of the Supreme Court

The Supreme Court (Number of Judges) Amendment Bill, 2019, which increasing the strength of the Supreme Court to thirty-three (33), excluding the Chief Justice of India, was passed by Parliament and assented to by the President in August. The increase in the strength of the Supreme

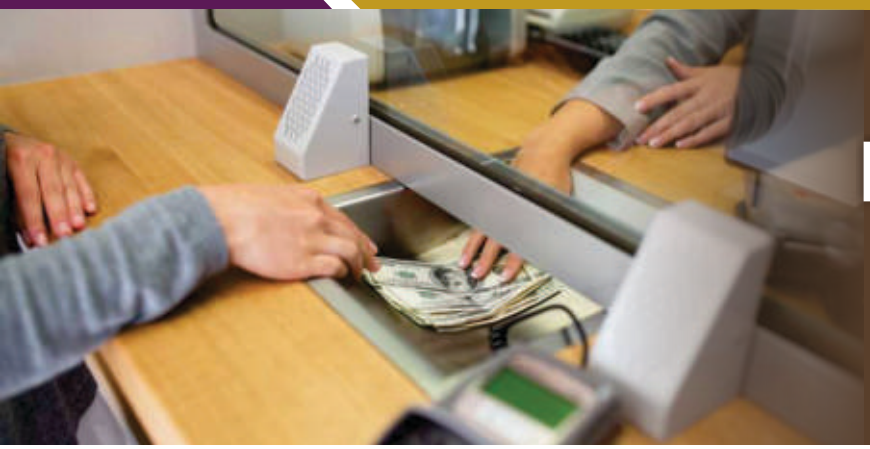
Court is intended to deal with the rise in pendency of cases in the Supreme Court. As on June 1, 2019, there were 58,669 cases pending in the Supreme Court. An increase in the number of judges is likely to help reduce the backlog on the Court's docket and ensure speedier justice.

The Bombay High Court frames new Rules on Arbitral Tribunal Fees

Section 11 of the Arbitration and Conciliation Act, 1996 ("**Act**"), which deals the procedure for appointment of arbitrators, was amended in 2015 to include a new Section 11 (14) and Fourth Schedule in relation to setting fees for arbitrators appointed by a court under the Act. Under these provisions, the High Court was empowered to frame such rules as may be necessary for determination of the fees of the arbitral tribunal and the manner of their payment after taking into consideration the rates specified in the Fourth Schedule. Years after the amendments kicked in (on and from October 23, 2015), the Bombay High Court issued the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018, pursuant to Section 11 (14) and the Fourth Schedule ("**Rules"**). An analysis of the salient features of the Rules may be accessed at the following link: https://corporate.cyrilamarchandblogs.com/2019/07/bombay-high-courts-new-rules-arbitral-tribunal-fees/

Act to amend the IBC receives presidential assent

The Insolvency and Bankruptcy Code (Amendment) Act, 2019 received the President's assent on August 5, 2019, and shall come into force on such date as the Central Government may appoint by notification in the official Gazette. The amendment introduces some key changes such as a maximum mandatory timeline of 330 days from commencement for conclusion of the insolvency resolution process, reintroduction of payment of liquidation value to dissenting financial creditors, and an express clarification that a resolution plan seeking the insolvency resolution of corporate debtor as a going concern may include the provisions for corporate restructuring, including by way of merger, amalgamation and demerger. An analysis of the salient features of the amendment may be accessed at: https://corporate.cyrilamarchandblogs.com/2019/07/2019-ibc-amendment-bill-insolvency-bankruptcy/ .



Madhav Prasad Aggarwal v. Axis Bank Ltd.

In *Madhav Prasad Aggarwal v. Axis Bank Ltd.*[1], the Supreme Court ("**Court**") held that under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 ("**CPC**"), the power of a court is limited to rejecting a plaint as a whole or not at all.

A suit was filed by the Madhav Aggarwal. Axis Bank sought to have the suit rejected qua itself on the basis that the suit against itself was barred under Section 34 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The issue before the Court was whether the plaint could be rejected only qua Axis in exercise of powers under Order VII Rule 11(d) of the CPC, which provision allows a court to reject a plaint in cases where the suit appears from the statement in the plaint to be barred by any law.

The Supreme Court held that relief under Order VII Rule 11(d) of the CPC cannot be pursued only in respect of one of the defendants to the Suit (and consequently, deemed it unnecessary to deal with the remaining grounds of appeal). In arriving at its decision, the Court considered the nature of reliefs claimed by Axis in its Motion, wherein the principal and singular substantive relief sought was to reject the Suit only qua Axis. The Court found the decision in *Sejal Glass Limited v. Navilan Merchants Private Limited* [(2018) 11 SCC 780] to be directly on this point, since the Court in that case had held that a plaint can either be rejected as a whole or not at all. The Court in *Sejal Glass* had further clarified that it is not permissible to reject a plaint qua any particular portion of a plaint including against some of the defendants, while continuing against the others, and held that if a plaint survives against certain defendants and/or properties, Order VII Rule 11(d) of the CPC will have no application at all, and the suit as a whole must proceed to trial. The Court observed that the objection that one or some of the reliefs claimed against Axis in the Suit were barred by law, could be raised by invoking other remedies including under Order VI Rule 16 of CPC at the appropriate stage, which could be considered by the court on its own merits and in accordance with law.

[1] (2019) 7 SCC 158.

Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India

In *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*[1], the Supreme Court considered the scope of review to set aside an award passed in an international commercial arbitration, on the ground that it was in violation of the public policy of India, contrary to the fundamental policy of Indian law and against the most basic notions of justice and morality under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**), particularly in light of the Arbitration and Conciliation (Amendment) Act, 2015 (**"Amendment Act"**).

Disputes arose thereafter and the issue in the arbitration was regarding the applicability of the circular to the agreement between Ssangyong and NHAI. The majority award was passed in favour of NHAI and it held that the circular issued by NHAI could be applied to the contract between Ssangyong and NHAI as it was within the contractual stipulations. On the other hand, the dissenting arbitrator favoured Ssangyong's argument and ruled that the new circular could not be applied since it was *de hors* the contract between the parties. Ssangyong filed appeals under Section 34 and Section 37 of the Arbitration Act to set aside the award but these appeals were dismissed and the majority award was upheld by the Delhi High Court. Therefore, Ssangyong filed an appeal before the Supreme Court challenging the majority award passed by the arbitral tribunal.

The Supreme Court proceeded to examine the changes made by the Amendment Act and the scope of review in a challenge to the award (in an international commercial arbitration) on the public policy ground under the amended Section 34(2)(b)(ii) of the Arbitration Act. In this regard, the Supreme Court noted Explanation 1 to Section 34(2)(b)(ii) of the Arbitration Act which provides that an award is in conflict with the public policy of India, only if (i) the making of the award was induced or affected by fraud or was in violation of Section 75 or Section 81 of the Arbitration Act; (ii) the award is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice and thereafter dealt with the scope of review under each of these heads.

Dealing with fundamental policy of Indian law, the Supreme Court held that after the coming into force of the Amendment Act, 'violation of fundamental policy of Indian law' would be as explained in *Renusagar Power Co. Ltd. v. General Electric Co.*[2] i.e. disregarding orders of superior courts in India, disregarding binding effect of the judgment of a superior court or contravention of a statute linked to public policy or public interest. The Supreme Court also interpreted the meaning of 'most basic notions of morality or justice', stating that this ground can be attracted only in very exceptional circumstances where infraction of the fundamental notions or principles of justice will shock the conscience of the court.

Based on the parameters stated above, the Supreme Court proceeded to examine whether the majority award was in violation of the public policy of India. The Supreme Court noted that circular and guidelines were neither in evidence before the tribunal nor were they disclosed during the arbitration proceedings. The Court therefore held that the award ought to be set

[1] 2019 (3) ArbLR 152 (SC).
[2] 1994 Supp (1) SCC 644.

aside under section 34(2)(a)(iii). The Supreme Court observed that it was not correct to say that the formula under the agreement could not be applied in light of NHAI's circular. A circular which was unilaterally issued by one party could not bind the other party without its consent. The Court noted that Ssangyong had accepted the circular only conditionally and without prejudice to its argument that the circular does not and cannot apply. This being the case, the majority award had created a new contract for the parties by applying the unilateral circular and by substituting a workable formula under the agreement with another formula de hors the agreement. The Supreme Court held that in doing so, a fundamental principle had been breached i.e. a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. The Court held that such a course of conduct was contrary to the fundamental principles of justice and shocked the conscience of the Court. On this basis, the Supreme Court set aside the majority award as well as the decisions of the Delhi High Court upholding the majority award.

As the majority award was set aside, the Supreme Court noted that the dispute would then need to be referred afresh to arbitration which would cause considerable delay and be contrary to one of the important objectives of the Arbitration Act, namely, speedy resolution of disputes. Therefore, in order to do complete justice between the parties, the Supreme Court invoked its inherent power under Article 142 of the Constitution of India to uphold the minority award instead of referring the parties to fresh arbitration proceedings.

Interestingly, in this case, the Supreme Court has for the first time in its history, used its inherent power under Article 142 of the Constitution to uphold the minority award and opened up a possibility whereby parties are not forced to arbitrate again. However, it remains to be seen whether the Supreme Court is keen to adopt this approach more frequently, especially as it might not be possible to use Article 142 where the decision has been made by a sole arbitrator or where a unanimous award has been passed. Further, the power under Article 142 of the Constitution is only available to the Supreme Court and such power is not available to the lower courts. Accordingly, if the award is set aside by a court lower than the Supreme Court, the dispute will have to be referred to arbitration afresh.

Validity of the arbitration clause in an unstamped arbitration agreement

In *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.* [Civil Appeal No. 3631 of 2019 arising out of SLP(C) No. 9213 of 2018], the Supreme Court recently clarified a nebulous area of arbitration law. It held that an unstamped arbitration agreement would be treated as being non-existent in law and could not therefore be acted upon by courts for the appointment of an arbitrator under section 11 of the 1996 Arbitration Act.

The Court in *Garware* examined whether the earlier judgment of the Supreme Court in *SMS Teas Estates (P) Ltd v. Chandmari Tea Co (P) Ltd*, (2011) 14 SCC 66, would continue to apply to the introduction of Section 11 (6A) of the 1996 Arbitration Act, by way of the 2015 Amendment Act 2015. In *SMS Teas*, the SC had held that when there is an arbitration clause in an unstamped / insufficiently agreement, the provisions of the Indian Stamp Act 1899 require the judge hearing the application under Section 11 application to impound the agreement and ensure that stamp duty and/ or penalty is paid before proceeding with the Section 11 application. The Supreme Court therefore reinforced this decision in *Garware*.

Under Indian law unstamped documents cannot be admitted into evidence. In *Garware*, the Court was considering a Section 11 application. Under Section 11(6A), courts can only inquire whether an arbitration agreement is in place, and not enter issue on its validity and enforceability. The Court sought to overcome the clear language of Section 11(6A) by ruling that the arbitration clause would only become a binding contract "*if it is enforceable by law*" and under the Indian Stamp Act, an agreement does not become a binding contract "*unless it is duly stamped*". The Court also saw the stamp law as a special statute and gave it greater import on that basis. The Court held that an arbitration clause could not exist if the agreement itself was unstamped or insufficiently stamped and therefore unenforceable under law. Accordingly, the Court held when dealing with unstamped or insufficiently stamped arbitration agreements, courts would have to impound the agreement and had over the agreement to the relevant authority under the Stamp Act which must deal with all stamping issues expeditiously and (preferably) within a period of 45 days after which the agreement could be enforced by courts.

In so doing, the Supreme Court also overruled a full-judge bench of the Bombay High Court in *Gautam Landscapes Pvt. Ltd. v. Shailesh Shah* (2018 SCC OnLine SC 1045) where the Bombay High Court had held that courts need not await adjudication of stamp duty by stamp authorities when appointing arbitrators under Section 11 of the Arbitration Act.

Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited[1]

In *Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited*, a question arose before the Supreme Court as to whether a foreign company could be impleaded as a party in an arbitration proceeding despite being a non-signatory to the arbitration agreement, solely on the basis of the "group of companies" doctrine.

Reckitt filed a petition under Sections 11(5), 11(9) and 11(12)(a) of the Arbitration and Conciliation Act, 1996 ("**Act**") for the appointment of a sole arbitrator. Reckitt argued that the 1st Respondent Reynders Label and its parent/holding company, Reynders Ttiketten NV the 2nd Respondent incorporated in Belgium, entered into negotiations with Reckitt, pursuant to which the Respondents were to supply packaging materials to Reckitt. Reckitt circulated an email to Mr. Frederik Reynders attaching a draft of the agreement along with the code of conduct and its anti-bribery policy. Clause 13 of the draft agreement contained the arbitration clause and Clause 9 was an indemnity clause, providing Reckitt the right to be indemnified by the Reynders Ttiketten on account of any loss or damage caused to Reckitt due to any act or omission of Reynders Ttiketten.

Mr. Frederick Reynders responded to Reckitt's e-mail and attached the draft agreement with '*comments from the Respondent's headquarters in Belgium*'. On this basis that Reckitt alleged that Reynders Ttiketten was aware that the indemnity was being extended to Reckitt and that although Reynders Ttiketten did not sign the final agreement dated May 1, 2014 ("**Agreement**"), the Reynders Label acted on behalf of Reynders Ttiketten in signing the Agreement as if the latter were its undisclosed principal.

On the issue of whether a non-signatory to an arbitration agreement can be impleaded and subjected to arbitration proceedings, the Supreme Court stated that the same is no more *res integra*. The Supreme Court referred to a three judge bench decision in the case of ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and Ors***[2], where the Supreme Court had invoked the doctrine of "**group of companies**" to hold that although ordinarily, an arbitration takes place between the persons who are parties to the agreement and the substantive underlying contract, *an arbitration agreement entered into by a company, being one within a group of corporate entities, can, in certain circumstances, bind its non-signatory affiliates*. This exposition was followed and applied by another three judge bench of the Supreme Court in the case of ***Cheran Properties Limited v. Kasturi and Sons Limited and Ors***[3], where the court held as follows:

"In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory."

In the present case, the Supreme Court, while keeping in mind the exposition laid down in *Chloro Controls* and *Cheran Properties*, sought to inquire whether it was manifest from the correspondence between the parties that the intention was to bind both the signatory and the non-signatory parties qua the existence of an arbitration agreement between Reckitt and the Respondents.

[1] 2019 SCC Online SC 809.
[2] (2013) 1 SCC 641.
[3] (2018) 16 SCC 413.

Based on the averments made by the parties and the correspondence between them preceding the execution of the Agreement, the Supreme Court observed that Reynders Ttiketten had sufficiently proven that Mr. Frederick Reynders was in no way associated with Reynders Ttiketten and was in fact an employee of Reynders Label, acting in that capacity during the negotiations. Therefore, Reynders Ttiketten was neither a signatory nor did it have any causal connection with the negotiations preceding the execution of the Agreement. The Supreme Court stated that the main plank of Reckitt's argument was based on the premise that Mr. Frederick Reynders was acting on the instructions of Reynders Ttiketten, a premise which has been disproved by Reynders Ttiketten. Consequently, it followed that Reynders Ttiketten was not a party to the stated agreement nor had it given assent to the arbitration agreement and, in absence thereof, even if Reynders Ttiketten happens to be a constituent of the group of companies of which Reynders Label is also a constituent, the same will be of no avail. The burden of proof to show that Reynders Ttiketten intended to consent to the arbitration agreement lay on Reckitt who had failed to discharge this burden. The Supreme Court accordingly rejected the application as against Reynders Ttiketten.

This case emphasises the principle of not binding non-signatories to arbitration and upholds party autonomy. The Supreme Court in passing this decision reiterated the principle laid down in its previous decisions where the "group of companies" doctrine has been applied sparingly.

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The views expressed in this newsletter do not necessarily constitute the final opinion of Cyril Amarchand Mangaldas and should you have any queries in relation to any of the issues set out herein or on other areas of law, please feel free to contact us on **cam.publications@cyrilshroff.com** or write to following coordinates with the copy to **cam.publications@cyrilshroff.com**:

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