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Arbitrating with Indian Parties: Another Twist in the Tale

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The Bombay High Court recently upheld an Order passed by the Company Law Board (*CLB*) refusing to refer disputes, arising from a shareholders agreement, to arbitration.

The proceedings before the CLB arose from a dispute between Rakesh Malhotra (*Rakesh*) and certain members of the Malhotra family for control of the Supermax Group of Companies a conglomerate comprising a number of Indian companies (*Indian Entities*) and certain offshore entities (*Offshore Entitles*) as well. In 2008 the conglomerate was restructured and, amongst others, a Subscription and Shareholder Deed (*SSD*) was executed inter alia between Rakesh and other members of the Malhotra family. The SSD also provided for arbitration under the LCIA Arbitration Rules.

After a while the members of the Malhotra family (*Petitioners*), being the majority shareholders, found themselves unable to access information in relation to the Indian Entities and brought actions for oppression and mismanagement of the Indian Entities, under Sections 397, 398 and 402 of the Indian Companies Act, 1956 (*Companies Act*) inter alia before the CLB. However, Rakesh obtained an ex-parte anti suit injunction from the Queen's Bench Division, UK restraining the Petitioners, amongst others, from proceeding with the actions pending before the CLB. On October 30, 2012 the Queen's Bench Division held that the disputes before the CLB did not fall within the sweep of the arbitration clause in the SSD and the anti-suit injunction was vacated. Undeterred, Rakesh filed applications under Section 45 of the Arbitration & Conciliation Act, 1996 (*Indian Arbitration Act*) to refer the disputes pending before the CLB to arbitration. These applications were eventually dismissed by the CLB (*Impugned Order*).

In support of the Impugned Order the members of the Malhotra family (i.e. *the Petitioners before the CLB*) contended that an action *bonafide* invoking Sections 397, 398 and 402 of the Companies Act cannot be referred to arbitration. The test, they argued, was not what relief was sought or how the relief was structured, but the source of the power (i. e. Section 402). The Section empowered the CLB to terminate agreements, make orders against third parties and regulate the affairs of a company. These powers were beyond the remit of any arbitral tribunal and, thus, such disputes could not be referred to arbitration. The Petitioners also submitted that it would not be permissible to refer some reliefs to an arbitral tribunal while retaining others for determination by the CLB. Lastly, the Petitioner's argued that the jurisdiction of the CLB in actions for oppression and mismanagement was statutory and, like the Court's jurisdiction in liquidation proceedings, could not be ousted by an arbitration clause.

Per contra, Rakesh submitted that the source of the power was not relevant and what was of relevance was the '*dispute*' which would be referred to arbitration. Though the arbitrator may not be able to exercise powers under Section 402 of the Companies Act this was immaterial. As long as the dispute was referable to arbitration, that reference must be made and the Indian Arbitration Act did not confer any discretion in this regard. If an action for oppression and mismanagement brought before a civil court could, on the existence of an arbitration agreement, be referred to arbitration the CLB could not stand on a higher pedestal. This, it was argued, was the mandate of Section 45 of the Indian Arbitration Act and the legislative intent could not be ousted by clever drafting.

The Bombay High Court ruled that oppression and mismanagement actions have some flavour of actions *in rem* and are such that they demand the exercise by the CLB of powers under Section 402 of the Companies Act. These are not powers that can be exercised by a civil court and certainly not by an arbitral tribunal where actions are largely *in personam*. The High Court further held in certain cases the pleadings may disclose a pattern of conduct of clandestine non-contractual actions that result in the mismanagement of the company's affairs or in the oppression of the minority shareholders, or both. In such situations, even if there were an arbitration agreement, it would not necessarily imply that all disputes relate only to the arbitration agreement. The parties to the *lis* could always invoke the powers of the CLB under the provisions of the Companies Act. Thus where an oppression and mismanagement action seeks reliefs some of which are in the nature of reliefs in rem and others that are *in personam*, it would not be possible or permissible to sever one from the other and disassemble such a petition. Such an action would have to be adjudicated by the CLB alone. However, the High Court clarified that an action merely *'dressed up'* as an oppression and mismanagement petition, with a view to oust an arbitration clause, would not be permitted to succeed.

The ruling of the High Court does not shed much light on when an action for oppression and mismanagement would be considered *'dressed up'*. Undoubtedly, there can be no straight jacket formula in this regard and this question would have to be determined on a case to case basis. Until there is some clarity on this aspect, the ruling of the High Court will significantly impact the comfort that foreign entities derive from arbitration clauses in shareholder agreements with Indian parties. An unscrupulous litigant by simply seeking a relief *in rem* or invoking the broader powers of the CLB under Section 402 of the Companies Act could compel foreign entities to litigate before Indian courts / tribunals. While the aggrieved foreign entity would always be at liberty to contend that the oppression and mismanagement action was *'dressed up'* with a view to circumvent an arbitration agreement, such an argument would necessarily have to be canvassed before the CLB alone. If unsuccessful, it would entail another round of litigation before the High Court and, maybe, even the Supreme Court.

On the other hand, shareholders approaching the CLB in actions for oppression and mismanagement must now ensure that pleadings are carefully drafted. The pleadings when read as a whole should disclose a dispute incapable of being referred to arbitration. Absent this, the shareholder(s) could be shunted to an arbitral tribunal possibly unable to provide effective reliefs in the facts and circumstances of the case.

Actions for oppression and mismanagement, in India, must be brought before that Company Law Board which enjoys territorial jurisdiction over the registered office of the Company in question. Therefore, in complex multi-party transactions with companies incorporated in different parts of India, even an exclusive jurisdiction clause to limit the jurisdiction of such actions would not be of

much assistance. This aspect may also have to be carefully considered while structuring such multi-party agreements.

The matter is presently *sub judice* before the Supreme Court of India which, on September 10, 2014, declined to stay the Order of the Bombay High Court. The ruling of the Supreme Court may not be pronounced this year. However, when pronounced, it will in all probability clarify the law *qua* the arbitrability of actions for oppression and mis-management in India.

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