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EDITOR'S NOTE

India has celebrated its 65th Independence Day on 15th of August. It was exactly on this day in 2003 that "The Indian Arbitrator" was launched. When we are entering the 9th year, we are aware that the quality of the magazine still requires improvement. There had been a variety of changes made in the magazine based on the suggestions of our valued subscribers. The hardcopy magazine was changed to softcopy version in February 2009 and the subscription was made free. We look forward to your continued support and welcome your suggestions to serve you better.

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Judgment Critique

SMS Tea Estates Pvt. Ltd. Versus Chandmari Tea Co. Pvt. Ltd.

: ANIL XAVIER

The Supreme Court of India in its recent judgment had the occasion to examine the validity of an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument and in an unregistered instrument which is not duly stamped. The Court was of the view that it is valid even if the agreement is not registered, but it cannot be looked into if the original agreement is unstamped. The author tries to analyze the judgment from the arbitration perspective.

The Supreme Court of India was faced with two important questions relating to arbitration agreement in the case, "SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Co. Pvt. Ltd."[1]. The questions were:

(i) Whether an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument is valid and enforceable?

(ii) Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?

Facts in brief:

The appellant and the respondent entered into a lease deed, whereby the appellant was granted lease of two tea estates for a term of 30 years. The respondent abruptly evicted the appellant from the estates and took over their management. The lease deed provided for settlement of disputes between the parties by arbitration and the appellant issued a notice calling upon the respondent to refer the matter to arbitration. The respondent contended that the unregistered lease deed for thirty years was invalid, unenforceable and not binding upon the parties, having regard to section 107 of Transfer of Property Act 1882 ('TP Act' for short) and section 17 and section 49 of the Registration Act, 1908 ('Registration Act' for short); that the said lease deed was also not duly stamped and was therefore invalid, unenforceable and not binding, having regard to section 35 of Indian Stamp Act, 1899 ('Stamp Act' for short); that the clause providing for arbitration, being part of the said lease deed, was also invalid and unenforceable. It contended that as the lease deed itself was invalid, the appellant could not claim appointment of an arbitrator under the arbitration agreement forming part of the said deed.

(Footnote)

[1] 2011 (4) CTC 574 / CDJ 2011 SC 684

Supreme Court decision on Question No. (i):

Section 17(1)(d) of Registration Act and Section 107 of TP Act provides that leases of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. Section 49 of the Registration Act sets out the effect of non-registration of documents required to be registered. The section makes it clear that a document which is compulsorily registrable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited purposes – first as evidence of a contract in a suit for specific performance, second as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction. The question is whether a provision for arbitration in an unregistered document (which is compulsorily registrable) is a collateral transaction, in respect of which such unregistered document can be received as evidence under the proviso to section 49 of the Registration Act.

When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts – one in regard to the substantive terms of the main contract and the other relating to resolution of disputes – had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. Similarly, when an instrument or deed of transfer (or a document affecting immovable property) contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the transfer or transaction affecting the immovable property. It is as if two documents – one affecting the immovable property requiring registration and the other relating to resolution of disputes which is not compulsorily registrable – are rolled into a single instrument.

Therefore, even if a deed of transfer of immovable property is challenged as not valid or enforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer. These principles have now found statutory recognition in sub-section (1) of section 16[2] of the Arbitration Act. An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the proviso to section 49 of Registration Act read with section 16(1)(a) of the Act, an arbitration agreement in an unregistered but compulsorily registrable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.

(Footnotes)

[2] "16. Competence of arbitral tribunal to rule on its jurisdiction. - (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

The Lighter Side

An old woman was sipping on a glass of wine while sitting on the patio with her husband and she says,

"I love you so much. I don't know how I could ever live without you."

Her husband asks, "Is that you or the wine talking?"

She replies, "It's me... talking to the wine."

Supreme Court decision on Question No. (ii):

What if an arbitration agreement is contained in an unregistered (but compulsorily registrable) instrument which is not duly stamped? To find an answer, it may be necessary to refer to the provisions of the Stamp Act. Section 33 of the Stamp Act relates to examination and impounding of instruments. Section 35[3] of Stamp Act provides that instruments not duly stamped is inadmissible in evidence and cannot be acted upon.

Having regard to section 35 of Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of Stamp Act is distinct and different from section 49 of Registration Act in regard to an unregistered document. Section 35 of Stamp Act, does not contain a proviso like to section 49 of Registration Act enabling the instrument to be used to establish a collateral transaction.

The scheme for appointment of arbitrators by the Chief Justice of Guwahati High Court 1996 requires an application under section 11 of the Act to be accompanied by the original arbitration agreement or a duly certified copy thereof. In fact, such a requirement is found in the scheme/rules of almost all the High Courts. If what is produced is a certified copy of the agreement/contract/instrument containing the arbitration clause, it should disclose the stamp duty that has been paid on the original. Section 33 casts a duty upon every court, that is a person having by law authority to receive evidence (as also every arbitrator who is a person having by consent of parties, authority to receive evidence) before whom an unregistered instrument chargeable with duty is produced, to examine the instrument in order to ascertain whether it is duly stamped. If the court comes to the conclusion that the instrument is not duly stamped, it has to impound the document and deal with it as per section 38 of the Stamp Act. Therefore, when a lease deed or any other instrument is relied upon as contending the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in section 38 of Stamp Act. The court cannot act upon such a document or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in section 35 or section 40 of the Stamp Act, the document can be acted upon or admitted in evidence.

Comments:

Before analysing the judgment, it would be worthwhile to look at the definition of "arbitration agreement" under the Arbitration Act, which is seen to be overlooked in the judgment. Section 7 defines arbitration agreement. It means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement shall be in writing and may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Sub-section 4 of Sec. 7 states that an arbitration agreement is in writing if it is contained in –

(a) A document signed by the parties;
(b) An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
(c) An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(Footnotes)

[3] "35. Instruments not duly stamped inadmissible in evidence, etc. – No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :

Provided that –

(a) any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion."

Sub-section 5 of Sec. 7 also states that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Clauses (a) and (b) of sub-section (1) of section 16 of the Arbitration Act also states that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and that a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Therefore the Arbitration Act provides an extensive definition of an arbitration agreement and any understanding or consensus between the parties to refer any dispute to arbitration is given due effect. This definition has been made in consonance with the object of the Arbitration Act, i.e., to give party autonomy and to minimize the supervisory role of courts.

The Supreme Court while deciding Question No.(i) has held that an arbitration clause is an agreement independent of the other terms of the contract or the instrument. The court held that it is as if two contracts – one in regard to the substantive terms of the main contract and the other relating to resolution of disputes – had been rolled into one, for purposes of convenience. For easier understanding, it could be stated as two sets of agreements pinned into one file for convenience. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. This position was so held even earlier by the Supreme Court in its judgment, "Magma Leasing & Finance Limited & another Vs. Potluri Madhavilata & Another"[4].

If for this reason, the Court has found that the arbitration agreement has to be treated as a separate agreement independent of the deed which is unregistered (but compulsorily registrable) and therefore valid, why should not the same principle apply for a document which is not duly stamped. Since arbitration agreement is not compulsorily registrable or required to be stamped, the independent and separate arbitration agreement has to survive. This is also evident from the definition of "arbitration agreement" as specified in Sections 7 and 16 of the Arbitration Act.

The Court while examining the validity of an arbitration agreement contained in a contract which is not properly stamped, interpreted the legality based on Section 33 of the Stamp Act and concluded that if the court comes to the conclusion that the instrument is not duly stamped, it has to impound the document and deal with it as per section 38 of the Stamp Act.

(Footnotes)

[4] AIR 2010 SC 488

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Should the very essence or being of an "arbitration agreement" be interpreted as given under the Arbitration Act or based on the Stamp Act?

The Supreme Court had occasion to consider the interpretation of two different special enactments in "Life Insurance Corporation of India Vs. D.J. Bahadur and Others"[5]. The Court held as follows, "When the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms. The crucial question which demands an answer before we settle the issue is as to whether the LIC Act is a special statute and the ID Act a general statute so that the latter protanto repeals or prevails over the earlier one. What do we mean by a special statute and, in the scheme of the two enactments in question, which can we regard as the special Act and which the general?"

The Court further held, "In determining whether a statute is a special or a general one, the focus must be on the principal subject matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes-so too in life. The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega the ID Act has one special mission – the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, the ID Act is a special statute, and the LIC Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, or management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific, or special place in the scheme of the LIC Act. And whenever there was a dispute between workmen and management the ID Act mechanism was resorted to."

The Court in the very same judgment went on to say, "What is special or general is wholly a creature of the subject and context and may vary with situation, circumstances and angle of vision. Law is no abstraction but realises itself in the living setting of actualities. Which is a special provision and which general, depends on the specific problem, the topic for decision, not the broad rubric nor any rule of thumb. The peaceful coexistence of both legislations is best achieved, if that be feasible, by allowing to each its allotted field for play. Sense and sensibility, not mechanical rigidity gives the flexible solution."

In the instant case, the principal subject matter was with respect to the enforceability of an arbitration agreement and the special enactment which covers the principal subject matter was the Arbitration Act, When the Arbitration Act had defined an "arbitration agreement", and when the same was defined to cover any written arrangement between the parties to refer a dispute to arbitration as legally valid and when an arbitration agreement is not statutorily required to be registered or stamped, the Court ought to have upheld the validity of the arbitration agreement, even if it is part of a contract which is improperly stamped. In this case Stamp Act is a general statute and Arbitration Act is a special statute. Stamp Act does not deal with matters coming under the provisions of Arbitration. Arbitration Act being a subsequent enactment and being a special enactment dealing exclusively with the provisions of arbitration, interpretation has to be made treating the Arbitration Act as the special enactment.

The Supreme Court in "J.K. Cotton Spinning & Weaving Mills Co. Ltd. V. State of Uttar Pradesh"[6] has also held, "The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same

(Footnotes)

[5] AIR 1980 SC 2181

[6] AIR 1961 SC 1170

person gives two directions one covering large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect".

Under the scheme of appointment of arbitrators also, what is required and contemplated is to produce the original or true copy of the "arbitration agreement" and not the original or true copy of the contract or deed (which may contain an arbitration clause). When the parties agree that there is an arbitration clause, but when one party challenges it based on the technicality of insufficient stamp in the parent deed, the object of the Arbitration Act is defeated. While defining "arbitration agreement", section 7 of the Arbitration Act has gone to the extent of stating that an arbitration agreement is in writing, if it is contained in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

So, when the arbitration agreement is admitted, it has to be given effect to. The fact that the arbitration agreement forms part of a deed which is compulsorily registrable or required to be stamped should not and cannot defeat the intent of the parties to seek their resolution of disputes by way of arbitration.

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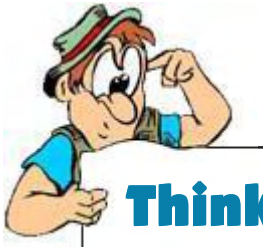

Think ... Lessons of Failure

Failure does not mean I'm a failure; It does mean I have not yet succeeded.

Failure does not mean I have accomplished nothing; It does mean I have learned something.

Failure does not mean I have been a fool; It does mean I had enough faith to experiment.

Failure does not mean I have disgraced; It does mean I have dared to try.

Failure does not mean I don't have it; It does mean I have something to do in a different way.

Failure does not mean I am inferior; It does mean I am not perfect.

Failure does not mean I have wasted my life; It does mean that I have an excuse to start over.

Failure does not mean that I should give up; It does mean that I should try harder.

Failure does not mean that I will never make it; It does mean that I need more practice.

Failure does not mean that the God has abandoned me; It does mean that He must have a better idea.

Article

Nationality of a Corporation in International Investment Disputes

: RUHI KALSOTRA

Globalisation and economic development has given rise to inflow of investments by foreign corporations and entities. Various international Bilateral and Multilateral investment treaties are signed up between nations which has simultaneously increased the count of disputable issues. Bearing in mind the provisions of the respective investment treaty signed between the host nation and the investor corporation, the requirements with respect to nationality are required to be convened. The author looks at the importance in determining the nationality of the corporation for effectively getting the jurisdiction before an arbitral tribunal.

INTERNATIONAL INVESTMENTS

The surge for the economic development has given rise to a congenial environment for investments in many nations. Many countries have steadily opened up their economies and are inviting foreign investments in the hope of availing utmost inflow of capital management skills and foreign technologies. We see that in majority of the instances, investors are companies. Although we often speak of protection of individual person in international law, yet often in international investment cases, the relevant actors appear in the form of juridical persons. The foreign enterprises are seen heading towards making investments in order to stretch economic co-operation with foreign nations. It is seen that the corporations seek destination where they expect high yield, get hospitable investment climate and protection of their investment and right of the returns on the investment that they anticipate to repatriate. Various international Bilateral and Multilateral investment treaties are signed up between nations which has simultaneously increased the count of disputable issues. These issues include the subjects like most favoured nation principle, national treatment, expropriation, full protection and security. To solve such disputes, investment treaties provide an effective dispute resolution system at international level.

Dispute Resolution

In the current International law, direct arbitration between the host state and the foreign investor is the most functional method. It enables the foreign investor with the option of redressing investment disputes with the state either under domestic legal regime or with the International forums like American Arbitration Association (AAA), International Centre for Settlement of Investment Disputes (ICSID), International Chamber of Commerce: International Court of Arbitration (ICA), Permanent Court of Arbitration (PCA) etc. are the arbitral bodies and institutions where a corporation may approach for the dispute resolution.

REQUIREMENT WITH RESPECT TO NATIONALITY

Bearing in mind the provisions of the respective investment treaty signed between the host nation and the investor corporation, the requirements with respect to nationality are required to be convened. In numerous cases, it is seen that the international investor may be unable to institute arbitration because they do not have a required nationality. Nationality of a corporation, therefore, is the foremost criterion that has to be firmly established in the tribunals. It may happen that a company inspite of having nationality of a State may be incorporated in other country. There may be a case when the host State requires the investor to create a company within its territory and carry out the investment through its locally incorporated company. When a dispute arises, the company has to prove its nationality of its actual State. The State thus plays a vital role in protecting its national who may suffer injury in consequence of international investment treaty with some other State. Under diplomatic protection, a State intervenes on its own account to benefit the injured party. But presently, if an investment dispute arises, the investor or the juridical entity, typically, will be able to bring a claim against the State entity with which it has concluded its investment agreement.

NATIONALITY OF A CORPORATION: AN ENTAILMENT

Convention on the Settlement of Investment Disputes between States and Nationals of the other States provides that "Nationality of a corporation has to be established for initiating the arbitral proceedings".[1] The term nationality is not defined as such in the convention. But traditional international law uses several criterions in order to establish corporate nationality. Widest possible latitude should be provided to the parties to agree on the meaning of nationality which is otherwise difficult to be construed merely on the basis of apparent and more general facts. The terms should always be explained on the basis of reasonably accepted criteria. "Two criteria are generally decisive in determining the Nationality of a Corporation:

1. Place of incorporation, the law under which the corporation is formed.
2. Seige Social or the Place of Seat where headquarters of its management is located".[2]

Moreover, ICSID tribunals have consistently adopted the traditional test of incorporation or seat in determining the Nationality of a Corporation.

Place of Incorporation

As observed in many cases, the widest criteria assign nationality to the state of incorporation or where its registered office is. A company is a national of a state where it is incorporated. It must abide by the laws of the land and its actions are considered within the ambit of the laws of the nation where it was incorporated. The corporation must be regulated by the statutory Company Act provisions of a definite State. Moreover all

(Footnotes)

[1] Article 25(2)(b) of the Convention on Settlement of Investment Disputes.

[2] 2.4 Requirement Rationae Personae Dispute Settlement Document of United Nations Conference on Trade and Development,2003, New York and Geneva.

the profits, dividends of the company, on the apparent face if it is regulated by the Company Act provisions of the country where the incorporation of the company has taken place. A decision of the Court with regard to the Nationality of a Corporation holds that "A company incorporated in a particular country has the nationality of that country, though unlike a person it cannot change its nationality".[3]

It is evident that a company incorporated under a particular statute of a nation may acquire the residence of the foreign state and is predisposed to be sued in that country being a national of that country. Thus it could be securely inferred that the place of incorporation aptly refers to the nationality of a state.

Seige Social or the Place of Seat

Besides the place of incorporation, the nationality can also be assigned to a state on the basis of Place of Seat of that corporation. Seat of the corporation is the seat of central administration or the effective seat of business. Only in cases where the juridical person being a non-contracting state which has not signed any investment treaty wants to initiate proceedings, it has to demonstrate that it holds the nationality of a contracting state[4] on the basis of incorporation or the seat.

NATIONALITY THROUGH ACQUISITION Of SHARES

Investments are frequently carried out through companies incorporated in the host State. The local company may have been established by a foreign investor especially for investment purpose. This means that the foreign investor may have acquired shares in the existing company to exercise the control in the foreign incorporated company. In case of control in the foreign incorporated company under ICSID convention, host State and foreign investor may agree that locally incorporated company should be treated as foreign company because of its foreign control on the basis of the acquired shares by a foreign national. In such a case foreign shareholders are protected indirectly through local company's action. But this method of establishing nationality necessarily works if foreign investor controls the company through majority of shareholding. This way "Majority shareholders determine the nationality of an enterprise and direct shareholder certainly can be regarded as the reasonable test for the control".[5] It is quite evident that the damage done to the shareholders may affect its right directly by expropriation of its shares or the damages may be indirect which may be due to diminution of profitability or the value of company's shares. This means that "the shareholders may have either direct or indirect claim, they have a legal position"[6] as held by International Court of Justice.

Sometimes regarding shareholders nationality, the problem arises where the company in question is incorporated in another State. In that case too, shareholding may be a major controlling factor where the actual character of piercing the corporate veil is manifested. In that case, the controlling owner i.e. the majority shareholder plays a leading role in deciding the nationality if a corporation. The rights of investors thus are always protected. The damage done to the shareholder may give rise to a legitimate expectation and interest in the protection of his investment. The International Court of Justice also mentions the arrangement that "Shareholding in companies that are incorporated or have their seat in a State other than the host State is also equally protected"[7].

Majority and Minority Shareholding

It is quite clear that the shareholding is a decisive aspect in determining the nationality of a corporation either by holding majority of shares or even minority shares. "Majority shareholding is regarded as the basis of determining nationality"[8]. But there are reported cases where it was held that "investor was not required

(Footnotes)

[3] Keunegl Vs. Donnersmarck [1955] QB 515, B 35: [1755] 1 ALL ER 46.

[4] Contracting state here refers to the state which has entered into a Bilateral, Multilateral investment treaty.

[5] Autopista Concesionada de Venezuela, CA ('Aucoven') v Venezuela, ICSID Case No ARB/00/5, IIC 19 (2001) 27 September 2001

[6] Barcelona Traction Light and Fower Company Limited (Belgium vs. Spain) ICJ Reports 1970

[7] Ibid (footnote:6)

[8] Knocker vs.Cameroon (ICSID Case No: Arb/81/2)

to have a control over the company or to have a majority share for its investment to be protected by bilateral investment treaty"[9]. This evidently shows that although at times majority shareholding is stressed to be the controlling factor, there have been instances where minority shareholders have been granted protection under the respective treaties. In CMS Gas Transmission Company v. Argentine Republic[10], the shareholding amounted to 17 per cent of the investment in the host country, and even then the company was considered to be a national. Thus shareholding, be it majority or minority stake in the shares of a company, could decide the nationality of a corporation. There have also been cases where there may not be an immediate control of shareholders of affected company. There may be shareholders:

a) Through an intermediary in Host State.
b) Through an intermediary in Investors Home State
c) Or an intermediary in Third State

But it matters little whether intermediate owner of the affected company shares is incorporated in claimants' home State, host State or in a third State. In this context, the rights of shareholders have still been protected and thus nationality could be proved under these situations also.

MANAGERIAL CONTROL

Managerial control is another decisive factor whereby a subsidiary of a company established in some foreign State may acquire the nationality of the foreign State on the grounds of the governing authorities. The count of Board of Directors affects the decision making process for the company. Thus a company established in another State for its business activity can still be regarded as the national of a nation where the managerial control or the Board of directors are located, meaning that nationality of members of board of Directors is taken into consideration where nationality of a corporation has to be determined. In a case the tribunal found that Flexa itself was under Belgian control and since Belgium was a Contracting State, ruled that indirect control by place of control is also enough to fulfill the jurisdictional requirements of Article 25 (2) (b)"[11]. There have been instances where majority shareholding was the basis along which analysis of decision making structure and management was considered in determining nationality"[12].

(Footnotes)

[9] Lanco International Inc v Argentina, ICSID Case No ARB/97/6, IIC 148 (1998)8 December 1998
[10] CMS Gas Transmission Company v Argentina, , ICSID Case No ARB/01/8, IIC 66 (2005),8 September 2005
[11] In SOABI vs. Senegal (ICSID Case No: Arb/01/82)
[12] In LET Co. Vs. Liberia (ICSID Case No: Arb/83/2)

This indicates that although, generally a company is said to reside at a place of incorporation or at the place of registered office, yet the place of registered office or the registration is not conclusive on this question. An Indian legislation provides an alternative easy test for determining the residence of the company. It says that "A company is said to be a resident in India, if it is an Indian company, the control and management of the affairs is situated wholly in India"[13]. The determination as to what place or places the control and management of a company abides is a pure question of face. The facts may assume a company established in a foreign State, can acquire nationality if it suffices with Section 6(3) of the said legislation.

Further it is possible for instance that a company incorporated in one State having place of effective management in another State and the company may claim nationality on the basis of:

a) Incorporation
b) Managerial control or Management

In that regard United Nations Model Tax Convention and Organisation for Economic Co-operation and Development (OECD) Model Tax Convention suggested that place of effective management is a decisive factor to determine the nationality of a juridical entity.

CONCLUSION

Nationality concerns thus have come a long way because the tests of Nationality of a corporation are majorly dictated by the practical needs and are contingent depending upon the circumstances. There has been a divided opinion of different scholars as to what is the sole factor that could govern the nationality square. *Delaume*, an eminent scholar, is very much in favour of using Place of incorporation or Seige Social as the main criterion whereas *Amerasinghe,* another eminent scholar is in favour of more flexible approach; an adequate connection should exist between the juridical person and the State.

The more straightforward and perhaps more cautious way to solve the problem would be to take a thoughtful look on the facts and the provisions mentioned in the treaty provisions. There is a need to address the issue further because it seems that most of the time tribunals contradict their own decisions of assigning nationality on the basis of incorporation at one instance and judging at the other instance through foreign control. However even the efficiency and the competence of the tribunals cannot be doubted as the job of determining nationality is a tough task which is circumscribed by the distinguishable and newer facts every time. Hence, the tribunals need to look at overall operations and thereby express a neutral view to resolve the question on nationality in International Investment Disputes.

(Footnotes)

[13] Section 6(3) of Indian income tax Act, 1961

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Promoting Student Authors

With a view to promote and support students in developing the qualities of legal research and presentation, IIAM is providing opportunity to law students to publish original, innovative and thought provoking articles on arbitration, mediation, conciliation, dispute resolution and similar topics and critiques on judgments relating to the same topics. Selected articles will be published in the "Indian Arbitrator". From amongst the submitted articles, every year one student author will receive the "Best Young Author" certificate from IIAM.

Arbitrators not employees in anti-discrimination legislation

The UK Supreme Court has clarified the status of arbitrators and confirmed that they are not employees, but "independent providers of services who are not in a relationship of subordination with the person who receives the services". Therefore, arbitrators do not fall within the scope of the UK anti-discrimination legislation, including the Equality Act 2010.

The ruling in Jivraj v Hashwani [2011] UKSC 40 overrule the Court of Appeal's previous findings that the Employment Equality (Religion and Belief) Regulations 2003 rendered void an arbitration agreement that provided for the appointment of arbitrators from a particular religious community. More generally, it removes the question mark over the legality of provisions contained in certain institutional rules which restrict the nationality of arbitrators.

Thursday & Friday, 15 & 16 September 2011
Venue: The Hotel Royal Plaza, New Delhi

Over 85% of business transactions today are governed by contracts. As they have multiplied, contracts have also become increasingly complex. And each creates rights and imposes obligations. Businesses can't live without contracts. Negotiated agreements can be assets or liabilities, depending upon how well they are managed. This conference is designed to address issues faced by in-house counsel, contract managers, procurement professionals and private practitioners to draft and manage contracts towards the success of the business organization.

Key issues to be addressed include how to negotiate to ensure a successful negotiation, elements in drafting enforceable commercial contracts, legal issues arising from contractual clauses, successful contract management and cross border agreements. More importantly, the conference will also address Alternative Dispute Resolutions (ADR) as it is estimated that 80% of commercial disputes are resolved through ADR. Understanding dispute resolution in India and cross border litigation will give you an advantage over others.

For more details; see: http://www.goldmancommunications.com/CCMADR2011.pdf
Or mail to training@arbitrationindia.com or sridhar@goldmancommunications.com

IIAM Members are entitled for a special discount of Rs. 10,000/-

Indian Court of Arbitration for Sports

An Eight Member Indian Court of Arbitration for Sports (ICAS) has been set up by the Indian Olympic Association (IOA). The members are Justice AR Lakshmanan – Former Supreme Court Judge & Chairman of Law Commission, M R Culla, Justice R S Sodhi, Justice B A Khan, Justice Usha Mehra, Justice J K Mehra, Justice Lokeshwar Prasad and Justice S N Sapra.

Malaysian Arbitration Act amended to allow ship arrest

The Arbitration (Amendment) Act 2011 was passed, amending the Arbitration Act 2005. This empowers a Malaysian court that exercises admiralty jurisdiction to order the retention of vessels or the provision of security, pending the determination of arbitration proceedings related to admiralty disputes, as security for the satisfaction of any award given in an arbitration.

Singapore Court rules against Arbitrability of Insolvency Claims

The Singapore Court of Appeal held that insolvency claims arising from the operation of the statutory provisions of the insolvency regime are *per se* non-arbitrable. However, a creditor may arbitrate his claim(s) against an insolvent company if the claim stems from the company's pre-insolvency rights and obligations.

Philippines to seek UN arbitration in South China Sea.

Philippines plans to seek UN arbitration of its conflicting claims with China over parts of the South China Sea, as tensions in the resource-rich region again rose. According to sources, Philippines was forced to take the arbitration option provided for in the UN Convention on the Law of the Sea (UNCLOS) as it does not require the agreement of the other party.

Bermuda Crime committee calls for gang mediation

A top recommendation of the parliamentary committee on crime has called for members from gangs to be brought together to negotiate a truce. The joint select committee on violent crime and gun violence issued its report and made its recommendations to the House of Assembly. The task force is now calling on Government to kick-start the National Summit, which will then help provide the seed work for a National Plan to ensure tackling these problems is "Bermuda's number one priority". It would see gang members sitting around the table with mediators to try to understand the motives behind the escalating gun crime.

Conference

Poverty and the International Economic Legal System: Duties to the World's Poor

Event in Basel, Switzerland

Thursday, 20 October 2011 –Saturday, 22 October 2011

International trade and investment have been supported by economists and policymakers as a primary means for lifting populations out of poverty. Recent economic turmoil has caused some observers to question accepted view. Given states' acceptance of the Millennium Development Goals, they have obligations to reduce poverty, but few directions how to do so. How do the legal frameworks of trade, investment, financial regulation, and commercial arbitration relate to this duty? This conference will address the particular topic of "duties to address poverty" from multiple international economic law viewpoints. Global experts in each of these fields will discuss the impacts such rules have, or could have, on efforts to reduce poverty. The conference will be looking for solutions to questions about whether the rules regulating international economic activities are sufficient to ensure that poverty reduction is an actual result, and suggesting changes where necessary.

For more details, see: http://iel.jus.unibas.ch/wordpress/

Student commits suicide after arbitration in Bangladesh

A girl in her teens has committed suicide by hanging herself from the ceiling fan after she was caned following a village arbitration over an altercation with one of her neighbours. Her family members blamed a former union council member and some other local people who tortured her in a so-called arbitration or *salish*.

It is a long-practiced tradition in rural Bangladesh to resolve small-scale disputes but its widespread abuse has repeatedly been condemned by the High Court and human rights groups, especially while it has been used to punish someone for any criminal offence. An unnatural death case has been filed in this connection with the local Police Station.

Certificate in Dispute Management (CDM)

CDM is a distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment.

You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded.

For more details on CDM, mail to training@arbitrationindia.com