Section 2(1)(f) "International Commercial Arbitration" – is it as simple as it looks?

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In India, Section 2(1)(f) of the Arbitration and Conciliation Act, 1996 ("Act"), as amended w.e.f. 23rd October 2015, ***"international commercial arbitration"*** means an arbitration relating to a commercial dispute where at least one of the parties is:

"*(i) an individual who is a national of, or habitually resident in, any country other than India; or*

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country".

Prior to the amendment, ***"international commercial arbitration"*** in terms of Section 2(1)(f) of the Act meant an arbitration relating to a commercial dispute where at least one of the parties to the dispute is:

"…

(iii) ***a company or*** *an association or a body of individuals whose central management and control is exercised in any country other than India; or …*".

Post the amendment, effective from 23rd October 2015, the words "***a company or***" were omitted from Section 2(1)(f)(iii) of the Act.

Prior to the amendment, a dispute revolving around the interpretation of Section 2(1)(f)(ii) and (iii) of the Act had arisen before Hon'ble Supreme Court of India in the matter of **TDM Infrastructure v. UE Development India[1].** This is a landmark judgment laying down the ***'place of incorporation'*** principle, which later on paved the way for the above-mentioned amendment**.** This was a petition seeking appointment of an arbitrator under Section 11(5) and (6) of the Act

[1] (2008) 14 SCC 271

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on the ground that the present arbitration being an international commercial arbitrator and the exclusive jurisdiction lies with the Hon'ble Supreme Court and not the Hon'ble High Court, which has exclusive jurisdiction in case of domestic arbitrations. In this matter, the National Highway Authority of India awarded a highway construction contract to the Respondent, which sub-contracted a portion of it to the Petitioner. Both the Petitioner as well as the Respondent Companies were registered and incorporated under the Companies Act, 1956 in India. However, the Directors and Shareholders of the Petitioner Company were residents of Malaysia. In light of Section 2(1)(f)(iii) *(unamended)* as it stood then, the case of the Petitioner was that since the central management and control of the Petitioner Company is exercised in Malaysia, in as much as the term "central management" would mean that its day to day management does not take place in India, therefore, the Petitioner would qualify under 2(1)(f)(iii), in which case, the jurisdiction to appoint the arbitrator would lie only before the Hon'ble Supreme Court of India. Per contra, one of the contentions raised by the Respondent was that the Petitioner Company was registered in India, therefore, the Hon'ble Supreme Court of India has no jurisdiction to pass an order for appointing an arbitrator.

The Hon'ble Supreme Court of India while resolving the dichotomy regarding the aforesaid sub-clauses (ii) and (iii) of Section 2(1)(f), observed the following:

"13. Whenever in an interpretation clause, the word "means" is used the same must be given a restrictive meaning".

"14… Section 2(1)(f) speaks of legal relationship whether commercial or otherwise under the law in force in India. The relationship has to be between an individual who is a national of or habitually resident in any country other than India as specified in Clause (i) of Section 2(1)(f). 'Nationality' or being 'habitually resident' in respect of a body corporate in any country other than India should, in my view, receive a similar construction."

"15. Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration."

While disagreeing with the contention of the Petitioner that the word 'or' being disjunctive, clause (iii) of Section 2(1)(f) of the Act *(unamended Act)* shall apply in a case where clause (ii) shall not apply, the Court held that the question of taking recourse to clause (iii) would come into play only in a case where clause (ii) otherwise does not apply in its entirety.

"19. When, thus, both the companies are incorporated in India, in my opinion, Clause (ii) of Section 2(1)(f) will apply and not the Clause (iii) thereof."

For the afore-mentioned reasons, it was held that the Hon'ble Supreme Court of India has no jurisdiction to nominate an arbitrator.

The **Law Commission of India** in its Report No. 246 of August 2014 recommended several amendments to the Act and took into account the reasoning given in the judgment of **TDM Infrastructure** (supra) for recommending deletion of the words ***'a company or'***.

The issue relating to the meaning and import of Section 2(1)(f)(iii) again came up for consideration before the Hon'ble Supreme Court of India in the matter of **Larsen and Toubro Limited Scomi Engineering BHD v. Mumbai Metropolitan Regional Development Authority *("MMRDA")*[2].** In this matter, a contract was executed between MMRDA and a consortium comprising of: (a) L&T, an Indian Company and (b) M/s. Scomi Engineering BHD, a Malaysian Company. Disputes arose between the parties, the consortium filed a petition under Section 11 of the Act. According to the Petitioner, since one of the parties to the Arbitration Agreement, being a body corporate incorporated in Malaysia, it would attract Section 2(1)(f)(ii) of the Act. In light of the above facts, the core question before the Hon'ble Supreme Court was whether the petition filed under Section 11 of the Act was maintainable i.e. whether international commercial arbitration could be invoked by the Petitioner? The Hon'ble Supreme Court while interpreting Section 2(1)(f) and also taking cognizance of the earlier judgment of Hon'ble Supreme Court in **TDM Infrastructure** judgment (supra) held that Section 2(1)(f)(iii) of the Act refers to two different sets of persons, an "association" as distinct and separate from a "body of individuals". An association as referred to in Section 2(1)(f)(iii) would therefore include a consortium consisting of two or more bodies corporate, at least one of whom is a body corporate incorporated in a country other than India. It was further held that the unincorporated "association" referred to in Section 2(1)(f)(iii) would be attracted on the facts of the present case and not Section 2(1)(f)(ii), as the Malaysian body corporate could not be referred to as an independent entity. The Hon'ble Apex Court also considered that since the Indian company i.e. L& T in the present case, was the lead member, the consortium's office was in Mumbai, India and also that the lead partner was to lead the arbitration proceedings, therefore, the central management and control of this consortium appeared to be exercised in India. In light of the above, the Hon'ble Supreme Court dismissed the petition under Section 11 seeking appointment of an arbitrator as there was no "international commercial arbitration" in terms of Section 2(1)(f) of the Act.

[2] (2019) 2 SCC 271

In a recent judgment in the matter of **Amway (India) Enterprises v. Ravindranath Rao Sindhia**[3], the Hon'ble Supreme Court once again delved into the interpretation of clauses of Section 2(1)(f) of the Act wherein the Hon'ble Court examined the nature of arbitration having regard to the nationality of the proprietors and their business enterprise having operations in India. The facts of the present case are succinctly as such, the Respondents in the year 1998 were appointed as distributor for the Petitioner herein for undertaking sale, distribution and marketing of its products in India. The Respondents were registered as Amway Business Owner/Amway Direct Seller, in the name of the sole proprietorship "Sindhia Enterprises". Disputes arose between the parties and the Respondents herein preferred a petition under Section 11(6) before Hon'ble Delhi High Court seeking appointment of an arbitrator in terms of the Act. The Appellant herein *(Respondent before the Hon'ble Delhi High Court)* defended the petition and the main plea taken by them was that the said petition was not maintainable as the disputes relates to an international commercial arbitration, being covered under Section 2(1)(f)(i) of the Act, in as much as, the Respondents herein *(Petitioners before the Hon'ble Delhi High Court)*, are husband and wife, who are both nationals of and habitual residents in the United States of America. This plea was turned down by the Delhi High Court holding that since the central management and control of this association or body of individuals is exercised only in India under Section 2(1)(f)(iii), the dispute is not a dispute which is an international commercial arbitration, and therefore, the Delhi High Court exercised its jurisdiction under Section 11(6) of the Act to appoint and arbitrator. Thereafter, the Appellant herein *(Respondent before the Delhi High Court)* preferred a SLP before the Hon'ble Supreme Court. The Hon'ble Supreme Court having placed reliance on the **L&T judgment** (supra) as well as the judgment in the matter of **Ashok Transport Agency v. Awadhesh Kumar**[4], wherein it was held that a sole proprietary concern is equated with the proprietor of the business, reversed the judgment of the Delhi High Court and held that:

"the argument that there is no international flavour to the transaction between the parties has no legs to stand on. Indeed, an analysis of Section 2(1)(f) would show that whatever be the transaction between the parties, if it happens to be entered into between persons, at least one of whom is either a foreign national, or habitually resident in, any country other than India; or by a body corporate which is incorporated in any country other than India; or by the Government of a foreign country, the arbitration becomes an international commercial arbitration notwithstanding the fact that the individual, body corporate, or government of a foreign country referred to in Section 2(1)(f) carry on business in India through a business office in India".

An interesting question had arisen for determination before the Hon'ble Bombay High Court in the matter of **Aslam Ismail Khan Deshmukh v. Asap Fluids**[5], a petition under Section 11(6) of the Act. The

[3] (2021) 8 SCC 465
[4] (1998) 5 SCC 567
[5] 2019 SCC OnLine BOM 304

Applicant/Petitioner in this case, was a non-resident Indian residing and working in Dubai, UAE and the Respondent was a company incorporated in Mumbai under the Companies Act, 2013. It was contended by the Respondent before the High Court that since the Applicant is *ex-facie* a person habitually resident in a country other than India, therefore, the present arbitration is an international commercial arbitration. Therefore, in view of Section 11(12)(a) of the Act, an application under Section 11 of the Act would only lie to the Hon'ble Supreme Court and not before the Hon'ble Bombay High Court. As against this, the Applicant's case was that the present arbitration is not an international commercial arbitration, because the Applicant is a national of India holding an Indian passport, also having a ration card and an Aadhar card. It was also a plea by the Applicant that he is presently residing in Dubai only for work and comes to India frequently to visit his family. The Applicant also relied upon the definition of "habitually resident" as defined in the Law Lexicon and sought to content that in order to decide whether a person is a habitual resident in a particular country, the Court should consider whether such person intends to reside in that country so as to obtain domicile in that country. The Applicant contended that his permanent place of residence is in India and he has no intention of residing in any other country except India. In light of the above facts, the question of law which arose for consideration before the Hon'ble High Court was as regards the meaning and interpretation of Section 2(1)(f)(i) of the Act and more particularly, the meaning of *"…or habitually resident in, any country other than India"*. The Hon'ble High Court while upholding the contention of the Respondent, concluded that the proposed arbitration proceedings in the present case would constitute an international commercial arbitration and observed as under:

"It is clear from the definition that the legislature has used two distinct expressions viz. "national" and "habitual resident". These two expressions are separated by the expression "or", which means they have been used disjunctively. Therefore, if even one of the parties to the arbitration satisfies the requirement of being a national of, or habitual resident in, any country other than India, it would be an international commercial arbitration. It is not necessary that party must be both a national of and a habitual resident in any country other than India… even if one of the parties is habitually resident in a country other than India but a national of India, this provision would still be applicable, and it would be an international commercial arbitration."

"It is very clear that language of sub-clause (i) of Section 2(1)(f) of the Act does not use the expression 'domicile'. It is an expression that the legislature would have been aware of but has consciously chosen to use the expression 'habitually resident'. Further, even the Law Lexicon definition relied upon by the Applicant states that the meaning of "habitually resident" is "a physical presence in a country which must endure for some time; it is equivalent to the residence required to establish domicile without the necessary animus. Habitually Resident also means Place or Country in which a person has his home." Even from this definition it is clear that the animus necessary for domicile is not necessary for satisfying the meaning of 'habitually resident'. It is therefore a lower standard than that

of domicile. Therefore, the judgments that deals entirely with the meaning of 'domicile' would not be of any help to the Applicant. Further, the submission of the Applicant that it is the intention to reside in a particular place that makes him a 'habitual resident' would be contrary to the Law Lexicon definition relied upon even by the Applicant, which says that animus is not necessary. For the same reason the alleged intention of the Applicant not to reside in any country other than India, as stated in the Written Submissions, would not be material to the issue of the Applicant being a 'habitual resident' of Dubai."

The Hon'ble High court opined that the Applicant habitually resides in Dubai, therefore, the present arbitration being international commercial arbitration, the Application under Section 11 of the Act was not maintainable before the Hon'ble High Court under the provision of Section 11(12)(a).

In view of the law laid done in the above judgments, the following can be safely concluded:

i) In the case of the individuals, their nationality or habitual residence shall be the determinative factor.

ii) Whereas, if one of the parties to the dispute is a body corporate then the place of its incorporation will decide the nature of arbitration.

iii) In case of disputes between two parties, where one of the parties is a consortium or joint venture of two or more entities, the identity of the lead member under the agreement would be a determinative factor for deciding the nature of arbitration.