Private Equity Case Update

January 10, 2019

Maharana Infrastructure and Professional Services Ltd. v. Matrix Partners India Investment Holdings LLC [1] ***(Bombay High Court, January 3, 2019)***

INTRODUCTION

In this recent decision of the Bombay High Court, interim relief granted by an arbitral tribunal was upheld in favour of an investor.

FACTUAL BACKGROUND

Matrix Partners India Investment Holdings LLC, Matrix Partners India Investments LLC and Resurgence PE Investments LLC ("**Investors**") had collectively invested, in various tranches, approximately INR 190 cr. in Maharana Infrastructure and Professional Services Ltd. ("**MIPSL**") through various agreements, thereby acquiring approximately 43% of the shareholding of MIPSL. As is common in such agreements, exit options were provided which *inter alia* included a Put Option enforceable by the Investors against the promoters of MIPSL and MIPSL on the non-happening of certain events. The agreements to which the Investors promoters of MIPSL and MIPSL were parties contained an arbitration clause.

Disputes arose between the parties, and the Investors filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Act**") [2] before the Bombay High Court seeking interim reliefs pending the constitution of the Arbitral Tribunal. The Investors made several MIPSL group companies, who were not signatories to the arbitration agreement, party to the Section 9 proceedings under the principles of *Group of Companies* and *Alter Ego* as laid down in the Supreme Court decision of *Chloro Controls.* [3] Pending the Section 9 petition before the Bombay High Court, Section 11 proceedings[4] were filed before the Supreme Court. By consent a sole arbitrator was appointed. As such, the Section 9 petition was directed to be treated as an application under Section 17 [5] of the Act for interim reliefs before the Arbitral Tribunal.

The Investors under the Section 17 application sought to secure their claim of INR 590 cr. being the valuation as alleged by them of their investment. The Investors, on the basis of a report authored by Price Water House Coopers Private Limited ("**PWC**"), alleged that MIPSL was entering into contracts with MIPSL's group companies which were taking security deposits from MIPSL as consideration for exclusivity and as a performance guarantee. The Investors alleged that this was a disguised means of siphoning funds from MIPSL. The Investors also alleged several instances of breaches of the agreements they entered into with MIPSL and its promoters. MIPSL, its promoters and the group companies denied any wrongdoing and alleged that the transactions were on an arms' length basis and that the PWC report was unreliable. MIPSL's group companies also alleged that, being non-signatories to the arbitration agreement, they could not be subjected to the reliefs as prayed for by the Investors. It was additionally argued that the Arbitral Tribunal had no jurisdiction as the subject matter fell within the jurisdiction of the National Company Law Tribunal ("**NCLT**") (under the Companies Act, 2013). However, no application under Section 16 of the Act [6] was in fact filed.

The Arbitral Tribunal held that it had jurisdiction to decide the dispute as it was purely a contractual dispute. Also, based on the decision in *Chloro Controls*, the Arbitral Tribunal held that the group companies of MIPSL could be proceeded against in the Section 17 application in the arbitration. The Arbitral Tribunal went on to hold that the Investors had established all the necessary requisites for interim relief and directed MIPSL, it's promoters and group companies to jointly and severally deposit INR 190 cr. or provide a Bank Guarantee for the said amount. Additionally, the Arbitral Tribunal also restrained MIPSL, it's promoters and group companies from alienating, transferring, disposing of and/or encumbering any of their properties.

Against this order, MIPSL and its promoters preferred an appeal under Section 37(2)(b) of the Act, being Arbitration Petition No. 919 of 2017, and MIPSL's group companies preferred a similar appeal being Arbitration Petition No. 939 of 2017. MIPSL, its promoters and MIPSL's group companies are hereinafter collectively referred to as the Petitioners.

ISSUES AND FINDINGS

MIPSL and its promoters contended that the Arbitral Tribunal had no jurisdiction to decide the disputes on account of the provisions of the Companies Act, 2013 conferring jurisdiction in this regard to the NCLT. MIPSL's group companies argued that the Arbitral Tribunal had no jurisdiction over them on account of the fact they were not signatories to the arbitration agreement. The Investors countered that the question of jurisdiction could not be adjudicated upon by the Bombay High Court in the present proceedings under Section 37 and could only be raised once the arbitral award was rendered and subsequently subjected to a challenge under Section 34 of the Act. MIPSL and its promoters argued in rejoinder that as no Section 16 application was filed, the findings on jurisdiction were prima facie findings for the purposes of deciding the Section 17 application and thus could be challenged under Section 37 proceedings. The said argument was not adopted by MIPSL's group companies. The Bombay High Court held that a plain reading of Section 16 read with Section 34 and 37 of the Act reveals that if the Arbitral Tribunal rules that it has jurisdiction, the same can only be challenged at the time of challenge to the arbitral award

and not before. Thus, the Bombay High Court disagreed with the Petitioners in this regard and hence did not go into the findings of the Arbitral Tribunal on jurisdiction.

MIPSL and its promoters contended that no case for interim relief had been made out by the Investors, that the Arbitral Tribunal was wrong in directing the Petitioners to deposit INR 190 cr. and that the injunction restraining the Petitioners was excessive and would hamper the entire business activity of the Petitioners. MIPSL and its promoters alleged that the PWC report that formed the basis of the Arbitral Tribunal's decision was a partisan report. It was further contended that the Investors were always aware of the various agreements entered into between MIPSL and its group companies as also of the deposits remitted by MIPSL to the said group concerns. Alternatively, it was argued that the Arbitral Tribunal could not have pierced the corporate veil, looked into the books of MIPSL's group concerns and awarded interim relief against MIPSL on such basis, especially when the group concerns were not signatories to the arbitration agreement.

The Investors contended that they had made out a complete case for interim relief which was awarded unto them correctly by the Arbitral Tribunal and was not in any manner excessive. The Investors countered that the PWC report was based on the documents provided by MIPSL, the promoters and MIPSL's group concerns and that the same was not seriously impugned by the Petitioners. The Investors also alleged that till date the Petitioners had, despite being directed to do so, not disclosed the details including the value and status of their assets and as such a comprehensive order had to be passed by the Arbitral Tribunal as the valuations were undisclosed. It was further contended that as the interim relief awarded by the Arbitral Tribunal was a plausible view, the court ought not to interfere with the discretion exercised by the Arbitral Tribunal unless the same was wholly perverse or palpably contrary to the provisions of law.

The Bombay High Court agreed with the Investors and held that they had made out a prima facie case for interim relief. It held that the Arbitral Tribunal had painstakingly perused the available materials and arrived at its decision. It was observed that the PWC report was never seriously contested by the Petitioners before the Arbitral Tribunal and the Petitioners had instead sought to rest on the argument that the Arbitral Tribunal had no jurisdiction. The court, thus, did not permit the Petitioners to now agitate the said issue. Further, the court held that not having disclosed the value of the assets, the Petitioners could not now complain that the injunction was excessive. The court also found that subsequent to injunction issued by the Arbitral Tribunal, the Petitioners had disposed some assets in violation of the said injunction. This too coloured the decision to uphold the interim reliefs awarded by the Arbitral Tribunal.

ELP COMMENT

Investors across the globe have reason to applaud this decision which aims at protecting their investment and ensuring that they are able to secure the sums in dispute. In our experience, obtaining effective and urgent interim relief often expedites settlements that help investors recoup their investment in such cases.

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[1] Arbitration Petition 919 and 939 of 2017, Bombay High Court.
[2] A court may be approached by a party to an arbitration agreement under S. 9 of the Act for interim reliefs
[3] Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors., (2013) 1 SCC 641.
[4] In the case of an international commercial arbitration, where an arbitral tribunal is not constituted in accordance with the arbitration agreement, parties can approach the Supreme Court under the said provision for appointment of an arbitrator.
[5] As per Section 9(3) once the arbitral tribunal is constituted, the court shall not entertain an application under Section 9 and the interim reliefs are to be sought before the arbitral tribunal itself.
[6] The said provision permits a jurisdictional challenge before the arbitral tribunal itself.