



## DELHI HIGH COURT'S JUDGEMENT IN *SAIL V. TATA PROJECTS LTD.* A WAY FORWARD OR CONUNDRUM?

### *SAIL V. Tata Projects Ltd. Anr*

Anyone familiar with the arbitration regime in India would appreciate the importance of an arbitration being declared as an international commercial arbitration. Narrower scope of judicial review and flexibility regarding the governing law, act as comfort cushions for the parties in such arbitrations. *L&T Scomi*<sup>1</sup> and *Perkins Eastman*<sup>2</sup>, till now, held the fort in determining the nature of arbitration between an Indian party and a consortium comprising of one foreign entity. However, Justice Vibhu Bakhru, in a bold decision rendered in *Steel Authority of India Limited v. Tata Projects Ltd., 2021 SCC OnLine Del 4170* distinguished *L&T Scomi* and *Perkins Eastman* to hold that even when an Indian entity is a Consortium Leader and Contractor, if the foreign entity is defined as Consortium Member and Contractor having separate and specific rights, such a member is a party to the Agreement, and such an arbitration would be “International Commercial Arbitration”.

### FACTS

1. On 24.07.2007, Steel Authority of India (**SAIL**) invited tenders for setting up a Blast Furnace. Tata Projects Limited (**TPL**) – an Indian entity and DC Systems (**DC**), a company incorporated under the laws of Netherlands, formed a consortium to bid for the tender. TPL, DC and SAIL were awarded the tender which led to execution of a contract dated 02.10.2008 (**the Contract**).
2. Pursuant to execution of the Contract, SAIL requested for installation of Wireless Fire Detection Alarm (**FDA**) instead of the regular FDA, provided for under the Contract. After protracted correspondence, TPL placed an order with one Diaonics Automation (P) Ltd. (**Diaonics**) for installing and commissioning of the wireless FDA at SAIL's insistence, despite its reservations.

<sup>1</sup> *Larsen and Toubro Limited Scomi Engineering BHD v. Mumbai Metropolitan Region Development Authority*, (2019) 2 SCC 271.

<sup>2</sup> *Perkins Eastman Architects DPC and Ors. v. HSCC (India) Ltd.* (2019), SCC OnLine SC 1517.

3. SAIL issued the Preliminary Acceptance Certificate to the Respondents, while the commissioning of wireless FDA was pending. Subsequently, when wireless FDA could not be commissioned and DC requested SAIL to issue the Final Acceptance Certificate (**FAC**) and FAC linked payments, SAIL refused the same, calling upon DC and TPL to complete the balance work so that FAC linked payments could be released.
4. There were certain “other” disputes between the parties, which were referred to arbitration (**First Arbitration**). Pertinently, the issue of FAC and FAC related payments were not referred to arbitration at this stage, and a right was reserved in this regard.
5. Since the impasse re FAC and FAC linked payments continued, TPL and DC, on 13.09.2017, invoked another arbitration raising claims regarding FAC and FAC linked payments, which then resulted in an award wherein the Arbitral Tribunal (**AT**) partly allowed TPL and DC’s claims.
6. Aggrieved by this Award, SAIL filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (**the Act**) before the Hon’ble Delhi High Court (**Court**) seeking setting aside of the Award *inter alia* on the ground that the Impugned Award was not an International Commercial Arbitration (**ICA**). It therefore could be assailed for being patently illegal as per Section 34(2A) of the Act. As per SAIL, since TPL was the consortium leader, the central management and control of the consortium vested with TPL and the same was exercised in India, thus for all practical purposes, the consortium was to be considered as a party located in India. In this regard, the Petitioner placed reliance upon the judgements of the Hon’ble Supreme Court of India in *L&T Scomi* and *Perkins Eastman*.
7. SAIL had argued that since the arbitration was domestic, the Award was patently illegal and opposed to the basic notions of morality and justice because although the AT accepted that the FDA was not commissioned, it had implied deemed completion and deemed issuance of the FAC in order to hold that TPL and DC were entitled to the FAC payments. As per the judgement in *Nabha Power*,<sup>3</sup> the AT could not have inserted terms into a commercial agreement.
8. TPL and DC, amongst other things, argued that the award was passed in an ICA, therefore, the scope of challenge for such an award, is narrow. They relied on the decision of the Hon’ble Supreme Court in *HRD Corporation*<sup>4</sup> in support of their contention.
9. Upon hearing the parties, the Court dismissed SAIL’s petition on the ground that the Award had arisen from an ICA under Section 2(1)(f) of the Act. While doing so, the Hon’ble High Court held that as per the Contract, DC had been referred to as both - a consortium member as well as contractor. This fact was also clear in the minds of SAIL which signed the Contract specifying the obligations to be independently performed by DC.
10. Thus, the Hon’ble Court rightly distinguished *L&T Scomi* and *Perkins Eastman* to hold that where it is evident that a foreign incorporated entity is a party to the contract, as it clearly specifies the obligations to be performed by that foreign entity and creates corresponding rights in favor of the other party, an arbitration in terms of such an agreement would be an ICA.

## ANALYSIS

While the judgement dealt with several issues viz. constructive res judicata and deemed acceptance, which reiterate the existing law, the present judgement appears to be key since it creates an exception to the law laid down by *L&T Scomi* and allows the Court to go into the terms of the Contract to ascertain whether the proceedings amount to ICA or not. The *L&T Scomi* rule was touted by many to be unnecessarily harsh since it brought all consortiums having foreign members, within the ambit of domestic arbitrations merely because the lead member was an Indian entity.<sup>5</sup> In our opinion, the interpretation adopted by the present judgement would find favor with foreign stakeholders, as ICA awards do not undergo the scrutiny of the patent illegality as provided under Section 34(2A) of the Act.

<sup>3</sup> *Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Another*, (2018) 11 SCC 508.

<sup>4</sup> *HRD Corporation v GAIL*, (2018) 12 SCC 471.

<sup>5</sup> The rule in *L&T Scomi* essentially states that a consortium would come within the ambit of Section 2(1)(f)(iii) of the Act and the location of its “central management and control” would be the location of the registered office of the lead member of the consortium.

One may argue that when an unincorporated consortium unequivocally declares a lead Partner, it would be illogical to go beyond the intent of the parties. What will have to be seen in such a case is “whether the foreign partner has specific rights and duties or not.” In case the foreign partner has specific rights and duties, and it is a signatory to the Contract, it cannot be argued that the foreign partner intended to be represented through the Indian partner for its own obligations. Thus, it would only be reasonable to conclude that an arbitration with such a party will be an ICA for a contract where one of the parties is a foreign incorporated entity.

We hope you have found this information useful. For any queries/clarifications please write to us at [insights@elp-in.com](mailto:insights@elp-in.com) or write to our authors:

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