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Indian Oil Corporation Limited vs NCC Limited: The Road not Taken

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India ranked 62nd in the world according to the World Bank's ease of doing business index for the year 2019, which now has been discontinued. Notably, the dispute resolution mechanism for commercial contracts becomes one of the important parameters in terms of business efficacy for any jurisdiction especially wherein Public Sector Undertakings ("**PSUs**") are involved. The dispute resolution mechanism is almost always *via* arbitration in most of the commercial contracts. The Arbitration & Conciliation Act, 1996 ("**Indian Arbitration Act**") has been amended by the government from time to time since 1996 to facilitate the ease of doing business in India. This article will essentially focus on the contracts/tenders of Indian PSUs and the dispute resolution clauses provided therein.

DISPUTE RESOLUTION CLAUSE IN PSU CONTRACTS

Indian PSUs are not just responsible for infrastructure building in the country but are also the major job-generating companies in India. The tenders floated by these PSUs for even meagre amount receive a large number of bids thereby, making these bids 'take it or leave it' arrangements. This is a clear indicator of the importance of PSUs in the Indian commercial space and the bargaining position these PSUs hold. Considering this, the contractual drafting of these contracts is quite one-sided leaving no scope for any deviations for Contractors.

At this juncture, it is important to discuss the latest development in light of the recent Supreme Court judgment of Indian Oil Corporation Limited vs NCC Limited ("**NCC**"). There is a widely prevalent practice of incorporating a dispute resolution clause in most of the PSU contracts where a distinction is made between a notified claim and a non-notified claim. This is done to make only 'notified claims' to be arbitrable while the other claims are either non-arbitrable or are left open for the parties to be fought for in commercial suits. This is particularly important to note and to ponder upon because the legislature has been trying to project a pro-arbitration

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outlook *vide* various amendments made to the Arbitration Act. The dispute resolution clauses enumerated in the PSU contracts are unprecedented when compared to similar contracts in other countries. Notably, the Supreme Court in the NCC judgment had upheld the validity of such clauses in the contractual agreements leaving the contractors in a state of ambiguity. The affected parties will have a hard time trying to fight for contractual claims in commercial courts due to these being non-arbitrable. Additionally, apart from such clauses being 'anti' arbitration intent, such clauses hamper the ease of doing business in the county as well.

The clauses in question are seldom altered by PSUs despite requests from contractor companies because of the unequal bargaining power and the dynamics shared between the PSUs and the respective Contractor. The situation is further aggravated when these clauses are introduced in the contractual agreements discouraging parties from claiming their respective dues under the contract. Companies are effectively made to suffer and have to run from pillar to post to not only get the claims approved but even to submit such claims, thereby, affecting the ease of doing business and giving the PSUs unrivalled power. In fact, it would not be wrong to say that most foreign investors tend to get reluctant to do business in India with PSUs due to such clauses and this ultimately affects the potential foreign direct investment.

Contracts between government and private entities become more important in light of the recent economic development and foreign direct investment opportunities in India. A pro-business outlook will encourage not just private companies but private investors to establish both long term and short-term associations with the PSUs rather than being wary of them.

Notably, the statistics have shown that in cases wherein an arbitration award is challenged, a large majority of cases are decided in favor of the respective contractor. However, this comes with substantial litigation costs for the government as well as the contractor together with substantial time loss which hinders business. To address this issue, recently, the Hon'ble Finance Minister in budget 2023-2024 has announced Vivad se Vishwas 2. This will be a voluntary commercial dispute settlement scheme and the standardized terms of this scheme will be used to settle disputes wherein government entities are involved, and the matter is sub judice. This scheme is yet to be notified though a welcome step to make the dispute resolution process involving government entities speedier and more standardized. This was also important because

PSUs are the major stakeholders for almost all projects of national concern in India and hence, also the major litigators.

CONCLUSION

Considering the current attitude of PSUs, the recent amendments will be rendered useless because if not paid heed to such clauses that lead to aforesaid issues, Government's intent to make India an arbitration hub will be a distant dream. Going forward, to realize this dream, the government will not just have to amend the Arbitration Act along with the introduction of schemes like Vivad se Vishwas 2 but will also have to bring about a change in its contracts by deletion and/or amendment of erroneous clauses present in the current form. This will ensure that the financial and business world will have a positive outlook towards India and will in turn attract foreign investment leading to a better and stronger commercial environment in India. This is also to project India as a pro-arbitration jurisdiction which is the need of the hour.