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This issue covers the following topics:

India

PARTY AUTONOMY IN ARBITRATION

本年４月、インドの最高裁判所は、インド法人間の紛争をインド国外の仲裁で解決する旨の当事者間の合意について、その有効性を認める判断を下した。予てよりかかる当事者間の合意はインドのパブリックポリシーに反して無効ではないかという議論がなされてきたが、これに対して明確な判断が示されたことになる。契約実務においても紛争解決条項はしばしば論点になる項目であり、実務上重要な判例であることから本稿で紹介する。

Introduction

In April 2021, the Supreme Court of India, in a landmark judgement rendered in *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited, has put to rest an often debated question regarding choice of seat of arbitration between two Indian parties and upheld the autonomy of Indian parties to choose a seat of arbitration outside India. Whilst at first go this decision may seem relevant only to Indian parties, the judgment has far reaching effects on the ability of Indian subsidiaries and joint venture partners of foreign companies to choose a neutral foreign seat of arbitration, such as Singapore or London when executing contracts with other Indian parties and not be compelled to choose India as a seat of arbitration, which entailed* Indian courts having supervisory jurisdiction and the award being subject to challenge in India.

Facts

PASL Wind Solutions Private Limited ("**PASL**") and GE Power Conversion India Private Limited ("**GE Power**") being two Indian companies, executed a settlement agreement dated December 23, 2014 ("**Settlement Agreement**"), which provided for disputes to be resolved by way of arbitration conducted in accordance with the ICC Rules and the seat of arbitration to be Zurich.

Pursuant to disputes between the Parties under the Settlement Agreement, arbitration proceedings were initiated and an arbitral award dated 18 April 2019 ("**Award**") was passed in favour of GE Power.

GE Power initiated proceedings before the Gujarat High Court for enforcement of the Award and also filed an application seeking interim reliefs under Section 9 of the Arbitration & Conciliation Act, 1996 ("**Arbitration Act**") for securing the Award. The Gujarat High Court upheld the enforcement of the Award, but dismissed the interim application filed by GE Power, on grounds that interim relief under Section 9 is only available in 'international commercial arbitrations', where at least one party is a foreign party.

Against the order of the Gujarat High Court, PASL filed an appeal before the Supreme Court of India.

Decision of the Supreme Court

The Supreme Court, while dismissing the appeal filed by PASL, unequivocally held that that two Indian parties can opt for a foreign seat to conduct arbitration. The Supreme Court also clarified that an award delivered by an arbitral tribunal seated outside India is a foreign award, and will be enforceable under Part II of the Arbitration Act (which deals with enforcement of foreign awards) even if the parties to the arbitration are Indian. It held that for an award to be considered a foreign award, there is no requirement under the Arbitration Act for one of the parties to be a foreign, non-Indian party.

In considering the issue whether choice of a foreign seat by two Indian parties is against the public policy of India, the Supreme Court examined the provisions of the Arbitration Act as well as the Indian Contract Act and held that '*the balancing act between freedom of contract and clear and undeniable harm to the public must be resolved in favour of freedom of contract as there is no clear and undeniable harm caused to the public in permitting two Indian nationals to avail of a challenge procedure of a foreign country*.' Therefore, by choosing a foreign seat, Indian parties are not acting contrary to the public policy of India.

On the issue of seeking interim relief, the Supreme Court overruled the decision of the Gujarat High Court and held that parties to a foreign-seated arbitration have access to Indian courts for interim relief, notwithstanding their nationality. The Supreme Court categorically held that Section 9 of the Arbitration Act remains available where two Indian parties adopt a foreign seat of arbitration, since it would be classified as an international commercial arbitration by relying on the place-centric approach. The Supreme Court reasoned that the term 'international commercial arbitration' as used in Section 2(2) of the Arbitration Act must be interpreted to mean an arbitration that take place outside India, irrespective of the nationality of the parties.

The Supreme Court also examined and considered previous precedents on this issue, and overruled or distinguished earlier judgments which were contrary to its stance. In doing so, the Supreme Court has indisputably upheld the supremacy of party autonomy in designating a seat of arbitration outside India even when both parties are Indian.

Conclusion

Through this significant pro-arbitration judgement, the Supreme Court has provided much needed clarity on a controversial issue dominating arbitration proceedings between Indian parties for a long time. The Supreme Court has given vital impetus to party autonomy, calling it the `brooding and guiding spirit of arbitration'.

The decision will assist parties in cross-border transactions and multi-national companies and foreign companies having Indian subsidiaries who may prefer to streamline disputes by opting for a preferred neutral and efficient choice of seat of arbitration. So long as the seat of the arbitration is a territory that is a signatory to the New York Convention and has been notified as such by the Central Government in the Official Gazette, the award will be enforceable in India as a foreign award.

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Indonesia

RISK BASED APPROACH: NEW REGIME FOR BUSINESS LICENSING IN INDONESIA

インドネシアでは、昨年施行されたオムニバス法に基づき、リスク・ベース・アプローチと呼ばれる新たな許認可制度が導入された。事業のリスク量に基づき必要となる許認可を設定するもので、本年 6 月 2 日から運用が開始される。本稿では、この新たな許認可制度について概説する。

Introduction

In furtherance to the Law No. 11 of 2020 on Job Creation ("**Omnibus Law**"), the government introduced a new licensing system for companies in Indonesia, known as risk-based licensing through the Government Regulation No. 5 of 2021 on the Implementation of Risk-Based Licensing Service ("**GR 5/2021**"). Although this regulation has come into force on 2 February 2021, GR 5/2021 explicitly stipulates that the implementation of this new system will be effective on 2 June 2021. During the period between 2 February 2021 and 2 June 2021, the BKPM and other government institutions would actively communicate with businesses, both domestic and foreign investment companies.

The Concept

Currently all licensing activities are implemented through the online single submission ("**OSS**") system. Companies apply for all required licenses for their business through the OSS system, including the Business Identification Number ("**NIB**"), environmental license, and business license. The GR 5/2021 aims to simplify the licensing requirements in the OSS system and introduces the new concept named risk-based approach licensing system ("**RBA**"). In essence, the licensing activities in the OSS RBA system will be conducted depending on the level of risk of each business, which is evaluated based on the aspects of safety, health, environment, and/or utilization and management of natural resources. This is different from the old regime where all companies were required to obtain similar type of licenses irrespective of their line of business.

GR 5/2021 divides the level of risk into 4 (four) categories, namely (i) low risk, (ii) medium-low risk, (iii) medium-high risk, (iv) high risk. These categories will have different licensing requirements. Businesses in "***low risk***" category will only require NIB to commence the commercial activity. Businesses in "***medium-low risk***" and "***medium-high risk***" category require standard certificate in addition to the NIB. The standard certificate is the checklist of fulfilment of requirements for the relevant business determined by the government. For "medium-low risk" business, the companies will only do a self-declaration related to the completion of requirements, while for "medium-high risk" businesses the fulfilment of standard certificate must be verified by the relevant government institution. Lastly, businesses in "***high risk***" category will require NIB and business license. Business license will be issued after the companies have fulfilled all requirements determined by the relevant government institution.

Furthermore, OSS RBA system still requires companies to obtain environmental approval, but now with some modification depending on the risk of business. There are 3 (three) types of environmental approvals, namely (i) Environmental Impact Analysis ("**AMDAL**") that is given for businesses that substantially affect the environment. The types of businesses that require AMDAL are set out in the relevant ministerial regulation, (ii) Environmental Management and Monitoring Efforts ("**UKL-UPL**") that is given for businesses that do not substantially affect the environment, which are determined by local government where the business is conducted, and (iii) Environmental Management and Monitoring Willingness Statement Letter ("**SPPL**") that is given for businesses which are not required to have UKL-UPL as they pose low risk to the environment.

Below is a comparison table for reference:

Risk	NIB	Standard Certificate	Business License	Environmental Approval	Time to Commence Commercial Activity
Low	Yes	No	No	SPPL, which is integrated with NIB	Immediately after obtaining NIB
Medium-Low	Yes	Yes, self-declaration to be made	No	• If the businesses do not require	• Not require UKL-UPL: Immediately

		by the business actors		UKL-UPL, then only SPPL which is integrated with NIB. • If the businesses require UKL-UPL, then it is necessary to fill UKL-UPL form when applying for NIB.	after obtaining NIB. The government will do post-monitoring for the fulfilment of requirements under the standard certificate. • Require UKL-UPL: Immediately after obtaining NIB. The government will do post-monitoring for the fulfilment of requirements under the standard certificate and UKL-UPL.
Medium-High	Yes	Yes, fulfilment must be verified by the relevant government institutions	No	• If the businesses do not require UKL-UPL, then only SPPL which is integrated with NIB. • If the businesses require UKL-UPL, then it is necessary to fill UKL-UPL form when applying for NIB.	• Not require UKL-UPL: After the verification of fulfilment of requirements under standard certificate by the relevant government institutions. Require UKL-UPL: After the verification of fulfilment of requirements under standard certificate and UKL-UPL by the relevant government institutions.
High	Yes	No	Yes, fulfilment of requirement must be verified by the relevant government institutions.	• If the businesses require UKL-UPL, then it is necessary to fill UKL-UPL form when applying for NIB. The NIB will be issued upon the issuance of UKL-UPL. • If the businesses require AMDAL, then it is necessary to apply for AMDAL through the Environmental	After the verification of fulfilment of requirements under business license.

				System Information managed by the Ministry of Environment. The NIB will be issued upon the issuance of AMDAL.	

Examples of Risk-Category

We set out below some examples of the risk-category of certain line of businesses in accordance with GR 5/2021

Low Risk	Medium-Low Risk	Medium-High Risk	High Risk
Restaurant (with less than 50 seat)	Restaurant (with 50-100 seat)	Freight forwarding	Restaurant (with more than 200 seat)
Hotel (with the area less than 4,000 m^2, number of rooms less than 61 unit and/or number of employees is less than 41 employees)	Hotel (with the area of 4,000 m^2 - 6,000 m^2, number of rooms 61-100 unit and/or number of employees is 41-99 employees)	Industry related to health devices	Golf course
Large trading (including distribution business) in general, except for few products such as hazardous materials and health products.	Household appliance industry	Restaurant (with 101-200 seat)	Hotel (with the area more than 10,000 m^2, number of rooms more than 200 unit and/or number of employees more than 200 employees)
Retail business in general, except for few activities or products such as multi-level marketing and retail in health sector.	Distribution business of cosmetic products.	Hotel (with the area of 6,000 m^2 - 10,000 m^2, number of rooms 101-200 unit and/or number of employees is 100-200 employees)	Medium and large scale e-commerce
Warehouse and storage			Hospital
Real estate business			Pharmacy

Treatment of New and On-Going Businesses

The OSS RBA system will be effective on 2 June 2021. According to BKPM Circular Letter No. 12 of 2021 dated 3 May 2021, the old OSS system will be effective until 31 May 2021 and on 1 June 2021 the BKPM will start the migration from the old OSS system to OSS RBA system.

All licensing activities for companies that are established from 2 June 2021 onwards and the companies whose business license is yet to become effective at the latest on 31 May 2021 will be processed based on OSS RBA system.

As for companies that have obtained business license which is already effective and have been conducting the commercial business activities, they are only required to update the corporate information to access and use the new OSS RBA system. All licenses are still valid so long the companies carry out the business.

Conclusion

This OSS RBA system can become a solution for the lingering licensing problems in Indonesia which can be a time consuming process for investors. The government aims to simplify the licensing activities depending on the risk of the

business, hence for businesses that are considered as low risk or medium-low risk, i.e. those that do not substantially impact environment, natural resources, or practically easy to conduct, the government has decided that such businesses can commence activities immediately after obtaining NIB, without any additional requirements. While this system can be good for foreign investors, the rapid changes to the investment system in Indonesia often cause confusion to the investors as they have to adjust with the new system in conducting the business. We will monitor the implementation of this OSS RBA system when it comes into force on 2 June 2021, and will update you should there are any significant issues in its implementation.

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Vietnam

DECREE 31/2021 ON GUIDING THE LAW ON INVESTMENT 2020

ベトナムでは新しい投資法が 2021 年 1 月に施行されたものの、施行から数ヶ月にわたり、その施行細則が成立せず、管轄当局が発行した公文書に従って運用をするなど不安定な実務運用がなされていたが、3 月 26 日、新投資法の施行細則として政令 31 号がようやく成立し、同日施行された。本記事では、この政令 31 号について実務的に関心が高いと思われる点を中心にご紹介する。

For the implementation of the Law on Investment 2020 ("**LOI**"), on 26 March 2021, the Government issued Decree 31/2021 for detailing a number of articles of the LOI ("**Decree 31**"), which takes effect on the same day. In addition to providing guidelines for licensing procedures for making investments, Decree 31 sheds light on some concepts and provisions unclear in the LOI, some of which are discussed below.

Market access for foreign investors

Decree 31 provides the list of businesses which are not open to foreign investors ("**Restricted List**"), and the list of businesses, where market entry is conditional for foreign investors ("**Conditional List**"). The former is comprised of 25 business lines, while the latter is comprised of 59 business lines.

Decree 31 confirms negative list approach stipulated in the LOI. In particular, for the business lines that are not in either the Restricted List or the Conditional List, a foreign investor is subject to the same market access conditions applied to domestic investor. Ministry of Planning and Investment ("**MPI**"), in cooperation with other relevant ministries, will review and publish specific market access conditions and legal basis of the Conditional List on National Portal of Investment. However, the negative list approach does not seem to be absolute because Article 17.4 which provides guidance on market access to business lines that Vietnam has no commitment to open, stipulates that a foreign investor will be treated as domestic one unless there are restrictions in domestic regulations (including laws, resolutions of the National Assembly, ordinances, resolutions of the Standing Committee of the National Assembly, decrees of the Government) ("**Domestic Regulations**"). In other words, in addition to the Restricted List and Conditional List, Domestic Regulations will also be considered before determining if the market access conditions for domestic investor can be applied to the foreign investor .

Decree 31 also allows foreign investors to choose the market access conditions applicable to them from one of the treaties, to which they are eligible to apply. However, once the foreign investor has chosen to apply the conditions under a specific treaty, all of their business lines as well as their rights and obligations will be consistently determined in accordance with such treaty.

Clarification on "areas affecting national defense and security"

Under the LOI, foreign investors' investment in the "*areas affecting national defense and security*" is required to fulfil certain investment procedures (e.g. the procedure to obtain the investment policy approval under the authority of provincial people's committee, or procedure to register for capital contribution, purchase of shares or capital contribution portion). Decree 31, by providing as below, has clarified which areas are considered as affecting national defense and security:

(a) The areas that have defense and security constructions, military zones, restricted zones, protection zones, safety belts of defense works and military zones in accordance with the law on protection of defense works and military zones;

(b) The areas bordering with the important political, economic, diplomatic, scientific-technical, cultural and social points that are guarded by the People's Police;

(c) Important construction related to national security and protection corridor of important construction related to national security;

(d) The economic-defense zones under Government's regulations on combining national defense with socio-economic and vice versa;

(e) The areas having value for military defense under Prime Minister's decisions;

(f) The areas in which foreign organizations and individuals are not allowed to own houses to ensure the national defense and security in accordance with Law on Housing.

As a result of this provision, in cases of investment projects using land, the investors will have to diligently study about the location of the projects in order to determine and carry out all of necessary investment procedures.

Offshore investment activities

Among other things, Decree 31 provides that capital sources for offshore investment can be money and other legal assets of investors, including equity and loans in Vietnam transferred overseas, and profits obtained from offshore investment projects retained to carry out offshore investment activities.

In addition, Article 70 of Decree 31 provides guidelines on offshore investment by an enterprise with foreign investment capital. Being consistent with Article 23 of the LOI on the threshold of foreign ownership used to determine which investment conditions and procedures would be applied, Article 70 of the Decree 31 aims to regulate the enterprise with more than 50% of its charter capital held by a foreign investor(s) ("**FIE**"). Specifically, the FIE's offshore investment capital resources have to be its equity, exclusive of the capital contributed to conduct investment activities in Vietnam. The FIE can increase its contributed capital for the purpose of offshore investment, but it needs to apply for the offshore investment registration certificate, carry out the procedures to increase its contributed capital, and fully contribute the charter capital in Vietnam before transferring investment capital overseas.

Clarification on terminating an investment project due to a fraudulent civil transaction

Article 48.2.e of the LOI on termination of an investment project stipulates that the investment registration authority will terminate all or a part of the operation of an investment project if the investor conducts the investment activities on the basis of a fraudulent civil transaction as previously discussed in our Asia Legal Review about the LOI. In order to enforce Article 48.2.e of the LOI, Article 59 of Decree 31 stipulates that a fraudulent civil transaction must be decided by an effective court judgement or decision upon the request of the investment registration authority (e.g.: Provincial Department of Planning and Investment), and other relevant organization or individuals.

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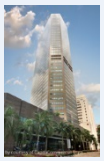

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