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This issue covers the following topics:

India

CLARIFICATION ON VICARIOUS CRIMINAL LIABILITY OF DIRECTORS

法人がその行為により刑事責任を負う場合に取締役や管理職の地位にある社員も同様に刑事責任を負うかどうかが争われた事案で、インドの最高裁は、取締役等が当該法人の行為に主体的に関与していた等の一定の事由が認められない限り自動的に責任を負うものではないと判示した。本稿ではかかる最高裁の判断について紹介する。

Introduction

The Supreme Court of India, in a recent judgement rendered in *Ravindranatha Bajpe v. Mangalore Special Economic Zone Ltd. and Ors.,* has clarified the scope of liability that can be imposed on a director/manager/key managerial personnel of a company for criminal actions of the company. The Supreme Court has held that directors and managerial personnel cannot automatically be held vicariously liable for criminal acts of the company unless they are actively involved in the commission of such crime and specific allegations and averments have been made against them.

Facts

In the present case, Mr. Ravindranatha Bajpe ("**Complainant**") had filed a criminal complaint before the Judicial Magistrate against 13 accused persons, comprising of the Mangalore Special Economic Zone Ltd. ("**MSEZ**"), its directors and managers, MSEZ's contractor, sub-contractor and their respective directors and managers on the grounds that the accused together conspired with the common intention to lay the pipeline beneath the Complainant's property and in doing so, they had trespassed into the property and demolished the compound wall. Therefore, all accused persons, committed criminal trespass and caused a pecuniary loss of more than INR 27 million to the Complainant. The Judicial Magistrate accepted the complaint and directed to register the case against all accused persons for the offences punishable under various sections of the Indian Penal Code ("**IPC**").

Aggrieved by the order, MSEZ and its directors and managers preferred revision petitions before the Sessions Court, which allowed the revision petitions and quashed and set aside the order against the said accused persons. On appeal the High Court of Karnataka, also dismissed the Complainant's application and affirmed the Sessions Court Order. Accordingly, the Complainant preferred an appeal before the Supreme Court of India.

Decision of the Supreme Court

On examination of the complaint, the Supreme Court noted that the complaint merely stated that all the accused persons have conspired with common intention to lay the pipeline beneath the Complainant's property without any lawful authority and right whatsoever. The Court observed that apart from that, there were no specific allegations in the complaint against the directors & managers of MSEZ or its contractors. In fact there was no indication that MSEZ or the contractors had acted on the specific instructions of the directors/managers while undertaking the task of laying down the pipeline. Accordingly, the Supreme Court held that in absence of any specific role being attributed to the directors or managers and any specific allegations being preferred against such persons, the Magistrate was not justified in issuing process against the said directors and managers.

In passing the order, the Supreme Court re-affirmed its earlier judgments in *Sunil Bharti Mittal v. Central Bureau of Investigation*, and *Maksud Saiyed v. State of Gujarat* which held that in the absence of an express statutory provision, vicarious liability of the directors cannot be automatically imputed where company is the offender. The IPC does not contain any provision for attaching vicarious liability on part of the managing director or the directors of the company when the accused is the company. Thus, an individual who has perpetrated the commission of an offence on behalf of a company could be made accused, along with company, only if there was sufficient evidence of his active role coupled with criminal intent. Even in case of statutes where vicarious liability of directors is expressly provided, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

In addition to above, the Supreme Court also referred to its earlier judgments of *Pepsi Foods Ltd. v. Special Judicial Magistrate* and *GHCL Employees Stock Option Trust v. India Infoline Ltd*, to reiterate that "*summoning of an accused in a criminal case is a serious matter and criminal law must not be set into motion as a matter of ordinary course*". The Magistrate, to initiate a criminal proceeding, has to carefully scrutinize the evidence brought on record and determine whether a *prima facie* case is made against the accused who are directors, or key managerial personnel of a company and the role played by them in their respective capacities.

With the above observations, the Supreme Court held that the Magistrate in this case had not recorded his reasons of satisfaction about a prima facie case against the directors and managers and therefore dismissed the appeal of the Complainant.

Conclusion

The Supreme Court's judgment strengthens the well-settled jurisprudence that criminal liability cannot be imputed automatically on directors and management personnel. Vicarious liability may only be imposed in situations where the law specifically provides for such vicarious liability, for e.g. under the Indian Companies Act, where an 'officer in default' may be held liable for certain acts of the company. If the law does not specifically provide for imposition of such vicarious liability, such as in the case of the IPC, then directors/managers can only be prosecuted if there is direct evidence of their active role played along with criminal intent in the commission of the crime. This judgment should assist directors/managers from avoiding harassment at the hands of law enforcement authorities when the company is embroiled in criminal proceedings.

[Author]

Rashmi Grover (Nagashima Ohno & Tsunematsu Singapore LLP)
rashmi_grover@noandt.com
Rashmi Grover is an Indian and UK qualified foreign attorney in the Singapore office. Her areas of practice include mergers and acquisitions, private equity and general corporate. She has extensive experience working in the Indian markets and advising clients on corporate commercial and finance transactions including transactions involving mergers, formation of joint ventures, acquisition of stakes in companies, private equity investments, business/asset acquisition transactions, regulatory filings, debt issuances and structured lending transactions.

Indonesia

NEW PROCEDURES RELATING TO APPEAL FROM KPPU DECISIONS

昨年のインドネシアでのオムニバス法の施行により、企業競争監視委員会による独占禁止法違反の決定に対して不服申立を行う場合の裁判管轄が地方裁判所から商業裁判所に変更された。これを受けて最高裁判所はかかる不服申立の手続きの詳細を定めた規則を本年９月に制定した。本稿ではかかる規則の内容について紹介する。

Introduction

In furtherance to the implementation of Law No. 11 of 2020 on Job Creation ("**Omnibus Law**"), which provides that an appeal from the decision of the Indonesian Anti-Monopoly Supervisory Commission ("**KPPU**") shall be submitted to the Commercial Court (previously it was submitted to the District Court), the Supreme Court of Republic of Indonesia has issued the Regulation of Supreme Court No. 3 of 2021 on Procedures for the Filing and Examination of Appeal to KPPU Decisions ("**Supreme Court Regulation 3/2021**"). The Supreme Court Regulation 3/2021 came into effect from 17 September 2021.

Supreme Court Regulation 3/2021 revoked the earlier Supreme Court Regulation No. 3 of 2019 which regulated that appeals from KPPU decisions were to be submitted to the District Court.

Filling of Appeals

According to the Supreme Court Regulation 3/2021, appeals against KPPU decisions can only be filed by business actors against KPPU, not vice versa. Moreover, Supreme Court Regulation 3/2021 stipulates that in the event that the appeal is submitted by one or more business actors but there are other business actors in the same case that do not file an appeal, the KPPU decision will be considered final and binding on those that do not file an appeal.

The appeal against KPPU decisions must be filed in accordance with the following timeline:

a. If the business actors are present at the hearing, the appeal shall be filed within 14 days after the KPPU decision is rendered; or
b. If the business actors are absent at the hearing, the appeal shall be filed within 14 days after they are notified about the KPPU decision.

The appeal can be filed electronically through the Court Information Electronic System. Following any such measure, the issuance of any summons or notification, as well as the rendering of appeal decision will be conducted electronically.

Upon receiving the appeal request, the Head of Commercial Court will form a panel of judges to adjudicate the appeal case within three days. The judges must obtain the certification with respect to business competition and anti-monopoly practice as an evidence that they have sufficient knowledge of competition laws and anti-monopoly issues. If the relevant Commercial Court does not have sufficient number of judges who have obtained such certification, the Head of Commercial Court may appoint the judges who have experience in handling appeal cases against KPPU decisions.

The panel of judges will examine the appeal request at the earliest by 3 (three) months and latest by 12 (twelve) months. However, it is also possible that the judges may render the appeal decision in less than 3 (three) months if they deem that the examination and assessment which have been conducted are sufficient to conclude the case. This is a new process introduced under the Supreme Court Regulation 3/2021 as the Supreme Court Regulation No. 3 of 2019 did not allow the District Court to hand down the decision in less than 3 (three) months.

Cassation to Supreme Court

Upon the issuance of appeal decision by the Commercial Court, business actors and/or KPPU are given the opportunity to submit a cassation to the Supreme Court within 14 days after they are notified of the issuance of appeal decision. This cassation is the final legal remedy in competition laws cases, and no civil review (*peninjauan*

kembali) to the Supreme Court is allowed thereafter.

Bank Guarantee Requirement

As regulated under the Government Regulation No. 44 of 2021 on the Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition, in the event that a business actor wishes to file an appeal against KPPU decision, it must provide bank guarantee in the amount of maximum 20% of the total fines imposed by KPPU at the latest 14 days after it receives the decision. If the business actor fails to provide the guarantee, it will be deemed to have accepted KPPU's decision and willing to pay the entire amount of fines.

Conclusion

The issuance of Supreme Court Regulation 3/2021 provides clarity on the Omnibus Law that any appeals against KPPU decision shall be submitted to the Commercial Court, instead of the District Court and lays down the procedure for filing the same. In addition, the Supreme Court Regulation 3/2021 also clarifies that civil review (*peninjauan kembali*) against cassation decision by the Supreme Court is not allowed in competition law cases.

[Author]

Ichsan Montang (Nagashima Ohno & Tsunematsu Singapore LLP)
ichsan_montang@noandt.com
Ichsan Montang is an Indonesian qualified attorney in the Singapore Office. He graduated from the University of Indonesia with Cum Laude predicate and obtained his LL.M degree in Erasmus University Rotterdam, the Netherlands. Prior to joining NO&T, Ichsan worked at one of the most prominent law firms in Indonesia and experienced in handling both domestic and international clients. He focuses his practice on mergers and acquisitions, foreign direct investment, general corporate matters, TMT, and real estate business.

Vietnam

PRACTICAL ISSUES IN ENFORCING FOREIGN AWARDS IN VIETNAM

ベトナムにおける外国仲裁判断の承認執行については、過去にそれが不合理に拒絶された事例があり、難しさが指摘されているが、一方でそれが認められた事例も多数あるのが実情である。本稿では、ベトナム司法省が公開している、2012 年から 2019 年までの間における外国仲裁判断の承認執行が求められた裁判例のデータベースから、承認執行が認められなかった事例を分析し、その対応策を探るものである。

With a series of advantages such as flexibility, confidentiality, impartiality, arbitration is a dispute resolution method commonly being used by parties in commercial disputes. In the global trade market, where there are increasing international commercial disputes, the settlement of disputes by foreign-seated arbitration is unavoidable and indispensable. However, in principle, a foreign arbitration award cannot be immediately enforced in Vietnam without being approved by a Vietnamese court for recognition and enforcement under the provisions of the Vietnamese Civil Procedure Code. There are many cases where foreign arbitral awards are not recognized and enforceable in Vietnam, based on the legal basis specifically listed in Article 459 of the Vietnamese Civil Procedure Code.

According to the database regarding the recognition and enforcement of foreign court judgments and arbitral awards in Vietnam, from 2012 to 2019, published by the Ministry of Justice of Vietnam, there were 83 arbitration awards filed for recognition and enforcement in Vietnam. However, 30 awards (equivalent to 36%) were rejected, while 12 other cases of request consideration were terminated. It also should be noted that there is a case where the court terminated the request consideration regarding the recognition and enforcement of an arbitration award because the person signing the petition to the court was the chief attorney of the law office and not the legal representative of the petitioner. This violates the provisions of Article 362.2.g of the Vietnamese Civil Procedure Code regarding the signatories of a lawful representative of the requester.

Based on the contents of such a database, especially in relation to commercial disputes between entities, the following are the most common reasons why foreign arbitral awards are not recognized by Vietnamese courts.

1. Violation of the signatories' authority to conclude an arbitration agreement:

Article 142 of the Vietnamese Civil Code stipulates that, in principle, "*Civil transactions established and/or performed by persons without the right of representation shall not give rise to rights and obligations of the represented persons*". Besides, Article 137 of such Civil Code also provides that: "*The legal representatives of legal persons include a/ Persons appointed by the legal person in accordance with its charter; b/ Persons competent to represent in accordance with law; c/ Persons appointed by the court during procedures at the court.*"

In other words, if a party to the arbitration agreement is a Vietnamese company, in accordance with Article 142 of the Vietnamese Civil Code – which is the applicable law to the Vietnamese party, the signatories of such arbitration agreement must be the legal representatives or authorized representatives of such legal representatives.

However, there are many real-life examples of arbitral awards not being recognized due to violations of such clear provisions, in detail:

- The signer is not the legal representative and does not have a valid power of attorney. This refusal to recognize applies even in cases where the company's seal is already stamped, or the signer is in a managerial position such as a deputy general director of the company, or head of a branch, head of a department. A branch or a representative office, a department does not have a legal person status under Vietnamese law, thus, they cannot be determined as an obligee or a respondent.

- The signing of the arbitration agreement is out of the scope of the power of attorney. This happens in the common context that the arbitration agreement was just a shortened agreement, with the basic contents including only determination of the arbitration center, place of arbitration. Thus, the parties need to agree on additional contents such as language, number of arbitrators, and seat of arbitration. It may be confusing, but even lawyers who have the right to participate in arbitration proceedings are not

legally authorized to sign additional arbitration agreements.

- There is only a signature without clearly stating the name and position of the signer, and such party failed to provide documents proving the signing authority: As a result, it is unable to determine the signatories' authority.

- There are two or more registered legal representatives with equal authority, but the arbitration agreements was only signed by one representative.

It seems some parties ignore or miss to confirm the signatories' authority because the parties have already signed other contracts with the same signer and executed them for a long time, thus, they claim that this should be recognized as customary practice. On the other hand, the Vietnamese Court has affirmed that under Article 45.1 of the Vietnamese Civil Procedure Code, customary practices are applicable in case the parties have no agreement and such case or matter is not regulated by law. Meanwhile, Article 140 of the Civil Code contains legal provisions on legal representatives. Therefore, when signing an agreement/contract, especially with a Vietnamese legal entity, it is necessary to confirm its legal person status, signer's information and authority, and registered address, emails.

Another interesting example in which arbitration agreement was not recognized is a dispute regarding an equity transfer contract. In this case, an article stipulated that such contract shall terminate if not all of the conditions precedent are satisfied, and the non-breaching party has the right to claim compensation or initiate a court action. Meanwhile, another article (Article 13) of such contract stipulated that the contract shall be governed by Vietnamese law and disputes shall be settled by arbitration. However, there was a prior effective court judgment declaring Article 13 null and void. Therefore, the conclusion was that this dispute could not be resolved by arbitration.

2. Failure to promptly and properly notify the obligee of the appointment of the arbitrator, the dispute resolution arbitration procedures, the resolution session, and the arbitral award.

The Vietnamese court gave some specific reasons to clear their point that the respondent/obligee was not promptly and properly notified including the improper sending of the relevant documents, correspondence, and notices from the judgement creditor or the arbitral tribunal as follows:

- There is no signature of the recipient in any acknowledgment of receipt of the relevant documents;

- Relevant documents sent by express delivery are only printed copies, not originals;

- Relevant documents are not sent to the officially registered email of the company;

- It is not verified that the recipient of the relevant documents is a legal/duly authorized representative;

- Relevant documents are only sent to the branch, or representative office, not the head office;

- Relevant documents are only sent to the party's employees, not to the legal representative;

Once again, determining the correct background information of the parties in the dispute has shown its importance for the arbitration award to be recognized for enforcement in Vietnam. In Vietnam, company information such as head office address, legal representative, email address, etc. is registered and posted publicly and clearly on the official website of the National Business Registration Portal. Therefore, to avoid similar mistakes, the arbitral tribunal and related parties need to verify and send correspondence and documents to the registered addresses and the proper recipient.

3. Contrary to basic principles of Vietnamese law

This is the reason given in six rejected cases. According to the above mentioned database, listed violated principles include: individuals and legal persons may establish, perform and terminate their civil rights and obligations based on free and voluntary commitment and agreement. (Article 3.1 of the Civil Code), equality in rights and obligations in civil proceedings (Article 8 of the Civil Proceedings Code), not applying any specific legal provisions of Vietnam when making the judgment (Article 11 of the old Civil Code). The generic definition of "contrary to the basic

principles of Vietnamese law" under relevant regulations has become a controversial topic because of its ambiguity. However, a significant number of arbitral awards have not been recognized not only for this reason but also for other reasons as described in 1. and 2.

4. Other reasons

In addition, there are several reasons for non-recognition of arbitral awards such as settling disputes beyond arbitrator's jurisdiction, violating the arbitration proceedings (the arbitration center appointing an arbitrator when the parties have not been consulted), expiration of statute of limitation for requesting recognition and enforcement. The Vietnamese court also rejected an arbitration award because the copy of the arbitration agreement submitted to the court is not copied from the original. However, the most indirect and direct reasons why many foreign arbitral awards are not recognized and enforceable in Vietnam are the violations in signatories' authority of the arbitration agreement, and the failure to send the relevant notifications/documents promptly and properly.

Conclusion

In light of the above observations, it is recommended that parties seeking to enforce foreign seated arbitration awards in Vietnam pay heed to the above and ensure that appropriate steps are taken to ensure that the arbitration agreement is executed by a person with appropriate legal authority and that all relevant documents are sent at the correct address and addressee.

[Author]

Tran Thi Viet Nga (Nagashima Ohno & Tsunematsu Hanoi Branch)
nga_tran@noandt.com
Nga Tran is a Vietnamese qualified lawyer in the Hanoi Office. She has been assisting foreign investors, foreign invested enterprises and foreign organizations to start and expand their business and operation in Vietnam. She also provides legal advices regarding general corporate matters, competition, labor issues, and regulatory and compliance matters.

[EDITORS' PROFILES]

Nobuo Fukui (Nagashima Ohno & Tsunematsu Singapore LLP)
nobuo_fukui@noandt.com
Nobuo Fukui is a partner at Nagashima Ohno & Tsunematsu and a representative of its Singapore Office (Nagashima Ohno & Tsunematsu Singapore LLP). He has been stationed in Singapore since 2013 and providing legal services mainly to Japanese companies and its affiliates to expand their business into south-east Asian countries.
He is a graduate of the University of Tokyo (LL.B., 2001) and Duke Law School (LL.M., 2009). He was admitted to the Japan Bar in 2003 and New York State Bar in 2010. He worked as a foreign lawyer at Widyawan & Partners (Jakarta) from 2010 to 2013, focusing on Indonesian legal practice, and he has extensive legal experience in the Indonesia related transactions.

Rashmi Grover (Nagashima Ohno & Tsunematsu Singapore LLP)
rashmi_grover@noandt.com
Rashmi Grover is an Indian and UK qualified foreign attorney in the Singapore office. Her areas of practice include mergers and acquisitions, private equity and general corporate. She has extensive experience working in the Indian markets and advising clients on corporate commercial and finance transactions including transactions involving mergers, formation of joint ventures, acquisition of stakes in companies, private equity investments, business/asset acquisition transactions, regulatory filings, debt issuances and structured lending transactions.

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NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com

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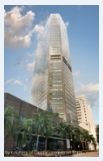
Singapore Office
(Nagashima Ohno & Tsunematsu Singapore LLP)



6 Battery Road #40-06
Singapore 049909
Tel: +65-6654-1760 (general)
Fax: +65-6654-1770 (general)
Email: info-singapore@noandt.com

Bangkok Office
(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)

34th Floor, Bhiraj Tower at EmQuartier
689 Sukhumvit Road, Klongton Nuea
Vadhana, Bangkok 10110, Thailand
Tel: +66-2-302-4800 (general)
Fax: +66-2-302-4899 (general)
Email: info-bangkok@noandt.com

HCMC Office
(Nagashima Ohno & Tsunematsu HCMC Branch)

Suite 1801, Saigon Tower
29 Le Duan Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84-28-3521-8800 (general)
Fax: +84-28-3521-8877 (general)
Email: info-hcmc@noandt.com

Hanoi Office
(Nagashima Ohno & Tsunematsu Hanoi Branch)

Suite 10.04, CornerStone Building
16 Phan Chu Trinh, Hoan Kiem District
Ha Noi City, Vietnam
Tel: +84-24-3266-8140 (general)
Fax: +84-24-3266-8141 (general)
Email: info-hanoi@noandt.com

Shanghai Office
(Nagashima Ohno & Tsunematsu
Shanghai Representative Office)

21st Floor, One ICC, 999 Middle Huaihai Road
Xuhui District, Shanghai 200031, China
Tel: +86-21-2415-2000 (general)
Fax: +86-21-6403-5059 (general)
Email: info-shanghai@noandt.com

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