

India—parties cannot apply to courts after emergency arbitration (Ashwani Minda v U-Shin)

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Arbitration analysis: The Delhi High Court found a petition for interim reliefs under section 9 of the Arbitration and Conciliation Act 1996 (ACA 1996), filed after the party had unsuccessfully applied for reliefs in an Emergency Arbitration in Japan, was not maintainable on multiple grounds. This ruling, while highlighting the growing importance of emergency arbitration, also finds that the parties had by agreement excluded the applicability of ACA 1996, s 9, which raises certain questions. Vyapak Desai, head of the International Dispute Resolution and Investigations at Nishith Desai Associates and Ashish Kabra, leader, Singapore office of Nishith Desai Associates discuss this decision.

Ashwani Minda v U-Shin Ltd [2020 DEL 1266, OMP \(I\) \(COMM\) 90/2020](#) (subscription to Lexis Advance® required)

Note: other Indian judgments not reported by LexisNexis® UK

What are the practical implications of this decision?

References:

[Arbitration and Conciliation Act 1996](#)

A number of cases have now emerged wherein the parties have initiated emergency arbitration outside India and obtained relief; and thereafter applied for and obtained the same relief in India under ACA 1996, s 9 (*HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd*, Arbitration Petition No 1062 of 2012; *Raffles Design International India Private Ltd v Educomp Professional Education Ltd*, OMP(I) (Comm) 23/2015, CCP(O) 59/2016; *Plus Holdings v Xeitgeist Entertainment Group*, Com Arb Pet No 399 of 2019).

An application under ACA 1996, s 9 is made considering that there are is no clear provision in ACA 1996 or otherwise any jurisprudence on direct enforcement of foreign emergency arbitration awards in India. However, in these cases, while the courts have taken into account the orders passed in emergency arbitration, they have clarified that the findings have also been independently arrived at. These cases reflect that Indian courts have given a certain degree of deference to emergency arbitration proceedings which have previously taken place. From that perspective, the dismissal of the ACA 1996, s 9 petition in this decision and the approach of the court to give deference to emergency arbitration appears reasonable and cogent.

What was the background to this decision?

A dispute arose out of a joint venture agreement between an Indian party and a Japanese party. The dispute resolution clause under the joint venture agreement provided:

'In case of failure to reach a settlement, such disputes, controversies or differences shall be submitted to the arbitration under the Commercial Rules of the India Commercial Arbitration Association to be held in India if initiated by [the Japanese Party], or under the Rules of the Japan Commercial Arbitration Association to be held in Japan if initiated by [the Indian Party].'

The Indian party commenced arbitration proceedings seated in Japan and applied for interim relief through an emergency arbitration under the rules of the Japan Commercial Arbitration Association (JCAA). However, the emergency arbitrator declined to grant the relief. Thereafter, the Indian party approached the Delhi High Court praying for the same interim relief.

What did the court decide?

The court duly traced the law on the ability of parties to claim interim relief in India in aid of foreign seated arbitration. Having traced the march of law, the court found that the proviso to section 2(2) of the Act was inserted by the Arbitration and Conciliation (Amendment) Act, 2015 (the Amendment Act), to cover the gap in law created by the BALCO judgment (*Bharat Aluminium and Co v Kaiser Aluminium and Co*, (2012) 9 SCC 552) ie non-availability of interim reliefs in India, in aid of foreign seated arbitration. ACA 1996, s 2(2) provides:

'This Part shall apply where the place of arbitration is in India:

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.'

The court held that with the Amendment Act, the position of law went back to as it stood prior to the BALCO judgment, namely as expounded in *Bhatia International v Bulk Trading SA and another*, (2002) 4 SCC 105, to the limited extent of applicability of ACA 1996, ss 9, 27, 37(1)(a) and 37(3).

With that background, the court held that the applicability of ACA 1996, s 9 was impliedly excluded by the parties. The court stated:

'The Dispute Resolution Mechanism agreed to, in the present case envisages conduct of Arbitration in Japan and regulated by the JCAA Rules. JCAA Rules provide a detailed mechanism for seeking interim and emergency measures and was known to the parties when entering into the Agreement. Reading of the Arbitration clauses clearly evinces the intention of the parties to exclude the applicability of part I of the Act.'

The court also held that:

- the applicant, having unsuccessfully tried to obtain relief in an emergency arbitration, cannot have a second bite at the cherry by asking for same interim relief from a court
- even as per the doctrine of election, the parties having chosen to go down the path of emergency arbitration, cannot seek relief from the court, and
- the court cannot effectively sit in appeal over the judgment of the emergency arbitrator

The court interestingly distinguished *Raffles Design Int'l India Pvt v Educomp Professional Education* (2016) 234 DLT 349. In the *Raffles* case, the party after having successfully obtained reliefs in an emergency arbitration under SIAC Rules (with the seat in Singapore), had applied for and obtained the same relief in India under ACA 1996, s 9. The court distinguished the case on following grounds:

'Firstly, in that case [Raffles case], there was no Clause in the Dispute Resolution Mechanism by which the parties had excluded the applicability of Section 9 of the Act and secondly, unlike in the present case, the Rules governing the Arbitration were SIAC Rules, which permit the parties to approach the Courts for interim relief.'

Consequently, the court having found that ACA 1996, s 9 was impliedly excluded, it held that the petition was not maintainable.

Concerns with implied exclusion of section 9

Even though the overall approach of the court is welcome, the finding that parties had impliedly excluded ACA 1996, s 9. raises certain questions. The judgment states that the arbitration clause evinces an intention to exclude 'ACA 1996, Pt 1'. We understand by ACA 1996, Pt 1, the reference is to ACA 1996, s 9. It is difficult to ascertain how the arbitration clause in this case evinced an intention to exclude applicability of ACA 1996, s 9. The application of pre-BALCO test for determination of implied exclusion of ACA 1996, Pt 1, for inferring an implied exclusion of ACA 1996, s 9 pursuant to the proviso to ACA 1996, s 2(2), is not appropriate.

In this case, the arbitration clause provided for a Japan seated arbitration under the JCAA Rules in the event the arbitration was initiated by the Indian party. The selection of a foreign seat itself cannot imply an exclusion of section 9. If that were the case, then it would conflict with the proviso to ACA 1996, s 2(2), which was inserted by the Amendment Act for the very purpose of making the ACA 1996, s 9 applicable to foreign seated arbitrations. Additionally, merely choosing of institutional rules for administering the arbitration also per se on its own cannot imply that the parties intended to exclude ACA 1996, s 9.

Further, under the arbitration law of Japan (Article 3(2) read with Article 15 of the (Japan) Arbitration Act, 2003), parties are permitted to approach the courts in aid of arbitrations seated in Japan and outside. Additionally, the absence of a provision similar to Rule 30.3 of the SIAC Rules 2016 or Article 28.2 of the ICC Rules, 2017 in the JCAA Rules does not make any difference. Rule 30.3 of the SIAC Rules, 2016 and Article 28.2 of the ICC Rules, 2017 clarify that approaching a court for interim relief is not contrary to the choice of arbitration. These rules are not positively conferring the ability on a party to approach the court. Thus, simply an absence of such a provision in the rules of an institution, should not imply that parties agreed to exclude their ability to approach courts for interim relief. This also calls into question the basis on which the court distinguished the *Raffles* case.

It appears that the courts' approach is driven by the fact that an emergency arbitrator had previously declined to grant the relief. However, an exclusion of section 9 has to be considered irrespective of the outcome of the prior emergency arbitration. An exclusion of section 9, implies that the parties may not have any ability of obtain enforceable interim reliefs in India. Thus, in this case, had the Indian party succeeded in obtaining the interim relief, it may not have any clear path of effectuating those reliefs in India.

This case highlights the importance of the choice between the parties to choose between court proceedings or emergency arbitration for the purpose of obtaining the interim reliefs. On the whole, the approach of the court is welcome. However, going forward this case should not form the basis on which a determination of an implied exclusion of ACA 1996, s 9 pursuant to proviso to ACA 1996, s 2(2) is made. The courts may recognise the findings of the emergency arbitrator as part of the tests for granting relief under ACA 1996, s 9 and through that give deference to the orders of the emergency arbitrator.