

Dispute Resolution Hotline

September 28, 2015

FOREIGN ARBITRAL AWARD: RECOGNIZED BUT NOT EXECUTED

Bombay High Court:

- Coercive orders cannot be passed in execution of a foreign arbitral award against a party which has preferred proceedings before the Board for Industrial and Financial Reconstruction ("BIFR").
- Section 22 of the Sick Industrial Companies Act, 1985 ("SICA") does not impose a bar on declaring a foreign arbitral award as enforceable as a decree of a Court.
- Enforcement of a foreign arbitral award cannot be challenged because of a simpliciter violation of Indian law.

INTRODUCTION

The Bombay High Court ("Court") in the case of *Armada (Singapore) Pte Ltd* ("Petitioner") v *Ashapura Mnechem Ltd*¹ ("Respondent") has partially allowed a Petition for recognition and enforcement of a foreign arbitral award, whilst proceedings before the BIFR are pending. The Court has held that Section 22 of SICA does not impose a bar on declaring a foreign arbitral award enforceable as a decree of a Court. However, if the party against whom the award is to be enforced has filed proceedings before the BIFR then no steps can be allowed in furtherance of execution of the award without permission of the BIFR.

FACTS

The Petitioner entered into a two separate contracts of affreightment with the Respondent. The Respondent sought to terminate the contracts citing instances of *frustration* and/or *force majeure*. The Petitioner disputed the termination and invoked the respective arbitration agreements in the contracts. Thereafter, although the Petitioner had appointed an Arbitrator, the Respondent had failed to do so within the stipulated period of seven days resulting in the Petitioner's Arbitrator being appointed as the Sole Arbitrator in the arbitration proceedings in terms of Section 17 of the English Arbitration Act, 1996. The Respondent also failed to file a defense submission in the arbitral proceedings. Subsequently, the Arbitrator by two separate awards dated February 16, 2010 had directed the Respondent to pay the Petitioner a sum of US\$ 28,196,000 and US\$ 37,353,524. The Petitioner sought to recognize and enforce the two arbitral awards through the present petitions.

CONTENTIONS

Respondent

- The Respondent had filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") in Gujarat to set aside the foreign arbitral awards passed in favor of the Petitioner. It was contended that as per Section 42 of the Act² the present petitions for enforcement of the same foreign arbitral awards should have been preferred in Gujarat.
- The Respondent had filed a reference before the BIFR under Section 15(1) of SICA. The Respondent contended that the BIFR had already declared them to be a sick industrial company under Section 3(1)(o) of SICA and therefore the present petition was not maintainable. Further, it was contended that as per Section 22 of SICA³, no coercive steps could be adopted in pursuance of execution of the arbitral awards during the pendency of the proceedings before the BIFR.
- It was contended that the Directorate General of Shipping had refused to grant certain permissions because of which they were under incapacity to perform their obligations under the contract. Section 48(1)(a) of the Act provides that a foreign arbitral award may be refused to be enforced if one of the parties to the agreement was under some incapacity to perform the contract as per the applicable law.

Petitioner

- Part I of the Act was not applicable to the arbitration proceedings as it was impliedly excluded by the parties. Therefore, Section 42 of the Act was not applicable to the present petition.
- The contract was already terminated by the Respondent before the statutory authorities had refused their permission to allow the Respondent to carry out the work envisaged in the affreightment contracts.
- The Petitioner relied upon the judgment of *Tropic Shipping Co Ltd v Kothari Global Limited*⁴ to contend that Section 22 of SICA did not pose any bar on the declaration that a foreign arbitral award is enforceable as a decree of a Court.
- The Petitioner relied upon *Renusagar Power Co Ltd v General Electric Co.*⁵, *Shri Lal Mahal v Progetto Grano*

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*Spa*⁶ and *Pol India Projects Ltd v Aurelia Eugen Friederich GmbH*⁷ to state that Indian Courts could not have a “second look” at a foreign award at the enforcement stage. Further, it was stated that mere contravention of Indian law even if proved would not be a valid ground to refuse enforcement of a foreign award.

JUDGMENT

Maintainability

The Court, *inter alia*, held that the parties had impliedly excluded the applicability of Part I of the Act; therefore Section 42 of the Act was not applicable. The Court also referred to the petition filed under Section 34 of the Act in the Gujarat Court to set aside the foreign arbitral award, which was held not maintainable and therefore there was no bar on the Petitioner to prefer the present petitions.

Implications of reference before BIFR

The Court observed that the Petitioner had prayed for (a) an order and/or a declaration that the foreign awards in both the petitions were enforceable as a decree of the Court under Section 48(2) of the Act; and (b) to enforce and to execute the said awards.

Relying on *Tropic Shipping*, the Court held that there was no bar under Section 22 of SICA to declare that foreign awards are enforceable as decrees of a Court. The Court went on to hold that if the Petitioner prefers an application for execution of the award or to take some coercive steps regarding execution, then the embargo contained in Section 22 of SICA would become applicable. The Court concluded by stating that since the Respondent had preferred a reference before the BIFR and the Petitioner had subsequently applied to the BIFR for appropriate direction, therefore the Court could not pass any coercive orders in execution of the foreign award as a decree of the Court at the current stage.

Narrower interpretation of Public Policy of India

Relying on *Pol India Projects* the Court held that *simpliciter* violation of the provisions of Indian Law would not tantamount to breach of the *fundamental policy of Indian law*. Following *Shri Lal Mahal Ltd.*, the Court held that under Section 48(2)(b) of the Act, enforcement of a foreign arbitral award would be refused only if such enforcement is found contrary to (1) fundamental policy of Indian Law; or (2) the interests of India; or (3) justice or morality.

The Court also referred to the judgment of the Delhi High Court in *Penn Racquet Sports v Mayor International Limited*⁸, which stated that under Section 48 of the Act, the scope of objection to the enforcement of a foreign arbitral award is very limited.

Considering the above, the Court was of the view that the Respondent had failed to furnish any proof basis which the enforcement of the foreign arbitral award could be refused. Consequently, the Court held the award to be enforceable as a decree of the Court under the provisions of the Arbitration & Conciliation Act, 1996.

ANALYSIS

It is evident that the Court has tried to harmoniously interpret the provisions of the Act with SICA, in the spirit of non-intervention with a foreign arbitral award. Section 22 of SICA provides that no proceedings for execution, distress or the like against any of the properties of the industrial company and no suit for the recovery of money or for the enforcement of any security against the sick industrial company shall lie or be proceeded with further, except with the consent of the BIFR, pending a reference before the BIFR or AAIFR. The rationale behind this section is that the status quo of an industrial undertaking is maintained while the BIFR is contemplating possible ways to rehabilitate the undertaking in the most efficient manner.

In such a situation, if creditors of the undertaking are allowed to continue with their recovery proceedings, then there would not be any progress with the process of rehabilitation as, amongst other things, the financial position of the undertaking would keep changing. Keeping this position in sight, the Court has held that while nothing bars an arbitral award from being recognized and thus deemed to be enforceable as a decree of a Court, the same cannot be executed without the prior approval of the BIFR.

— Arjun Gupta, Sahil Kanuga & Vyapak Desai
You can direct your queries or comments to the authors

¹ Arbitration Petition No. 1359 of 2010 and 1360 of 2010

² Section 42- Jurisdiction

Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

³ Section 22- Suspension of legal proceedings, contracts, etc-

(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding, anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof 2] and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

⁴ 2002 (2) Bom CR 93

⁵ AIR 1994 SC 100%

⁶ (2014) 2 SCC 433

⁷ Arbitration Petition No. 76 of 2012

⁸ ILR (2011) Delhi 181

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