

Dispute Resolution Hotline

July 08, 2014

ARBITRAL AWARDS; RELEVANT DATE FOR FX RATES AND INTEREST PAYABLE

- Delhi High Court ascertains "relevant date" for conversion of foreign exchange in case of enforcement of foreign arbitral awards to be the date of passing of a decree;
- No power with execution/enforcement courts to award interest for the period from the date of institution of enforcement proceedings till passing of decree and subsequently till the date of actual payment.

BACKGROUND

The Delhi High Court ("**Delhi HC**") in its recent judgment in *Progetto Grano S.P.A. v. Shri Lal Mahal Limited*¹ has resolved two long standing issues with respect to enforcement of arbitral awards, viz. (i) relevant date for ascertaining the rate of conversion of the foreign exchange of the sum awarded ("**FX Rate**"); and (ii) entitlement of decree holder to interest from the date of the arbitral award till the actual date of realization of dues under the provisions of the Indian Arbitration and Conciliation Act, 1996 ("**Act**").

FACTS

Shivnath Rai Hamarain (Sellers) (now succeeded by Shri Lal Mahal Limited ("**Lal Mahal**") and Italgrani Spa, Naples, Italy (Buyers) (now succeeded by Progetto Grano S.P.A. ("**Progetto**") by way a contract dated May 12, 1994, entered into a contract for sale of 20,000 metric tons of Durum wheat of Indian origin. Progetto sent a fax informing Lal Mahal that as per SGS Geneva, the quality of the wheat supplied was not in accordance with the terms of the contract. Therefore, Progetto initiated arbitration proceedings before the Arbitral Tribunal of the Grain and Feed Trade Association ("**GAFTA**") for breach of contract.

Lal Mahal challenged the jurisdiction of the Arbitral Tribunal of GAFTA before the Delhi HC by filing a petition on the grounds of absence of an arbitration agreement. The petition was dismissed by the Delhi HC and subsequently the appeal was dismissed by Supreme Court of India ("**Supreme Court**") as well.

Progetto initiated separate arbitration proceeding against Lal Mahal for having commenced legal proceedings before the Delhi HC with respect to existence and validity of the arbitration agreement.

The Arbitral Tribunal heard both the matters and passed 2 separate awards which were challenged before the Board of Appeal ("**Arbitral Award**"). The Board of Appeal disposed of both the appeals on September 21, 1998. In terms of the Arbitral Award, Lal Mahal was directed to pay certain sums denominated in US Dollars and GB Pound along with interest. Lal Mahal challenged the Arbitral Award in the High Court of Justice at London and the appeal was dismissed on December 21, 1998.

Progetto filed proceedings to enforce the Arbitral Awards in India. Both the Arbitral Awards were held to be enforceable under Part II of the Act, despite objections raised by Lal Mahal under Section 48² of the Act. The special leave petition challenging the order before Supreme Court was also dismissed by order dated July 3, 2013 making the Arbitral Awards final and binding on the parties. The amounts payable under the Arbitral Awards without interest were deposited by Lal Mahal during the pendency of the special leave petition leaving two issues open for adjudication.

ISSUE

The two primary issues that survived for adjudication (i) determination of the relevant date for the purpose of ascertaining the FX Rate for quantifying the Rupees equivalent of the amount awarded (as amounts were to be paid in India); and (ii) (a) to award *pendente lite*, interest from the date of institution of the proceedings in the court till judgment and (b) interest for the period subsequent thereto until realization of the awarded amount.

JUDGMENT AND ANALYSIS

The Delhi HC dealt with both issues at length. On the first issue, the Delhi HC relying on *Forasol vs. Oil and Natural Gas Commission*³ held that the date for determining the FX Rate should be the date on which the decree finally becomes enforceable under Section 49⁴ of the Act, i.e. the day on which all the objections under Section 48 of the Act are dismissed / disposed of by the final appellate court and no further proceedings remain pending.

Due to long drawn litigation process in India, often foreign parties are subjected to prejudice and fail to recover the amounts awarded well within time. The judgment brings in the much needed clarity on the relevant date for determining the FX Rate and putting an end to the uncertainty with respect to determination of the relevant date. This judgment has clearly set out that the relevant date would be the date on which decree was passed i.e. the Arbitral

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Awards being final and binding on the parties.

On the second issue, the Delhi HC discussed about the applicability of provisions of Part I of the Act for grant of interest at the time of enforcement of foreign awards. A closer look at this aspect reveals that in an international commercial arbitration, like any domestic arbitration, the award of interest falls under the following periods:-

- period prior to the date of reference to arbitration (governed by the substantive law of the contract);
- period during which the arbitration proceedings were pending before the arbitral tribunal (governed by the law governing the arbitral proceedings);
- period from the date of award till the date of institution of proceedings in a court for enforcement of the award (governed by the law governing the arbitral proceedings);
- period from the date of institution of enforcement/execution proceedings in a court till the passing of the decree; and
- period subsequent to the decree till payment.

The law of the forum i.e. **“lex fori”** where the award is enforced is applicable for determining the rate of interest from the date of filing of enforcement proceedings in a court till the decree is passed and for period thereafter, till the date of actual payment (i.e. for (iv) and (v) above). Section 31(7)⁵ of the Act (contained in part of Part-I of the Act) provides for payment of interest at the rate of 18% p.a. from the date of the award until the date of payment unless otherwise awarded by the arbitrator.

The Supreme Court in *Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd*⁶ has held that the Act being a self-contained code in itself, provisions of Part-I cannot be extended to Part-II (which is applicable to foreign awards). Further, the constitutional Bench of the Supreme Court in *Bharat Aluminium Company vs. Kaiser Aluminium Technical Services*⁷, has clarified that there is no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Act. The territoriality principle of the Act precludes Part I from being applicable to an arbitration seated outside India.

"Therefore, the provisions of Section 31(7) of the Act cannot be extended to foreign awards, thus creating a serious lacuna in the legislation. The Delhi HC thus held that a court has limited jurisdiction under Part II of the Act to grant interest as provisions of Part I of the Act are inapplicable.

The amount that was awarded to Progetto under the Arbitral Awards, was required to be kept with the Hon'ble Supreme Court as a fixed deposit, based on the FX Rate as on the date of the order i.e. May 18, 2012; pending the determination of actual FX Rate. The amounts were thereafter released in favour of Progetto but no interest was granted to Progetto for the period from the date of institution of enforcement proceedings till passing of decree and subsequently till the date of actual payment. The court dealing with enforcement and execution of foreign awards do not have the powers to award interest for such period.

— Payel Chatterjee, Sahil Shah & Vyapak Desai

You can direct your queries or comments to the authors

¹ Ex.P. No. 52/2012

² Conditions for enforcement of foreign awards.—

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India. Explanation.—Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

³ 1984 Supp SCC 263

⁴ Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

⁵ Section 31 (7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

⁶ (2011) 8 SCC 333

⁷ 2012 (9) SCC 552

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