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What's Inside

(1)

When staying arbitral awards, courts should not be swayed because large amounts are awarded against government corporations (Supreme Court of India)

02 August 2021| Toyo Engineering Corporation and another v. Indian Oil Corporation Limited | Civil Appeal No. 4549-4550 of 2021 | RF Nariman and BR Gavai JJ

The Supreme Court has reiterated that when staying arbitral awards under Section 36 (3) ACA, the court should follow principles under Order XLI Rule 5 CPC.

It said that "largely because public corporations are involved, discretion continues to be exercised not on principles of Order XLI Rule 54 but only because large amounts exist and that Government Corporations have to pay these amounts under arbitral awards."

Observing that both considerations are irrelevant and set aside the High Court's orders by which the award-debtor IOC was directed to make a deposit of 125 crores, which was around 20% of the sum awarded.

The court also pointed that in another decision relied on by the High Court, the set-aside petition was eventually dismissed, and, at its highest, would be irrelevant.

Read here the High Court's first order impugned before the SC where Navin Chawla J had considered the matter and *prima facie* agreed with IOC's argument, among others, that the tribunal erred in overlooking that the extension of time granted by IOC was conditional upon price reduction. Chawla J also relied on another case (para 26), where although IOC's set aside petition was dismissed, the court (Chawla J himself) had considered a similarly worded extension letter and found that it was conditional.

Read here the High Court's second order impugned in the SC where Jyoti Singh J dismissed Toyo's application to modify Chawla J's order. Singh J had noted that the settled principle that government bodies cannot be given special treatment was not disputed. Still, the point was that the court had already exercised its discretion, and there was no change in circumstance that called for a modification.

Read the Supreme Court's order here.

Categories: Section 36 ACA | Section 36 (3) ACA | Enforcement | Enforcement of Domestic Awards | Execution of Arbitral Award | Order XLI CPC | Order XLI Rule 5 CPC | Stay of Execution | Hindustan Construction Company | Applicability of Code of Civil Procedure

(2)

Post-award Section 9 remedy is available even in foreign-seated arbitration governed by foreign laws (Calcutta High Court)

03 August 2021 | Medima LLC v. Balasore Alloys | AP 267 of 2021 | Moushumi Bhattacharya J |

An award was made in Medima's favour in a London seated arbitration. English law governed the main contract as well as the arbitration agreement.

Medima applied under Section 9 ACA to secure the awarded amount.

Balasore opposed the application on two arguments. One, choosing a foreign seat and foreign laws was an "agreement to the contrary" within the meaning of Section 2 (2) ACA (the provision that makes Section 9 applicable to foreign seated arbitrations). Two, post-award remedy under Section 9 ACA is only for domestic awards enforceable under Section 36 ACA.

The court rejected both.

It examined the first argument in detail and concluded that "there must be something more to an arbitration agreement governed by a foreign law and with a foreign seat; the agreement must indicate in clear and express terms that the parties intend to exclude the operation of Section 9 from the purview of the said arbitration agreement."

On the second question, it reasoned that:

(a) "The language ".....and an arbitral award made or to be made....." in Section 2(2) read with the proviso makes it clear that Section 9 would

apply in a post-award scenario subject to the other conditions of the proviso being satisfied."

(b) The respondent's interpretation would defeat the very purpose of introducing the proviso to Section 2(2) if allowed to magnify into a conflict.

(c) "Section 9 read with the proviso to Section 2(2) would require a purposive construction which would be in line with the intention of the framers for bringing in the proviso by the Amendment Act of 2016. The objective of the amendment was to make the proviso workable, not stultify it by reason of a conflict with Section 9."

(d) Every attempt should be made to harmonise the provisions of a statute wherever there appears to be a conflict. (citing *JK Cotton Spinning and Weaving Mills Co. Ltd.* v. State of Uttar Pradesh AIR 1961 SC 1170)

(e) While the court is not entitled to re-write the statute itself, it is not debarred from "ironing out the creases." (citing *Gujarat* v. *Gujarat Kishan Mazdoor Panchayat* (2003) 4 SCC 712)

(f) In a conflict, the later intention prevails (citing *King* v. *Dominion Engineering* AIR 1947 PC 94). Thus, the last intention of the legislature in the present case to ascertain the true scope and meaning of Section 9 is the proviso to Section 2(2) ACA, and the power of the court to make interim measures in a foreign seated arbitration post-award.

(g) The parties' arbitration agreement permits enforcement of the award in any court having jurisdiction over the party against whom enforcement is sought.

Read the judgment here.

Categories: Section 9 ACA | Section 2 (2) ACA | Interim Measures | Interim Measures by Court | Interim Measures in Foreign Seated Arbitration | Jurisdiction | Jurisdiction in Foreign Seated Arbitration | Part I | Section 36 ACA | Enforcement

(3)

Application to review Section 9 order because written submissions were not considered dismissed (Bombay High Court)

04 August 2021 | Priyanka Communications India Pvt. Ltd. and others v. Tata Capital Financial Services Ltd.| Review Petition (L) 5868 of 2021 | GS Patel J | 2021 SCC OnLine Bom 1595

The Bombay High Court dismissed a petition to review its order under Section 9 ACA. In that order, GS Patel J had determined, *prima facie*, that the petitioners were borrowers from Tata and, and not having repaid the loan, were in contractual default. Accordingly, he granted an injunction and directed asset disclosure.

In appeal, the division bench found that the several submissions made before it was not advanced before Patel J though they were contained in the written submissions filed before the hearing. Accordingly, it granted liberty to the petitioner to seek a review.

Patel J came down heavily on the petitioners and dismissed the review petition with costs of INR 5 lakhs. He found the petitioner's conduct deplorable and frivolous, vexatious, and unforgivable waste of judicial time.

According to the court, the power of substantive review—as opposed to procedural or purely procedural review—must be conferred by law and is narrowly constrained by the law that grants it. Accordingly, it held that grounds taken in this case did not fall under the narrow limits of Section 114 and Order 47 of the Code of Civil Procedure, 1908, by which the power of review was conferred on the civil courts.

Patel J examined in detail the circumstances in which the written submissions had been filed and emphasised that the submissions were not considered because nobody argued them or even pointed that they had been filed. He said that a litigant has a right to be heard, but no party has a right to change the lawyers and then having the new lawyers attempt to argue points not raised, given up, or rejected.

[*Ed.* It was not a question either before the division bench or before Patel J if the review provisions of CPC applied to the ACA].

Access the court's decision here.

Categories: Section 9 ACA | Interim Measures by Court | Review | Power of Review | Section 114 CPC | Order XLVII CPC

(4)

Effect of signing a letter that became an addendum to a prior agreement containing arbitration clause—the party signing the letter became signatory to arbitration (Delhi High Court)

29 July 2021 | Blue Star Ltd. v. Bhasin Infotech & Infrastructure Pvt. Ltd. and another | Arb. Pet. No. 444 of 2021| Sanjeev Narula J | 2021 SCC OnLine Del 3900

[*Ed. The date of this judgment is wrongly reported by SCC as 05 August 2021*]

Blue Star and Bhasin entered into a Service Agreement that had an arbitration clause. Later, both signed a letter with an additional party Venice. The letter did not refer to dispute resolution or arbitration. Instead, it noted that the Service Agreement "has the same effect and all clauses are binding on all parties," and only the billing name was changed from Bhasin to Venice. Also, the letter "shall be attached as an addendum to the Service Agreement."

In Blue Star's petition for the arbitrator's appointment, the question before Narula J was if, under the letter, Venice became a party to the arbitration agreement within the terms of Section 7 ACA.

Narula said yes, *prima facie*, and left the matter for final determination by the arbitrator. His reasoning was as follows:-

(a) First, he relied on a decision of a co-ordinate bench (Vibhu Bakhru J) in *Indiacan Education* v. *Amit Popli*, 2016 SCC OnLine Del. 4497, where it was held that the addendum there (not containing an arbitration clause) did not give a go-by to the main agreement (that had an arbitration clause), and instead was in addition. He noted that "in the present case, too, the letter ... was … meant to serve as an addendum."

(b) Second, he relied on *MTNL* v. *Canara Bank*, (2020) 12 SCC 767 and noted that there was "an objection of joinder of a party" and "the clinching factor which weighed on the mind of the Court … that the party sought to be joined was a wholly-owned subsidiary of the Respondent."

(c) Third, "applying the principles enshrined" and "as made clear from the conduct of the parties", he said that Venice was a "necessary and proper party to the arbitration proceedings." He relied on the language of the letter and said, "it cannot be assumed that the parties agreed to be bound by all the clauses in the service agreement, as clearly stipulated, but not the arbitration clause."

Access the decision here.

Categories: Section 11 ACA | Appointment of Arbitrators | Section 7 ACA | Arbitration Agreement | Incorporation | Incorporation by Reference | Incorporation of Arbitration Agreement | Binding Non Signatory to Arbitration | Doctrine of Group of Companies | Chloro Controls | Construction of Arbitration Agreement | Existence of Arbitration Agreement | Form of Arbitration Agreement | Interpretation of Arbitration Agreement | Joinder of Non Signatories | Necessary Party | Proper Party

(5)

SIAC's Emergency Arbitrator order in India-seated arbitration is enforceable in India under Section 17 (2) ACA (Supreme Court of India)

06 August 2021 | Amazon.com NV Investment Holdings LLC v. Future Retail Limited and others | Civil Appeal Nos. 4492-4493 and connected matters | RF Nariman & BR Gavai JJ | 2021 SCC OnLine SC 557

We have covered this case in an Update here.

Amazon and the future group are arbitrating their widely reported disputes (explained in another Update here) under the SIAC Rules. On Amazon's application, SIAC appointed an

Emergency Arbitrator, which on 25 October 2020, passed some injunctive orders against the Future group until an order by the arbitral tribunal when constituted.

Two sets of proceedings arose from this. The first was an anti-arbitration suit by Future, pending before an appellate bench of the Delhi High Court (on Amazon's appeal from the judgment of Mukta Gupta J).

Relevant for this Highlight is the second set. Amazon filed an application in the Delhi High Court under Section 17 ACA read with Order XXXIX Rule 2A, CPC to "enforce" the Emergency Arbitrator's order. This means that Amazon filed that petition seeking orders identical to that passed by the Emergency Arbitrator and simultaneously praying to punish the respondents for violating the Emergency Arbitrator's order. A single judge of the Delhi High Court (JR Midha J) first made an order of *status quo*, followed by a detailed order. Successive appeals were filed by Future in which a 2-judge bench stayed both orders. As Future would later say, both appeals were filed under Order XLIII, Rule 1(r) CPC.

Now, Amazon challenged the stay orders in the Supreme Court in special leave petitions.

Two questions arose: (i) whether Emergency Arbitrator's order under SIAC Rules is an order within the contemplation of the ACA and Section 17(1) ACA, and (ii) was the appeal maintainable?

On the first question, the court held that Emergency Arbitrator's order under the SIAC Rules is valid and enforceable in India under the ACA. Given the facts of the case and the arguments advanced, the court gave several reasons to reach this conclusion. At least thirteen can be easily gleaned:

(a) A conjoint reading of specific provisions of the ACA [paras 31-34].

(b) No express or implied bar in the ACA [para 35].

(c) Party autonomy, which is a pillar of the ACA [para 36-42].

(d) The meaning of "arbitral tribunal" depends on the context [paras 43-47]. So, in this context, it would not simply mean an arbitral tribunal constituted to give interim orders, interim and final awards.

(e) No inconsistency in SIAC Rules and the ACA [paras 48-49].

(f) The parties agreement adopted SIAC rules as a whole and did not exclude the emergency arbitration provisions [paras 50-52].

(g) Merely because the Parliament did not adopt the Law Commissions recommendation to have a specific provision for emergency arbitrators, it does not matter [para 53].

(h) The BN Srikrishna Committee Report recognised that it is possible to interpret Section 17 ACA to include emergency arbitrator's orders [paras 55-56].

(i) The interpretation in favour furthers the objective of decongesting the clogged court system [para 57-62].

(j) The Future group cannot resile from its agreement and participation in the emergency proceedings [para 63].

(k) It is wholly incorrect that the Emergency Arbitrator under the SIAC Rules is not an independent judicial body like an arbitral tribunal [para 64]

(l) It is also incorrect that the ACA is an ouster statute, and there was no room for interpreting anything under the ACA as implied. The ACA is a complete break from the past. It is not an ouster statute but favours the remedy of arbitration to de-clog civil courts [para 65].

(m) There is no stamp of invalidity on the forehead of any order [paras 66-67].

On the second question, Amazon contended that Future's appeals (before the 2-judge bench of the High Court) were not maintainable. Future's essential point in defence was that the orders made in enforcement proceedings are outside the ACA and instead are under the CPC. Therefore, in enforcement proceedings--both

under Section 17(2) ACA and under Section 36(1) ACA--appeals could be filed under the CPC. [see paras 25, 29-30, and 69 onwards]

The court rejected Future's defence and held that the appeals were not maintainable.

See our Update on the judgment here.

Access the judgment here.

Categories: Section 9 ACA | Interim Measures by Court | Section 17 | Interim Measures Ordered by Arbitral Tribunal | Section 2(1) (a) ACA | Section 2 (6) ACA | Section 2 (8) ACA| Section 21 ACA | Arbitral Tribunal | Commencement of Arbitral Proceedings | SIAC | SIAC Rules | Emergency Arbitration | Emergency Arbitrator | Emergency Award | Party Autonomy | Object of ACA | Section 36 ACA | Enforcement | Enforcement of Emergency Award | Enforcement of Interim Order | Enforcement Under Section 9 ACA | Enforcement Under Section 17 ACA | Section 37 ACA | Appealable Orders | Section 94 CPC | Order XLIII CPC | Order XXXIX CPC | Order XXXIX Rule 2A CPC | BALCO | Adhunik Steels | Kandla Export

(6)

Tribunal can charge fees separately for claim and counter-claim. The upper cap in item 6 of the Fourth Schedule is for a 0.5 per cent portion over 20 crores (Delhi High Court)

06 August 2021| NTPC Limited v. Afcons RN Shetty and Co. Pvt. Ltd. JV | OMP (T) Comm. 37 of 2021 | C Harishankar J |

A single-judge bench of the Delhi High Court affirmed the tribunal's order by which it had fixed separate fees for counterclaim that for considering the claim.

The court rejected NTPC's argument that once the parties agreed to abide by the Fourth Schedule, the tribunal could not resort to Section 38 ACA. And, the Fourth Schedule prescribed fees for "sum in dispute", which meant the claim and counterclaim in totality.

The court ruled that the arbitrators' fees are an integral part of the costs to be fixed by the arbitral tribunal under Section 38 (1) ACA. Therefore, though the proviso gives discretion ("may") if the tribunal *does* fix separate fees, it is not irregular or contrary to the statute.

The court also said that Section 38 (1), 31 (8) and 31A are inextricably interlinked, and the expressions "deposit", "costs", and "fees" are intertwined by the statute.

Following the Fourth Schedule ACA, the three-member tribunal fixed a fee of INR 28,64,520 per head, considering the claim amount was 37 crore plus. Later, the tribunal set 19,13,615 per head as fees for the counter-claim of around 19 crores.

The tribunal rejected NTPC's application for modification by an elaborately reasoned order. It concluded that the tribunal was entitled under the proviso of Section 38 ACA to fix separate fees. It also relied on precedent from the Delhi High Court. Aggrieved, NTPC applied to the court under Section 14 ACA to terminate the tribunal's mandate (for *de jure* inability). Harishankar J dwelled briefly on maintainability but agreed with NTPC that there was no other remedy from a tribunal's order fixing fees. He said he was not inclined to non-suit the petitioner on that ground.

Secondly, the English text of Item 6 of the Fourth Schedule was misleading, and the Hindi text was correct: the Hindi version is clear, and there is a cap on the total fees of 30 lakhs rupees; it appeared from the English version that the cap was for 0.5 per cent over and above 20 crores.

The two versions are as follows:

Sl. No.	Sum in dispute	Model fee
6	Above Rs. 20,00,00,000	Rs. 19,87,500 plus 0.5 per cent. of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000.

6.	20,00,00,000/- रुपए से ऊपर	19,87,500/- रुपए + 20,00,00,000/- रुपए से अधिक की दावा रकम का 0.5 प्रतिशत, 30,00,00,000/- रुपए की अधिकतम सीमा सहित

On the question of which version to follow, the court said that the correct provision was not Article 343 of the Constitution (the official language of the Union) as NTPC suggested but Article 348 (1) (b) (ii) (English language to be used to Acts, Bills etc.).

Read the judgment here.

Categories: Section 38 ACA | Section 38 (1) ACA | Section 31 (8) ACA | Section 31A ACA | Fourth Schedule | Deposits | Costs | Arbitral Fees | Fees | Sum in Dispute

(7)

The *Alupro* decision that makes notice of arbitration mandatory had no application where the rationale of giving notice is fulfilled and no prejudice is caused (Orissa High Court)

09 August 2021 | De Lage Landen Financial Services Pvt. Ltd. v. Parhit Diagnostic Private Limited and others | Arb. P. 267 of 2021 | Sanjeev Narula J |

A notice under Section 21 ACA invoking arbitration is mandatory, decided a single judge of the Delhi High Court (S Muralidhar J) in *Alupro Building Systems Pvt. Ltd.* v. *Ozone Overseas Pvt. Ltd.* (2017) SCC OnLine Del 7228. The Madras High Court followed *Alupro* in *Globe Detective Agencies* v. *Gammon India Ltd.* MANU/TN/4774/2019.

Now Sanjeev Narula J has distinguished *Alupro* to say that the *Alupro* rationale of giving a notice was fulfilled in the facts.

The dispute arose from a loan agreement and two guarantee agreements. All had identical arbitration clauses that gave the lender the unilateral right to appoint a sole arbitrator. After disputes arose, the lender sent a letter demanding payment " ..failing which [it would] commence legal proceedings …" Then the lender appointed an arbitrator. Later, however, on the lender's request the arbitrator withdrew because the decision in *Perkins* made his appointment invalid.

After that, the lender applied under Section 11 ACA for the appointment of an arbitrator. without sending a notice. But the borrower objected contending that: (a) Arbitration was not validly invoked because a notice was not given; (ii) the unilateral appointment earlier did not meet the invocation requirement under Section 11 (5) ACA; (iii) alternatively, even if the letter sent was a valid invocation, it was in respect only of the loan and not the guarantee agreement; (iv) the proceedings had not commenced validly in the earlier round. [*Ed.* Notice requirements under Sections 21 and 11 ACA should not be confused with each other]

Rejecting every argument, Narula J concluded that the respondent was aware of the petitioner's intent to arbitrate, the choice of arbitrator, and the claims. Thus, no prejudice was caused (or even pleaded). He also said:

(a) The ACA does not provide a "defined or specific requirement" but the notice "must specify that arbitration is being resorted to."

(b) Limitation begins from the date when the other party fails to appoint an arbitrator (or respond). Such failure, *Alupro* held, gives the court jurisdiction under Section 11 ACA. Thus, a notice under Section 21 ACA was held mandatory. But *Alupro* is distinguishable because a notice was not sent "at all." Here, the respondent had due notice of the arbitration proceedings.

(c) Also, a co-ordinate bench in *Badri Singh Vinimay Pvt. Ltd.* v. *MMTC Ltd.*, 2020 SCC OnLine Del 106, considered a letter informing that " …appropriate legal action … including initiation of arbitration proceedings" as sufficient notice.

(d) The purpose of notice was unachievable in this case because the lender had complete discretion to make an appointment.

(e) The argument that regardless of the arbitration clause, a notice was necessary to enable the respondent to oppose the appointment, is inconsequential in the facts.

(f) In the facts, limitation is not an issue.

Because the petition had been pending for around four months, Narula J also rejected the submission that thirty days was mandatory under Section 11 ACA to come to an agreement on the name of the arbitrator.

Read the judgment here.

Categories: Section 21 ACA | Commencement of Arbitral Proceedings | Notice of Arbitration | Section 11 ACA | Appointment of Arbitrators | Perkins | Alupro

(8)

Foreign award against a person not a party to the arbitration agreement is enforceable (Supreme Court of India)

10 August 2021 | Gemini Bay Transcription Pvt. Ltd. v. Integrated Sale Service Ltd. and another | Civil Appeal Nos. 8343-8344 & 8345-8346 of 2018 | RF Nariman & BR Gavai JJ 2021 SCC OnLine Del 572

Read our Update here to know more about the facts and the reasoning.

Very briefly, Arun Dev, the boss of the DMC group of companies, and another company, Gemini, which Arun had set up, resisted enforcement of a foreign award on the ground that they were non-signatories to the arbitration agreement. Earlier, the tribunal had considered that objection but applying the alter ego doctrine under the laws of Delaware (the substantive law), pierced the corporate veil, and made a joint and several award. In enforcement proceedings, a single judge of the High Court of Bombay (Nagpur bench) said that the award could be enforced only against the signatories. The division bench allowed the appeal after examining the laws of Delaware. In the Supreme Court, the conditional leave to appeal granted to the signatory party (DMC) was revoked later because the deposit condition was not met. These appeals were by the two non-signatories.

The court dismissed the appeals and its conclusions, in sum, were as follows:

(a) The burden of proof is on the party resisting enforcement to prove that the case falls within Section 48 (1) or 48 (2) ACA. Neither under Section 47 ACA nor Section 48 ACA, the party enforcing a foreign award is required to prove by substantive evidence that the foreign award can bind a non-signatory.

(b) "Proof" in Section 48 means "established on the basis of the record of the arbitral tribunal" and such other matters as are relevant to the grounds contained in Section 48 ACA.

(c) The ground under Section 48 (1) (a) ACA or Section 48(1)(b) ACA or Section 48 (1) (c) ACA cannot be deployed to argue that the award against non-signatory cannot be enforced.

(d) The UK Supreme Court's decision in *Dallah's case* cannot justify bringing the objection of a non-signatory under Section 48 (1)(a) ACA.

(e) In the guise of applying Section 48(1)(a) ACA, a merits-based review cannot be done.

(f) Perversity is not ground to challenge a foreign award.

(g) Section 46 ACA makes a foreign award binding on persons between whom it was made. "Persons" may be non-signatories to the arbitration agreement.

(h) A foreign award cannot be set aside because it violates the substantive law of the agreement.

(i) Section 44 recognises that an arbitrator may decide tort claims provided they are disputes that arise in connection with the agreement. The argument that damages have been awarded on no basis whatsoever would not fall within any of the exceptions contained in Section 48(1) ACA. Only exceptional cases involving basic infraction of justice that shock the court's conscience attracts the ground of Section 48(2) read with Explanation 1(iii).

Read the judgement here.

Categories: Section 44 ACA | Section 46 ACA | When Foreign Award Binding | Section 47 | Evidence | Section 48 ACA | Section 48(1)(b) ACA | Section 48 (1) (c) ACA | Conditions for Enforcement of Foreign Awards | Enforcement | Enforcement of Foreign Awards | Foreign Award | Challenge to Foreign Award | Recognition and Enforcement of Foreign Award | Public Policy | Public Policy of India | Fundamental Policy of Indian Law | Perverse Award | Burden of Proof | Proof | Proof of Damages| Merits Based Review | Non Signatory to Arbitration | Binding Non Signatory to Arbitration | Enforcement Against Non Signatory | Non Signatory | Natural Justice | Damages | Renusagar | Vijay Karia | Dallah | Aloe Vera | Ssangyong

(9)

An award cannot be remitted to consider an issue on which the tribunal gave no finding (Delhi High Court)

11 August 2021 | Bentwood Seating System P. Ltd. v. Airport Authority of India | FAO (OS) Comm. 97 of 2021 | Manmohan and Navin Chawla JJ | 2021 SCC OnLine Del 3989

In a case where the tribunal had not returned any finding on a core issue, *held*, the single-judge was right in rejecting the argument the award should be remitted under Section 34 (4) ACA. The issue was if the purchase orders from which the dispute arose, was obtained fraudulently giving the respondent a right to avoid the contract.

The appellate court found that it was a case of "no finding" and "not the case of merely not recording reasons" for a finding. Thus, it was not a curable defect that satisfied the pre-condition for exercising power under Section 34 (4) ACA.

The court also denied a request to restrain the appellant from recovering the money paid under the award till another tribunal considered the matter. The court said it was not within its powers under Section 37 ACA to make such an order.

Read the judgment here.

Categories: Section 37 ACA | Appealable Orders | Remand of Award | Remission of Award | Section 34 (4) ACA | Kinnari Mullick

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