Arbitration Newsletter

Shardul Amarchand Mangaldas

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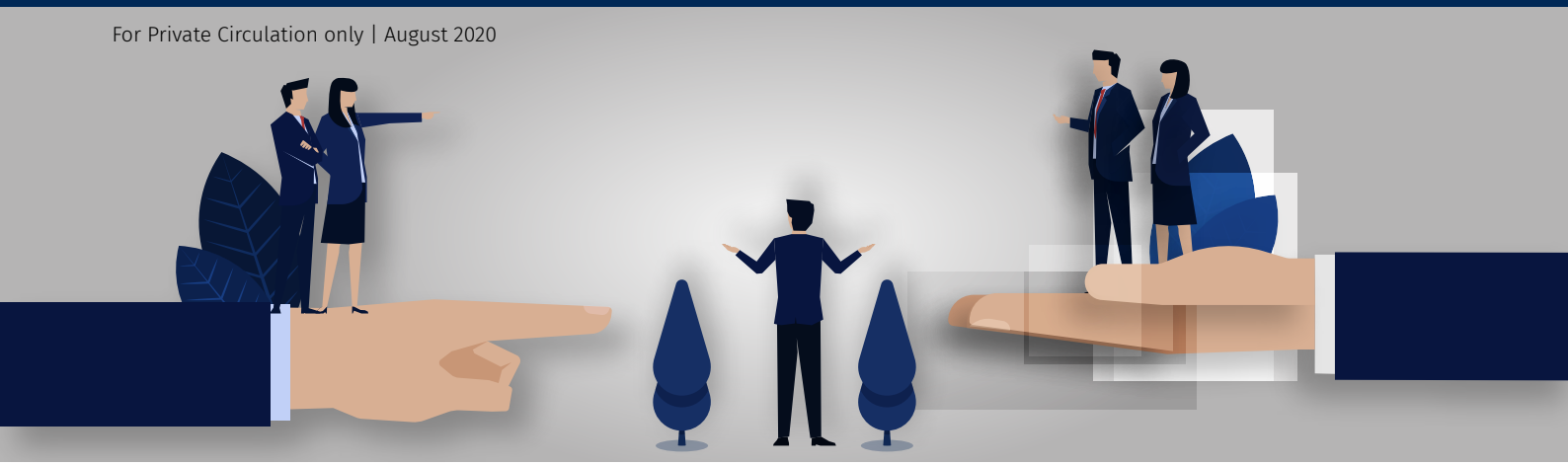

It gives us immense pleasure to circulate the fourteenth edition of the Arbitration Newsletter of Shardul Amarchand Mangaldas & Co.

At the outset, we sincerely wish that you, your family and colleagues have been, and continue to be, healthy and safe in the ongoing situation in light of the spread of COVID-19. We hope and pray that soon we will come out of these trying times.

In this edition, we have analysed the impact of recent arbitration related judgments of the Supreme Court of India and Indian High Courts.

We are pleased to inform you that Shardul Amarchand Mangaldas & Co has been ranked as a 'Top Tier Firm' for the second year in a row, in the recently announced Benchmark Litigation Asia-Pacific 2020 Rankings. The practice area of 'International Arbitration' was ranked in Tier 1. **Ms. Pallavi Shroff (Managing Partner and National Practice Head-Dispute Resolution)** was ranked as Litigation Star for Commercial and Transactions, Competition/Antitrust, **Mr. Tejas Karia (Partner, Head-Arbitration)** was ranked as Litigation Star for Commercial and Transactions, Construction, and **Mr. Aashish Gupta** was ranked as Future Star for Commercial and Transactions.

Ms. Pallavi Shroff (Managing Partner and National Practice Head-Dispute Resolution) was recognised among the 'Top 100 Women in Litigation 2020' by Benchmark Litigation.

We hope you enjoy reading this edition and find it useful to your practice.

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Arbitration Case Law Updates

Bombay High Court rejects objections to enforcement of foreign award and upholds legality of put option under SCRA and FEMA[1]

Brief Facts

On 12 September 2008, Banyan Tree Growth Capital LLC ("**Petitioner**") and Respondent Nos. 2 and 3 entered into a Share Subscription Agreement ("**SSA**") whereunder the Petitioner made an initial investment of USD 50 million in return for equity shares and convertible debentures in Axiom Cordages Ltd. ("**Respondent No. 1 Company**"). The parties also entered into a put option deed on the same date ("**Put Option Deed**") whereunder Respondent Nos. 2 and 3 were required to buy the Petitioner's shareholding in Respondent No. 1 ("**Put Securities**") to secure its exit. However, upon the exercise of the put option right by the Petitioner in 2015, Respondent Nos. 2 & 3 refused to purchase the Put Securities and stated that the Put Option Deed was void *ab initio* under Indian law. The dispute was referred to arbitration at the Singapore International Arbitration Centre. The arbitral tribunal held the Put Option Deed to be a valid and legal contract under Indian law and awarded damages to the Petitioner based on the fair market value of the Put Securities, which remained uncontested by the Respondents ("**Award**").

The Respondents opposed the petition for enforcement of the Award filed before the Bombay High Court ("**Court**") and contended that the Award was against the public policy of India, and for the first time, raised an objection that the Put Option Deed was inadequately stamped.

Issues:

Issue (i): Whether the Put Option Deed is inadequately stamped, resulting in the illegality of the contract?

Issue (ii): Whether the Put Option Deed is unenforceable under the Securities Contracts (Regulation) Act, 1956 ("**SCRA**")?

Issue (iii): Whether the Put Option Deed is unenforceable under the Foreign Exchange Management Act, 1999 ("**FEMA**")?

Issue (iv): Whether the Award is contrary to the fundamental policy of Indian law?

Judgment

Issue (i): The Court observed that the Put Option Deed was accepted in evidence before the arbitral tribunal and such admission of the document precluded the Respondents from challenging the document subsequently for insufficient stamping under Section 35 of the Maharashtra Stamp Act, 1958. The Court also noted that the obligation of adequately stamping the Put Option Deed was upon the Respondents who, for a period of ten years, took the position that the Put Option Deed was adequately stamped. The Court held that the Respondents were estopped in law to challenge their own actions and conduct in contending that the document is not adequately stamped.

While enforcing a foreign award under Sections 47 and 48 of the Arbitration and Conciliation Act, 1996 ("**Act**"), the Court is precluded from adjudicating any factual dispute. The Court noted that accepting the contentions of the Respondents, especially after the parties had admitted the document in the arbitral proceedings, would tantamount to reopening the trial on factual issues, which was beyond the jurisdiction of the Court.

Issue (ii): Relying on ***Edelweiss Financial Services Ltd. v. Percept Finserve Pvt. Ltd.***,[2] the Court reiterated that a contract containing a put option cannot be termed as a contract in derivatives and held to be illegal under Section 18A of the SCRA. Since the option in favour of the Petitioner

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was a buyback arrangement, it could neither be dealt nor traded on the stock exchange, and would not attract the SCRA.

In any case, the Court also held that the contract for the sale or purchase of securities came into existence in 2015 only after the Petitioner exercised its option under the Put Option Deed.[3] The Court recognised that the Put Option Deed was governed by the SEBI notification dated 3 October 2013 ("**SEBI Notification**"), which provided statutory recognition to shareholders contracts for purchase or sale of securities, with a put option, even if entered prior to the issuance of the SEBI Notification. Therefore, the Put Option Deed was permissible under the SCRA.

Issue (iii): The Respondents contended that the Put Option Deed was in contravention of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 ("**FEMA Regulations**"), and in particular, in contravention of Regulation 5(1), which permitted optionality clauses only from 2013 onwards and Regulation 10, which mandated valuation of unlisted shares as per the fair market value. The Court held that the Put Option Deed could only be exercised under certain conditions and did not guarantee assured returns to the Petitioner. The Put Option Deed provided that if the put option price exceeded the FMV valuation, the excess amount was not to be remitted to the Petitioner, but was to be repatriated to a nominee's account in India, which is not prohibited under the FEMA Regulations.[4]

The Court relied on ***Vijay Karia v. Prysmian Cavi E Sistemi SRL & Ors***.[5] and held that enforcement of the Award cannot be refused on the ground of violation of the FEMA Regulations. This is because the provisions of the FEMA and the regulations thereunder do not deal with the legality of contracts and are concerned only with the manner in which contracts are to be performed with respect to foreign exchange.

Issue (iv): The Court relied on the decision in ***Shri Lal Mahal Ltd. v. Progetto Grano SPA***[6] to interpret 'public policy' and its applicability in enforcement of a foreign award, as well as the rationale espoused in ***Vijay Karia*** *(supra)* to reject a challenge to an award argued to be contrary to the FEMA. In light of upholding the legality of the Put Option Deed under the FEMA, the SCRA and the regulations and notifications thereunder, the Court held that the grounds raised to challenge enforcement of the Award did not fall within the ambit of fundamental policy of Indian law. Resultantly, the Award was held to be in consonance with the public policy of India.

Analysis

The present case is an addition to the precedents set by Indian Courts recognising the concept of put options, which is one of the most prevalent exit mechanisms for foreign investors. Courts have granted interim reliefs in disputes involving exercise of put options and not interfered with awards granting reliefs based on put options.

On the issue of inadequate stamping, the Court interestingly distinguished the position laid down by the Supreme Court that an arbitration clause contained in an agreement, which is inadequately stamped, cannot be acted upon, by differentiating the jurisdictions of the court under Section 11 and Sections 47-48 of the Act.

The concept of fundamental policy of Indian law has been interpreted to mean compliance of statutes and judicial precedence, need for judicial approach, natural justice compliance and standards of reasonableness. Even if the law laid down in ***SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Co. Pvt. Ltd.***[7] and ***Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engineering Ltd.***[8] is made applicable to the present case, it would still be difficult to refuse enforcement of the foreign award on the ground of inadequate stamping, as the said ground is

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technical in nature, which can be easily cured and rectified. Therefore, such ground will not fall under the scope of fundamental policy of Indian law.

Madras High Court clarifies that award passed after mandate of arbitrator has expired cannot be subsequently ratified by court[9]

Brief Facts

Suryadev Alloys & Power Pvt. Ltd. ("**Suryadev**") and Shri Govindaraja Textiles Pvt. Ltd. ("**Govindaraja**") entered into a power purchase agreement. Disputes arose between the parties when Govindaraja failed to clear certain invoices of Suryadev, resulting in Suryadev invoking the bank guarantees held by it. However, even after invoking the bank guarantees, there was a balance amount due, which led to Suryadev invoking arbitration. Govindaraja contended that Suryadev had not allotted power as per the contracted demand of energy and by September 2015, it had completely stopped the power supply. Govindaraja filed a counter claim for the losses incurred in purchasing power from TANGEDCO. The arbitrator entered reference on 20 March 2017.

During the arbitration proceedings, the time period for making an award was about to expire. Suryadev therefore filed an application under Section 29A of the Act seeking an extension of time ("**Application**"). By its order dated 4 September 2018, the Application was allowed and the time period for making the award was extended by six months from the date of receipt of the order. Thereafter, the parties concluded their arguments on 9 February 2019 and the award was reserved.

The arbitrator passed the award dated 13 September 2019 ("**Award**") rejecting the counterclaim of Govindaraja and allowing Suryadev's claim, but awarded interest only from the date of the Award. Therefore, both parties challenged the Award.

Issue

Whether an award passed after the termination of the mandate of the arbitrator is valid?

Judgment

Govindaraja contended that the Award is not valid as it was passed after the mandate of the arbitrator expired. It was contended that the Award was passed on 13 September 2019, which was much beyond the time extension granted by the Court. Suryadev, on the other hand, contended that the court, in a Section 34 petition, had the power to extend the time till the date of passing of the award. It relied on a previous judgment of a Single Judge of the Delhi High Court, where the Court had extended the time after the award was passed by exercising its powers under Section 29A(4) of the Act. It was further contended that the foundation of the powers under Section 29A can be found in Section 28 of the Arbitration and Conciliation Act, 1940 ("**1940 Act**"), whereby courts were given wide powers to enlarge the time for making the award even after the expiry of the time for making the award or even after the award had been made.

The Court undertook a detailed examination of Section 28 of the 1940 Act and Section 29A of the Act to come to the conclusion that Section 29A had greatly curtailed the powers of the court and that even though court has the power to extend the time for making the award, it cannot ratify an award ex post facto by extending the time period in a challenge petition. Section 29A(4) clearly states that if the award is not made within the stipulated time period or the extended time period, the mandate of the arbitrator stands terminated.

The Court relied on the judgment of the Supreme Court in ***NBCC Ltd v. J.G. Engineering Pvt. Ltd***.[10] wherein the arbitrator's mandate was terminated upon the expiry of the time period that was extended with the consent of the parties. In the instant case, the Court passed an order on 4 September 2018, extending the time by six months from the date of receipt of the order. After

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receiving this order, sittings were held and the Award was reserved on 9 February 2019. However, the Award was pronounced only on 13 September 2019, much after the expiry of the six-month extension granted by the Court. Once the extension granted by the Court expired, the arbitrator became *functus officio* as his mandate had terminated. The Court disagreed with the decision of the Delhi High Court relied upon by Suryadev on the ground that Section 29A of the Act does not grant the same power as Section 28 of the 1940 Act. Since the Award was made after the termination of the mandate of the arbitrator, it was set aside and the Section 34 petition filed by Govindaraja was allowed, whereas the one filed by Suryadev was rejected.

Analysis

By this decision, the Court has highlighted that timelines under the Act are strict and must be adhered to. The judgment sends out a strong signal to both litigants and arbitrators that non-compliance with timelines under the Act can have serious consequences.

Supreme Court rules on perverse interpretation of clauses by arbitral tribunal[11]

Brief Facts

South East Asia Marine Engineering And Construction Ltd. ("**Appellant**"), who was awarded a work order for well drilling by Oil India Ltd. ("**Respondent**"), claimed reimbursement from the Respondent since the prices of High Speed Diesel ("**HSD**"), one of the essential materials for carrying out the drilling operations, had increased. The Appellant contended that the price increase triggered the "change in law" clause in the contract, i.e., Clause 23, ("**Clause 23**") justifying reimbursement from Respondent. The three-member arbitral tribunal ("**Tribunal**") issued the majority award ("**Award**") in favour of the Appellant and held that while an increase in HSD prices through a circular issued under the authority of the State or Union is not a "law", it has the "force of law" and thus, falls within the ambit of Clause 23. The minority award held that the executive orders do not come within the ambit of Clause 23.

The Respondent's challenge under Section 34 of the Act failed as the District Judge held that the findings of the Tribunal were not against the public policy of India or patently illegal. The Respondent's challenge under Section 37 of the Act succeeded, with the Hon'ble Gauhati High Court ("**High Court**") setting aside the Award. The High Court held that the interpretation of the contract by the Tribunal was erroneous, was against the public policy of India and overlooked certain terms of the contract.

Issue

Whether the interpretation provided to the contract in the Award was reasonable enough to pass muster under Section 34 of the Act?

Judgment

The Supreme Court upheld the setting aside of the Award, observing that the Tribunal's interpretation of Clause 23 of the contract was an impossible view. The Tribunal had arrived at its conclusion on the strength of beneficial construction as a rule of interpretation, which provides that a word which makes an interpretation inconsistent with the document as a whole, should be avoided. While the Supreme Court agreed with this rule of interpretation, it concluded that the Tribunal's ultimate conclusion rendered Clause 23 inconsistent with other clauses of the contract. The other contractual terms inferably made the contract a fixed-rate contract, requiring the rates to be in force until the completion or abandonment of the last well being drilled. The Supreme Court also referred to another clause in the contract, which indicated that the fuel would be supplied by the contractor at its expense. The Supreme Court observed that prudent contractors usually take such commercial price fluctuations into margin and such price fluctuations could not be brought under Clause 23 unless specific language points to the inclusion.

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Although the Award was set aside by the Supreme Court, it did not agree with the High Court's reasoning to grant the same relief. The High Court had observed that Clause 23 was akin to a *force majeure* clause and was inserted in the contract to meet uncertain and unforeseen eventualities, and not for revising a fixed rate of contract. The High Court was of the view that under Clause 23, rights and obligations of both parties were saved due to any change in law keeping in mind the "doctrine of frustration" under Section 56 of the Indian Contract Act, 1872. The Supreme Court was quick to dismiss this view because the parties, in a distinct clause, had agreed for payment of a *force majeure* rate to tide over any *force majeure* event.

Analysis

The judgment of the Supreme Court opines on various aspects of contractual interpretation and scope of judicial interference under Section 34 of the Act. The Supreme Court duly expressed mindfulness of its limited role in interfering in arbitral awards by placing reliance on the three-judge bench decision of the Supreme Court in ***Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd***.[12] However, ultimately the perversity of the Award, in the Court's opinion, merited judicial interference. Undoubtedly with this judgment, the ground of perverse interpretation of clauses by an arbitral tribunal has obtained fresh vigour and widened the public policy and patent illegality grounds in Section 34 of the Act. This decision is bound to fly in the teeth of the much relied upon Supreme Court's decision in ***Associate Builders v. DDA***,[13] recently affirmed in ***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India***.[14] Both these decisions have categorically narrowed the confines of Section 34 while *inter alia* holding that interpretation of the terms of a contract is primarily the prerogative of an arbitrator and the award can only be disturbed if such interpretation is impossible to arrive at by any reasonable person. It is important to note that in this case, while the Tribunal interpreted the import and meaning of individual words of the Clause, the Supreme Court checked the consistency of the Clause with other clauses to arrive at its conclusion.

The Supreme Court unreservedly indicated that "beneficial" construction of a clause does not mean "liberal" interpretation of a clause, and the acceptable test for interpretation of such a clause is to check its consistency with other terms of the contract. With its observations on factoring common price fluctuations by contractors, the Supreme Court may have debilitated clauses that mitigate the risks of price fluctuations. The judgment may have also given significant leeway to the argument that foreseeable price variations can escape the restraints of price variation clauses. The judgment will undoubtedly serve as an important precedent on the issue of interpretation of contracts by arbitrators, and more specifically, will have an effect on price variation clauses in fixed-rate contracts.

Delhi High Court interprets meaning of 'Court' under Section 29A of Arbitration Act to mean court that has the power to appoint an arbitrator under Section 11[15]

Brief Facts

DDA ("**Petitioner**") filed a petition under Section 29A ("**Petition**") of the Act before the Delhi High Court ("**Court**") to extend the mandate of the arbitrator. M/s Tara Chand Construction Co. ("**Respondent**") objected to the maintainability of the said Petition on the ground of lack of pecuniary jurisdiction as the claim value was less than INR 20 million.

The Petitioner argued that it is a fit case for extension of the mandate of the arbitrator as the final arguments had nearly concluded. On the point of maintainability of the Petition, the Petitioner argued that the term 'Court', as used in Section 29A, would mean the High Court in the case of domestic arbitration, which also has exclusive power to appoint the arbitrator under Section 11 of the Act, and not the District Court as per Section 2(1)(e) of the Act.

Issues

Issue (i): Whether the meaning of 'Court' under Section 29A includes the District Court?

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Issue (ii): Whether a petition under Section 29A is maintainable in a Court that does not have pecuniary jurisdiction?

Issue (iii): Whether the arbitrator should be substituted in the present case?

Judgment

Issue (i): The Court first explained the meaning and scope of Section 29A(4) of the Act. The Court stated that the said provision seeks to extend the mandate of the arbitral tribunal if the award is not made within 12 months plus 6 months, and such extension can be sought either prior to or after the expiry of the 12 month period. The Court further explained that under sub-section (6) of Section 29A, the 'Court' also has significant power to substitute one or more arbitrators if the need arises and after such substitution takes place, the arbitration is to continue from the stage already reached. The Court held that the present arbitration was a domestic arbitration and therefore, the High Court will have jurisdiction to entertain a petition under Section 29A of the Act. Relying on ***Nilesh Ramanbhai Patel v. Bhanubhai Ramanbhai Patel***,[16] the Court opined that under Section 29A, the court has the power to extend the mandate of the arbitrator coupled with the power to substitute the arbitrator. Thus, the power of substitution of arbitrator is concomitant to the principal power of granting extension. Therefore, 'Court' under Section 29A should be read as the one which appointed the arbitral tribunal under Section 11 of the Act. In the opinion of the Court, this was a necessary interpretation to avoid complications and overreach of jurisdiction. Similarly, the Court held that in an international commercial arbitration under Section 2(1)(f) of the Act, a petition under Section 29A should be filed before the Supreme Court of India.

The Court further explained that under Section 2(1)(e) of the Act, in case of domestic arbitration, 'Court' means Principal Civil Court of original jurisdiction in a district and includes a High Court in exercise of its original civil jurisdiction. However, the term 'Court' can be interpreted differently in the context of Section 29A. The Court opined that it is inconceivable that the Legislature would vest the power in the Principal Civil Judge to substitute an arbitrator who may have been appointed by a High Court or the Supreme Court. Section 2(1) itself gives the answer as it starts with the expression "*in this part, unless the context otherwise requires*".

Issue (ii): The Court held that since petitions under Section 11 are filed irrespective of pecuniary jurisdiction, the same reasoning will apply to petitions under Section 29A. Therefore, the Court decided the second issue too in favour of the Petitioner.

Issue (iii): Lastly, the Respondent argued that if the mandate of the arbitrator is extended, the arbitrator should be substituted as the present arbitrator was delaying proceedings in connivance with the Petitioner. The Court rejected the Respondent's plea on the ground that the Respondent was unable to prove dilatory tactics on part of the arbitrator. The Court held that since the arbitration had almost reached its conclusion, any substitution of arbitrator at this stage would put a financial burden on the parties.

Analysis

This judgment has given much needed clarity on filing of applications under Section 29A of the Act. The Court has harmoniously construed seemingly contrary provisions of the Act to hold that a court that does not have power to appoint the arbitrator, can certainly not have the power to extend the arbitrator's mandate or substitute the arbitrator. If a contrary view is taken, it would directly be in teeth of Section 11 of the Act. Therefore, the conflict can only be resolved if the term 'Court' is read as the High Court/Supreme Court exercising powers under Section 11 of the Act. Any other interpretation would be contrary to the entire scheme of the Act. The Court also considered the judgment of the Bombay High Court in an international commercial arbitration, ***Cabra Instalacionies Y. Servicios S.A. v. Maharashtra State Electricity Distribution Company Ltd***.[17] to clarify the law in case of international commercial arbitrations.

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Bombay High Court clarifies that liquidated damages are not payable in the absence of proof[18]

Brief Facts

Jackie Shroff ("**Petitioner**"), a shareholder of Atlas Equipfin Pvt. Ltd. ("**Atlas**"), received a notice of placement instruction for sale of shares of Atlas to a third party ("**Placement Instruction**"). The Placement Instruction bore the Petitioner's signature, which the Petitioner claimed was not his. The Petitioner filed a complaint alleging forgery with the Economic Offences Wings ("**EOW**") against Ratnam Iyer ("**Respondent**"), another shareholder of Atlas. Subsequently, a settlement deed ("**Deed**") was drawn and executed between the parties. Clause 3 of the Deed forbade the Petitioner from writing any letter or communication to any authority or person complaining about the subject matter of the Deed. The Deed also provided for keeping an amount in an escrow to be released to the Petitioner in two tranches upon closure/withdrawal of the EOW complaint and upon receipt of sale proceeds from Atlas.

The Petitioner received only the first tranche of the amount after unconditionally withdrawing the EOW complaint. With regard to release of the second tranche, the Respondent claimed that the Petitioner had committed a breach of Clause 3 of the Deed as the Petitioner's wife had sent emails calling the Respondent a 'forger'.

The Bombay High Court at Mumbai ("**High Court**") referred the dispute to a sole arbitrator ("**Tribunal**"). During the pendency of the arbitration proceedings, the sale of shares held by Atlas was completed followed by receipt of full sale consideration by Atlas.

The Tribunal passed the award ("**Award**") holding that the Petitioner had committed a breach of Clause 3 of the Deed. The Tribunal awarded liquidated damages in favour of the Respondent and declared that the Petitioner was not entitled to the amount lying in the escrow. The Tribunal treated the Petitioner's wife as his agent and the emails as having been sent with the knowledge, consent, authority, and on behalf, of the Petitioner. Consequently, the Petitioner challenged the Award under Section 34 of the Act before the High Court.

Issues

Issue (i): Did the Petitioner breach Clause 3 of the Deed with the Petitioner's wife acting as an agent of the Petitioner?

Issue (ii): Could the Tribunal award pre-estimated damages/liquidated damages when the same were not contemplated in the Deed and when one of the parties completed its reciprocal obligation?

Judgment

The High Court set aside the Award under Section 34 on the following grounds:

Issue (i): The emails sent by the Petitioner's wife complained about the Respondent's subsequent conduct in the matter of the sale of shares. The subject matter of the Deed referred to in Clause 3 could only mean the complaint made by the Petitioner to the EOW regarding the alleged forgery by the Respondent. Moreover, the High Court observed that there was nothing on record before the Tribunal to show that the Petitioner had authorised his wife to make any complaint of forgery against the Respondent or that the emails were sent with consent of the Petitioner. Therefore, the High Court held that the Petitioner did not breach Clause 3 of the Deed.

Issue (ii): The High Court observed that it was undisputed that the Petitioner had fulfilled his reciprocal obligations under the Deed. Only in the case that the contract remained unexecuted and the Respondent suffered actual loss could the Respondent seek liquidated damages. The

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High Court also noted that the damages sought by Respondent under the garb of value of his reputation were not defined as such in the Deed. They were neither liquidated damages nor a pre-determined estimate of the loss of reputation of the Respondent as held by the Tribunal. The Deed only entailed refund of the amounts in the escrow and the same was the only remedy available to the Respondent.

Setting aside the Award, the High Court observed that the Award was completely unreasonable, impossible and perverse. The Award was based on no evidence, and suffered from non-application of mind and misapplication of law.

Analysis

The High Court has given adequate reasoning as to why the Award "*shocked its conscience*", justifying its interference under Section 34 of the Act. The judgment passes the test of limited judicial intervention as laid down in ***Associate Builders*** *(supra)*,[19] which was recently affirmed in ***Ssangyong Engineering*** *(supra)*. The High Court rightly observed that the Tribunal travelled beyond the terms of the Deed and awarded liquidated damages to the Respondent without any proof of loss or damages suffered by the Respondent. The Respondent sought damages by way of an unexplained figure for alleged loss of reputation. Since the Petitioner had performed his reciprocal obligations, the Tribunal could neither exceed its jurisdiction nor the terms of the Deed to award liquidated damages that were not contemplated in the Deed. Having observed that the Petitioner did not breach the terms of the Deed, the High Court rightly set aside the Award. The judgment definitely cautions against the wide and fluid interpretation of contracts, especially by arbitrators, who have been held to be creatures of contracts in various recent precedents.

Supreme Court reinforces 'patent illegality' as a ground to challenge an arbitral award post 2015 Amendment[20]

Brief Facts

Disputes arose between Patel Engineering Ltd. ("**Petitioner**") and North Eastern Electric Power Corporation Ltd. ("**Respondent**") with respect to payment of extra lead in item nos. 2.7 and 3.4 of the BOQ in three identical contracts for different packages, which were referred for arbitration before the Ld. Sole Arbitrator ("**Tribunal**").

The Tribunal made three declaratory arbitral awards dated 29 March 2016 ("**Awards**") in favour of the Petitioner. The Respondent filed three applications under Section 34 of the Act challenging the Awards before the Additional Deputy Commissioner (Judicial), Shillong, which were dismissed *vide* common judgment dated 27 April 2018 ("**Section 34 Judgment**").

In the second round of litigation, the Respondent filed three appeals under Section 37 of the Act before the High Court of Meghalaya at Shillong ("**High Court**") challenging the Section 34 Judgment. The High Court allowed the appeals and set aside the Section 34 Judgment and the Awards ("**Section 37 Judgment**") on the ground that the findings of the Tribunal suffered from the vice of perversity. The High Court held that the Tribunal arrived at the conclusion by considering irrelevant factors and by ignoring vital clauses of the contract, and therefore, the same was considered as patently illegal. The Petitioner preferred Special Leave Petitions before the Supreme Court, which were dismissed holding that the Court was not inclined to interfere in the matters ("**SLP-I**").

Thereafter, the Petitioner filed review petitions before the High Court against the Section 37 Judgment on the ground that the High Court failed to consider the amendments made to the Act *vide* the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment**"). The High Court dismissed the review petitions *vide* common order dated 10 October 2019 ("**Impugned**

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Order") since the Petitioner failed to make out a case for review. The Petitioner filed Special Leave Petitions before the Supreme Court challenging the Impugned Order ("**SLP-II**").

Issues

Issue (i): Whether SLP-II was maintainable despite dismissal of SLP-I on merits?

Issue (ii): Whether the Section 37 Judgment suffered from error since the High Court relied upon the decisions of ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd***.[21] and ***Oil & Natural Gas Corporation Ltd. v. Western Geco International Limited***,[22] which are no longer good law after the enactment of the 2015 Amendment?

Judgment

The Supreme Court dismissed SLP-II *inter alia* on the grounds that:

Issue (i): The Section 37 Judgment was challenged before the Supreme Court *vide* SLP-I and after hearing the matter at length, SLP-I was dismissed by common order dated 19 July 2019 and no liberty was sought to file a review before the High Court.

Issue (ii): The Section 37 Judgment referred to various judgments such as ***Saw Pipes*** *(supra)* and ***Western Geco*** *(supra)* but rightly followed the tests as set out in ***Associate Builders*** *(supra)* and ***Ssangyong Engineering*** *(supra)*. The High Court, in the Section 37 Judgment, held that no reasonable person could have arrived at a different conclusion while interpreting the terms of the BOQ and the contract, and any other interpretation of the said clauses would be irrational.

The Supreme Court further accepted the findings in the Section 37 Judgment that the Awards suffered from the vices of irrationality and perversity. This was because the view taken by the Tribunal was arrived at by considering irrelevant factors and by ignoring vital clauses of the contract, and as such the view was not even a possible view.

The Supreme Court also referred to the judgment in ***Board of Control for Cricket in India v. Kochi Cricket Private Limited and Others***[23] wherein the Supreme Court had held that the 2015 Amendment would apply to an application under Section 34 of the Act that is made after 23 October 2015. Accordingly, in the present case, since the Awards were made on 29 March 2016, the provisions of the Act, as amended by the 2015 Amendment, were applicable.

Analysis

The Supreme Court reached its well-founded conclusion after briefly discussing the history of the ground of '*patent illegality*'. The ground of patent illegality was first introduced in the judgment of ***Saw Pipes*** *(supra)* and the Supreme Court, while giving a broad interpretation to public policy of India, held that an award would be patently illegal if it is contrary to the substantive provisions of law, or provisions of the Act, or terms of the contract. Further, in ***Associate Builders*** *(supra)*, the Supreme Court explained in detail the ground of patent illegality as a ground under public policy of India to set aside a domestic award.

Thereafter, upon recommendations of the 246th Law Commission Report, the ground of '*patent illegality*' for setting aside a domestic award was given statutory force by introducing Section 34(2A) to the Act *vide* the 2015 Amendment. The ground was restricted to challenging domestic awards and cannot be invoked for international commercial arbitrations seated in India. The Supreme Court also referred to the judgment in ***Ssangyong Engineering*** *(supra)*, reiterating that the broad interpretation of public policy of India in ***Saw Pipes*** *(supra)* and ***Western Geco*** *(supra)* was done away with. Further, the ground of 'patent illegality' was no longer in the definition of public policy of India and was statutorily introduced *vide* Section 34(2A) of the Act, which would apply to applications for setting aside an award under Section 34 of the Act made on or after 23 October 2015.

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Supreme Court upholds a foreign award given through a two-tier arbitration procedure[24]

Brief Facts

Centrotrade Minerals and Metal Inc. ("**Appellant**") and Hindustan Copper Ltd. ("**Respondent**") entered into a contract for sale of 15,500 DMT of copper concentrate by the Appellant to the Respondent. The dispute resolution clause of the contract provided, in relevant part, as follows:

> "*14. All disputes and difference whatsoever arising between the parties…shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the rules of arbitration of the Indian Council of Arbitration.*
>
> *If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitrator in London, U.K. in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce in effect on the date hereof and the result of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any Court of Jurisdiction*".

A dispute arose between the parties regarding the quantity of dry concentrate delivered to the Respondent, which led the Appellant to commence arbitration seated in India, under the rules of the Indian Council of Arbitration ("**ICA**").

The Appellant was unsuccessful in the ICA arbitration. Thereafter, it invoked the second tier of Clause 14 of the contract, which allowed parties to appeal the result from the ICA arbitration to another arbitrator in London in accordance with the rules of the International Chambers of Commerce ("**ICC**").

The Respondent filed an application in the Rajasthan High Court to obtain an injunction against this second arbitration. The order of the Rajasthan High Court, granting such ad-interim *ex-parte* injunction, was challenged by the Appellant in the Supreme Court. By an order dated 8 February 2001, the Supreme Court vacated the injunction issued by the Rajasthan High Court, thereby allowing the parties to continue the ICC proceedings.

The arbitrator appointed in the ICC arbitration, by an award dated 29 September 2001, decided in favour of the Appellant ("**ICC Award**").

An action was brought before the Calcutta High Court by the Respondent challenging the execution of the ICC Award by the Appellant under Section 48 read with Section 49 of the Act. The Single Judge dismissed the Respondent's petition. However, on appeal, a Division Bench of the Calcutta High Court overturned the decision of the single judge on the basis that there was a "*contrary Indian award making it to no effect*". Further, it held that the ICC award was not a foreign award since no seat of arbitration was mentioned in Clause 14 and the "*proper law of the contract*" was Indian.

The matter eventually reached the Supreme Court. Two separate judgments were given by the judges of the Division Bench. The judgment by S.B. Sinha, J. merely dealt with the validity of the two-tier process of dispute resolution in Clause 14 of the contract and held such a contractual provision to be "*void for being opposed to public policy*" under Section 23 of the Indian Contract Act, 1872.

On the other hand, the judgment by Tarun Chatterjee, J. held that Clause 14 was enforceable and not opposed to public policy since similar clauses have been regularly upheld and are not considered as defeating the object of the Act. Further, he held that the ICC Award was a foreign award because even though Indian law was the governing law of the contract, the parties

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cannot be said to have "*deemed*" India as the seat of the second arbitration. However, he held that the ICC Award was not executable in India since the Respondent was not given a "*fair hearing*" by the arbitrator who did not consider the Respondent's delayed submissions even when the delay was "*not attributable to HCL's conduct*".

This matter was eventually referred to a three-judge bench of the Supreme Court in 2017. The three-judge bench held that the two-tier process in Clause 14 of the contract was valid. However, the Supreme Court deferred ruling on the enforceability of the ICC Award as a foreign award to a later date.

Issues

Issue (i): Whether a larger bench could consider the issue of enforceability of the ICC Award in India?

Issue (ii): Whether the ICC Award was enforceable as a foreign award in India?

Judgment

Issue (i): The Supreme Court held that a larger bench could decide on this issue since the entire matter, and not merely the question of the validity of Clause 14 of the contract, was referred to it owing to lack of consensus between the judges of the Division Bench of the Supreme Court.

Issue (ii): The Supreme Court held the ICC Award was enforceable in India and rejected the Respondent's contention that it was not given adequate opportunity to present its case in the ICC proceedings on the basis that:

First, the ICC Award was not void on the ground that the arbitrator continued the proceedings in spite of the injunction issued by the Rajasthan High Court. The Supreme Court held that even though the injunction is only binding on the parties, and not the arbitrator, the arbitrator asked the parties to make their submissions only after receiving a green signal of the ICC and after the Supreme Court had vacated the injunction issued by the Rajasthan High Court on 8 February 2001.

Second, the arbitrator had given multiple extensions to the Respondent to make its submissions and even considered lengthy submissions that were submitted by the Respondent after the deadline.

Relying on the judgments given in ***Vijay Karia*** *(supra)* and ***Minmetals Germany GmbH v. Ferco Steel Limited***,[25] the Supreme Court held that the Respondent cannot claim that it was not given adequate opportunity to present its case since it was never outside its control to present its submissions to the ICC arbitrator.

Analysis

The Supreme Court's final decision has brought much needed clarity on the scope of enforcement of foreign awards given in two-tier arbitrations.

Also, this decision has imposed a high burden on parties challenging foreign awards on the grounds of natural justice to prove that they were unable to present their submissions due to factors outside their control.

Further, the Supreme Court's active reinforcement of the approach adopted in ***Vijay Karia*** *(supra)* to restrict the grounds of challenge to enforcement of foreign awards, is certainly welcome. An outcome of the Supreme Court's reliance on this judgment is that Indian Courts may require parties to challenge foreign awards in the seat of arbitration before challenging their execution in India.

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Delhi High Court restricts scope of 'delivery of the arbitral award' under Section 39 of Arbitration Act[26]

Brief Facts

M/s. Janapriya Engineers Syndicate Private Limited ("**Petitioner**") was awarded two separate contracts by the Union of India ("**Respondent**") for a construction related work. Thereafter, certain disputes arose between the parties and accordingly, the Respondent invoked the respective arbitration clauses under the said two contracts. Further, the Respondent appointed the Chief Engineer from the Standing Panels of Arbitrators as the sole arbitrator ("**Sole Arbitrator**") to adjudicate the disputes in both the proposed proceedings.

Subsequent to the submissions made by the parties in both proceedings, the Sole Arbitrator apprised the Petitioner and the Respondent of the fact that he was due for superannuation. The Sole Arbitrator intimated the parties that he was willing to continue as the sole arbitrator even after his retirement and also sought consent from the parties. Accordingly, the Petitioner and the Respondent accorded their consent to the Sole Arbitrator to continue the proceedings ever after his superannuation.

Thereafter, the Sole Arbitrator advised the parties to pay INR 2.7 million towards the arbitration fee, to be shared equally by the parties. The Petitioner communicated its readiness to pay its share of the arbitration fee. However, the Respondent objected to the demand made by the Sole Arbitrator and *inter alia* submitted that no such condition was communicated to the parties at the time of seeking consent and accordingly, no fee was payable. Additionally, the Respondent requested the Sole Arbitrator to either continue with the proceedings without claiming any fee or resign in accordance with Section 14(1) of the Act. The Petitioner maintained that the Sole Arbitrator was entitled to receive compensation for services rendered after his retirement. However, on account of the Respondent's inaction, the Sole Arbitrator adjourned the matter without fixing a date for the next hearing.

Aggrieved by the 'non-delivery' of the arbitral award in the two proceedings, the Petitioner filed two separate petitions under Section 39 of the Act. By way of the said petitions, the Petitioner prayed before the Delhi High Court to direct the Sole Arbitrator to "*pass/ deliver the arbitral Award as expeditiously as possible on payment by the petitioner of the costs demanded by the sole arbitrator*".

Issue

Whether the petition(s) are maintainable under Section 39(2) of the Act?

Judgment

The Court held that the petitions were 'premature' and accordingly, not maintainable. Basis a reading of Section 39A(2) of the Act, the Court held that an application under Section 39 is maintainable if the arbitral award is "*made, but not delivered to the parties*". The Court also relied upon a judgment passed by the Calcutta High Court in ***Assam State Weaving & Manufacturing Co. Limited v. Vinny Engineering Enterprises (P) Limited & Anr.***,[27] wherein the Court had held that the word 'delivery' under Section 39(2) of the Act implies physical delivery of the document and not merely the pronouncement of the award.

Accordingly, the Court held that the Petitioner cannot invoke Section 39 as the Sole Arbitrator had not yet 'made'/'prepared' the award(s). Therefore, the petitions were dismissed on account of being non-maintainable.

Analysis

At the outset, it is important to take note of the heading ascribed to Section 39 of the Act, which reads as "*Lien on arbitral award and deposits as to costs*". In legal parlance, the term 'lien'

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means the right to retain 'something' (as security), which belongs to someone else, until the underlying obligation is satisfied. A reasonable sequitur that follows from the said meaning is that 'something' should be in existence. Accordingly, an arbitrator can exercise his right of lien, in accordance with Section 39, provided that the arbitral award has been drafted and ready to be delivered.

Similarly, as argued by the Respondent, one may even examine the words adopted by the Legislature in the various provisions of the Act. For instance, Section 31(1) states "*An arbitral award shall be made in writing...*" and Section 29A(2) uses the phrase "*If the award is made within a period of six months...*". In contradistinction to the aforesaid provisions of the Act, Section 39 uses the word 'delivery' with respect to an arbitral award. Accordingly, it can be deduced that the legislative intent to employ the word 'delivery' was to presuppose the existence of the arbitral award at the time when the arbitrator exercises his right to lien. Moreover, as observed by the Court itself, the object behind 'delivery' of the award is to entitle a party to possess the physical copy of the award in order to enable the party to either challenge the award or to seek execution of the same.

Moreover, if the law was to be interpreted otherwise, sole arbitrators in various proceedings (particularly in proceedings where arbitrators are appointed by governmental agencies/PSUs) would intentionally delay proceedings so as to reap monetary benefits after their retirement. However, there may be cases where sole arbitrators could not complete proceedings during their tenure in the relevant organisation for reasons beyond their control. In view of this judgment, it will indeed be difficult for such arbitrators to proceed after their retirement as they may not be able to bear the costs related to the proceedings, such as expenditure towards travelling, legal materials or for secretarial services. In such cases, the arbitrator may decide to terminate the proceedings in accordance with Section 38 of the Act and consequently, further delay the dispute resolution process agreed by the parties. However, in view of the 2015 Amendment and ineligibility of an employee (of a party to the arbitration) to be the arbitrator, hopefully, only a few such proceedings will be affected by this judgment.

Therefore, the conclusion arrived at by the Court is well-founded and in line with the true intention of the Legislature behind enacting the aforesaid provisions of the Act.

Delhi High Court clarifies jurisdiction of 'court' to hear application seeking appointment of arbitrator in context of an exclusive jurisdiction clause[28]

Brief Facts

Certain disputes arose between Aarka Sports Management Pvt. Ltd. ("**Petitioner**") and Kalsi Buildcon Pvt. Ltd. ("**Respondent**") in relation to the operation, maintenance and management agreement dated 16 March 2018 ("**Agreement**").

While the '*Governing Law, Jurisdiction and Dispute Resolution*' clause in the Agreement did not specify the seat of arbitration, it provided that courts of New Delhi would have exclusive jurisdiction over the Agreement. The clause provided that in case of a dispute, both parties should make endeavours to resolve it through negotiations and mediation, failing which the dispute was required to be determined by arbitration. A sole arbitrator was to be appointed with the mutual consent of both parties. The clause further provided that if the parties were unable to reach at a consensus on the choice of arbitrator within thirty days of the notice of arbitration, the parties could approach the court of proper jurisdiction for appointment of the sole arbitrator.

The Petitioner invoked arbitration by its letter dated 26 February 2019, to which the Respondent replied on 20 March 2019. The Petitioner filed an application under Section 11 of the Act before the Delhi High Court seeking appointment of the sole arbitrator.

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The Respondent argued that neither the seat of arbitration is Delhi nor any cause of action arose at Delhi. The agreement was executed at Ranchi, signed at Lucknow and the place of performance of the agreement was Patna. On the other hand, the Petitioner argued that the Delhi High Court had exclusive jurisdiction as specifically provided in the Agreement.

Issue

If the arbitration clause in the Agreement did not specify the seat of arbitration, which court will have jurisdiction to hear applications under Section 11 of the Act?

Judgment

The Delhi High Court held that in terms of Section 20(1) of the Act, the parties are at liberty to choose a neutral seat of arbitration, i.e., where neither the cause of action arose nor the parties reside or work for business. The Court further held that once the seat is determined, the court of that place (seat) would have exclusive jurisdiction to deal with all matters relating to the arbitration agreement.

If the parties have not determined the seat of arbitration, then it would be determined by the arbitral tribunal under Section 20(2) of the Act. In that context, an application under Section 11 of the Act may be filed before the "*Court*" defined in Section 2(1)(e) of the Act read with Sections 16 to 20 of the Code of Civil Procedure, 1908 ("**CPC**").

It was held that since the Agreement did not stipulate any seat of arbitration, only the "*Court*" within the meaning of Section 2(1)(e) of the Act read with Sections 16 to 20 of the CPC would be competent to hear an application under Section 11 of the Act.

In light of the above, the Court held that it lacked territorial jurisdiction as: (i) Delhi was not the seat of arbitration; (ii) the cause of action did not arise in Delhi; and (iii) the Respondent did not work in Delhi. As regards the jurisdiction clause, the Court held that parties cannot confer jurisdiction on a court which otherwise has no jurisdiction and therefore, the exclusive jurisdiction of courts of New Delhi was not valid.

Analysis

While the Petitioner primarily relied on cases like ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited***[29] and ***Brahmani River Pellets Limited v. Kamachi Industries Limited***[30] in support of its contention that only courts of New Delhi had exclusive jurisdiction over the Agreement, the Court differentiated these judgments on the basis of the facts of the present dispute. In all the cases relied on by the Petitioner, the parties had agreed and specified the seat of arbitration in the contract, which was not the case with the present dispute.

The Court drew force from the cases relied on by the Respondent, primarily ***Interglobe Aviation Limited v. N. Sachidanand***,[31] wherein it was held that: (i) a clause which ousts the jurisdiction of a court having jurisdiction and confers jurisdiction on a court not having jurisdiction would be invalid; and (ii) the parties cannot confer jurisdiction by agreement.

This case is yet another example of a litigation, which arose from a badly drafted arbitration clause: firstly, the arbitration clause in the Agreement did not specify the seat of the arbitration; and secondly, the provisions relating to the 'governing law', 'jurisdiction' and 'dispute resolution' were all clubbed in one clause, which are generally dealt with/explained in distinct clauses in all modern day commercial contracts. The Petitioner's argument that the Agreement specified that courts of New Delhi would have exclusive jurisdiction over the Agreement stems from the confusion between "*seat of arbitration*" and "*jurisdiction of courts*". It appears that the Petitioner misunderstood the jurisdiction clause to mean the seat of arbitration.

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Needless to say, this decision of the Delhi High Court is another appreciable addition to the list of cases clarifying the conundrum revolving around the seat of arbitration.

Delhi High Court holds that recourse to Section 9 of the Arbitration Act will not be available for reliefs rejected by the emergency arbitrator[32]

Brief Facts

A Joint Venture Agreement ("**JVA**") was executed on 30 May 1986 between U-Shin Limited ("**USL**") and a partnership firm M/s Jay Industries ("**JAY**"). JAY was represented by Mr. J.P. Minda ("**JPM**") and through the JVA, parties agreed to establish a joint venture company for *inter alia* manufacture and sale of automobile locks, steering locks, key ignition switches, door latches and combination switches for all categories of automobiles.

Jay Ushin Limited ("**JUL**") was accordingly created as the joint venture company pursuant to the JVA. Salient clauses of the JVA provided a mutual right of first refusal and a requirement of prior consent for assignment or transfer of the rights created by the JVA. Disputes arising in relation to the same were to be referred to arbitration under the Commercial Rules of the India Commercial Arbitration Association, to be held in India if initiated by USL, or under the Rules of the Japan Commercial Arbitration Association ("**JCCA**") to be held in Japan if initiated by JAY.

After a series of transfers, JAY's interest in JUL ultimately stood vested in Mr. Ashwani Minda ("**AM**"), with the consent of USL, and AM had been acting as the Managing Director of JUL since 1988. JUL thereafter went public in 1989 and 43.7% of its shareholding is at present held by parties other than AM and USL. AM and USL in turn hold 30.3% and 26% of the shareholding respectively.

On 7 November 2018, USL and Minebea Mitsumi Inc. ("**MMI**") announced a transaction for mutual business integration, as a result of which, USL became a subsidiary of MMI on 10 April 2019. MMI contended that in terms of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**Takeover Code**"), it was required to make an open offer to the public regarding JUL. AM and JUL contended that the same amounted to a breach of the JVA and approached the JCCA for emergency measures. During the pendency of the emergency arbitration proceedings, 'a request for arbitration' dated 23 March 2020 was also submitted to the JCAA, wherein various interim reliefs, substantially similar to the reliefs sought in the application before the emergency arbitrator were sought. By an order dated 2 April 2020, the request for emergency measures was rejected and on 13 May 2020, the arbitral tribunal was constituted.

Prior to the constitution of the arbitral tribunal, AM and JUL approached the Delhi High Court under Section 9 of the Act seeking reliefs, similar to those enumerated as interim measures before the arbitral tribunal, and impleaded USL and MMI as respondents.

The Petition was dismissed by the Ld. Single Judge on the grounds of maintainability, holding that the petition could not be maintained after dismissal of the appellants' request for emergency measures before the JCAA. While the Ld. Single Judge accepted the argument that Section 9 of the Act is also applicable to foreign-seated arbitrations, it was observed that upon the amendment of Section 2(2) of the Act by the 2015 Amendment, application of Part I of the Act was impliedly excluded in the facts and circumstances of the present case.

Aggrieved by the said judgment dated 12 May 2020, AM and JUL filed an appeal under Section 37 of the Act before a division bench of the Delhi High Court.

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Issues

Issue (i): Whether applications under Section 9 of the Act would be maintainable before Indian Courts with respect to foreign-seated arbitrations?

Issue (ii): Whether applications under Section 9 of the Act would be maintainable before Indian Courts after the emergency arbitrator has ruled on the same interim reliefs?

Judgment

Issue (i): The Court held that while applications under Section 9 would be maintainable with respect to foreign-seated arbitrations, such an application would not lie after the constitution of the Arbitral Tribunal, unless it can be shown that the an efficacious remedy is not available before the tribunal.

Issue (ii): The Court opined that after the amendment of Section 2(2) of the Act, the choice of either approaching Indian Courts or going to the court of the seat of the arbitration or the arbitral tribunal, while seeking interim reliefs in a foreign-seated arbitration, vests with the parties to the proceedings. However, since the Appellants herein had already approached the emergency arbitrator for interim reliefs and failed to obtain favourable orders, they could not be permitted to revise the choice.

The Court also distinguished the decision of a Ld. Single Judge of the Delhi High Court in ***Raffles Design Int'l India Pvt. Ltd. v. Educomp Professional Education Ltd. & Ors.***,[33] and clarified that in the said decision, the emergency arbitrator had already granted an interim relief in the favour of the petitioner therein and the same had also been enforced by the High Court of Singapore. The petition filed under Section 9 of the Act therein was filed in light of subsequent facts depicting the non-compliance of the emergency order. The Division Bench clarified that it was under those circumstances that an application under Section 9 of the Act was held to be maintainable.

It was, therefore, concluded that in a case where the interim relief was already rejected by the emergency arbitrator, recourse wold not be available under Section 9 of the Act. The Court, however, left the question as to whether the parties have agreed to opt out of the applicability of Section 9 of the Act open and permitted the same to be agitated by the parties in subsequent proceedings, if necessary.

Analysis

As rightly noted by the Delhi High Court, approach to Indian courts regarding interim measures would be available to parties in domestic as well as foreign-seated arbitrations, under Section 9 of the Act.

In an endeavour to affirm the sanctity of the arbitral process and to prevent an encroachment upon the jurisdiction of arbitral tribunals, the Court fairly opined that such a recourse would not be available after the constitution of the arbitral tribunal. To ensure access to justice is unhindered, the Court also provided a limited carve out and stated that the remedy would be available, even after constitution of the arbitral tribunal, in the event that the remedy before the tribunal was not efficacious.

While discussing the scope of proceedings under Section 9 of the Act after orders have been passed by an emergency arbitrator, the Court clarified that while such recourse wold not be available if the interim reliefs already stood rejected by the emergency arbitrator, in instances where the interim relief was allowed and subsequent events showed non-compliance with the emergency orders, remedy under Section 9 of the Act would continue to be available.

In this edition

This judgment provides a very fair and balanced view on the scope of recourse to Section 9 of the Act for foreign-seated arbitrations.

Past Events

YMCIA Webinar (6 May 2020)

The Young Mumbai Centre for International Arbitration (YMCIA) organised a webinar on the "*Commencement of arbitration proceedings*". **Rishab Gupta (Partner)** was a speaker at this event.

Workshop on Alternative Dispute Resolution (7 May 2020)

Burnished Law Journal organised a workshop on "*Alternative Dispute Resolution*", where **Gauhar Mirza (Principal Associate)** was the speaker.

Panel Discussion on IAF Guidelines 2.0 (9 May 2020)

The Indian Arbitration Forum (IAF) organised an online panel discussion on "*IAF Guidelines 2.0*" with Hon'ble Mr. Justice Vibhu Bakhru, Hon'ble Mr. Justice B.D. Ahmed and Mr. Jasbir Dhillon QC as the panellists. **Tejas Karia (Partner, Head-Arbitration)** co-moderated the panel discussion.

Investment Arbitration Webinar (19 May 2020)

Shardul Amarchand Mangaldas & Co organised a webinar on "*Indian Investment Treaties and claims in the wake of COVID-19*". The webinar shed light on the potential investment treaty claims that may arise under Indian investment treaties as a result of COVID-19 related measures adopted by governments across the world. The webinar also discussed practical insights and best practices that foreign investors may adopt to preserve their rights. **Rishab Gupta (Partner)**, **Mayuri Tiwari Agarwala (Senior Associate)** and **Niyati Gandhi (Senior Associate)** were the speakers at this event.

DLA Piper and Shardul Amarchand Mangaldas & Co Joint Webinar (21 May 2020)

To enhance co-operation between the legal communities, Shardul Amarchand Mangaldas & Co and DLA Piper, Australia and Europe, held a joint seminar for their respective Arbitration Practice Groups, to discuss current challenges faced in various jurisdictions. **Tejas Karia (Partner, Head-Arbitration)** spoke extensively on "*Artificial Intelligence and Virtual Hearings*", **Rishab Gupta (Partner)** discussed "*Enforcement of Foreign Awards*", and **Ila Kapoor (Partner)** elaborated on "*Seat and Venue of Arbitration: An ever-growing conundrum*".

MNLU Webinar (28 May 2020)

The Maharashtra National Law University, Aurangabad (MNLU) organised a webinar on "*ADR as a way to move forward in resolving disputes: A Success*", where **Gauhar Mirza (Principal Associate)** spoke on the evolution of the alternative dispute resolution mechanism and its significance in recent times.

Webinar on Contemporary Implications in ADR (30 May 2020)

MyLegalStudio in association with the Centre for Arbitration and Mediation of Geeta Institute of Law organised a webinar on "*Contemporary implications in ADR*", where **Gauhar Mirza (Principal Associate)** and **Hiral Gupta (Associate)** were the speakers.

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ILSCA Webinar I (6 June 2020)

As part of its webinar series, the ILS Centre for Arbitration and Mediation (ILSCA) conducted an interactive webinar on "*Role of Institutional Arbitration in India post COVID-19*". **Tejas Karia (Partner, Head-Arbitration)** was the speaker in the webinar and **Gauhar Mirza (Principal Associate)** was the moderator.

University of Delhi National Webinar (20 June 2020)

The Law Centre-II, University of Delhi organised a national webinar on "*Effect of COVID-19 on Legal Profession and the Road Ahead*". **Tejas Karia (Partner, Head-Arbitration)** was a panellist in the webinar.

Corporate Law Journal Webinar (29 June 2020)

The Corporate Law Journal organised a webinar on "*ADR & Sustainability during COVID-19: Present and Future*", where **Gauhar Mirza (Principal Associate)** spoke on the need of the alternative dispute resolution mechanism and the steps taken by arbitral institutions to promote arbitration.

Kluwer Meet Up (2 July 2020)

Wolters Kluwer and IDEX Legal organised the Meet Up on "*Reimagining the Future of Arbitration - Adapting Post COVID-19*", which discussed the impact of technology-driven arbitration, revisiting ethics and code of conduct, and issues relating to data privacy. **Tejas Karia (Partner, Head-Arbitration)** was a speaker at this event.

RMLNLU Webinar (3 July 2020)

The Ram Manohar Lohiya National Law University (RMLNLU) organised a webinar on "*Arbitration during COVID-19: Adequacy of the Indian Regime*". The webinar focused on the practical, strategic and legal considerations involved in the shift to virtual arbitrations. **Ila Kapoor (Partner)** was a speaker and **Ananya Aggarwal (Senior Associate)** was the moderator at this event.

RGNUL Masterclass (4-5 July 2020)

The Centre for Alternative Dispute Resolution, RGNUL with LexADR and Bar & Bench organised a Masterclass wherein **Tejas Karia (Partner, Head-Arbitration)** spoke extensively on "*Virtual Hearings in Arbitration*" on 4 July 2020 and "*Artificial Intelligence in Arbitration*" on 5 July 2020.

Forum for International Dispute Resolution and Triumvir Law Webinar (10 July 2020)

The King's College London Forum on International Dispute Resolution in collaboration with Triumvir Law and the Asia Pacific Forum for International Arbitration organised the 2nd Webinar of their Investment Arbitration Talk Series on the topic "*Enforcement of Investment Arbitration Awards in India: One Step Forward, Two Steps Back*". **Rishab Gupta (Partner)** was a panellist at this event.

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ILSCA Webinar II (11 July 2020)

As part of its webinar series, ILSCA conducted another interactive webinar on "*Arbitration and Conciliation (Amendment) Act, 2019: A Critical Analysis*". Hon'ble Mr. Justice A.P. Shah (Retd.) and **Tejas Karia (Partner, Head-Arbitration)** were the speakers in the webinar, and **Avlokita Rajvi (Senior Associate)** was the moderator.

ICCK Webinar (16 July 2020)

The Indian Chamber of Commerce in Korea (ICCK) conducted a webinar on "*Doing Business in India: Opportunities for Korean Investors*". **Ila Kapoor (Partner)** spoke on "*Effective Management of Disputes*", which included a focus on managing disputes in the time of the COVID-19 pandemic.

Legal Sarcasm and SPRED LAW Webinar (25 July 2020)

Legal Sarcasm and SPRED LAW organised a webinar on "*Sustainability of Alternate Dispute Resolution during and after COVID-19 Era*", in which **Gauhar Mirza (Principal Associate)** was the speaker.

Fireside Chat with Ms. Catherine Dixon (29 July 2020)

The Chartered Institute of Arbitrators (CIArb), India hosted a fireside chat with Ms. Catherine Dixon, Director General, CIArb, UK on "*CIArb: Milestones and The Road Ahead*". **Tejas Karia (Partner, Head-Arbitration)** co-hosted the fireside chat with Ms. Dixon.

AIAC Webinar (30 July 2020)

The Asian International Arbitration Centre (AIAC) conducted a webinar titled "*MESA Energy, Infrastructure & Resource Disputes: Avoidance and Resolution in 2020s*", in which **Tejas Karia (Partner, Head-Arbitration)** discussed the "*South Asia Perspective on Energy, Infrastructure and Resource disputes – India focused*".

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Upcoming Events

MCCI Arbitration Webinar (6 August 2020)

The Madras Chamber of Commerce and Industry (MCCI) Arbitration, Mediation and Conciliation Centre is organising a webinar on "*Role of Institutional Arbitration – Recent Developments to boost Institutional Arbitration in India*". **Tejas Karia (Partner, Head – Arbitration)** will be the speaker in the webinar.

Panel Discussion on Effective Management of Litigation and Arbitration (11 August 2020)

Shardul Amarchand Mangaldas & Co is organising a webinar on the "*Effective Management of Litigation and Arbitration*" comprising of two panel discussions, with Mr. Harish Salve QC as the main panellist for both the discussions. The topic of the first panel discussion is the "*Blueprint for successfully managing litigation before Courts*". This session will be moderated by **Pallavi Shroff (Managing Partner and National Practice Head-Dispute Resolution)** and **Siddhartha Datta (Partner)** will be one of the panellists. The topic of the second panel discussion is "*Strategies for effectively managing an arbitration - institutional and ad-hoc perspective*". This session will be moderated by **Tejas Karia (Partner, Head – Arbitration)**, and **Rishab Gupta (Partner)**, **Ila Kapoor (Partner)** and **Nitesh Jain (Partner)** will be panellists.

Publications

Ila Kapoor (Partner) and **Ananya Aggarwal (Senior Associate)**, *COVID lockdown: When you can't litigate, arbitrate*, Financial Express (6 May 2020). Click here

Ila Kapoor (Partner) and **Shruti Sabharwal (Principal Associate)**, *Is "public policy" back to haunt enforcement in India?*, Global Arbitration Review (7 May 2020). Click here

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Endnotes

1 Authored by Nitesh Jain, Partner and Shambhavi Pandey, Associate; *Banyan Tree Growth Capital LLC v. Axiom Cordages Ltd.*, Commercial Arbitration Petition No. 476/2019, Bombay High Court, 2020 SCC Online Bom 781, judgment dated 30 April 2020.
Coram: G.S. Kulkarni, J.

2 2019 SCC OnLine Bom 732.

3 *MCX Stock Exchange Ltd. v. Securities & Exchange Board of India & Ors.*, 2012 SCC OnLine Bom 397.

4 *IDBI Trusteeship Services Ltd. v. Hubtown Ltd.*, 2018 SCC OnLine SC 2795.

5 2020 SCC OnLine SC 177.

6 (2014) 2 SCC 433.

7 (2011) 14 SCC 66.

8 (2019) 9 SCC 209.

9 Authored by Ila Kapoor, Partner, Ananya Agarwal, Senior Associate and Mitali Daryani, Associate; *Suryadev Alloys and Power Pvt. Ltd. v. Shri Govindaraja Textiles Pvt. Ltd.*, O.P. Nos. 955/2019 and 15/2020, Madras High Court, judgment dated 8 May 2020.
Coram: P.T. Asha, J.

10 (2010) 2 SCC 385.

11 Authored by Tejas Karia, Partner & Head-Arbitration, Gauhar Mirza, Principal Associate and Hiral Gupta, Associate; *South East Asia Marine Engineering and Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd.*, Civil Appeal No. 673 of 2012, Supreme Court, 2020 SCC OnLine SC 451, judgment dated 11 May 2020.
Coram: N.V. Ramana, Mohan M. Shantanagoudar and Ajay Rastogi, JJ.

12 2019 SCC OnLine SC 1656.

13 (2015) 3 SCC 49.

14 (2019) 15 SCC 131.

15 Authored by Siddhartha Datta, Partner, Surabhi Binani and Sejal Agarwal, Associates; *DDA v. Tara Chand Sumit Construction Co.*, O.M.P. (Misc.) (Comm) No. 236 of 2019, Delhi High Court, judgment dated 12 May 2020.
Coram: Jyoti Singh, J.

16 Misc. Civil Application (O.J.) No. 1 of 2018, Gujarat High Court.

17 2019 SCC Online Bom 1437.

18 Authored by Tejas Karia, Partner & Head-Arbitration, Gauhar Mirza, Principal Associate and Manavendra Gupta, Associate; *Jackie Kukubhai Shroff v. Ratnam Sudesh Iyer*, Arbitration Petition No. 167 of 2015, Bombay High Court, 2020 SCC OnLine Bom 647, judgment dated 19 May 2020.

Coram: S.C. Gupte, J.

19 (2015) 3 SCC 49.

20 Authored by Tejas Karia, Partner & Head-Arbitration, Gauhar Mirza, Principal Associate and Nishant Doshi, Associate; *Patel Engineering Ltd. v. North Eastern Electric Power Corporation Ltd.*, Special Leave Petition (Civil) Nos. 3584-3585 of 2020, Supreme Court, 2020 SCC OnLine SC 466, judgment dated 22 May 2020.
Coram: R. Banumathi, Indu Malhotra and Aniruddha Bose, JJ.

21 (2003) 5 SCC 705.

22 (2014) 9 SCC 263.

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