



## Calcutta High Court holds that Indian courts may grant anti-arbitration injunctions against foreign-seated arbitrations<sup>1</sup>

### Brief Facts

Balasore Alloys Limited (“**Plaintiff**”), an Indian company, and Medima LLC (“**Defendant**”), a US company, entered into an exclusive arrangement in 2017 for distribution and sale by the Defendant of goods manufactured by the Plaintiff. A retrospectively applicable “Agency Agreement”, which was an umbrella agreement, was executed in 2018 (“**Agreement**”). It was governed by English laws and provided for arbitration under the rules of the International Chamber of Commerce (“**ICC**”) in London. However, individual sale and purchase contracts issued under the Agreement from time to time required the Arbitration and Conciliation Act, 1996 (“**Act**”) to apply and Kolkata was designated as the seat of arbitration. Disputes arose between the parties and ICC arbitration proceedings were initiated by the Defendant. The Plaintiff moved the Calcutta High Court (“**Court**”) seeking an injunction against the ICC proceedings since it sought to rely on the arbitration agreement in the purchase orders for a domestic arbitration. The matter was heard at the ad-interim stage.

### Issues

**Issue (i):** Does the Court have the power and jurisdiction to grant an anti-arbitration injunction against a foreign-seated arbitration, and if so, under what circumstances?

**Issue (ii):** If the answer to the above question is in the affirmative, do the facts and circumstances in the present case warrant the grant of such an ad-interim injunction?

### Judgment

**Issue (i):** The Court relied on **SBP & Co. v. Patel Engineering**<sup>2</sup> to hold that civil courts in India have the power to grant anti-arbitration injunctions against a foreign-seated arbitration, however, this power is to be used sparingly and with abundant caution. The Court relied on **Modi Entertainment Network v. W.S.G. Cricket**<sup>3</sup> and **Devi Resources Limited v. Ambo Exports Ltd.**<sup>4</sup> to determine the circumstances to be considered before the grant of an anti-arbitration injunction. The Court emphasised that where parties

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have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-arbitration injunction will be granted. The burden of establishing that the forum of choice is a forum *non-conveniens* or that the proceedings therein are oppressive or vexatious, would be on the party so contending.

**Issue (ii):** Applying the principles laid down in *Modi Entertainment (supra)*, the Court found that the Plaintiff had failed to conclusively discharge its burden of establishing that the ICC in London, the alternate forum in this case, is either a forum *non-conveniens* or that the proceedings initiated before it by the Respondent are oppressive or vexatious in nature. The Court also held that the Plaintiff had not shown how the arbitration clause in the Agreement was inoperative or incapable of being performed. The Court further pointed out that the pleas taken by the Plaintiff before the ICC highlight the Plaintiff's conduct in subjecting itself to ICC's jurisdiction and its acquiescence to a sole arbitrator. Taking all these factors into account, the Court did not find any reason to grant an ad-interim order for an anti-arbitration injunction and therefore, declined the Plaintiff's prayer for restraining the ICC proceedings.

The Court, while summarising its conclusions, also held that when a

contract provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then the terms of the referred contract with regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is a special reference to the arbitration clause also. In light of the same, the purchase contracts would be governed by the domestic arbitration clause in the purchase orders and not the Agreement, as the same is repugnant to the arbitration clause in the purchase orders. However, where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it, ordinarily no injunction will be granted in regard to proceedings in such a *forum conveniens* and favoured forum. This is because it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to the non-exclusive jurisdiction of the court of their choice, which cannot be treated just as an alternative forum.

### Analysis

The present case stands as a reminder to contracting parties to amend and/or to refrain from entering into agreements with disparate arbitration clauses. Even while clarifying that Indian courts may grant an injunction restraining foreign-seated arbitrations, the present judgment

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has set the burden quite high for a party seeking such an injunction, who has to establish that a neutral foreign forum is vexatious or oppressive. Courts will not interfere, even in cases involving potential multiplicity of proceedings, if these parameters are not met. The Court has also touched upon the scope of arbitration clauses in umbrella agreements, like the Agreement in

question, by holding that such clauses will govern all aspects of the agreement. What will be worthwhile to see is how the issue of multiplicity of proceedings is tackled and what will be the scope of the arbitration before the ICC. Since the order was passed at the ad-interim stage, the final judgment passed by the Court in this matter may provide more clarity and finality.

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### Endnotes

1 Authored by Siddhartha Datta, Partner, and Surabhi Binani and Sejal Agarwal, Associates; *Balasure Alloys Limited v. Medima LLC*, General Application No. 871 of 2020 in Civil Suit No. 59 of 2020, Calcutta High Court, judgment dated 12 August 2020.

**Coram:** Shekhar B. Saraf, J.

2 (2005) 8 SCC 618.

3 (2003) 4 SCC 341.

4 APO No. 430 of 2017 decided on 13 February 2019.

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