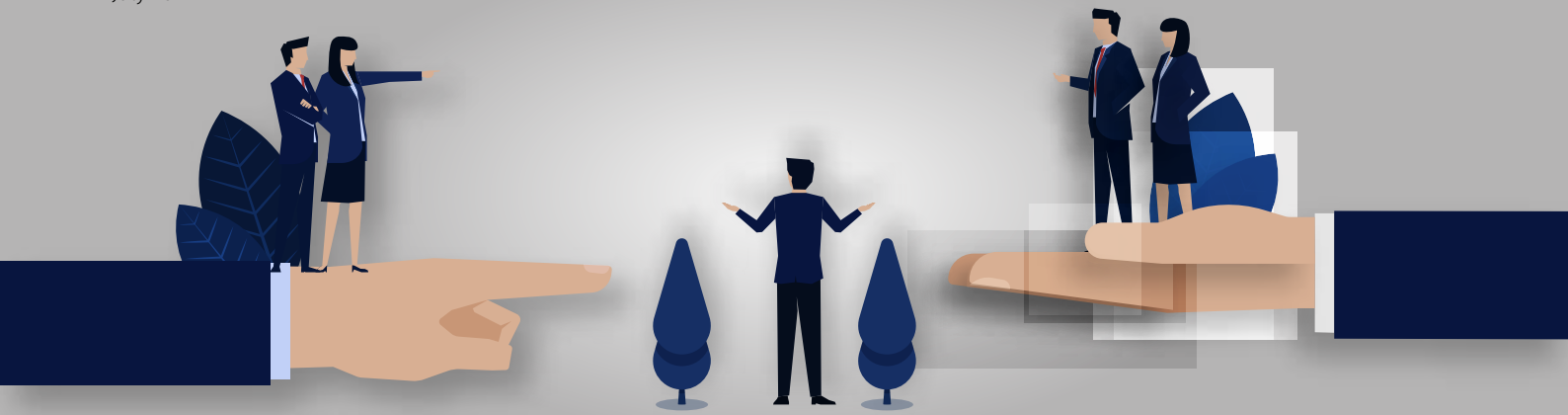


July 2021



High Court of Delhi holds that a foreign State cannot claim sovereign immunity against enforcement of an arbitral award arising out of a commercial transaction¹

Brief Facts

The Petitioners, KLA Const Technologies Pvt. Ltd. (“**KLA**”) and Matrix Global Pvt. Ltd. (“**Matrix**”), filed two separate petitions under Section 36 of the Arbitration and Conciliation Act, 1996 (“**Act**”) before the High Court of Delhi (“**Court**”), seeking enforcement of arbitral awards against the Embassy of Islamic Republic of Afghanistan (“**Afghanistan**”) and the Ministry of Education, Federal Democratic Republic of Ethiopia (“**Ethiopia**”) respectively (“**Enforcement Petitions**”).

The brief facts in KLA’s case are that Afghanistan had awarded a contract to KLA for rehabilitation of its Embassy in New Delhi. Disputes arose between the parties during the course of execution of work, pursuant to which KLA initiated arbitration against Afghanistan in India. Afghanistan appeared in the arbitration till a certain date, after which it stopped appearing. The arbitrator passed an *ex parte* award partially allowing KLA’s claims.

The brief facts in Matrix’s case are that Matrix had entered into a contract for supply and distribution of books in Ethiopia for a certain consideration. Matrix raised several invoices but Ethiopia only made partial payments and cancelled the contract. Matrix initiated arbitration in India to recover its balance payment. Ethiopia did not appear in the arbitration and the arbitrator passed an *ex parte* award in favour of Matrix.

The awards passed in favour of KLA and Matrix had attained finality pursuant to which the Enforcement Petitions were filed. The Enforcement Petitions were heard *ex parte* as the Respondents did not appear despite service of the Petitions. During the pendency of the Enforcement Petitions, the Court directed the Central Government to examine whether the Petitioners would be required to take the Central Government’s consent under Section 86(3) of the Code of Civil Procedure, 1908 (“**CPC**”) for enforcement of these awards. The Central Government informed the Court that such consent is not necessary as execution proceedings in respect of an arbitral award cannot be regarded as a ‘Suit’ for the purposes of Section 86(3).

The Petitioners contended that: (i) there is no requirement for obtaining the consent of the Central Government under Section 86(3) of the CPC for execution of an arbitral award against a foreign State and this requirement cannot be imported as strict principles of CPC

In this Issue

Brief Facts

Issues

Judgment

Analysis





do not apply to arbitration proceedings; (ii) an award passed in an international commercial arbitration held in India would be construed as a “*Domestic Award*” under the Arbitration Act and would be enforceable under Section 36 of the Act; (iii) the legal fiction created under Section 36 is for the limited purpose of enforcing an arbitral award as a “*decree*” of the Court by providing it an associated legitimacy and validity, and is not intended to make it a decree under the CPC; (iv) a foreign State does not have sovereign immunity against an arbitral award arising out of a commercial transaction; and (v) an arbitration agreement constitutes a waiver of sovereign immunity.

Issues

Issue (i): Whether the prior consent of the Central Government is necessary under Section 86(3) of the CPC to enforce an arbitral award against a foreign State?

Issue (ii): Whether a foreign State can claim sovereign immunity against enforcement of an arbitral award arising out of a commercial transaction?

Judgment

Issue (i): The Court *inter alia* held that the Central Government is not required to give its consent under Section 86(3) of the CPC for enforcement of an arbitral award against a foreign State. This is because Section 36 of the Act treats an arbitral award as a “*decree*” of a Court for the limited purpose of enforcing an award and not for the purposes of CPC. Section 36 cannot be read in a manner that would defeat the underlying rationale of the Act, namely speedy, binding, and legally enforceable resolution of disputes.

Additionally, the Court held that a foreign State cannot contend that its consent must be sought again at the stage of enforcement, in ignorance of the fact that the award itself is an outcome of a voluntary arbitration process.

Issue (ii): The Court held that an arbitration agreement in a commercial contract between a party and a foreign State constitutes an implied waiver of the defence of sovereign immunity by the foreign State against enforcement of an award. Once a foreign State enters into a commercial transaction and opts to wear the hat of a commercial entity, it cannot seek sovereign immunity, i.e. sovereign immunity is available to a State only when it is acting in its sovereign capacity and not otherwise. The purpose and nature of the transaction would be the determining factors in ascertaining the true nature of the foreign State’s activity. The Court also noted that if foreign States are permitted to frustrate enforcement of arbitral awards by pleading sovereign immunity, the very edifice of international commercial arbitration would collapse.

The Court directed the Respondents to deposit the respective award amounts within four weeks, failing which the Petitioners were granted liberty to seek attachment of the Respondents’ assets.

Analysis

The present decision is yet another remarkable attempt by the Court to ensure that Indian arbitration law aligns with international arbitration jurisprudence and that it is not plagued with the rigours of domestic procedural laws. The Court has reinforced that an arbitration

In this Issue

Brief Facts

Issues

Judgment

Analysis



agreement, when entered into for purely commercial purposes, is binding on all signatories, even if one of the parties is a sovereign State. The Court conclusively held that once a sovereign State enters into a contract purely for commercial purposes, it is bound by the dispute resolution mechanism it has voluntarily consented to. This judgment will assure private parties, who enter into commercial contracts with sovereign States, that the fruits of awards passed in their favour under such contracts will be adequately protected and that these awards will not end up being mere paper decrees.

In this Issue

Brief Facts

Issues

Judgment

Analysis

Endnotes

- ¹ Authored by Ila Kapoor, Partner, Ananya Aggarwal, Principal Associate and Akriti Kataria, Associate; *KLA Const Technologies Pvt. Ltd. v. The Embassy of Islamic Republic of Afghanistan*, OMP (ENF) (COMM) 82/2019 & I.A. No. 7023/2019 and *Matrix Global Pvt. Ltd. v. Ministry of Education, Federal Democratic Republic of Ethiopia*, OMP (EFA) (COMM) 11/2016 & E.A. No. 666/2019, High Court of Delhi, 2021 SCC OnLine Del 3424, judgment dated 18 June 2021.

Coram: J.R. Midha J.

PRACTICE AREA EXPERTS

Pallavi Shroff

Managing Partner and
National Practice Head Dispute Resolution
+91 98100 99911
E: pallavi.shroff@AMSShardul.com

Rishab Gupta

Partner
+91 98217 80313
E: rishab.gupta@AMSShardul.com

Binsy Susan

Partner
+91 96500 80397
E: binsy.susan@AMSShardul.com

Gauhar Mirza

Partner
+91 70423 98844
E: gauhar.mirza@AMSShardul.com

Tejas Karia

Partner and Head, Arbitration Practice sub-group
+91 98107 98570
E: tejas.karia@AMSShardul.com

Siddhartha Datta

Partner
+91 90070 68488
E: siddhartha.datta@AMSShardul.com

Aashish Gupta

Partner
+91 98189 19857
E: aashish.gupta@AMSShardul.com

Shruti Sabharwal

Partner
+91 98107 46183
E: shruti.sabharwal@AMSShardul.com

Anirudh Das

Partner
+91 98100 98329
E: anirudh.das@AMSShardul.com

Ila Kapoor

Partner
+91 98717 92737
E: ila.kapoor@AMSShardul.com

Smarika Singh

Partner
+91 97170 98075
E: smarika.singh@AMSShardul.com

Disclaimer

This is intended for general information purposes only. It is not a substitute for legal advice and is not the final opinion of the Firm. Readers should consult lawyers at the Firm for any specific legal or factual questions.