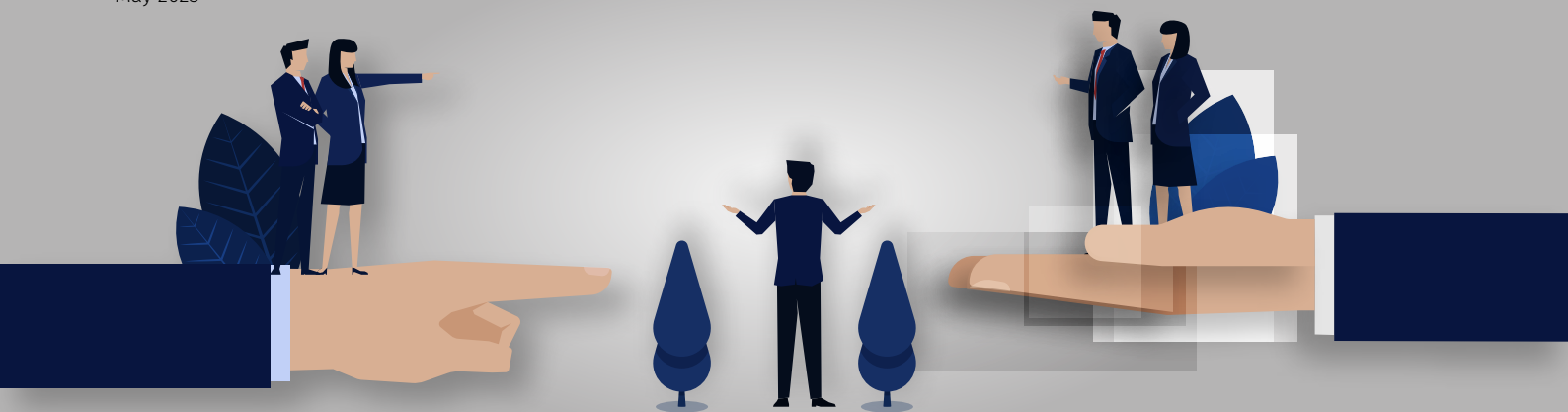


May 2023



High Court of Bombay rejects allegations of bias against the tribunal and enforces a foreign award under Section 48 of the Arbitration and Conciliation Act, 1996¹

Brief Facts

HSBC PI Holdings (Mauritius) Limited (“**HSBC**”) entered into a Share Subscription Agreement (“**Agreement**”) with Avitel Post Studioz Limited (“**Avitel**”) for the investment of USD 60 million. Prior to and during the execution of the Agreement, Avitel made several representations and undertakings that the invested monies would be utilised for the fulfillment of a contract with the British Broadcasting Corporation worth USD 1-1.3 billion. An amended shareholders agreement was also executed subsequently as a condition of completion.

It thereafter came to light that there were several discrepancies regarding the legitimacy, business operations and clientele of Avitel. Disputes arose when it was revealed that Avitel had shut down and it was not operating, and that it neither had any relationship with the British Broadcasting Corporation, nor had any contract with it. It was alleged that the monies invested by HSBC were siphoned out of the Avitel group through payments made to fake suppliers and/or service suppliers, allegedly owned by Avitel.

In light of these disputes, HSBC initiated arbitration proceedings. As per the Agreement, the law governing the contract was Indian law and the jurisdiction was Singapore. The arbitration was to be conducted in accordance with the Rules of the Singapore International Arbitration Centre and Part I of the Arbitration and Conciliation Act, 1996 (“**Act**”) was excluded, with the exception of Section 9 of the Act. Avitel participated in the arbitration, and the arbitration culminated in an award wherein Avitel was directed to pay HSBC a sum of USD 60 million.

HSBC thereafter approached the High Court of Bombay (“**Court**”) under Section 9 of the Act, seeking the deposit of USD 60 million by Avitel. The interim relief sought for by HSBC was granted. HSBC also filed a petition under Section 48 of the Act before the Court seeking enforcement of the award (“**Section 48 Petition**”).

The order was unsuccessfully challenged by Avitel before the Supreme Court. The Supreme Court, while rejecting Avitel’s Special Leave Petition, directed it to deposit the sum of USD 60 million. These directions were disobeyed and further action followed for contempt.

In the Section 48 Petition, Avitel raised several grounds to resist enforcement but only pressed into service the ground of bias against the chairperson of the tribunal, Mr. Christopher Lau, SC and the emergency arbitrator, Mr. Thio Shen Yi.

Avitel’s sole contention was the allegation of bias due to the purported conflict of interest between HSBC, and Mr. Lau and Mr. Shen Yi. It was contended that there existed business

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interests between affiliates of HSBC, and Mr. Lau and Mr. Shen Yi, thereby clearly giving rise to bias. It was emphasised that in the facts and circumstances of the present case, there was a duty of disclosure on the part of the said arbitrators about their alleged relationship with HSBC and due to their failure to make such disclosure, the foreign award was rendered unenforceable. It was also contended that the gateway of Section 48 of the Act would have to be met, without which enforcement of a foreign award would not be possible.

HSBC contended that there existed no bias whatsoever and that if situations in a particular case were covered by clauses under the exhaustive International Bar Association Guidelines on Conflicts of Interest in International Arbitration (“**IBA Guidelines**”), it was impermissible to entertain contentions of bias beyond its scope and ambit. Emphasis was laid on judgments of the Supreme Court to elucidate the narrow scope available to courts while dealing with objections to the enforcement of a foreign award under Section 48 of the Act.

Issue

Whether the foreign award was enforceable under Section 48 of the Act given allegations of bias against the arbitral tribunal?

Judgment

Rejecting Avitel’s contentions, it was held that: (i) if the facts and circumstances of the case did not give rise to the requirement of disclosure by the arbitrators, there could be no bias at all; and (ii) for an award to be against the public policy of India, it ought to be clearly established as such and in the absence thereof, the award cannot be said to be against the public policy of India and rendered unenforceable.

Accepting HSBC’s contentions and its reliance on the judgments of the Supreme Court in **Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors.**² and **Renusagar Power Co. Ltd. v. General Electric Co.**³ as regards the tendency of award debtors to indulge in speculative litigation while resisting enforcement of foreign awards and the narrow scope of Section 48 of the Act, it was observed that Avitel indulged in speculative litigation.

Noting the New York Convention and the above judgments of the Supreme Court, it was observed that there existed a pro-enforcement bias in such cases. While adjudicating cases where the element of bias, conflict of interest and duty of disclosure are contended, the court is expected to adopt a pragmatic and commonsensical approach.

The Court further opined that the position of law in the backdrop of the IBA Guidelines is clear and there is no question of any mud sticking to the foreign award in the present case, which deserves to be enforced. The Court acknowledged that the IBA Guidelines can be said to be part of the public policy of India but that Avitel was not able to show any violation of these Guidelines. Avitel’s contention that the present circumstances were not specifically covered under the red lists or orange list of the IBA Guidelines, but that there existed a duty of disclosure on the part of the arbitrator, did not find favour with the Court. Even assuming that such a duty existed, it was held that the court would examine such bias under the reasonable third person test under clause 2(b) of the IBA Guidelines. Avitel had to therefore demonstrate from the point of view of a reasonable third person, having knowledge of the relevant facts, that justifiable doubt had arisen as to the impartiality or independence of the arbitrators. Applying the said test, the Court held that Avitel had failed to demonstrate that the chairperson and emergency arbitrator were under a duty of disclosure and that having failed to do so, a likelihood of bias had arisen.

Applying the said position of law to the present case, it was held that HSBC was entitled to enforce the foreign award and that Avitel’s objections deserved to be rejected.

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The High Court of Bombay has adopted a welcome pro-enforcement approach, which amplifies India's efforts to be seen as a pro-arbitration destination. The grounds raised by Avitel were found to be too remote and far-fetched to constitute bias. The Court recognised that unsuccessful parties would go to any lengths to resist enforcement and that the approach in dealing with such cases should be circumspect so as to allow award debtors minimal maneuverability in their attempts to escape liability under arbitral awards.

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Endnotes

- 1 Authored by Karan Joseph, Partner and Anish John, Associate; *HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Private Limited & Ors.*, Arbitration Petition No. 833/2015, High Court of Bombay, 2023 SCC OnLine Bom 901, judgment dated 25 April 2023.
Coram: Manish Pitale, J.
- 2 (2020) 11 SCC 1.
- 3 1994 Supp. (1) SCC 644.

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