

Recognition and Enforcement of Arbitral Awards

Consideration of challenges which seek
to render an Award unenforceable

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Introduction

- Indian courts have made huge strides in this area since the decision of the Supreme Court in *BALCO v Kaiser Aluminium Technical Services Ltd.*, (2012) 9 SCC 552.
- Effect of the 246th Law Commission Report and the 2015 amendments is to narrow the grounds to challenge ICA and foreign awards.
- The decision of the Supreme Court in *HCC v Union of India*, 2019 SCC OnLine SC 1520 (“**HCC**”) is a further step towards the faster enforcement of Arbitral Awards.

- *HCC* and subsequent decisions of various High Courts are effective ways of enforcing Awards pending consideration of their challenge. The recent decision of the Delhi High Court in *NHPC v HCC OMP* (Comm.) 484/2020 is illustrative of this trend.
- However, at the end of the day, a challenge is still required to be considered on its merits.

Principles for consideration of challenges are well defined

- Apart from the provisions of the Arbitration & Conciliation Act 1996, three helpful guides in *Associate Builders v. Delhi Development Authority*, [2015] 3 SCC 49 and *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India* 2019 SCC Online SC 677 and *Vijay Karia*, 2020 SCC OnLine SC 177.
- The judgment of the High Court of Delhi in *Campos Brothers Farms v. Matru Bhumi Supply Claim Pvt. Ltd.* 2019 SCC OnLine Del 8350, whose dicta was accepted by the Supreme Court in *Vijay Karia* is useful:

*“51. As noted above, the respondent nos. 1 and 2 had raised a preliminary objection challenging the maintainability of the arbitration proceedings under the aegis of TNA. It may be true that they have not contended before this Court the basis on which they were challenging the maintainability of the proceedings either before the TNA or the Arbitrator, and have raised fresh ground for such challenge before this Court, at the same time, as noted above, **at no time the TNA or the Arbitrator gave any finding on the maintainability of the arbitration proceedings....***

*55. In any case, the respondent nos. 1 and 2 had also made submissions on merit before the Arbitrator. Though the learned counsel for the petitioner submitted that the same were rightly excluded from consideration by the Arbitrator as the Arbitrator had never sought for the OMP (EFA.) (Comm.) No.1/2017 Page 21 same, **the Award does not reflect any such reason given by the Arbitrator for excluding them from consideration. The Arbitrator does not record a finding that she has intentionally 51, 55, 56, 76, 81, 91 21 3 ignored such submissions as they were filed belatedly or beyond what was permitted. Infact, as noted above, as per the Arbitrator no submission was filed by the respondents by 13.06.2016, which is factually incorrect.***

56. In exercise of powers under Section 48 of the Act, this Court cannot consider the submissions made by the respondent nos. 1 and 2 in their e-mail dated 13.06.2016 on merit as if it is a Court of Original Jurisdiction and find out whether such submission of the respondent nos. 1 and 2 had any merit or not. **Once it is found that the Arbitrator has ignored the submissions of a party in totality, whatever be the merit of the submissions, in my opinion, such Award cannot be enforced being in violation of the Principles of Natural Justice and contrary to the public policy of India as stated in sub-Section 2(b) read with Explanation 1(iii) of Section 48 of the Act....**

76... This Court, in exercise of its power under Section 48 and 49 of the Act, cannot supplant such reasons by considering the claims and defence of the parties on merit. Whether the request of the respondent no. 1 to the petitioner to make shipments in the name of respondent no. 2 under Contracts that had been executed between the petitioner and respondent no. 1, would entitle the petitioner to file a consolidated statement of claim against respondent nos. 1 and 2 or not, was an issue to be determined by the Arbitrator and reasons for such determination were to be given in the Award. From a reading of the Award it seems that the Arbitrator **was neither alive to the issue of whether such claims against different contractors can be consolidated as one, nor was she alive to the fact that joint and several liability cannot be fastened on respondent nos. 1 and 2 without lifting the corporate veil and giving reasons for the same. The Award in question clearly qualifies as a non-speaking Award”....**

81. In any case, as noted above, if the arbitrator had considered this issue giving reasons therefore, this Court may not have the power under Section 48 of the Act to test the validity of such reasons, **however, for her conclusion but infact, the Award indicates that the Arbitrator is not even alive to such an issue....**

91. In view of the above, **I refuse the enforcement of the Award dated 25.07.2016 passed by the Sole Arbitrator and consequently dismiss the present petition..”**

(emphasis supplied)

Certain relevant international decisions from Singapore

- *Soh Beng Tee & Co. Pte. Ltd v. Fairmount Development Pte. Ltd*, [2007] SGCA 28: A determination based on a “live issue”
- *JVL Agro Industries Ltd. v. Agritrade International Pte. Ltd.* [2016] SGHC 126: Could the Tribunal have adopted a “chain of reasoning” not advanced by the parties.
- *Front Row Investment Holdings (Singapore) Pte. Ltd v. Daimler South East Asia Pte. Ltd.* [2010] SGHC 80: Where submissions disregarded as the Tribunal made no effort to understand them.
- *G.D. Midea Air Conditioning Equipment Co. Ltd. v. Tornado Consumer Goods Ltd.* [2017] SGHC 193: Did the Tribunal determine an issue which was not submitted to it.

- *TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte. Ltd.* [2013] SGHC 186: “[W]hen a challenge was brought against an award, the court had a duty to entertain and engage the challenge” and that “invariably, the court had to look at the evidence on record to determine the merits of the challenge.”
- *AKM v. AKN* [2014] SGHC 148 and *AKN v. ALC* [2015] SGCA 1: “the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration.”

Practical way to consider challenges to the recognition and enforcement of awards

- The practical way to proceed is to set out a format for submissions based on the Arbitration & Conciliation Act based on the grounds for challenging/resisting enforcement under the Arbitration and Conciliation Act, 1996.

Violation of section	Nature of violation	Finding of the arbitral tribunal	Reference to pleadings/evidence from the arbitral record	Respondent's response to the challenge

- Indian Courts can lead the way by following this approach.

Thank you.