

Commercial Courts vis-à-vis Arbitration and Interpretation of Contracts under the Act

- NEWLY AMENDED SECTION 20 OF THE SPECIFIC RELIEF ACT
- NEW YORK CONVENTION ON ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

IMPACT OF AMENDED SECTION 20 **OF THE SPECIFIC RELIEF ACT**

SECTION 20 PRIOR TO THE 2018 AMENDMENT

Discretion as to decreeing specific performance. — (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

SECTION 20 POST 2018 AMENDMENT

Substituted performance of contract.—(1) Without prejudice to the generality of the provisions contained in the Indian Contract Act, 1872 (9 of 1872), and, except as otherwise agreed upon by the parties, where the contract is broken due to non-performance of promise by any party, the party who suffers by such breach shall have the option of substituted performance through a third party or by his own agency, and, recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach.

SUBSTITUTED PERFORMANCE OF CONTRACT

- ❖ The newly amended Section 20 provides an option to a party to a contract to have the contract performed through a third party or through their own agency when the terms of the contract have been broken by the other party. The party who suffers the breach may recover the costs or expenses incurred in the process, from the party who committed the breach.
- ❖ The important conditions for the applicability of section 20 are that:
 1. A breach must have been caused due to non-performance;
 2. A notice of thirty days must be given to the other party to give an opportunity for performance of the contract to ensure that no breach is caused at all;
 3. On the failure of the other party to respond or comply with such notice, the party may approach a third party to have the contract performed.

POWER OF ARBITRATOR TO GRANT SPECIFIC PERFORMANCE

- ❖ Order of specific performance not within the realm of arbitrator's jurisdiction- *Sulochana Uppal vs. Surinder Sheel Bhakri* AIR 1991 Del 138
- ❖ Arbitrator can grant specific performance- *Fertiliser Corp of India vs. Chemical Construction Corp* ILR 1974 Bom 856; *Keventer Agro Ltd. vs. Seegram Comp Ltd*
- ❖ Controversy settled in *Olympus Superstructures Pvt Ltd v Meena Vijay Khetan* (1991) 5 SCC 651- Claims for specific performance are arbitrable
- ❖ *Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd.* followed this view.

POWER OF ARBITRATOR IN CASE OF SUBSTITUTED PERFORMANCE

- ❑ There have been no decisions of the courts in 3 years of enactment of the amendment act on the relief per se, however, the question of applicability of the Specific Relief Act has been dealt with by the courts.
- ❑ Thus, there have been no cases in Indian litigation or arbitration proceedings which delve into the answers relating to powers of arbitrator in case of substituted performance (section 20). However, such provision shall be governed by the decisions of the Supreme Court, as stated above, which clarify that claims falling within the realm of Specific Relief Act shall be arbitrable.

NEW YORK CONVENTION ON ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959
- The two basic actions contemplated by the New York Convention are the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.
- The party against whom enforcement is sought can object to the enforcement by submitting proof of one of the grounds for refusal of enforcement which are limitatively listed in Article V(1). The court may on its own motion refuse enforcement for reasons of public policy as provided in Article V(2).
- India is a signatory to the New York Convention.
 - Part II of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015, deals with enforcement of certain foreign awards.
 - This Part in its first chapter follows the rules laid down under the New York Convention in relation to enforcement of foreign awards.

DECISIONS OF THE COURTS IN INDIA

- ✓ *Renusagar Power Co. Ltd. vs. General Electric Co. (1994 Supp (1) SCC 644)*

First, it held that the term “public policy” in Section 7(1)(b)(ii) of the 1961 Act referred to the public policy of India and not the public policy of New York. It based this conclusion on Article V(2)(b) NYC, which it found to clearly refer to the public policy of the country enforcing the award. Second, it held that the award was not contrary to the public policy of India. The Court found that no aspect of the award or interest was excessive or unjust, and therefore enforcing the award would not be contrary to India's public policy.

- ✓ *Vijay Karia vs. Prysmian Cavi E Sistemi SRL (2020) 11 SCC 1;*

Since most of the grounds of challenge related to perversity of the awards, the Supreme Court held that such ground was outside the ken of section 48. Further, the Supreme Court also imposed costs to deter litigants from entering into speculative litigation to avoid enforcement of foreign awards.