



International Arbitration Law Review

2017

Case Comment

India: enforcing tribunal-ordered interim measures

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Subject: Arbitration . **Other related subjects:** Administration of justice.

Keywords: Arbitration; Breach; Civil contempt; India; Interim orders;

Legislation:

Arbitration and Conciliation Act 1996 (India) s.27

Case:

Chandeshwar v Khan unreported 6 July 2017 (Sup Ct (Ind))

****Int. A.L.R. N-11* Introduction**

On 6 July 2017, the Supreme Court of India in *Alka Chandeshwar v Shamshul Ishrar Khan* (Civil Appeal No.8720 of 2017) allowed for initiation of contempt proceedings against parties for non-compliance with an interim order of the tribunal. The judgment of the court gives teeth to the tribunal-ordered interim measures and reflects the continued movement favouring arbitration in India.

Facts

On 7 October 2010, the sole arbitrator passed an interim order restraining the respondent from disposing of certain properties without the leave of the arbitral tribunal. It was alleged that the respondent, in breach of this order, transferred properties without the permission of the tribunal. On 5 May 2014, the arbitrator under s.27(5) of the Indian Arbitration and Conciliation Act 1996 (Indian Act) referred the alleged breach of its order to the High Court for passing necessary orders.

However, the High Court held that s.27(5) of the Indian Act does not empower the arbitrator to make representation to the court for breach of its interim orders. The High Court held that s.27(5) was restricted to orders regarding taking of evidence. The order of the High Court was challenged before the Supreme Court.

Text of Section 27 of the Indian Act

"Court assistance in taking evidence—

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence.

...

Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, *or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings*, shall be subject to the like disadvantages, penalties and punishments by order of the

court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the court.

..."

Held

The Supreme Court, allowing the appeal, held that the provisions of s.27(5) of the Indian Act can be invoked to punish a party for breach of tribunal-ordered interim measure. The Court reasoned that:

The object of the statute in providing for tribunal-ordered interim measures would be defeated if such orders are toothless.

Section 27(5) applied to "any contempt of arbitral tribunal" during the arbitral proceedings. Thus, express language of the statute allowed for punishment by the court in the event of breach of the tribunal's order. **Int. A.L.R. N-12*

The 246th report of the Law Commission of India, pursuant to which the Indian Act was amended, also did not indicate that s.27(5) of the Indian Act could not be made applicable in such situations.

Comment

Indian arbitration law has recently undergone a seminal reform. The country now adopts a very pro-arbitration approach and its courts reflect that in its judgments. Pursuant to the recent amendment of the Indian Act, a tribunal's order regarding interim measures is deemed as a court order. Accordingly, tribunal-ordered interim measures are enforceable as court orders. However, the provisions of the amended Indian Act only apply to arbitral proceedings that commenced after 23 October 2015. Thus, for ongoing arbitrations which commenced prior to the date, enforceability of interim orders of the arbitral tribunal remained questionable.

This judgment of the Supreme Court of India provides a solution to this issue of enforceability in arbitrations which commenced prior to 23 October 2015. It upholds the reasoning adopted by the High Court of Delhi, in *Sri Kishan v Anand* (2009) 3 Arb. L.R. 447 (Del) ensuring that tribunal-ordered measures are complied with by the parties. The judgment gives teeth to orders of the arbitral tribunal seated in India by introducing the threat of contempt proceedings.

Under the Contempt of Courts Act 1971 in India, a person can be fined and sentenced to up to six months' imprisonment for contempt of an order. In the event that such contempt is committed by a company, then every person who at the time the contempt was committed was in charge of, and was responsible to, the company for the conduct of business of the company can be held liable. Also, if it is found that such contempt has been done with the consent, connivance or due to neglect of any director or officer of the company, then such person can be punished.

Thus, going forward parties should be conscious of interim orders passed by the tribunal and with compliance thereof in India. This judgment empowers and vests greater powers in the arbitrator.

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Int. A.L.R. 2017, 20(5), N11-N12