

# Dispute Resolution Hotline

March 20, 2020

## THE LIMITATION GAME – DELHI HIGH COURT HOLDS THAT ENFORCEMENT OF A FOREIGN SEATED ARBITRAL AWARD CAN BE FILED WITHIN 12 YEARS!

*The Delhi High Court held that:*

- The limitation for filing an enforcement petition arising out of a foreign award is twelve years;
- A foreign arbitral award attains the status of a decree after it clears the tests of ‘access’ and ‘recognition’ contemplated under the Arbitration Act, and is not dependent on the objections that may be raised towards resisting the enforcement;
- The interpretation of a contract and appreciation of evidence are entirely in the exclusive domain of the arbitral tribunal’s powers, which courts cannot interfere in; and
- Grounds of objection in an enforcement proceeding cannot pertain to the merits of the dispute.

### INTRODUCTION

The Delhi High Court, in the case of *Caim India Ltd & Ors (“Petitioners”) v. Government of*

*India*<sup>1</sup> (“**Respondent**”) recently enforced a foreign arbitral award, rejecting all the objections raised against it for resisting enforcement. Pertinently, in the present case the enforcement proceeding was filed over 3 years after the date of the arbitral award. The Delhi High Court, interpreting the Limitation Act, 1936 (“**Limitation Act**”), held that an application of enforcement of a foreign arbitral award can be filed up to a period of 12 years from date of the arbitral award.

### BACKGROUND

A production sharing contract (“**PSC**”) was executed between the parties and Oil and Natural Corporation Limited (“**ONGC**”) on October 28, 1994 for the development of the Ravva Oil and Gas Field (“**Field**”). Disputes arose between the parties with respect to recovery of development costs, which were referred to arbitration seated in Malaysia. The arbitral tribunal delivered its award on January 18, 2011 (“**Award**”), which required the Respondent to pay an amount of USD 278.87 million to the Petitioners.<sup>2</sup>

The Respondent challenged the Award before Malaysian High Court and Malaysian Federal Court, which was eventually rejected. Subsequently, in October 2014, the Petitioners filed an enforcement petition under Sections 47<sup>3</sup> and 49<sup>4</sup> of the Arbitration and Conciliation Act (“**Arbitration Act**”). The Respondent raised objections to the enforcement of the Award under Section 48<sup>5</sup> of the Arbitration Act.

Pursuant to the Award, in April 2011, the Petitioners made certain adjustments with respect to recovery of the development costs, and these adjustments were accepted by the Respondent. Importantly, in July 2014, the Respondent issued a notice to the Petitioners to show cause as to why oil marketing companies (OMCs) to whom the product extracted from the Field was sold, should not directly pay the Respondent towards recovery of its share of profit petroleum with interest, which was alleged to be underpaid (“**SCN**”).

### ISSUES BEFORE THE HIGH COURT

The Delhi High Court identified three broad issues:

- Firstly, whether the enforcement petition would be barred by limitation? (“**ISSUE I**”)
- Secondly, whether the arbitral tribunal acted beyond its jurisdiction in awarding USD 278.87 million to the Petitioners by ignoring the provisions of the PSC? (“**ISSUE II**”)
- Thirdly, whether the objections filed on behalf of the Respondent under Section 48 of the Arbitration Act are merited? (“**ISSUE III**”)

### JUDGMENT

#### A. ISSUE I – Limitation for filing enforcement of a foreign arbitral award:

The enforcement petition was filed after over three years from the date of the Award. The Respondent contended that Article 137 of the Limitation Act (residuary provision) would apply to filing an enforcement petition, wherein the period of limitation prescribed is three years. It was also contended that the Petitioners did not show a sufficient cause which could compel the Court to condone the delay in instituting the enforcement petition.

The Petitioners contended that until the SCN was issued by the Respondent, a cause or a right to file the enforcement petition did not accrue. Relying upon the Madras High Court’s decision in *Compania Naviera ‘SODNOC’ v. Bharat Refineries Ltd.*,<sup>6</sup> (“**Compania Naviera**”) the Petitioners contended that Article 136 of the

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Limitation Act would apply to filing of an enforcement petition, which prescribes the period of limitation as 12 years, and thus, the period of limitation to file the enforcement petition had not lapsed.

The Delhi High Court, first allowed the Petitioners application for delay and held that the purported delay was not a dilatory tactic employed by the Petitioners. The Court then proceeded to examine the diametrically opposite views of the Limitation Act – (i) the Madras High Court in *Compania Naviera*, relying upon the Supreme Court's judgment in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*,<sup>7</sup> has held that Article 136 of the Limitation Act would apply as a foreign arbitral award takes the form of a 'decree' to be executed; (ii) However, the Bombay High Court in *Noy Vallesina Engineering Spa v. Jindal Drugs Limited*,<sup>8</sup> held that the limitation period for applying for the enforcement of an arbitral award is three years, and as such petition would be governed by Article 137 of the Limitation Act (residuary provision). However, recently, the Bombay High Court in *Imax Corporation v. E-City Entertainment (I) Pvt. Ltd.*,<sup>9</sup> has taken a contrary view, that Article 136 of the Limitation Act would be applicable and the period of limitation would be 12 years.

The Delhi High Court held that:

- i. The execution of a foreign award could, broadly, be divided into three stages. (i), access; (ii) recognition; and (iii) enforcement.
- ii. To gain 'access' to courts in India, as set forth in Section 47 of the Arbitration Act, the application must accompany the following, (i) Original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made; (ii) Original arbitration agreement or duly certified copy thereof; (iii) Such evidence as may be necessary to prove that the award is a foreign award.
- iii. A foreign award which passes the gateway of Section 47 must treated as being equivalent to a foreign decree whose enforcement can be refused at the request of the party against whom it is invoked only if it falls within the provisions of Section 48(1)(a) to (e) or under Section 48(2).
- iv. 'Enforcement' under Section 49<sup>10</sup> of the Arbitration Act is used interchangeably with the word 'execution' and 'satisfaction', and is relatable to the conditions of gaining *access* and *recognition* of courts as provided in Section 47 of the Arbitration Act.
- v. The Court concluded that Article 136 of the Limitation Act would apply to an enforcement petition as an award which satisfies the tests of 'access' and 'recognition' takes the form of a decree. Thus, the period of limitation for the execution of a decree, as provided under the Limitation Act is 12 years and the present enforcement petition is not time-barred.

## B. ISSUE II – Tribunal's Jurisdiction

The Respondents argued that the arbitral tribunal awarded a relief (i.e., whether capped cost towards development of the Fields should be increased, and the extent to which it may be increased), which was not referred to arbitration. However, the Award clarified that the parties were unable to agree on the sole expert who was to rule on capped costs, the arbitral tribunal had to adjudicate the issue under Clause 34.2 of the PSC, and neither party had contested the jurisdiction of the arbitral tribunal in this regard. Basis the above reasoning in the Award, the Court held that the arbitral tribunal did not act beyond its jurisdiction.

## C. ISSUE III – Objections on enforcement of the Award:

Relying on the decision of the Supreme Court in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*,<sup>11</sup> and *Vijay Karia v. Prysmian Cavi E Sistemi SRL*,<sup>12</sup> the Delhi High Court held that the Award did not violate the public policy of India, more particularly, the fundamental policy of Indian law, and additionally, the Award cannot be also said to be against justice or morality, and observed that:

- i. The Court is required to keep away from merits of the dispute as those fall within the purview of the supervisory courts (i.e., the Courts at the seat of the arbitration). Since the Respondent had exhausted its remedies in the Malaysian courts, they cannot approach the enforcement court into deciding the merits of the matter merely because it disagrees with the interpretation of the arbitral tribunal.
- ii. The interpretation of a contract is exclusively in the domain of the arbitral tribunal, and the Award cannot be interfered since it is not the case that the arbitral tribunal has failed to decide the dispute between the parties on merits, or has made a finding based on no evidence.
- iii. Once an arbitral tribunal has been vested with jurisdiction by the parties, it has the right to make both right and wrong decisions as these are errors which fall within their jurisdiction.

## COMMENT

The Delhi High Court's conclusion that an application for execution of a decree may be applied for up to 12 years will provide greater leeway in terms of time-lines to award-creditors to apply for the enforcement of their arbitral awards. This is important as in some instances, it is possible that award-debtors may provide an assurance that they will comply with an arbitral award, and eventually fail to do so. In such instances, enforcement petitions would not be time-barred until the completion of 12 years.

Importantly, the Delhi High Court has acknowledged that one must not adopt a pedantic view towards enforcement petitions. Rather, a practical approach must be followed to make the enforcement of foreign arbitral awards speedy and robust, which follows the purpose and objective of the Arbitration Act.

This judgment of the Delhi High Court was tendered prior to the Supreme Court's recent ruling in the case of *Bank of Baroda v. Kotak Mahindra Bank Ltd.*<sup>13</sup> wherein the Supreme Court has held that the period of limitation for the execution of a foreign decree would be determined by the limitation periods prescribed in the country wherein the decree was made. It remains to be seen if the Supreme Court's judgment will have an implication on the execution of foreign arbitral awards in India.

<sup>1</sup> O.M.P.(EFA)(COMM.) 15/2016 & I.A. Nos. 20459/2014 & 3558/2015

<sup>2</sup> Cairn India Limited, Ravva Oil (Singapore) Pte Ltd., and Videocon Industries Limited

<sup>3</sup> " 47. Evidence .—

(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court—(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; (b) the original agreement for arbitration or a duly certified copy thereof; and (c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India..."

<sup>4</sup> "49. Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court."

<sup>5</sup> "48. Conditions for enforcement of foreign awards.—

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]...."

<sup>6</sup> AIR 2007 Mad 251

<sup>7</sup> 2001 (6) SCC 356

<sup>8</sup> 2006 SCC OnLine Bom 545

<sup>9</sup> 2020 (1) ABR 82.

<sup>10</sup> "Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court".

<sup>11</sup> (2014) 2 SCC 433

<sup>12</sup> Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors., 2020 SCC OnLine SC 177

<sup>13</sup> Civil Appeal No.2175 of 2020, Special Leave Petition (Civil) No.8123 Of 2015.

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