

# Dispute Resolution Hotline

January 21, 2011

## DELHI HIGH COURT UPHOLDS ENFORCEMENT OF ICC ARBITRATION AWARD

In a judgment bound to comfort frayed nerves, the Delhi High Court (“**Court**”) has, in the case of *Penn Racquet Sports (“Penn Racquet”) Vs. Mayor International Ltd. (“Mayor International”)*<sup>1</sup> (“**Judgment**”), dismissed a challenge to and upheld the enforcement of a foreign Award passed in an International Chamber of Commerce, Paris (“**ICC**”) arbitration.

### BRIEF FACTS OF THE CASE:

Penn Racquet (a company based in Arizona, U.S.A.) entered into a trademark license agreement with Mayor International and granted Mayor International the license to use the “*Penn*” trademark in certain territories for certain products (including footballs, volleyballs and basketballs), for the period 01.01.2003 to 31.12.2005, for a royalty to be paid annually. A second trademark license agreement was thereafter executed for the period 01.01.2006 to 31.12.2009 (collectively “**TLA’s**”).

Disputes arose between the parties under the TLA’s. Penn Racquet contended that Mayor International had failed to pay the royalty due and consequently, Penn Racquet terminated the TLA. Meanwhile, Mayor International contended that no royalty was payable as Penn Racquet had breached the provisions of the TLA’s by granting a license to a third party, one Nebus Loyalty Limited (who was, in fact, Mayor International’s own sub-licensee).

Accordingly, the dispute was referred to arbitration as both TLA’s contained an arbitration clause providing for the settlement of any dispute to be resolved by arbitration by ICC in accordance with the law of Austria. An independent arbitrator was appointed and an award was passed, *inter alia*, holding that (i) Penn Racquet had not breached the provisions of the TLA’s; and (ii) outstanding royalties alongwith interest and costs was payable by Mayor International to Penn Racquet (“**Award**”).

Penn Racquet filed an execution petition before the Court seeking enforcement of the Award. Mayor International challenged the execution of the Award, *inter alia*, on the grounds that (i) the Award was contrary to the public policy of India; and (ii) they were unable to present their case (their counter claim was not considered).

Seeking to, *inter alia*, rely upon earlier judgments of the Supreme Court of India in *Venture Global Engg. Vs. Satyam Computer Services Ltd.*<sup>2</sup> and *ONGC Ltd. Vs. Saw Pipes Ltd.*<sup>3</sup>, Mayor International contended that a foreign award is also subject to challenge under Section 34<sup>4</sup> of the Act on the ground that award, being against the terms of contract, is patently illegal. Penn Racquet contended that the Award is not challenged by Mayor International either in Switzerland, or in India and relied upon the judgment of the Supreme Court passed in the case of *Renusagar Power Co. Ltd. Vs. General Electric Co.*<sup>5</sup> which held that it is impermissible to assail a foreign award on merits.

### JUDGMENT:

The Court heard detailed arguments for and against the enforcement of the Award.

- Distinguishing between the concept of challenging the enforcement of a foreign award and a challenge to an award, the Court observed that the expression “*public policy of India*” carried a narrower meaning under Section 48<sup>6</sup> of the Arbitration & Conciliation Act, 1996 (“**the Act**”) (which deals with enforcement of a foreign award), when compared to the meaning assigned under Section 34 (ii)(b)(which deals with the ground of challenge to an award). The Court observed that Award was, in fact, enforceable under the provisions of Chapter 1 Part II of the Act (i.e. as a New York Convention award).
- The Court further distinguished between proceedings under Section 34 and Section 48 and held that a foreign award, when final, can be challenged in the jurisdiction it is made and cannot be challenged in the Indian Courts like a domestic award.
- The Court also observed that even in the case of domestic awards, the Court would not interfere unless it could be shown that the interpretation (of the contract) was contrary to the contractual terms.
- The Court noted that in the instant case, being a foreign award (as defined under the Act) being governed by Austrian Law, the task of Mayor International (in challenging the enforcement) was even more onerous. Mayor International had not cited Austrian Law sought to be relied upon by them. The Court held that their attempt to interpret the contractual clause under Indian Law was not permissible.
- Observing that the interpretation sought to be given by Mayor International to the contract was not the only plausible one, even under Indian law, the Court relied upon judgments of the Supreme Court of India and held that enforcement of a foreign award could not be denied merely because the award was in contravention of the law of India. The Court reiterated that for an Indian court to deny recognition and enforcement of an award, it would need to be shown that a foreign award was contrary to (i) the fundamental policy of India; or (ii) interests of India, or justice or

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morality.

- Mere passing of a monetary award against an Indian entity on account of its commercial dealings would not make an award contrary to interests of India or justice or morality.

- Having agreed to refer disputes under the TLA's to arbitration under the ICC rules, it was not open to Mayor International to claim that they were not able to present their case, when, in fact, their counter claim was left unconsidered upon their own failure to deposit ICC costs and fees of the arbitrator (as per the ICC rules).

#### ANALYSIS & COMMENTS:

By this judgment, it appears that the Court has adopted a *hands-off* policy from the challenge to an enforcement of a foreign award, unless it is shown that an adequate reason to interfere is brought to the attention of the court. The Court has reiterated that the obligation of the party seeking to challenge a foreign award is far more onerous than even challenging a domestic award. Further, the Court has reiterated that a foreign award will be recognized and enforced as a decree of a court, unless it falls within the exceptions provided.

Separately, there have been several instances where parties have agreed to refer disputes to various internationally reputed arbitration institutions and when disputes arise, one of the parties defaults on account of the high costs involved. This Judgment makes it amply clear that having agreed to refer to such an institution, such party cannot back down on the ground of high costs. If they do choose to not pay the costs/fees as per the rules of the agreed and chosen institution, it will be at their own risk to the consequences.

This Judgment will provide significant comfort, assurance and certainty to foreign award holders, who are seeking to have their award recognized and enforced in India.

#### Sahil Kanuga & Vyapak Desai

1 E.A. No. 705 of 2009;

2 (2008) 4 SCC 190;

3 (2003) 5 SCC 705;

4 34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity; or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute 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, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.—Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

5 (1994) Supp (1) SC 644;

6 Section 48. Conditions for enforcement of foreign awards;

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.—Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

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