

Dispute Resolution Hotline

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INDIA—NO STATUTORY APPEAL IF PARTY FAILS TO RESIST ENFORCEMENT OF A FOREIGN AWARD (KANDLA V OCI CORPORATION)

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Arbitration analysis: The Supreme Court of India decided that a party that fails to resist the enforcement of a foreign award does not have access to any statutory appeal against an order enforcing the award. Moazzam Khan, Head of the Global Litigation Team and Payel Chatterjee, a senior member of the International Litigation and Dispute Resolution team at Nishith Desai Associates examine the decision.

Kandla Export Corporation & Anr v Ms OCI Corporation & Anor Civil Appeal No. 1661-1163 of 2018, judgment dated 7 February 2018 (not reported by LexisNexis® UK)

WHAT ARE THE PRACTICAL IMPLICATIONS OF THIS JUDGMENT?

Section 50 of the Arbitration and Conciliation Act 1996 (the Act) allows parties to appeal against two types of orders only:

- an order refusing to refer parties to arbitration, and
- an order refusing to enforce a foreign award

Under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 (the Commercial Courts Act), all applications arising out of arbitration are to be heard by the Commercial Courts.

Section 13(1) of the Commercial Courts Act, if read in isolation, could be interpreted to mean, and was contended by Kandla Export in this case, that a decision of the Commercial Court, even in matters not covered by section 50 of the Act, could be appealed against.

The Supreme Court re-affirmed its commitment to the enforcement of foreign awards by removing this confusion and reiterating that an appeal in cases of foreign awards would only apply on the grounds set out in section 50 of the Act and specifically no appeal will proceed to the Commercial Appellate Division if it is against an order rejecting the objections to enforcement.

An excerpt from the judgment speaks to a pro-enforcement stance taken by the Indian judiciary this past decade: 'Enforcement of foreign awards should take place as soon as possible if India is to remain as an equal partner, commercially speaking, in the international community.'

The only remedy would be to approach the Supreme Court by virtue of a special leave to appeal.

Conversely, parties seeking enforcement have access to a two-stage appeal process. If the court of first instance refuses to enforce a foreign arbitral award for whatever reason, it can appeal first—before Commercial Appellate Division and failing there it also has the option to approach the Supreme Court.

WHAT IS THE BACKGROUND TO THIS DECISION?

The parties, M/s. OCI Corporation (OCI/Buyers) and Kandla Export Corporation (Kandla Export/Sellers), had referred their disputes to be resolved by way of arbitration under the Grain and Feed Trade Association (GAFTA) Rules.

An arbitral award was made on 28 April 2014 directing Kandla Export to pay a sum of \$US 846,750 together with compound interest at the rate of 4% calculated on a quarterly basis to OCI. The award was appealed to the Appellate Tribunal, which directed Kandla Exports to pay a sum of \$US 815,000 at an interest rate of 4% on a quarterly basis to OCI by order dated 16 April 2015.

Subsequently, Kandla Export filed series of appeals challenging the award passed by the Appellate Tribunal, before the Queen's Bench in the Queen's Bench Division of the Commercial Court. Kandla Export were faced with dismissal in both the appeals in 2015. However, in their continuing urge to have the award set aside Kandla Export filed another appeal before the English Court of Appeal. Leave to appeal was not granted.

Meanwhile in India, OCI initiated execution proceedings on 29 June 2015, under section 48 of the Act, before the District Court of Gandhidham, Kutch. Kandla Export filed their objection to the petition. Thereafter, OCI filed an application before the Gujarat High Court (Gujarat HC) seeking transfer of the execution proceedings, with the

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Commercial Courts Act and amendments to the Act coming into effect from October 2015. The Gujarat HC allowed the application and execution proceedings that were transferred before the Commercial Division. Gujarat HC on November 11, 2016. Kandla Export filed a special leave petition (SLP) before the Supreme Court challenging the order, which was also dismissed.

With the SLP being dismissed, Kandla Export filed their objections in the execution proceedings. Dismissing their objections, the Gujarat HC recognised the foreign award as enforceable. Kandla Export challenged the decision of the Single Bench and filed an appeal under section 13(1) of the Commercial Courts Act before the Commercial Appellate Division. This appeal was dismissed by the Commercial Appellate Division on the ground of maintainability, ruling that against an order rejecting objections to enforcement, there would be no appeal to the Commercial Appellate Division.

The decision of the Commercial Appellate Division was then challenged before the Supreme Court of India—which is the subject matter of this article.

The contentions of Kandla Export are the following:

- section 13(1) of the Commercial Courts Act provides a right to file an appeal against any decision, judgment and order passed by the Commercial Division of the High Court—and thus an order rejecting the objections to enforcement would also be appealable under section 13(1) of the Commercial Court's Act
- section 50 of the Act does not prohibit appeals which are not expressly listed in section 50 of the Act. Since section 50 (which deals with enforcement of foreign awards in India) did not have the restricting language of section 37 (which deals with domestic arbitrations), appeals which were not expressly provided for in section 50, should anyway be allowed under section 13 of the Commercial Courts Act

On the other hand, OCI contended:

- the Act is a self-contained code which provides a substantive as well as procedural law regarding arbitrations and should exclude the application of general law, including provisions of section 13 of the Commercial Courts Act
- section 50 of the Act creates a specific bar against appeals from any orders which are not mentioned under the said provision. An appeal can only be made against an order refusing to enforce an award under section 48 of the Act and not against other orders
- section 13 of the Commercial Courts Act cannot be read in isolation and must be read harmoniously with the provisions of the Act to give effect to both the legislations
- the object of both legislations is to determine arbitration and commercial matters speedily and allowing an extra appeal under the Commercial Courts Act 2015 would defeat the objective of both acts

WHAT DID THE SUPREME COURT DECIDE?

The Supreme Court affirmed the Commercial Appellate Division's findings and ruled that section 13(1) of the Commercial Courts Act being a general provision vis-a-vis arbitration relating to appeals arising out of commercial disputes, would not apply to cases unless they are expressly covered under section 50 of the Act.

The Supreme Court relied on its earlier decision in *Fuerst Day Lawson Limited v Jindal Exports Limited* [2011] 8 SCC 333 which dealt with the issue as to whether an order though not appealable under section 50 of the Act would be subject to appeal under the letters patent of the High Court. The Supreme Court in *Fuerst Day* had laid down certain broad principles clarifying that in case a special statute is a self-contained code, the applicability of the general law procedure would be impliedly excluded. Appeals only under section 50 of the Act are maintainable in relation to foreign awards and not under letters patent.

Section 13(1) of the Commercial Courts Act states that an appeal will lie from orders passed by the Commercial Courts under section 37 (applicable only in case of India seated arbitration) of the Act. It was silent with respect to any appeals under section 50 of the Act (applicable in cases of enforcement of foreign awards).

The Supreme Court in its earlier decision in *Arun Dev Upadhaya v Integrated Sales Services* (not reported by LexisNexis® UK) had widened the scope of section 13 of the Commercial Courts Act to include appeals under section 50 of the Act too.

CASE DETAILS

- Court: Supreme Court of India
- Judge: Justice Rohinton Fali Narim and Lordship Mr. Justice Navin Sinha
- Date of judgment: 7 February 2018

The views expressed are not necessarily those of the proprietor.

— Payel Chatterjee & Moazzam Khan

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