

Enforcement Of Foreign Awards Unaffected By Belated Objections Raised On The Arbitral Tribunal's Composition: Delhi High Court

Authors: *Vasanth Rajasekaran and Harshvardhan Korada*

Introduction

In a recent decision in *Mercator Ltd. v. Dredging Corporation of India Ltd.*¹, the High Court of Delhi ("**High Court**") held that objections to the enforcement of arbitral awards must be raised in a timely manner and cannot be used as a strategy to delay the enforcement process. The High Court also emphasized that public policy grounds for resisting enforcement of foreign awards must be interpreted narrowly, in line with international standards. In this article, we briefly navigate through the facts and findings of the High Court in the aforesaid decision.

Brief Facts

Mercator Ltd., the award holder, filed proceedings seeking enforcement of three arbitral awards, all dated 15 March 2018, against Dredging Corporation of India Ltd., the judgment debtor.

The arbitral awards were rendered in separate arbitrations conducted with respect to three charterparty agreements dated 23 August 2007, 12 October 2007, and 24 April 2008. Aggrieved by the rendering of the awards, the judgment debtor filed petitions for setting aside the awards under Section 68 of the English Arbitration Act, 1996 before the High Court of Justice of England and Wales (the seat Court). The aforesaid petitions came to be dismissed. As the matter reached the stage of enforcement, the judgment debtor posed similar objections with respect to all three arbitral awards.

(i) The Composition Of The Arbitral Tribunal

The judgment debtor argued that the arbitration agreement contained in the underlying contracts provided for reference of disputes to arbitration in London to be "*conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced*". The judgment debtor submitted that Rule 5(a) of the LMAA Terms required the arbitrators to be members of the LMAA. However, the arbitral tribunal in the instant case comprised of two retired judges and a lawyer – who, as per the judgment debtor, were not experts in the field of maritime law. It was submitted that no further or other agreement contrary to the requirements spelt out in the arbitration agreement was ever entered into between the parties.

The award holder submitted that the above-mentioned objections of the judgment debtor *qua* the composition of the arbitral tribunal were never raised at an earlier stage either in the arbitration or in the applications filed by judgment debtor for setting aside of the awards. Even otherwise, the award holder submitted that the averments of the judgment debtor were contrary to the case pleaded by it before the seat Court. In this regard, the High Court's attention was drawn to the submissions made by the judgment debtor before the seat Court.

¹ *Mercator Ltd. v. Dredging Corporation of India Ltd.*, 2024: DHC: 3390.

(ii) The Alleged Violation Of The Merchant Shipping Act

The judgment debtor placed reliance on Section 313 of the Merchant Shipping Act to argue that vessels which were the subject matter of the charterparty agreements, were loaded in contravention of Section 313 of the Merchant Shipping Act, and attracted the penalties provided under Section 436. Since the object of the Merchant Shipping Act was related to the safety and security of Indian ships, the award of the award holder's claims ran in conflict with the public policy of India. In this regard, reference was made by the judgment debtor to a catena of decisions.²

The award holder, on the other hand, submitted that the above objection had already been dealt with both in the arbitral awards and the judgment of the seat Court. As per the award holder, the term public policy had to be attributed much more narrower meaning under Section 48 than Section 34 of the Arbitration Act.

Principles Governing Exercise Of Powers Under Section 48 Of Arbitration Act

Before dealing with the objections put forth by the judgment debtor, the High Court deemed it proper to first cull out the following principles which governed the exercise of powers and jurisdiction under Section 48 of the Arbitration Act:

- (i) The power to set aside an award vests only in the Courts at the seat of the arbitration, which exercise "*supervisory*" or "*primary*" jurisdiction over the award.³
- (ii) The jurisdiction of the Court in which enforcement is sought is a secondary jurisdiction, limited to the question of whether the award is enforceable in that particular jurisdiction.⁴
- (iii) A judgment of the seat Court rejecting a challenge to the award is not binding under Section 48 of the Arbitration Act but can be considered while deciding whether to permit re-litigation of the issue before the enforcement Court.⁵
- (iv) The public policy grounds for resisting enforcement of a foreign award under Section 48(2) of the Arbitration Act are limited to "*narrow and international standards*" of "*public policy*"⁶ in contrast with the grounds available for challenging a domestic award under Section 34 of the Arbitration Act.⁷
- (v) Similarly, while deciding questions of bias also, internationally recognised narrow standards of public policy, which reference the most basic notions of

² *National Agricultural Coop. Mktg. Federation of India v. Alimenta S.A.*, (2020) 19 SCC 260; *Associate Builders v. DDA*, (2015) 3 SCC 49; *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131, and *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1.

³ *Union of India v. Vendanta Ltd.*, (2020) 10 SCC 1 at paragraph 83.11.

⁴ *Id* at paragraph 91.

⁵ *Cruz City 1 Mauritius Holdings v. Unitech Limited*, 2017 SCC OnLine Del 7810; and *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1.

⁶ Order dated 04.03.2024 in *Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings (Mauritius) Limited*, Civil Appeal Nos. 3825-3836 of 2024 at paragraph 20.

⁷ *Id*, at paragraph 19; and *Shri Lal Mahal Ltd. v. Progetto Grano SpA*, (2014) 2 SCC 433 at paragraph 27.

morality or justice, or shock the conscience of the Court, alone can be considered.

- (vi) The Court can take into consideration the fact that a challenge on the ground in question was not raised before the seat Court.
- (vii) Even when the grounds under Section 48 of the Arbitration Act are made out, the Court has discretion as to whether enforcement should be refused.
- (viii) A review on the merits of the disputes does not fall within the jurisdiction of the Court under Section 48 of the Arbitration Act.

Findings Of The High Court

Given that the judgment debtor was raising the issue pertaining to the composition of the arbitral tribunal at the first instance before the executing Court, the High Court opined that, *"in such circumstances, enforcement should not be declined on grounds relating to the composition of the tribunal, which could have been raised before the Tribunal and before the seat Court, but were not so raised"*. From the records of the matter, the High Court noted that the parties were well-aware of the composition of the arbitral tribunal for a decade. As per the High Court, the judgment debtor permitted the arbitral proceedings to continue and culminate, and it was only after the culmination of two more attempts at setting aside the award did the judgment debtor seek to challenge the very constitution of the arbitral tribunal. The argument of the judgment debtor pertaining to the composition of the arbitral tribunal, was therefore, evidently an afterthought and was intended only to act as, *"speculative litigation with the fond hope that by flinging mud on a foreign arbitral award, some of the mud so flung would stick"*⁸.

To fortify the above findings, the High Court relied on the decision rendered by the Supreme Court in ***Avitel Post Studios Limited v. HSBC PI Holdings (Mauritius) Limited***⁹. Pertinently, in ***Avitel Post Studios***¹⁰, the Supreme Court observed that *"bonafide challenges to arbitral appointments have to be made in a timely fashion and should not be used strategically to delay the enforcement process"*.

In view of the above, the objections of the judgment debtor pertaining to the composition of the arbitral tribunal were rejected.

On the objections pertaining to the public policy ground, the High Court observed that the public policy in context of foreign awards had to be interpreted narrowly and in consonance with international notions of public policy. Placing reliance on several decisions, the High Court held that not all violations of statute would meet the threshold of contravention of public policy. Accordingly, the High Court found no merit in the judgment debtor's argument *qua* the purported contravention of the public policy.

Conclusion

⁸ *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1.

⁹ *Avitel Post Studios Limited & Ors. v. HSBC PI Holdings (Mauritius) Limited*, Civil Appeal Nos. 3825-3836 of 2024.

¹⁰ *Avitel Post Studios Limited & Ors. v. HSBC PI Holdings (Mauritius) Limited*, Civil Appeal Nos. 3825-3836 of 2024.

The High Court, in this case, based its judgment on the principle that challenges to arbitral awards must be made in a timely manner, and rooted in genuine legal concerns. At no stage should a challenge to an arbitral award act as a strategic dilatory move. The High Court's judgment is a robust affirmation of the principles governing arbitration under Indian law, particularly the importance of timely objections and the narrow scope of public policy as a ground for refusing enforcement of an arbitral award under Section 48 of the Arbitration Act.

Contact

For any query, help or assistance, please reach out at info@trinitychambers.in or visit us at www.trinitychambers.in.

Authors

	
Vasanth Rajasekaran Founder & Head vasanth@trinitychambers.in	Harshvardhan Korada Counsel harshvardhan@trinitychambers.in