Dispute Resolution Hotline

March 31, 2022

PUT OPTION ENFORCED: CONFLICT WITH INDIAN EXCHANGE CONTROL LAWS NOT A GROUND FOR SETTING ASIDE THE AWARD IN SINGAPORE

- In a challenge to an arbitral award on the ground of contravention with the public policy of Singapore, courts cannot delve into the findings of fact by the arbitral tribunal, except when there is fraud, breach of natural justice or some other vitiating factor.
- For the Singapore court, an arbitral tribunal's findings on foreign law (Indian law) are findings of fact which cannot be interfered with in a challenge to an arbitral award on the ground of contravention with the public policy of Singapore.

INTRODUCTION

In ***CHY & CHZ v CIA***,[1] the Singapore International Commercial Court (**"SICC"**)expounded the scope of curial interference in a challenge to an arbitral award on the ground of contravention with the public policy of Singapore under Art. 34(2)(b)(ii) of the UNCITRAL Model Law as incorporated under Section 3 of the International Arbitration Act, 1994.[2] The SICC held that findings of an arbitral tribunal on Indian law are findings of fact and therefore cannot be interfered with in a challenge to the award on the ground of contravention with the public policy of Singapore.

FACTUAL BACKGROUND

CHY, an Indian company (**"Shareholder"**)was a shareholder of another Indian company CHZ (**"Company"**), collectivelythe **"Plaintiffs".** CIA, a Mauritius investment company (**"Investor"**) had invested in the Company. Parties entered into a Shareholders' Agreement (**"SHA"**),[3] which provided that the Plaintiffs should publicly list the Company by a cut-off date, failing which the Investor could exercise the Put Option upon the Shareholder.[4] Further, if the Shareholder were legally unable to purchase the Investor's shares, it was obligated to arrange a third party to do so at the 'Put Price' (**"Put Option"**).[5]

The Plaintiffs failed to fulfil the aforesaid conditions by the cut-off date. However, the Investor did not exercise this right after the cut-off date. Instead, the parties negotiated the Investor's exit and eventually executed an Amended SPA ("**ASPA**").[6] Under the ASPA, the Shareholder would re-acquire the Put Shares from the Investor, which was subject to an approval by the Reserve Bank of India ("**RBI**"). The RBI did not approve of the transaction, and Shareholder did not ultimately re-acquire the Put Shares.

Subsequently, the Investor exercised the Put Option under the SHA. The Shareholder refused to act on the Put Option and stated that the Put Option was contrary to Indian law. As a result, the Investor instituted arbitration proceedings under the International Chamber of Commerce (**"ICC"**) Rules, 2017. The Tribunal upheld the validity of the Put Option and (a) directed the Shareholder to pay damages to the Investor in the amount of Put Price, and (b) directed the Investor to transfer its shares to the Shareholder upon receipt of such amount. ("**Award**")

The Plaintiffs challenged the Award before the SICC on the ground that the Award was in contravention of the public policy of Singapore as the Award compelled the Plaintiffs to perform an illegal act. Particularly, the Plaintiffs contended that the Award compelled the Plaintiffs to violate the Foreign Exchange Management Act, 1999 (**"FEMA"**).[7] The Plaintiffscontended thatcompliance with the Put Option would compel the Plaintiffs to 'pay assured returns to the Investor', which is illegal under the FEMA and its Regulations. *Per contra*, the Investor submitted that the issue regarding illegality of the Put Option had already been dealt with by the Tribunal. Therefore, the SICC cannot interfere with such finding. The Investor further contended that even if the Put Option were illegal, the same would only amount to the Tribunal incorrectly interpreting the SHA and such incorrect interpretation cannot be a ground of setting aside the Award.

JUDGMENT OF THE SICC

The SICC formulated three broad issues for deciding the Plaintiff's challenge to the Award. We have dealt with each issue separately.

To what extent can the Tribunal's findings based on Indian law be reviewed under Article 34(2)(b)(ii) of the Model Law?

The SICC discussed precedents on the question of illegality of the underlying agreement or transaction and its relation with 'public policy' as a ground for setting aside the award. The SICC referred to the ruling of the Singapore

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Court of Appeal ("**Court of Appeal**") in *AJU v. AJT* and found that it concluded that:

a. the court can reopen findings of Singapore law to determine whether the underlying agreement is illegal and set aside the award;

b. the court cannot reopen findings of fact made by an arbitral tribunal except when such findings of fact are marred by fraud or other vitiating factors.

The SICC recognised that in *AJU v. AJT,* the court found that the arbitral tribunal had correctly recognised the principle of Singapore law. However, the arbitral tribunal on facts held that the agreement did not require parties to take steps that were otherwise illegal. Thus, in *AJU v. AJT,* the court refused to set aside the award as holding that it should not substitute the arbitral tribunal's findings on fact for its own.

The SICC further noted that where an arbitral tribunal has returned a finding on law which is a foreign law for the setting aside court, the said finding must be considered as a finding of fact. Consequently, setting aside courts must not interfere with such findings of foreign law. In the present case as well, the SICC found that since the Tribunal had returned findings on Indian law, the same must be considered as a finding of fact. The SICC therefore concluded that it could not reopen or delve into the Tribunal's findings on the legality of the agreement under Indian law.[8]

The SICC found that the Tribunal had given due consideration to the objection regarding the SHA being contrary to FEMA Regulations. The SICC further observed that if the Shareholder were unable to purchase the Investor's shares due to any legal impediment, the Shareholder was required to procure a non-resident third party to purchase the shares as FEMA did not apply to non-resident third party purchasers. Based on such consideration, the Tribunal had decided the issue in the favour of the Investor. Therefore, the Plaintiffs' failure to appoint a non-resident third-party to purchase the Investor's Put Shares was not in circumvention of FEMA, and thus amounted to a clear breach of the SHA. Considering that such findings on Indian law amounted to findings of fact with which the courts cannot interfere, the SICC refused to set aside the award.

In addition to its reliance on *AJU v. AJT,* the SICC also discussed the approach taken by the Privy Council in *Betamax Ltd v. State Trading Corporation* (*Mauritius*).[9] In *Betamax*, the Privy Council had held that findings of fact and law by an arbitral tribunal are final and binding on the setting aside court except in case of fraud or other vitiating factors. The SICC noted that the approach taken by Privy Council in *Betamax* is slightly divergent from the approach taken by the Court of Appeal in *AJU v. AJT*. The SICC noted that the approach taken by Privy Council implied that the setting aside court can reopen the findings of law of an arbitral tribunal only if such findings are marred by fraud or other vitiating factors. In light of the aforementioned lack of convergence, the SICC stated that it 'leaves it to the Court of Appeal' to decide whether a finding of law can be reopened by the seat court or it is also subject to the exceptions set out in *AJU v. AJT*.

Whether the SICC can interfere with the Tribunal's award of damages and return of shares under Article 34(2)(b)(ii)?

The Plaintiffs challenged the Award insofar as it required them to pay the Put Price as damages on the ground that it effectively ensured payment of assured returns which was in violation of the FEMA. The SICC found that the Plaintiffs never took such an objection in the arbitral proceedings, and therefore cannot seek to open up that finding at a later stage in front of the setting aside court. In any case, even if they had so objected during the arbitral proceedings, the Tribunal's findings on the objection would amount to a finding of fact. Since, finding of fact cannot be interfered with, the SICC held that it would not interfere with the Tribunal's findings on India law under Article 34(2)(b)(ii) of the Model Law.

The SICC further noted that the Tribunal considered Indian precedents with similar factual background. The Tribunal had referred to and relied on judgments of the Delhi High Court in *Cruz City 1 Mauritius Holdings v. Unitech Limited* and *NTT Docomo Inc. v. Tata Sons Limited* to conclude that the Investor was entitled to damages in the measure of the Put Price.[10]

During the hearing stage, the Plaintiff admitted that its grievance arose from the manner in which the Tribunal had calculated damages. Further, the Plaintiff also challenged the Award on the basis that the Tribunal ignored certain principles of Indian contract law.[11] The SICC noted that the above grounds relate to a findings on fact by the Tribunal and therefore all the more immune from a challenge under Art. 34(2)(b)(ii).

If the SICC could review the Tribunal's findings on Indian law and come to a contrary view on the findings, would the matters raised amount to grounds for setting aside an award under Article 34(2)(b)(ii)?

The Plaintiffs contended that the Award is 'palpably and indisputably illegal' as it compels performance of an illegal act in India and therefore, raised public policy concerns. The SICC relied distinguished the factual background between *Soleimany v. Soleimany*,[12] and *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd.* ("***OTV***").[13] The SICC concluded that similar to OTV, the Award in the present case did not afford evidence of corruption or illegal practice. Therefore, the grounds do not meet the thresholds to trigger violation of the public policy of Singapore under Article 34(2)(b)(ii) of the Model Law.[14]

CONCLUSION

The above judgment of the SICC provides guidance on the adjudication of setting aside petitions when the underlying agreement is governed by a law which is foreign to a seat court in Singapore. If a party makes a challenge to a finding by an arbitral tribunal on the basis of an incorrect application of a foreign law, the same will be immune from scrutiny by the seat court.

At times, the ground of public policy acts as a tool for award-debtors to challenge the award on diminutive aspects in an attempt to prolong the process till enforcement. The present judgment adds to the jurisprudence of narrow scope of curial intervention and is therefore, likely to dissuade such challenges.

It is further pertinent to note the manner in which Tribunal had deliberated on the enforceability of the Put Option under the FEMA Regulations. The Tribunal specifically stated that the FEMA Regulations do not impose an absolute

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bar to the exercise of a put option. The Tribunal further explained that on a proper interpretation of the underlying agreement, it was evident that if the Indian promoter were legally unable to purchase the Investor's shares, it ought to have procured a non-resident third party for the purpose.

– Adimesh Lochan & Ashish Kabra

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You can direct your queries or comments to the authors

[1] [2022] SGHC(I) 3

[2] (Cap. 143A, 2002 Rev ED). S. 3 of the IAA states that UNCITRAL Model Law on International Commercial Arbitration shall have the force of law in Singapore.

[3] Dated October 09, 2009.

[4] June 30, 2012

[5] Clause 11.2 of the SHA. **Put Price**: Total amount invested by Investor plus an amount equal to a 22% compounded annual rate of return on the invested amount

[6] January 2013.

[7] Indian statute governing the law relating to foreign exchange in India.

[8] Para 43 and 44 of the Judgment.

[9] [2021] UKPC 14

[10] *Cruz City 1 Mauritius Holdings v. Unitech Limited* (2017) (3) ARBLR 20 (Delhi) and *NTT Docomo Inc. v. Tata Sons Limited*, (2017) SCC OnLine Del 8078

[11] The Plaintiffs challenged the Award on the basis that the Tribunal the 'requirement of proof of loss for the grant of damages' under Section 73 of the Indian Contract Act.

[12] [1999] QB 745

[13] [1999] 2 Lloyd's Rep 222.

[14] Including (a) 'shocking the conscience of the courts', (b) violating the most 'basic notions of justice and morality'.