ALLEN & OVERY

Ashwani Minda v U-Shin

The Delhi High Court's recent observations on emergency arbitrator relief and the availability of court-ordered interim measures

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The Delhi High Court has held that the choice of certain institutional arbitration rules could potentially disentitle parties to foreign-seated arbitrations from approaching the Indian courts for interim relief.

On 12 May 2020, the Delhi High Court delivered its judgment in the case of *Ashwani Minda & Anr v U-Shin Ltd & Anr* (**Ashwani Minda**),[1] dismissing an application for court-ordered interim relief filed by a party to a Japan-seated arbitration, following the applicant's failure to obtain similar relief from an emergency arbitrator.

The judgment is notable for being only the third Indian case to address the concept of emergency arbitrator relief in some detail, despite the conspicuous absence of any provisions in relation to it in the Indian Arbitration and Conciliation Act, 1996, as amended in 2015 and 2019 (the **Act**). It builds on earlier Indian jurisprudence[2] on the interplay between court-ordered interim relief under section 9 of the Act and the orders of an emergency arbitrator.

The judgment is also significant for its findings in relation to the ability of parties to foreign-seated arbitrations to exclude the application of section 9 (and certain other provisions[3]) of the Act by agreement, whether expressly or by implication. These findings are reminiscent of the situation prevailing in India prior to 2012, when a large number of international arbitration cases before the Indian courts turned on a lengthy (and, at times, puzzling) analysis as to what constitutes an exclusion of Part-1 of the Act.

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[1] OMP (I) Comm 90/2020, Judgment dated 12 May 2020 by Hon'ble Ms Justice Jyoti Singh.

[2] See HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited and Ors. 2014 SCC Online Bom 102 and Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors. 2016 SCC Online Del 5521.

[3] Section 2(2) of the Act limits the application of Part-1 of the Act to arbitrations seated in India, "[p]rovided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (b) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act".

Factual Background

Applicant No.1 before the Delhi High Court (the **Applicant**) was the controlling shareholder of a joint venture with a Japanese company engaged in the design and manufacture of certain automotive systems and components (the **Respondent**). Around 43% of the shares in the joint venture company were publicly held.

The Respondent announced a business integration plan with some of its Japanese affiliates, which triggered the Securities and Exchange Board of India's Takeover Code. As a result, the Respondent was required to make an open offer to purchase the joint venture company's publicly held shares. Concerned that this may lead to the loss of its controlling shareholder status, the Applicant alleged that these transactions would constitute a breach of the pre-emption, transfer and assignment provisions of a Joint Venture Agreement (**JVA**) and License and Technical Assistance Agreement between the parties.

The dispute resolution provisions of the JVA provided as follows:

"ARTICLE 9 GENERAL

9.4 All disputes, controversies or differences which may arise between the parties, out of or in relation to or in connection with this Agreement, shall be settled amicably through mutual consultation.

9.5 In case of failure to reach a settlement, such disputes, controversies or differences shall be submitted to the arbitration under the Commercial Rules of the India Commercial Arbitration Association to be held in India if initiated by [the Respondent], or under the Rules of the Japan Commercial Arbitration Association to be held in Japan if initiated by [the Applicant]."

Following the failure of efforts to resolve the dispute amicably, the Applicant invoked the emergency arbitrator provisions under the Japan Commercial Arbitration Association's Commercial Arbitration Rules (the **JCAA Rules**). The Applicant sought interim relief to restrain the Respondent from taking any steps pursuant to the Takeover Code or exercising its rights in respect of any shares purchased via the open offer, or alternatively, a mandatory injunction requiring the transfer of such shares to the Applicant. The emergency arbitrator rendered a reasoned order, refusing to grant any interim relief.

The Applicant then approached the Delhi High Court under section 9(1) of the Act seeking substantially the same relief as it had sought before the emergency arbitrator. The Respondent raised a preliminary objection against the maintainability of this application on the strength of section 9(3) of the Act, which bars courts from entertaining interim relief applications following the constitution of an arbitral tribunal, unless the court finds that circumstances exist which may render tribunal-ordered interim relief inefficacious.[4]

The Respondent also argued that the application for court-ordered interim relief would be barred by the doctrine of election even if the emergency arbitrator appointed under the JCAA Rules did not constitute an "arbitral tribunal" for the purposes of section 9(3). The Respondent's position was that having already elected an alternative remedy which it considered efficacious (i.e. emergency arbitrator relief) and lost, the Applicant could not be permitted to have a second bite at the cherry before the Delhi High Court.[5]

[4] Paragraph 27.

[5] Paragraph 28.

The Court's analysis

The Court refused to grant any interim relief and held that the Applicant's petition was not maintainable under section 9 of the Act for the following reasons:

– The judge observed that the dispute resolution clause in the JVA *"clearly evinces the intention of the parties to exclude the applicability of [P]art-1 of the Act"* (which includes section 9).[6] In the absence of any express exclusion of section 9 (or Part-1 as a whole) in the JVA dispute resolution clause, the judge's reasoning appears to have been predicated on an implied exclusion as a result of the parties' choice of the JCAA Rules.

  In particular, the judge examined Article 77 (Mandate of Emergency Arbitrator) of the JCAA Rules[7] and concluded that the Applicant was correct in *"understanding and perceiving that* [the] *appropriate remedy to seek interim measures was by invoking the jurisdiction of the Emergency Arbitrator under* [the] *JCAA Rules*".[8] Although not clearly spelt out in the judgment, this finding suggests that the judge construed Article 77 of the JCAA Rules as an implied exclusion of section 9 of the Act because Article 77 envisages that the power to grant interim relief prior to the constitution of the arbitral tribunal lies exclusively with the emergency arbitrator.

  The judge was further persuaded by the fact that while the *"JCAA Rules provide a detailed mechanism for interim and emergency measures*"[9], they do not recognise a party's right to approach national courts or tribunals for interim relief. The judge contrasted this with Rule 30 of the SIAC Rules[10], which states that "a request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with [the SIAC] Rules."[11] Notably, the JCAA Rules do not contain such a provision.

– It was not open to the Applicant to *"take a second bite at the cherry"*[12] by seeking interim measures from the Delhi High Court, following its failure before the emergency arbitrator.
  This was particularly so because the emergency arbitrator had rendered a detailed and reasoned order and the Applicant did not plead any change in circumstances since the emergency arbitrator's order.

– Pursuant to the doctrine of election, the Applicant was barred from pursuing interim relief under section 9 of the Act once it had *"consciously chosen to tread on a path*" before the emergency arbitrator.[13]

– The Applicant's pleadings were *"really in the nature of an appeal pointing out flaws and infirmities in the order of the Emergency Arbitrator*" and the Delhi High Court could not sit as a court of appeal over such orders under section 9 of the Act.[14]

– Although the judgement does not contain any express ruling on the Respondent's preliminary objection based on section 9(3) of the Act (perhaps because the Act does not recognise the concept of emergency arbitrator relief), it cites the continuing mandate of the emergency arbitrator (pending the constitution of the arbitral tribunal) as a basis for denying interim relief under section 9 of the Act. The judgment notes that it remained open to the Applicant to approach the emergency arbitrator to seek appropriate relief or a modification of its earlier order.[15]

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[6] Paragraph 54.

[7] Paragraph 54.

[8] Paragraph 55.

[9] Paragraph 54.

[10] Paragraph 61.

[11] Similar (but not exactly the same) provisions are contained in Article 25.3 of the 2014 LCIA Arbitration Rules, Article 23.9 of the 2018 HKIAC Administered Arbitration Rules and Article 28(2) of the 2017 ICC Arbitration Rules.

[12] Paragraph 55.

[13] Paragraph 56.

[14] Paragraph 56.

[15] Paragraph 57.

The judgement also contains an interesting discussion on an earlier judgment of the Delhi High Court in the case of *Raffles Design International India Private Limited & Ors. v Educomp Professional Education Limited & Ors*. (**Raffles**) – the second Indian case to deal with emergency arbitrator relief.[16]

In *Raffles*, the applicant succeeded in obtaining interim relief from an emergency arbitrator appointed under the SIAC Rules. Although the Delhi High Court held that the emergency arbitrator's order was not enforceable under the Act, it noted that the applicant was not precluded from applying for court-ordered interim measures under section 9 merely because it had obtained a similar order from the emergency arbitrator. The Delhi High Court held that courts are required to decide the question of whether to grant interim measures under section 9 of the Act independent of the emergency arbitrator's order.

The *Ashwani Minda* judgement does not interfere with the position established in *Raffles*. However, it distinguishes *Raffles* on two counts: (i) the dispute resolution clause in *Raffles* did not exclude the applicability of section 9 of the Act; and (ii) the SIAC Rules envisage that the parties may approach courts for interim relief in certain circumstances.[17]

[16] Paragraphs 40. 52 and 58-61.

[17] Paragraph 61.

Conclusion

Following this judgement, the Indian position on the availability of court-ordered interim relief in circumstances where parties have recourse to an emergency arbitrator mechanism under their chosen institutional arbitration rules is comparable (albeit not identical) to the position prevailing in England since the *Gerald Metals S.A. v Timis & ors*[18] judgment in 2016.

In *Gerald Metals* (discussed in an earlier post), the English Commercial Court rejected the claimant's application for interim relief under section 44(3) of the English Arbitration Act, following the claimant's failure to obtain urgent and emergency relief under Articles 9A and 9B of the 2014 LCIA Rules. The Commercial Court observed that the purpose of these provisions of the LCIA Rules was to reduce the need to invoke the court's assistance in urgent cases; and it was only cases where such powers were inadequate or could not be exercised in a practical manner, that the court could act under section 44 of the English Act.

Unlike the *Gerald Metals* judgment, the *Ashwani Minda* judgement does not clearly lay down any test based on the urgency of the relief sought or the adequacy/efficacy of interim relief that may be awarded under the chosen institutional arbitration rules. The Delhi High Court's judgement instead focusses on whether the choice of certain institutional arbitration rules could per se exclude recourse to section 9 of the Act in its entirety (as opposed to narrowing such recourse to a smaller set of circumstances, similar to the *Gerald Metals* case).

It is hoped that the Delhi High Court's decision to focus its analysis on implied/express exclusions of section 9 does not breathe new life into the decade-long uncertainty that plagued Indian court judgments in international arbitration cases in the same way as the Supreme Court's findings in the 2002 judgment of *Bhatia International v Buk Trading S.A* (which dealt with express/implied exclusions of Part-1 of the Act).[19]

Against this backdrop, the importance of a carefully considered and well-drafted arbitration clause assumes renewed significance for parties to foreign-seated arbitrations with an Indian connection. To the extent that such parties wish to retain their ability to approach the Indian courts for interim relief, they must take care not to expressly or impliedly exclude section 9 of the Act. This includes choosing institutional rules that clearly acknowledge (or, at least, do not prejudice) the parties' right to approach national courts or tribunals for interim relief in appropriate circumstances.

The *Ashwani Minda* judgment also suggests that parties could potentially face an uphill battle obtaining interim relief from the Indian courts where the same (or substantially the same) relief has already been refused in emergency a rbitrator proceedings and there has been no change in circumstances following the emergency arbitrator's order.

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[18] [2016] EWHC 2327 (Ch).

[19] (2002) 4 SCC 105