



ELP Arbitration Weekly Alert

July 10, 2019

DELHI HC: A PROCEDURAL ORDER REJECTING AN APPLICATION UNDER SECTION 19 OF THE ARBITRATION AND CONCILIATION ACT, 1996 (ACT) IS NOT AN INTERIM AWARD UNDER SECTION 2(1)(c) OF THE ACT

ONGC Petro Additions Limited v. Tecnimont S.P.A. & Anr. ¹ (July 1, 2019)

Background

In the matter of an international commercial arbitration between ONGC Petro Additions Limited (**ONGC**) and Tecnimont S.P.A. & Anr. (**Tecnimont**), ONGC sought the leave of the tribunal to file additional documents after the time period for completion of pleadings and production of documents had expired by way of an application. It is pertinent to note that the final hearing was scheduled to take place within a month.

¹ O.M.P. (COMM) 196/2019 & I.A. 7134/2019

The arbitral tribunal passed an order dated May 10, 2019 (**Order**) rejecting the application filed by ONGC under section 19 of the Act for placing additional documents and evidence on record. Aggrieved by the Order, ONGC filed a petition before the Delhi High Court (**Court**) under section 34 of the Act to set aside the Order (**Section 34 Application**).

The primary issue which arose for consideration before the Court was whether the Order constituted an "*interim award*" under section 2(1) (c) of the Act and was therefore amenable to challenge under section 34 of the Act.

Findings of the Court

Upon considering the factual and legal submissions made by ONGC and Tecnimont, the Court made the below findings.

The Order is a procedural order and does not qualify as an 'interim award'

ONGC sought reliance on *Cinevistaas*² and *Indian Farmers*³ wherein the orders of the tribunal were held to be an "*interim award*" and amenable to challenge under section 34 of the Act. Distinguishing both *Cinevistaas* and *Indian Farmers* on facts and law, the Court made the following observations:

- The Court observed that in *Cinevistaas*⁴ - (i) the impugned order rejected the additional claims that were being proposed to be introduced on the ground of limitation and therefore there was a finality attached to the interim order as there would be no determination of those claims in the final award; (ii) the order qualified as an interim award with the trappings of finality vis-a-vis the additional claims and (iii) accordingly, the impugned order was regarded as an '*interim award*' and held amenable to challenge as it rejected substantive claims.
- The Court held that ONGC's reliance on *Indian Farmers*⁵ case was misplaced. In the said case, the issue which *inter alia* arose for determination was whether an award on the issue of limitation qualified as an interim award, and the court therein concluded that since the order on the question of limitation was final on the issue, it qualified as an interim award.

Upon examining the factual matrix in *Rhiti Sports*⁶, the Court held that the facts squarely applied to the present case as the court therein decided whether an order of the tribunal rejecting to place additional documents on record qualified as an interim award. In *Rhiti Sports*, the court concluded that "any procedural order or an order which does not finally settle a matter at which the parties are at issue, would not qualify to be termed as 'arbitral award'".

Testing the above judicial precedents in the present case, the Court concluded that the Order is a *procedural order* and does not decide or finally dispose of any issue. The Court culled out as follows:

- In passing a procedural order, the tribunal may determine certain valuable rights of the parties. However, it does not mean that such determination would render an order as an arbitral award under section 2(1)(c) of the Act;
- To determine whether an order is an interim award, two factors have to be determined i.e. finality and issue. In the present case, the Order is not 'final' as it does not conclusively decide an issue in the arbitration proceedings. While the Order rejects a request for placing additional documents on record, it does not decide an issue or subject matter of adjudication between the parties; and
- Matters of procedure are to be left to the arbitral tribunal.

Act does not allow a challenge to a procedural order passed by the tribunal

The Court noted that there is no provision under the Act to allow a challenge to any procedural order passed by the arbitral tribunal. The Court observed that if the Act does not permit a challenge to such an order, the court cannot surpass the intent of the legislature. Nonetheless, the Court observed that the scheme of the Act endorses the intent of the legislature to allow procedural matters to be left to the arbitral tribunal.

² *Cinevistaas Ltd. v. Prasar Bharti*, 2019 SCC OnLine Del 7071

³ *Indian Farmers Fertilizer Co-operative Limited v. Bhadra Products*, (2018) 2 SCC 534

⁴ *Cinevistaas Ltd. v. Prasar Bharti*, 2019 SCC OnLine Del 7071

⁵ *Cinevistaas Ltd. v. Prasar Bharti*, 2019 SCC OnLine Del 7071

⁶ *Rhiti Sports Management Pvt Ltd v. Power Play Sports & Events Ltd.*, 2018 SCC OnLine Del 8678

Section 34(4) cannot be applied to the present case

ONGC sought reliance on *Kinnari Mullick*⁷, wherein the power of the court under section 34(4) was addressed and submitted that the Court should intervene under section 34(4) of the Act to prevent what may finally become an unsustainable award. Rejecting the contention of ONGC, the Court noted that although section 34(4) of the Act includes the words "*requested by a party, adjourn the proceedings*", in the present case, such a request to eliminate the grounds for challenge could not be made by the party (i.e. ONGC) seeking to set aside an order / award. Further, noting that ONGC's argument was wholly misconceived, the Court held that the provisions of the Act expressly bar intervention of the court except where expressly provided. It noted that as per the scheme of the Act, a challenge may be filed against a final award and not at an intermediate stage. The Court concluded that "*the Act does not mandate that a party should be coerced or cajoled into presenting its case; the Act only mandates that a party be given an opportunity to present its case.*"

The grounds to set aside an award under section 34 of the Act have not been met

Having concluded that the impugned Order does is not an interim award and is therefore not amenable to challenge under section 34 of the Act, the Court observed that it was not required to assess the merits of the Section 34 Application to set aside the award. Nonetheless, for the sake of completion, the Court rendered its findings on the Section 34 Application and *inter alia* held that the Order was well reasoned, well founded, and did not merit any interference of the court. Further, the Court concluded that grounds under section 34 of the Act to set aside an award were not met in the present case.

Conclusion and Analysis

The Court concluded that the Section 34 Application was devoid of merit and dismissed the said application. The Court cautioned that the findings in its order shall not have any bearing on the merits of the claims or counter claims.

This decision is welcome as the Court recognizes that certain aspects of the proceedings ought to be left to the discretion of the arbitral tribunal in furtherance of the scheme and objective of the Act. Given that the Court did not find that the Order was an interim award, it has reiterated that an order of the tribunal would only qualify as an interim award and be amenable to challenge only in certain circumstances, such as when the order is final and conclusively determines an issue in the arbitration proceedings.

It is worth mentioning that in *M/s Emkay Global*⁸ the issue which arose for consideration before the Supreme Court was whether parties could lead evidence in an application filed under section 34 of the Act since section 34(2)(a) of the Act uses the words "*furnishes proof*" in relation to grounds which need to be established in challenge proceedings. The Supreme Court held that an application for setting aside an award under section 34 of the Act will not '*ordinarily*' require any proof beyond the arbitrator's records. The Supreme Court added a rider to its finding and held that in certain circumstances parties may be allowed to lead evidence and if '*absolutely necessary*', parties may be allowed to cross examine in applications under section 34 of the Act. However, the circumstances which qualify as '*absolutely necessary*' to enable parties to cross examine remains to be seen. In this backdrop, it remains to be seen whether instances where additional documents have not been taken on record by the tribunal would qualify as a circumstance under which parties may be allowed to lead evidence in challenge proceedings.

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⁷ *Kinnari Mullick v. Ghanshyam Das Damani*, (2018) 11 SCC 328

⁸ *M/s Emkay Global Financial Services Limited v. Girdhar Sondhi*, (2018) 9 SCC 49