

DCHL does not comply with condition for stay

3. DCHL failed to furnish the bank guarantee within the prescribed timeline in terms of Order-I and sought an extension of time. After the extension, DCHL yet again did not furnish the bank guarantee. In view of the consecutive failure, by way of a letter, BCCI informed DCHL that there was no longer a stay on termination of the Contract.

Arbitral Tribunal grants ad-interim stay on the termination, which is later set aside by the Court in appeal

4. Shortly thereafter, in October 2012, DCHL filed an application under section 17 of the Act, before the Ld. Sole Arbitrator and sought (i) an extension of time to furnish the bank guarantee and (ii) an extension of the stay on the termination of the Contract or continuance of *status quo*. The Ld. Sole Arbitrator passed an ad-interim order of status quo and granted BCCI time to file a reply ("**Order-II**"). BCCI filed an appeal against Order-II under Section 37 of the Act, before the Court and the Court passed a stay on Order-II. Thereafter, by an order dated, 18 October 2012, the Court allowed the appeal against Order-II and quashed Order-II as the Ld. Arbitrator acted without jurisdiction ("**Order-III**"). DCHL then pursued a special leave petition before the Hon'ble Supreme Court, which was unsuccessful.

Court rejects second petition seeking stay on termination

5. DCHL once again filed a petition under section 9 of the Act, before the Hon'ble High Court, seeking a stay on the termination of the Contract ("**Second Section 9 Petition**"). By an Order dated, 18 October 2012, the Hon'ble High Court did not grant the ad-interim relief ("**Order-IV**").

Award

6. Thereafter, the proceedings continued before the Ld. Sole Arbitrator. Following the final hearing and filing of written submissions, there was a delay in rendering of the Final Award because of proceedings against DCHL before the National Company Law Tribunal, Hyderabad ("**NCLT**") under the Insolvency and Bankruptcy Code, 2016 filed by one of its creditors. The moratorium was lifted on 7 August 2019, and the Award was made on 17 July 2020 in favour of DCHL ("**Award**").
7. Aggrieved by the Award, BCCI filed an application under section 34 of the Act to set aside the Award ("**Section 34 Application**"). The issue which arose for consideration was whether the Award was 'patently illegal' and hit by 'perversity'.

FINDINGS OF THE COURT

8. The Hon'ble High Court perused the findings under the Award and the contentions of the parties in the Section 34 Application. The findings of the Hon'ble High Court are summarily as follows:
 - a) **Award is "patently illegal" – Show Cause Notice was not a pre-requisite to termination**
The Award upheld DCHL's contention that BCCI ought to have issued a Show Cause Notice ("**SCN**") to DCHL to cure defaults in 30 days and without it, there could be no termination. BCCI submitted that the Award was contrary to the Contract inasmuch as it held that a SCN was necessary. Upon examining clause 11 of the Contract, the Hon'ble High Court held that - the clause incorporated two categories of breaches i.e. (i) that could be remedied and (ii) that were incurable. While the first category required an SCN to be issued, the second only required a termination notice. The "*insolvency event*" qualified under the second category of breaches and therefore, no SCN was required as per the Contract. The Award fails to recognize the distinction between the remediable breaches and those that go to the root of the matter, thereby rendering the Award "*patently illegal*".
 - b) **Award fails to consider "vital evidence" - The question of premature termination could not have arisen**
The Award held that the termination was premature as it came one day prior to the expiry of the 30 day cure period. The Court observed that (i) the Award "*totally ignored*" the "*vital evidence*" which shows that BCCI

held the termination in abeyance specifically to allow DCHL an additional day to demonstrate that it had cured all breaches; and (ii) while DCHL complained of ‘short time’ of a day, DCHL was in fact given an additional day. Therefore, the complaint of premature termination was at naught. In this regard, the Award was vitiated by the non-consideration of vital evidence.

c) Award is not reasoned and does not rely on evidence - DCHL did not achieve “substantial compliance”

The Court observed that the Ld. Sole Arbitrator erred as it held that DCHL “substantially cured” the defect vis-a-vis payment of player’s fees and clearance of bank charges in light of the following:

- (i) Admittedly, actual payment had not been made to the players and therefore, DCHL could not have achieved “substantial compliance”. The Award is silent on the record of events that occurred in Hon’ble High Court and vital evidence leading upto the purported “substantial compliance” with respect to payment of players.
- (ii) With respect to bank charges, the Court observed that the Award relies upon uncorroborated submissions of DCHL that all charges existed before the Contract and that they were on the newspaper division. The Award neither relied upon the Contract nor provided “reasons” while concluding that there was no charge created on the franchise. Therefore, the Award is perverse and hit by patent illegality.
- (iii) While the Hon’ble High Court recognized that the generalized principle of “substantial compliance” has a footing in public law matters, it ruled out its applicability from private contract law unless the Contract itself allows for it.

d) The Award is hit by perversity – Existence of an “Insolvency event” under the Contract could not be ruled out

While Industrial Finance Corporation of India Ltd. (“IFCI”) had filed a winding up petition against DCHL, in the arbitration proceedings, DCHL contended that a winding up order had not been issued and the matter had been “compromised”. The Hon’ble High Court observed that the Award relied upon the uncorroborated submission and held that the “Insolvency Event” was no more in existence on the date of termination and “hence, it was not open to the Respondent to rely upon the event for terminating the Franchise Agreement.” The Hon’ble High Court *inter alia* observed that the Award stated that since consent terms were arrived in September 2012, the ‘matter was settled’ and did not delve into the manner into the terms of settlement’. Further, a mere compromise agreement does not dissolve the winding up process as the process goes till payments are paid. Thus, the Award falls within the legal definition of perversity.

e) Award was contrary to the Contract and erroneously based on principles of public law. Award is hit by Patent Illegality – BCCI’s termination of the Contract was not discriminatory/onerous

- (i) The Award records BCCI’s discrimination against DCHL i.e. while there were many other teams who acted in breach of their contracts, action was not taken against such teams. The Hon’ble High Court held that the allegation of discrimination was a ground to invalidate the termination and hence, the same must have been pleaded and proved with evidence. Thus, the findings in the Award were not possible and travelled beyond the Contract.
- (ii) The Award imports public law doctrines in a private law contract and concludes that while BCCI is not the State under Article 12 of the Constitution of India (“**Constitution**”), it nonetheless performs “public functions”. The Award then considers lending the principles of reasonableness under Article 14 of the Constitution to the Contract and whether public law. Relying upon *Avitel Post Studios*³, the Hon’ble High Court concurred that in a matter under the Act, the separation between private

³*Avitel Post Studios Ltd v. HSBC PI Holdings (Mauritius) Ltd.*, 2020 SCC OnLine SC 656

“34The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus necessitating the hearing of the case by a writ High Court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain”³.

law considerations and those in public law has already been laid down. However, the Award does not touch upon that aspect and states that when “*a public law principle is invoked, therefore the objection as to lack of pleading is rejected*”. The Hon’ble High Court held that the said finding is an impossible one, the Award erred in importing the public law principles, and in relying upon public law principles to justify the absence of pleadings.

- (iii) The Hon’ble High Court observed that section 28(3) of the Act mandates the arbitral tribunal to take into account the terms of the Contract and section 28(2), requires the Ld. Sole Arbitrator to decide *ex aequo et bono or as amiable compositeur* (i.e. according to the right and good) only if authorized to do so by the parties. The Ld. Sole Arbitrator ought to have limited itself to the Contract and cannot determine the issue based on his notions of equity and fairness unless permitted under the Contract. In view of the above, the Hon’ble High Court held that the Award is hit by patent illegality inasmuch as it held that BCCI’s termination was unfairly discriminatory.
- (iv) The Award applied the doctrine of proportionality to determine BCCI’s termination notice and equates it with “*the quantum of punishment*”. Relying upon *SsangYong Engineering*⁴, the Court held that the Ld. Sole Arbitrator cannot return a finding that something contravenes public policy unless the contract permits such a course of action. Whether or not the termination was onerous or had severe consequences, was entirely irrelevant and beyond the contract. The Ld. Sole Arbitrator ought to ensure that he does not traverse beyond the scope that might amount to violation of public policy standards. Thus, the termination cannot be treated as a punishment, but a consequence as provided in the Contract.

f) Arbitrator’s finding on certain evidence was perverse

The Award records that a letter (suggesting the sale of franchise) addressed by DCHL, which formed a matter of dispute, was obtained under duress. The Hon’ble High Court considered the facts with respect to the letter and the presence of the signatory at important meetings to conclude that the Award is perverse and fails to appreciate the facts.

g) When the relief of specific performance is not sought, the same could not have been granted

The Award stated that since the termination was illegal, DCHL was entitled to damages in lieu of specific performance. The Hon’ble High Court observed that DCHL had given up and did not press its claim for specific performance and specific performance can be granted to only those persons who specifically press for the same. Relying upon *Ardeshir Mama v. Flora Sasoon*⁵, the Court held that the Award traversed beyond its scope and granted a relief that was not even sought by the party.

CONCLUSION AND ANALYSIS

The Hon’ble High Court set aside majority of the Award and held in favour of BCCI, except to the extent of a claim payable by BCCI to DCHL.

The judgment is welcome in as much as it preserves the commercial understanding between the parties under a contract. The Hon’ble High Court finds the Award erroneous as it imports principles of public law and reasonableness while determining the rights of the parties under a contract. This judgment emphasises that arbitral tribunal’s must keep the commercial understanding of the parties above all other pre-existing notions. The judgment sets an important stand by

⁴ *SsangYong Engineering & Construction Co Ltd. v. National Highway Authority of India*, 2019 SCC OnLine SC 667

⁵ *Ardeshir Mama v. Flora Sasoon*, 55 IA : AIR 1928 PC 208

“28... the suit for specific performance must, therefore, fail. Once a suit for specific performance fails by reason of the fact that claim for specific performance was not pressed or abandoned at the trial, the question of damages for specific performance in substitution also fails....”

holding that the arbitral tribunal cannot travel beyond its scope as given by the law or in the contract. To put it differently, as long as the contract is within the limits of the law, contract is king.

The judgment also opens up perhaps another leg of interference that can be exercised by the Hon'ble High Court in a Section 34 petition. Under section 34 (2A) of the Act, the Court can set aside the Award in domestic arbitrations on the ground of 'patent illegality' but in doing so, it cannot re-appreciate the evidence or set aside the Award on the ground of erroneous application. While the Hon'ble High Court cautioned that it would not re-appreciate evidence, in determining whether the Award is patently illegal, the Court to an extent has exhaustively but carefully delved into the facts and the arbitrator's interpretation of the evidence. It therefore remains to be seen how the present judgment may have an impact on future Section 34 petitions.

We hope you have found this information useful. For any queries/clarifications please write to us at insights@elp-in.com or write to our authors:

Abhileen Chaturvedi, Associate Partner – Email – abhileenchaturvedi@elp-in.com; Ria Dalwani, Senior Associate – Email – riadalwani@elp-in.com; Sharmin Kapadia, Paralegal – Email – sharminkapadia@elp-in.com

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