



Enforcement of foreign arbitral awards

Territorial jurisdiction of courts in India

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Foreign arbitral award holders who do not have a presence in India often face the dilemma of which Indian court to approach for the enforcement of their award. Some clarification was provided by the Supreme Court of India in 2018 in *Sundaram Finance Ltd. v. Abdul Samad & Anr.*, 2018 SCC 622, where the Court clarified that an award holder could initiate execution proceedings before any court in India where assets are located. In the event that the subject-matter of the arbitration was of a specified value, commercial courts established under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 may have jurisdiction.

On June 8, 2020, the Delhi High Court in *Glencore International AG v. Hindustan Zinc Limited* (O.M.P.(EFA) (COMM.)9/2019 & O.M.P. (EFA) (COMM.) 10/2019) (*Glencore v. Hindustan Zinc*) provided further guidance on the matter holding that a foreign award maybe enforced as a deemed decree, depending on the location of the assets of the judgment debtor.

Enforcement of foreign awards in India

India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention). If a party receives a binding award from an arbitral tribunal seated in a country which is signatory to the New York Convention or Geneva Convention and such country is also notified as a reciprocating territory by the Indian government, the award would be enforceable in India.

The enforcement procedure for foreign awards is set out in Part II of the Arbitration and Conciliation Act, 1996 ("Act"). The enforcement of a foreign award in India is a two-stage process: (i) an application to enforce a foreign award may be filed under sections 48 (conditions for enforcement) or 59 (appealable orders) of the Act. (ii) Where the award is declared enforceable, the court can order the execution of the award similar to a decree as prescribed by the Civil Procedure Code, 1908 and provide relief sought by the award holder in its application for enforcement.

Glencore International AG v. Hindustan Zinc Limited

Background

Disputes arose between Hindustan Zinc Limited (Respondent) and Glencore International AG (Petitioner) concerning a contract for the supply of MRM concentrate being shipped from Australia to India. The Respondent invoked the arbitration clause and submitted the dispute to the London Court of International Arbitration (LCIA). As the subject-matter of the disputes related to two separate contracts entered into between the parties, the LCIA issued two final awards and further awards on costs and interest on costs.

The Respondent challenged the final awards before the Rajasthan High Court, which were dismissed. The Respondent appealed against this judgment before the division bench of the Rajasthan High Court. While, the appeal was pending, the Petitioner approached the Delhi High Court for enforcement of the awards on costs and interest on costs. The Respondent challenged the enforcement petition on the grounds that the Delhi High Court lacked appropriate territorial jurisdiction as the assets were not located within the jurisdiction of the court. The Respondent also contended that:

- the assets of the Respondent were in Rajasthan and there were no assets in New Delhi. The only asset within the Delhi High Court's jurisdiction which was identified by the Petitioner was a property leased out to the Respondent.
- the Indian Arbitration and Conciliation Act, 1996 contemplates a single executing court. Since the Respondent's challenge to enforcement was pending before the Rajasthan High Court, the Delhi High Court should not entertain the enforcement petitions.

The Petitioner argued that where the subject matter of the foreign award is money, an enforcement petition can be filed where the assets are located. The Petitioner noted that the Respondent's administrative office and movable assets such as cars, bank accounts, furniture etc. were located in New Delhi. The Delhi High Court therefore had requisite jurisdiction.

Territorial jurisdiction

The High Court held that a petition for the enforcement of the arbitral award is maintainable only where properties or assets of the judgment debtor are located. Relying on the Supreme Court judgment in *Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd., Saudi Arabia & Ors.* 1995 Supp (2) SCC 280, the Court observed that a foreign award, is a deemed decree when granted enforcement and can be enforced anywhere depending on the location of the assets of the judgment debtor or where the money lies.

The High Court also relied on *Wireless Developers Inc. v. India Games.*, 2012 (2) ALLMR 790 to rule that the onus is on the award holder to locate the money of the judgment debtor and in the event such money cannot be found, the award holder may subsequently file an application before another court to locate other property. Accordingly, the High Court ruled that it had the necessary jurisdiction to entertain the enforcement petitions since the Respondent had moveable assets and bank accounts within the Court's jurisdiction.

The Court observed that the Respondent had failed to establish that the administrative office was on lease. The Respondent was therefore directed to file an affidavit disclosing all assets, moveable and immovable, tangible and intangible. The Respondent was also ordered to furnish proof that the office premises were on lease. The Court held that depending on the disclosure in the affidavit, the issue of territorial jurisdiction would be finally decided. The Court also held that pendency of proceedings before the Rajasthan High Court did not hinder the enforcement proceedings before the Delhi High Court.

Concluding remarks

Securing a favourable award is only half the battle won. Success in an arbitration lies in being able to recover the award and not simply in prevailing in the arbitration. An enforcement strategy is the route to victory and *Glencore v. Hindustan Zinc* provides clarity to foreign award holders seeking to enforce arbitral awards in India. Key takeaways are:

- It is not uncommon for judgment debtors to improperly diminish the assets that would otherwise have been available to award holders. It would therefore be prudent for award holders to seek the assistance of asset tracing companies, at the earliest, to ascertain the location of all assets (movable and immovable, tangible and intangible) owned by the judgment debtor and its value prior to filing an enforcement petition.
- Once the assets have been traced, an application for enforcement of the foreign arbitral award may be filed at the court in the relevant jurisdiction where the assets are located. *Glencore v. Hindustan Zinc* reassures foreign award holders that the threshold to establish territorial jurisdiction of courts for enforcement of foreign awards, is not high. The onus is on the award holder to show that the judgment debtor has some assets within the jurisdiction of the court.
- Territorial jurisdiction of the court maybe established even if all details concerning the judgment debtor's assets may not be available at the time of filing the enforcement petition. The court has the power to direct the judgment debtor to furnish details of all assets within its jurisdiction.

The authors note that the proceedings are ongoing before the Delhi High Court and we will report further developments in

due course.

Please contact the authors or your DLA Piper relationship lawyers should you have any questions concerning these requirements and their implications.

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