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NCLT MUMBAI: UNENFORCED FOREIGN AWARD CAN BE THE BASIS FOR A CLAIM FOR A CIRP APPLICATION

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On 9 June 2020, the Mumbai Bench of the National Company Law Tribunal (NCLT) passed an order admitting a petition for the initiation of the corporate insolvency resolution process (CIRP) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) in the matter of *Agrocorp International Private (PTE) Limited v National Steel and Agro Industries Limited* (CP(IB) No. 798/MB/C-IV/2019). In doing so, the NCLT held that a foreign-seated arbitral award is adequate proof of a "claim" under Section 9 of the IBC, despite the fact that the foreign award had not undergone enforcement proceedings in India.

Brief Background

Agrocorp International Private (PTE) Limited (Operational Creditor) entered into a contract with National Steel and Agro Industries Limited (Corporate Debtor) for the sale of whole yellow peas. Disputes arose thereunder, and they were referred to a London-seated arbitration. The arbitral tribunal granted damages, interest, and costs to the Operational Creditor in its award. Thereafter, the Operational Creditor used the foreign award as proof of a claim against the Corporate Debtor for initiation of CIRP under Section 9 of the IBC, without having filed proceedings for the enforcement of the said foreign award under Part II of the Arbitration and Conciliation Act, 1996 (Arbitration Act).

Arguments

The Corporate Debtor raised objections to the Operational Creditor's petition for CIRP by *inter alia* contending that the foreign award had yet to attain finality in India as a decree, and as such was not yet binding upon the parties in India, because: (i) it had not yet undergone enforcement proceedings under the Arbitration Act; and (ii) the foreign award was yet to be challenged on merits in the courts of London, the seat of the arbitration, and was open to a 'pre-existing dispute'.

In order to supplement its former contention, the Corporate Debtor relied on the decisions of the Bombay High Court in *Noy Vallesina Engineering Spa v Jindal Drugs Ltd (2006 5 Bom CR 155)*, and the Calcutta High Court in *Sea Stream Navigation Ltd v LMJ International Ltd (2013 SCC Online Cal 1940)*, both of which analysed Sections 46, 47, 48 and 49 of the Arbitration Act, and consequently held that a foreign award is considered to be binding on the parties in India only when it is found to be enforceable under Part II of the Arbitration Act, and once the foreign award satisfies the tests

mentioned in Section 48 of the Arbitration Act, the award would be deemed to be a decree of the court.

In order to further its contention that the foreign award was the subject of a "pre-existing dispute" over a claim because it had not yet undergone challenge proceedings, the Corporate Debtor relied on the decision in *K Kishan v M/s Vijay Nirman Company Pvt Ltd ((2018) 4 CompLJ 168 (SC))* (K Kishan). In this case, the Supreme Court refused to uphold the allowance of a CIRP petition which based its claim on an arbitral award, because the award was pending proceedings under Section 34 of the Arbitration Act.

The Operational Creditor refuted the former contention by relying on the fact that United Kingdom (UK) is a reciprocating territory under Section 44A of the Code of Civil Procedure, 1908 (CPC), i.e., decrees passed by a court in UK are deemed to be decrees of a court in India, unless proven otherwise. It also placed reliance on the fact that a foreign award is binding on the parties and can be used by any of them by way of defence, set-off, or otherwise in any legal proceeding in India in terms of Section 46 of the Arbitration Act. The Operational Creditor went on to state that the NCLT was not a competent authority to adjudicate upon the validity of a foreign decree, as was held by the National Company Law Appellate Tribunal (NCLAT) in *Usha Holdings L.L.C. & Anr v Francorp Advisors Pvt Ltd (CP(IB) No. 196(PB)/2017)* (Usha Holdings). (you can access our earlier article on the NCLAT's decision in *Usha Holdings* here)

View of the NCLT

The NCLT considered the contentions of both the parties and decided to admit the petition for initiation of CIRP. It held that the foreign award was a valid source of a 'claim' as defined in Section 3(6) of the IBC, as the foreign award was passed in the UK, which is a reciprocating territory in terms of Section 44A of the CPC. Consequently, the NCLT specifically held that the foreign award was capable of being executed in India.

The NCLT also held that the Supreme Court's ruling in *K Kishan* does not entail that the Operational Creditor is to wait indefinitely for the Corporate Debtor to challenge the subject foreign award in the courts of London. If such proceedings were to be initiated, they are evidentiary of a pre-existing dispute and a consequent bar to initiation of CIRP under Section 9 of the IBC, but in their absence, there is no pre-existing dispute.

Comment

One must bear in mind that the present case was in the context of a foreign award passed by a reciprocating territory notified under Section 44A of the CPC. Moreover, India is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) as well as the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention) and the foreign award in the present case was from the UK which is a signatory to the New York Convention and the Geneva Convention and has been notified as a convention country by India. As such, in this case, the NCLT referenced Section 44A of the CPC to hold the said foreign award as being capable of execution in India. Despite referencing the decision of the NCLAT in *Usha Holdings* earlier, the NCLT's decision in the present case appears to be inconsistent with the finding of NCLAT – that the Adjudicating Authority is not a "court" which can decide upon the validity or jurisdiction of a foreign decree.

However, the conclusion that was drawn by the NCLT, i.e., that the admission of the CIRP petition, was accurate because Section 9 of the IBC is based on a "claim" - a right to payment / remedy for breach of contract, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. Further, there was no pre-existing dispute against the foreign award. The said foreign award, regardless of any enforcement proceedings, can clearly fall within the definition of a "claim", and the absence of any objections to enforcement proceedings or challenge

proceedings in the UK is evidentiary of the lack of a pre-existing dispute. The question of the validity of a foreign award in the absence of enforcement proceedings need not have been touched upon by the NCLT.

Regardless, by holding that a foreign arbitral award is evidence of a valid claim for initiation of CIRP, despite the absence of enforcement proceedings, the NCLT has eased out the path for financial and operational creditors who have claims against Indian debtors which are crystallised by way of foreign arbitral awards. This case seems to indicate that the IBC mechanism does not require a foreign operational creditor to undergo enforcement proceedings in the concerned High Court and obtain a valid enforcement order therefrom, before approaching the NCLT with a claim and CIRP proceedings. However, in keeping with the decision of the Supreme Court in *K Kishan*, if enforcement proceedings are initiated, and objections thereto are raised by the Corporate Debtor in the High Court, the NCLT may not admit a CIRP petition until the pending enforcement proceeding, i.e., the pre-existent dispute, is resolved.

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