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Case Note: Daiichi Sankyo v. Malvinder Mohan Singh

Nakul Dewan

Abhishkta Mallick

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Nakul Dewan[*] *and Abhishikta Mallick*[**]

I. Introduction

Daiichi Sankyo Co. Ltd. v. *Malvinder Mohan Singh*[1] marks two critical points in the development of arbitral jurisprudence in India. The first, that an application seeking to resist enforcement of the arbitral award was declined notwithstanding a pending setting aside proceedings in the court of the arbitral seat; and the second, that an issue related to the manner and measure of calculating damages would be outside the purview of judicial interference. The detailed judgment on the issue was rendered by the High Court of Delhi on 31 January 2018, and the Special Leave Petition against that was dismissed *in limine* by the Supreme Court of India on 16 February 2018.

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[1] Daiichi Sankyo Co. Ltd. v. Malvinder Mohan Singh, 2018 SCC Online Del 6869.

II. The factual background of the case

The case related to a dispute arising out of a Share Purchase and Share Subscription Agreement ("**Agreement**") dated 11 June 2008. Under this Agreement, Daiichi agreed to purchase the Respondents' stake in Ranbaxy Laboratories Limited ("**RLL**") for a value of INR 1980 crores.[2]

Subsequently, in November 2009, Daiichi discovered the existence of an internal document known as a Self-Assessment Report prepared in 2004, which expressly set out fraudulent practices taking place at RLL. This included fabrication of data for regulatory submissions which had triggered a series of investigations by the US Food and Drugs Administration ("**FDA**") and the Department of Justice ("**DOJ**"). Daiichi Sankyo had to pay $500 million to the DOJ and $35-$50 million to the FDA to arrive at a settlement resolving its liability.

In terms of the dispute resolution clause set out in the Agreement, the dispute was adjudicated under the Rules of the International Chamber of Commerce in Singapore. Daiichi alleged that it had suffered direct and indirect losses as a result of entering into the Agreement based on the Respondents' fraudulent representations. It claimed damages under Section 19 of the Indian Contract Act 1872 ("**Contract Act**").

During the pendency of the arbitral proceedings, Daiichi proceeded to sell its stake in RLL to an Indian company called Sun Pharma for a sum of INR 2267 crores, which was INR 287 crores more than the purchase price paid by Daiichi for the stake in RLL.

The Arbitral Tribunal rendered its award (2:1) in favour of Daiichi, and held that the Respondents had misrepresented and concealed facts relating to the investigations against RLL in the United States. The Arbitral Tribunal also found that the Respondents had fraudulently induced Daiichi to enter into the Agreement.

Further, the Arbitral Tribunal also rejected the selling shareholders' assertion that no damages were payable because the grant of consequential damages was beyond its jurisdiction. The Arbitral Tribunal held that Daiichi would not be precluded from claiming damages under Section 19

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[2] *Ibid.*, 2.

of the Contract Act, either because the Agreement did not have an indemnity clause, or because the subsequent sale of Ranbaxy to Sun Pharma had been done at a value higher than the cost of acquisition. According to the Arbitral Tribunal, an award of damages under Section 19 would ensure that Daiichi was restored to the same position it would have been in had the selling shareholders' representation been true. On that basis, the Tribunal held that Daiichi was entitled to recover damages to the tune of INR 2562 crores.

To achieve that, the Tribunal calculated the quantum of damages based on the present value of Daiichi's stake at the weighted cost of capital. The Tribunal took into account aspects such as reputational issues faced by Daiichi, the opportunity cost of being unable to enter into transactions with different generic companies, and the cost of dealing with the investigations pursued by regulatory authorities.[3]

The Award was sought to be resisted before the High Court of Delhi on the ground that the enforcement of the Award was contrary to the public policy of India, as set out in Section 48(2)(b) of the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**"). The Respondent asserted that the Tribunal had acted beyond its jurisdiction in awarding consequential damages. It was asserted that the computation of damages was contrary to Section 19 of the Contract Act and resulted in the award of multiple damages, making the Award unenforceable.

III. RESTRICTIVE SCOPE OF JUDICIAL INTERFERENCE

The submissions of the Respondent pertaining to the computation of damages was held to be beyond the scope of review under Section 48 of the Arbitration Act. The Delhi High Court ["**the Court**"] unsurprisingly held that the scope of interference in relation to the enforcement of a foreign award was limited. The Court refrained from reassessing the merits of the case or taking a second look at the foreign award at the stage of enforcement.

Further, in line with the view taken in previous judgments of the Supreme Court of India,[4] the Court confirmed that the expression 'public

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[3] *Ibid*., 49-57.

[4] Shri Lal Mahal Ltd. v. Progetto Grano SpA, (2014) 2 SCC 433; Associate Builders v. DDA, (2015) 3 SCC 49.

policy of India' was to be given a narrow meaning in case of enforcement of foreign arbitral awards. A violation of a statute would not constitute a breach of the fundamental policy of Indian law, i.e., the enforcement of an award could be successfully resisted only if there was a breach of a substantial principle on which Indian law is founded. The Court relied on the recent decision of the High Court of Delhi in *Cruz City 1 Mauritius Holdings* v. *Unitech Ltd*.,[5] to state that a foreign award could not be set aside on the ground that it may be possible to take another view on the factual and legal issues involved in the dispute.

The Court also relied on the decision of the High Court of Delhi in *Xstrata Coal Marketing AG* v. *Dalmia Bharat (Cement) Ltd*.[6] where it was held that "[t]he jurisdiction of the Arbitral Tribunal is not limited to merely accepting or rejecting the measure of damages as claimed by a claimant. The Arbitral Tribunal is equally empowered to assess the quantum of damages on the basis of material and evidence produced." The court took the view that an award of damages would fall foul of the fundamental policy of Indian law only in the limited circumstance that its computation was based on no material at all or on *fanciful surmises*.[7]

In fact, the Court held that since it was within the remit of the Arbitral Tribunal to estimate a reasonable measure of damages, a method which simply sought to put a party back in the position it would have been but for the breach, could not be considered to be perverse or contrary to the public policy of India.[8]

Therefore, the Court reaffirmed the principles of minimal interference in challenges seeking to resist the enforcement of foreign awards, setting the bar high.

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5 Cruz City 1 Mauritius Holdings v. Unitech Ltd.,2017 SCC OnLine Del 7810 : (2017) 239 DLT 649.

6 Xstrata Coal Marketing AG v. Dalmia Bharat (Cement) Ltd., 2016 SCC Online Del 5861.

7 *Ibid*., 37; Also in McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, the Supreme Court held as follows:

"[I]t is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the Arbitrator."

8 See also Glencore International AG v. Dalmia Cement (Bharat) Ltd., 2017 SCC OnLine Del 8932.

IV. ENFORCEMENT OF ARBITRAL AWARDS WHERE AN APPLICATION FOR SETTING ASIDE HAS BEEN MADE

Daiichi had commenced execution proceedings before the High Court of Delhi despite the fact that an application seeking to set aside the Award was pending before the Singapore High Court. Interestingly, rather than seeking a stay of execution proceedings, the parties made a concession, which the judgment sets out as follows:

> "21. *Learned senior counsel for the parties have pointed out that apart from resisting the enforcement of the Award in the present court the respondents have also challenged the Award in the proceedings before the Court in Singapore. However,* both the senior counsel stated that the pendency of the proceedings in Singapore would not in any manner prevent this court from adjudicating the present objections filed by the respondents."
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> (Emphasis supplied)

For this reason, the Court did not discuss the implications of proceeding with the enforcement of an Award during a subsisting challenge. It is pertinent to note that this case is the first reported judgment of an Indian court where enforcement proceedings have not been stayed and the application to resist enforcement of the Award has been disposed of, even during the pendency of setting aside proceedings, in the court of the seat.

It is therefore relevant to analyse the issue of enforcement of an award during the pendency of setting aside proceedings. The language of Section 48 of the Arbitration Act has been adapted from Article V(1)(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and sets out as follows:

> "48. Conditions for enforcement of foreign awards
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> (1) Enforcement of *a foreign award* may be refused, *at the request of the party against whom it is invoked, only if that party furnishes to the court proof that* –
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> …

> *(e) the award has not yet become binding on the parties, or* has been set aside *or suspended by a competent authority of the country in which, or under the law of which, that award was made.*"

In terms of Article VI of the New York Convention, where an application has been made to set aside or suspend an award before a competent authority in the country in which it was made, the court of the place where recognition and enforcement is sought ("**Enforcing Court**") may, in its discretion, adjourn the decision on the enforcement of the award. Further, sub paragraph (e) of Article V(1) of the New York Convention, states that recognition and enforcement of an award may be refused if the award has not yet become binding, has been set aside, or has been suspended in the country where the award was made.

In the absence of guidance in the both the Convention and the *travaux t*o the Convention, the decision whether to stay the enforcement proceedings is made by domestic courts on a case-by-case basis. Courts have taken into account all relevant factual elements in the backdrop of the Convention's pro-enforcement emphasis. As observed by Lord Mance JSC in *Dallah Real Estate and Tourism Holding Co.* v. *Ministry of Religious Affairs of the Govt. of Pakistan ("Dallah")*,[9] generally it is for each Enforcing Court to determine for itself what weight and significance should be ascribed to the omission, progress, or success of an active challenge in the court of the seat. Courts have also carried out an assessment as to whether foreign court proceedings are being pursued in good faith, and not simply as part of a dilatory strategy.[10]

However, there is no widespread consensus or an articulation of a test to control the exercise of such discretion. While some courts have taken the territorial approach, which renders an award non-existent following a setting aside decision by the court of the seat, other courts have emphasised on the presumption of enforceability of arbitral awards.

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[9] Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Govt. of Pakistan, (2011) 1 AC 763 : (2010) 3 WLR 1472 : (2010) 1 Lloyd's Law Rep 119 [28].

[10] Dowans Holding SA v. Tanzania Electric Supply Co. Ltd., 2011 EWHC 1957 (Comm).

A. The territorial approach

Under the territorial approach, an annulled award can have no validity in any jurisdiction. Therefore, if there is no award left to enforce, the discretion to an Enforcing Court given by the word 'may' in Article V(1)(e) of the New York Convention creates a legal impossibility.[11] For instance, the Italian Civil Code of Procedure provides that the annulment of an award at the seat of the arbitration creates a mandatory ground for refusing to enforce the award.[12]

In fact, in line with this approach, the courts of Singapore have not allowed for the enforcement of annulled awards. In *PT First Media TBK* v. *Astro Nusantara International BV*,[13] the Singapore Court of Appeal, while acknowledging the discretionary power of the Enforcing Court to enforce an award that has been set aside, took the view that in fact, if an award had been set aside, it would be a nullity and there would be no existing award to enforce. The court stated as follows:

> "77 While the wording of Art V(1)(e) of the New York Convention and Art 36(1)(a)(v) of the Model Law arguably contemplates the possibility that an award which has been set aside may still be enforced, in the sense that the refusal to enforce remains subject to the discretion of the enforcing court, the contemplated erga omnes effect of a successful application to set aside an award would generally lead to the conclusion that there is simply no award to enforce. What else could it mean to set aside an award? If this avenue of recourse would only ever be of efficacy in relation to enforcement proceedings in the seat court, then it seems to have been devised for little, if any, discernible purpose. As such, we do not think that in principle, even the wider notion of "double-control" can encompass the same approach as has been adopted by the French courts. The refusal to enforce awards which have not been set aside at the seat court may therefore constitute one

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[11] AJ Van Den Berg, "Enforcement of Annulled Awards" (1998) 9(2) ICC International Court of Arbitration Bulletin (November) 15.

[12] Andrew Tweeddale, "Cutting the Gordian Knot: Enforcing Awards Where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration" (2015) 81(2) Arbitration 137, 138.

[13] PT First Media TBK v. Astro Nusantara International BV, (2014) 1 SLR 372 : 2013 SGCA 57.

> of the outer-limits of "double-control". However, as this specific issue is not directly engaged in the present appeal, we offer no further comment beyond these tentative thoughts."
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> (Emphasis supplied)

B. The transnational approach

On the other hand, in terms of the transnational approach, an arbitral award is considered to not be attached to any national legal system. Since arbitration is treated as disjunctive, an award does not lose the capacity to be enforced notwithstanding annulment by the court of the arbitral seat.[14]

Courts outside India have upheld the enforcement of arbitral awards during the pendency of setting aside proceedings. In particular, English courts have taken the view that the binding nature of the award must be determined at the Enforcing Court as opposed to the court of the arbitral seat.[15] If the Enforcing Court decides to enforce a foreign arbitral award, there is no change to the binding nature of the award "as a result of some event in the home jurisdiction."[16] In fact, even in cases where the arbitral award has been set aside at the court of the arbitral seat, the enforcement of arbitral award has at times been upheld.

Similarly, in *Yukos Capital SarL* v. *OJSC Oil Co. Rosneft*,[17] the Queen's Bench division of the English High Court addressed, inter alia, the issue of whether the set-aside decisions had the effect that the awards cannot be enforced by the English courts because they no longer exist in a legal sense. The Court upheld the enforcement of an award that had been set aside by the Moscow Arbitrazh Court. The setting aside decision of the Russian court was given no effect on the basis of conventional English conflict of law principles.[18] The English Court opined that it could not be bound by the setting aside decision of a foreign court which offended the basic principles of honesty, natural justice, and domestic concepts of public policy.

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[14] This approach has been taken by the French Courts as discussed at para [add] to [add] above.

[15] Dowans Holding SA v. Tanzania Electric Supply Co. Ltd., 2011 EWHC 1957 (Comm); Diag Human SE v. Czech Republic, 2014 EWHC 1639 (Comm).

[16] Dowans Holding SA v. Tanzania Electric Supply Co. Ltd., 2011 EWHC 1957 (Comm), 26.

[17] Yukos Capital SarL v. OJSC Oil Co. Rosneft, 2014 EWHC 2188 (Comm).

[18] *Ibid*., 20.

Particularly, the French Code of Civil Procedure which governs the enforcement of foreign awards, does not even have a ground similar to Article V(I)(e), where a court may, in its discretion, refuse enforcement of an Award on the ground that the award has been set aside in the country of origin.[19] French judges have relied on the more favourable domestic regime for enforcement of arbitral awards provided by French arbitration law on the basis of Art VII(1)[20] of the New York Convention.[21]

C. The intermediate approach

An intermediate view would fall in the middle of the spectrum between an automatic refusal prescribed by the territorial approach, and the complete disregard of an annulment award under the transnational approach. A court may retain the discretion to enforce an arbitral award even if it has been set aside, and articulate tests in relation to the manner of exercise of the discretion.

For instance, the decisions of the English courts have expressly retained the discretion to enforce an award that has been set aside in the

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[19] "Code of Civil Procedure, Book IV, Arbitration" in *ICCA International Handbook on Commercial Arbitration*, Supplement No. 64 (Wolters Kluwer May 2011) 1-16. Art. 1526 of the French Code of Civil Procedure (previously Art. 1502) provides that: "The Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Art. 1520"; and Art. 1520 (previously Art. 1506) provides that:

"An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy."

[20] Art. VII(1) of the New York Convention sets out as follows:

"The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

[21] See Soc. Pabalk Ticaret Ltd. Sirketi v. Sot. anon Norsolor, Cour de Cassation (1re ChCiv) 3 October 1984, 2 Journal of International Arbitration (Kluwer Law International 1985, Issue 2) 67-76; Hilmarton Ltd. v. Omnium de Traitement et de Valorisation Cour d'appel de Paris, 19 December 1991 in ICCA Yearbook Commercial Arbitration ["**Yearbook**"] XIX (Kluwer 1994) 655-657; Arab Republic of Egypt v. Chromalloy Aeroservices Inc. Cour d'appel Paris, 14 January 1997 in Yearbook XXII (1997) 691-695; PT Putrabali Adyamulia (Indonesia) v. Rena Holding et al Cour de Cassation [Supreme Court], First Civil Chamber, 29 June 2007 in Yearbook XXXII (2007) 299-302. In that case, the Cour de Cassation confirmed that "[a]n international arbitral award – which is not anchored to any national legal order – is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought".

home jurisdiction while setting out that this discretion may be exercised sparingly.[22] In *Dallah*, Riz LJ set out as follows[23]:

> "*89 In sum, I see no reason arising out of the interesting arguments put before the court in this appeal to doubt, even if it was open to do so, this court's views in* Dardana Ltd. v. Yukos Oil Co.[24] *and* Kanoria v. Guinness[25] *that any discretion to enforce despite the establishment of a Convention defence recognised in our 1996 Act is a narrow one. Indeed, it seems to me that in context the expression "may be refused . . . only if" (article V), especially against the background of the French text ("ne serontrefusees"), and the expressions of the English statute "shall not be refused except" and "may be refused if" (sections 103(1) and (2)), are really concerned to express a limitation on the power to refuse enforcement rather than to grant a discretion to enforce despite the existence of a proven defence. What one is left with therefore is a general requirement to enforce, subject to certain limited defences. There is no express provision however as to what is to happen if a defence is proven, but the strong inference is that a proven defence is a defence.* It is possible to see that a defence allowed under Convention or statute may nevertheless no longer be open because of an estoppel *(Professor van den Berg's view, see The New York Arbitration Convention 1958, at p 265),* or that a minor and prejudicially irrelevant error, albeit within the Convention or statutory language, might not succeed as a defence (as in *China Agribusiness Development Corpn.* v. *Balli Trading*[26]. But it is difficult to think that anything as fundamental as the absence of consent or some substantial and material unfairness in the arbitral proceedings could leave it open to a court to ignore the proven defence and instead decide in favour of enforcement."
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> (Emphasis supplied)

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[22] Dowans Holding SA v. Tanzania Electric Supply Co. Ltd., 2011 EWHC 1957 (Comm).
[23] Dallah Estates and Tourism Holding Co. v. Ministry of Religious Affairs, Govt. of Pakistan, 2009 EWCA Civ 755.
[24] (2002) 1 All ER (Comm) 819.
[25] (2006) 2 All ER (Comm) 413.
[26] (1988) 2 Lloyd's Rep 76.

It has been suggested by noted arbitrator Jan Paulsson in his article that enforcement of an arbitral award should be refused only when the judgment setting aside the arbitral award constitutes an international standard annulment. These grounds, Paulsson suggests, fall within the scope of the first four paragraphs of Article V(1) of the New York Convention. Therefore, an Enforcing Court may exercise its discretion to enforce an award when the ground of setting aside is outside the realm of the New York Convention.[27]

V. WILL INDIAN COURTS ENFORCE AN AWARD ANNULLED AT THE SEAT?

Indian courts have, so far, not considered the issue of enforcement of awards that have been set aside by the court of the arbitral seat. The fact that the language used in Section 48 is permissive rests the discretion on the Enforcing Court to decide whether to enforce such an award. This begs the question on how Indian courts might exercise its discretion.

Practitioners have, in the past, taken the view that Indian courts are unlikely to enforce an annulled award, and therefore take a territorial approach. In fact, *Cruz City* sets out that "*[p]lainly, it would be highly unsatisfactory if a party is permitted to once again invite the enforcing court to rule on questions that have been agitated before a court of competent jurisdiction where the seat of arbitration is located (the supervisory court).*"

Such an approach is, however, inconsistent with the position in *BALCO,* where the judges have proceeded on the basis that seat is the centre of gravity. In addition, this also goes against the parties' choice of seat, which includes in its ambit the choice of supervisory court. Therefore, the discretion to enforce an annulled award materially alters the bargain between the parties and also introduces a significant unstable variable into the arbitral process.[28]

To consider the transnational approach in the Indian context, it is pertinent to appreciate the legislative intent of the Arbitration & Conciliation

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[27] Jan Paulsson, "Enforcing Arbitral Awards Notwithstanding Local Standard Annulments" (1998) 6 Asia Pacific Law Review 1-28.

[28] Sundaresh Menon, "Standards in Need of Bearers: Encouraging Reform from Within" (Singapore Centenary Conference of the Chartered Institute of Arbitrators, 3 September 2015) 26.

(Amendment) Act 2015 (the "**Amendment Act**"). One of the important changes brought about by the Amendment Act was the removal of the provision for an automatic stay on the execution of an award during the pendency of a setting aside proceeding. The recent decision of the Supreme Court in *BCCI* v. *Kochi Cricket (P) Ltd*.[29] simply reaffirms that as being the mandate of the Amendment Act.

While the judgment is in relation to Part I of the Arbitration Act which deals with India-seated awards, it expressly recognises the intent of the courts in India to empower the decree holder to enforce an award, irrespective of the fact that a proceeding challenging the award is pending before the courts exercising jurisdiction over the seat. The decision goes to the extent of setting out that a judgment debtor has no substantive vested right to resist execution of an award, and therefore an award pending challenge would be executable like a decree of a court. This, as expressed by the Supreme Court, is in consonance with the true intent of the Amendment Act and its pro-arbitration approach which aims at minimal intervention with an award.

While it is arguable that a similar approach may be expected in case of foreign awards pending a challenge at the court of the seat, the emphasis on the choice of foreign seat and, by extension, foreign curial law, might be a clog in the enforceability of such an award. However, it is reasonable to expect that courts shall not grant a blanket automatic stay in cases where the award has been challenged in the court of the seat. Instead, the court should evolve a test on the basis of which the discretion to enforce such an award may be exercised in line with the foreign jurisprudence.

In light of this, it will be interesting to observe the approach taken by Indian courts in the event that the award is set aside by Singapore courts in the instant case.

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[29] BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287.