

Impact of Sick Industrial Companies Act on Enforcement of Foreign Awards

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Indian Sick Industrial Companies Act, 1985 (“SICA”) is a unique legislation introduced in India with the purpose of identifying industrial companies in financial distress and introducing timely preventive, ameliorative, and remedial measures to alleviate its condition. The legislation was passed in public interest keeping in mind that large sections of society depend on the financial viability of industries in India.

Notwithstanding the benefits of the legislation, the provisions of the Act, specifically Section 22 have been used to hinder arbitration in the past. Section 22 imposes a bar on proceedings for execution, suits for the recovery and enforcement of any security against a sick company. For example, in the case of *Agio Countertrade Pte. Ltd. vs Punjab Iron & Steel Co. Ltd. (1999) 5 SCC 734*, the Respondent relied on Section 22 of SICA, albeit unsuccessfully, to argue that an arbitrator should not be appointed by the Chief Justice of India in an international commercial arbitration since the Respondent had been declared a sick industrial company under SICA.

SICA was enacted by the Indian Legislature to create a framework for the rehabilitation and revival of potentially sick companies. The prohibition under Section 22 comes into effect on the initiation of an enquiry to ensure that the implementation of any scheme under SICA is not impeded by legal proceedings. However, SICA has become regressive and outmoded and the Legislature tried, unsuccessfully, to repeal the law in 2003.

A similar attempt to misuse the provisions of the Act was recently made in the case of *Armada (Singapore) Pte. Ltd. (“Petitioner”) v. Ashapura Minechem Ltd. (“Respondent”)* 2015 SCC OnLine Bom 4783, wherein the Bombay High Court issued a noteworthy judgement discussing the impact of SICA on the enforcement of foreign awards. The case arose from two petitions filed under Section 49 of the Indian Arbitration and Conciliation Act, 1996, (“**Indian Arbitration Act**”) for recognition and enforcement of two foreign awards, both dated 16 February 2010.

The arbitration awards settled disputes between the Parties resulting from the unlawful termination of affreightment contracts dated 12 April 2008 and 4 April 2008. The Respondent contended that the contracts were terminated because of frustration of the contract and/or force majeure while the Petitioner maintained that the termination was unlawful. Thus, the matter was referred to arbitration in Singapore in accordance with English Law as per the contracts.

The Petitioner appointed its arbitrator, but the Respondent failed to do so and instead unsuccessfully commenced proceedings in India to restrain the Petitioner from continuing the arbitration. Subsequently, the Petitioner issued a notice to the Respondent under Section 17 of the English Arbitration Act, 1996. Since the Respondent failed to appoint their arbitrator after having been given 7 days' notice pursuant to Section 17, the arbitrator appointed by the Petitioner was appointed as the sole arbitrator.

The Tribunal decided the matter in favour of the Petitioner and the arbitral awards were not challenged by the Respondent at the seat. Thus, the said awards became final and binding, upon which, the Petitioner filed the present petitions in the Bombay HC.

To prevent the enforcement of the awards, the Respondent initially filed a reference to the Board for Industrial and Financial Reconstruction (“**Board**”) on 31 May 2011 and obtained a declaration to the effect that the Respondent had become a sick industrial company, that is, an industrial company which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.

Subsequently, the Respondent applied to the Board again on 15 April 2013 under Section 15 of SICA for measures to alleviate the financial situation of the company. The Petitioner opposed the reliefs claimed by the Respondent and the matter was still pending when the issue of enforcement came up for final adjudication.

On the basis of the pending inquiry before the Board (with respect to the Section 15 application), it was argued by the Respondent that the petitions for enforcement of the awards were not maintainable, and no coercive order could be passed against the Respondent. The Petitioner, however, argued that Section 22 of SICA does not prohibit the enforcement of foreign awards.

Thus, the issue under consideration was whether or not, the pendency of the application filed by the Respondent under the provisions of SICA had any impact on the enforcement of the foreign awards. The Petitioner had prayed for a declaration that the foreign awards were enforceable as a decree, but had not pressed the execution of the awards since the Petitioner had also applied to the Board for appropriate directions. In light of this, the Court held that Section 22 of SICA did not prevent the Courts from enforcing foreign awards and both the awards were enforceable under Part II of the Act. However, *“the petitioner would not be entitled to take steps in execution of the award and seek any relief which would be in violation of Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 without permission of the Board.”* The Respondent in this matter pursued multiple legal proceedings to delay the enforcement of the awards and it is likely that the application to the Board was another such attempt. However, the decision rendered by the Bombay High Court balances the interests of law and ensures that the awards are recognised in the very least, even if their execution is delayed by a few months.

The provisions of SICA have now been rendered obsolete by the Companies Act, 2013, which has introduced a new chapter on the revival and rehabilitation of sick companies (Chapter XIX) and provides for abatement of all matters under SICA, pending before the Board (which may be subsequently initiated under the Companies Act). The new law provides for stay of 120 days of any proceeding in respect of a sick company only if an application to that effect is specifically made.

Thus, the judgement of the Bombay High Court shall play an important role in the interpretation of the revised rules and prevent companies from misusing the law to weaken arbitration awards.