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REMEDY OF SECOND LAST RESORT? REMANDING THE AWARD TO THE ARBITRAL TRIBUNAL

by Jeet Shroff & Abhik Chakraborty

I. INTRODUCTION

A recent US Court of Appeals decision in *Smarter Tools Inc. v. Chongqing SENCI Import & Export Trade Co., Ltd.*[1] has recast the spotlight on the *functus officio* doctrine, which holds that an arbitrator loses the competence to reconsider questions submitted for arbitration once an award is issued[2] because it is necessary to prevent "re-examination of an issue by a nonjudicial officer potentially subject to outside communication and unilateral influence."[3] The issue of what remedy parties have for arbitral awards that are or could be successfully set aside on non-substantive grounds is critical from the point of view of efficiency and litigation costs. The issue has divided scholars: one view is that the only remedy available to parties is to have the award vacated;[4] another view is that the doctrine is outmoded and needs to be junked outright.[5] However, caselaw from the United States and India points toward an alternative to this all or nothing approach. In several cases now, American and Indian courts have employed innovative legal reasoning to bring the dispute to a close without requiring parties to go through arbitration all over again. We examine some of these cases and distill the principles that could form the basis for consistent application.

II. THE US POSITION ON REMISSION OF AN AWARD

In late January 2023, in *Smarter Tools Inc. v. Chongqing SENSI Import & Export Trade Co., Ltd.*, the US Court of Appeals for the Second Circuit ("Second Circuit") upheld a district court ruling that remanded an ICDR arbitration award to the

[1] Smarter Tools Inc. v. Chongqing SENCI Imp. & Exp. Trade Co., Ltd., 57 F.4th 372 (2d Cir. 2023).

[2] *See, e.g.*, T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 342 (2d Cir. 2010).

[3] *See, e.g.*, LLT Int'l, Inc. v. MCI Telecomms. Corp., 69 F. Supp. 2d 510, 515 (S.D.N.Y. 1999)

[4] *See* Thomas Webster, *Functus Officio and Remand in International Arbitration*, 27 ASA BULL. 441, 442–443 (2009).

[5] *See* Hans Smit, *Another Judicial Misstep in Correcting an Arbitral*, 12 AM. REV. INT'L ARB. 435 (2001).

arbitrator notwithstanding the *functus officio* doctrine.[6] Despite finding that the arbitrator had failed to issue a reasoned award (as he was required to do under contract), the district court did not vacate the award. Instead, it remanded the award to the arbitrator for a clarification of his findings. The reasoned award subsequently issued by the arbitrator was then confirmed.[7]

Overruling arguments that the arbitrator had become *functus officio*, the Second Circuit noted that US Circuit Courts of Appeal have recognized several exceptions to the *functus officio* doctrine such as ambiguity,[8] indefiniteness,[9] failure to address a later arising contingency,[10] clarification[11] and to assist the reviewing court to determine if the arbitrator had manifestly disregarded the law.[12] In this case, the Second Circuit noted that the original award lacked reasoning and the remand was thus justified as it sought only a clarification (and not a substantive modification of the award). According to the Second Circuit, it simply made "no sense to redo an entire arbitration" in such circumstances. The Second Circuit thus held that, given the presumption in favor of enforcing an award, the arbitrator's failure to render a reasoned award did not fall under the narrow reading of Section 10(a)(4) of the Federal Arbitration Act[13] ("FAA") and did not require that the original award be vacated. Instead, a failure to issue a reasoned award, made the award "imperfect in matter of form not affecting the merits of the controversy"[14] bringing it within the purview of Section 11 of the FAA, which justified a remand of the award.

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[6] *Smarter Tools*, 57 F.4th at 383.

[7] *Id.*

[8] *See*, *e.g.*, N.Y. Bus Tours, Inc. v. Kheel, 864 F.2d 9, 12 (2d Cir. 1988).

[9] *See*, *e.g.*, Ams. Ins. Co. v. Seagull Compania Naviera, S.A., 774 F.2d 64, 67 (2d Cir. 1985).

[10] *See*, *e.g.*, *Gen. Re Life*, 909 F.3d at 548.

[11] *See*, *e.g.*, Siegel v. Titan Indus. Corp., 779 F.2d 891, 894 (2d Cir. 1985); Hardy v. Walsh Manning Sec., L.L.C., 341 F.3d 126, 134 (2d Cir. 2003).

[12] *Smarter Tools*, 57 F.4th at 379–380.

[13] Section 10 of the Federal Arbitration Act lists grounds for vacating an award, whereas section 11 names those for modifying or correcting one.

[14] *See* 9 U.S.C. § 11(c).

III. THE INDIAN POSITION ON REMISSION OF AN AWARD

Indian courts have taken a similar approach. Under Section 34(4) of the Indian Arbitration Act, 1996 ("Arbitration Act") when deciding an application for setting aside or vacating an award, Indian courts can remand the award to the tribunal to take measures to "eliminate the grounds for setting aside the arbitral award." We will refer to this as the Section 34(4) Exception.[15]

Whether the Section 34(4) Exception allows courts to remit an award for lack of adequate reasoning is a question that recently came up before the Indian Supreme Court in *Dyna Technologies v. Crompton Greaves Ltd.*[16] In *Dyna*, an award was vacated by the Madras High Court on the merits on the basis that the award was not within the terms of the contract. The High Court also held that the award lacked proper reasoning. On appeal, the Supreme Court reversed the High Court's decision on the basis that "courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists."[17] The Supreme Court further held that the High Court should not have ignored the Section 34(4) Exception since the primary grievance of the award debtor was that the award had gaps in reasoning.[18] The Supreme Court ruled that the Section 34(4) Exception must be applied where an award "does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34," whereas a vacation of the award under Section 34 can only take place "when there is complete perversity in the reasoning."[19]

The Supreme Court accordingly identified three categories of awards for the purpose of ascertaining whether a remand is appropriate: perverse, unintelligible and

[15] Arbitration Act (1996), § 34(4) ("On receipt of an application under Sub-section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.").

[16] M/s. Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., (2019) SCC OnLine 1656 (India).

[17] *Id.* ¶ 27.

[18] *Id.* ¶ 28.

[19] *Id.* ¶¶ 36, 38.

poorly reasoned awards. Perverse awards or awards revealing a fundamental flaw in reasoning or the decision-making process are liable to be challenged on the grounds for vacation, since remanding such an award would amount to directing a reconsideration of the case. In contrast, unintelligible awards (i.e., awards having no reasoning as defined by the Court) or awards with gaps in reasoning can be cured by remanding the awards to the tribunal under the Section 34(4) Exception.

That said, the dispositive portion of *Dyna* is inconsistent with its ratio– unintelligible awards cannot be enforced as they first need to be cured by remitting it to the tribunal. On the facts, the Court found the award to be unintelligible as it was rendered "without reasoning" and was "confusing and ha[s] jumbled the contentions, facts and reasoning without appropriate distinction". However, the award was neither set aside nor was it remanded. The Court instead partially enforced the award[20] as it held that "remand would not be beneficial as this case has taken more than 25 years for its adjudication."[21] In so holding, the Court failed to apply its own reasoning to cure the defect in the award.

On an aside, it is worth noting that in exceptional circumstances, the Indian Supreme Court, under Article 142 of the Constitution ("Article 142"), has powers to take decisions in the interest of justice, even if it is not rooted in any statute. In the past, the Supreme Court has invoked Article 142 to enforce a minority award after setting aside the majority award on public policy grounds, as it felt that referring the parties for fresh arbitration would cause further delay.[22] However, in *Dyna*, the Supreme Court did not refer to Article 142 at all.

[20] *Id.* ¶¶ 12, 44. The Supreme Court's final direction was: "In totality of the matter, we consider it appropriate to direct the Respondents to pay a sum of Rs. 30,00,000/- (Rupees Thirty Lakhs only) to the Appellant in full and final settlement against claim No. 2 within a period of 8 weeks, failing which the Appellant will be entitled to interest at 12% per annum until payment, for providing quietus to the litigation." This was a partial enforcement of the award as the arbitrator had awarded a sum of Rs. 27,78,125/- with interest at 18% p.a. with its Award dated 30th April, 1998 and Correction to Award dated May 5, 1998.

[21] *Id.* ¶ 38.

[22] Ssangyong Engineering and Construction Co. Ltd. v. National Highways Authority of India (NHAI), (2019) SCC OnLine 677 (India), ¶ 49.

IV. CONCLUSION

Both India and the United States have applied innovative tests to avoid a full-fledged arbitration when tribunals issue awards that are unreasoned or poorly reasoned. In so doing, both have recognized that the cost of vacating an unreasoned or unintelligible award in the first instance are significant and avoidable. Courts thus are instead encouraged to remand the award to the tribunal so that the gaps in reasoning can be plugged by the tribunal itself. Given that the tribunal is not required to make any substantive changes to its decision, this solution does not erode the *functus officio* doctrine's purpose, which is to prevent arbitrators from changing their rulings under an outside influence.

Nevertheless, it is not ideal if, as in *Dyna*, a court dons the tribunal's hat instead of remanding the award and, as a result, enforces an unintelligible award by either supplying its own reasoning or through some other means. This approach runs counter to the principle of party autonomy and is not necessary given the existence of this simple, yet effective solution of remand.

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INSTITUTE FOR TRANSNATIONAL ARBITRATION
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