

An award based on put-option in a contract does not violate the public policy of India

(Bombay High Court)

Update by Editor

Published on 06 June 2020

Banyan Tree Growth Capital LLC v. Axiom Cordages Limited and others

Court: Bombay High Court | **Case Number:** Commercial Arbitration Petition No. 476 of 2019 | **Citation:** MANU/MH/0552/2020 | **Judges:** GS Kulkarni J | **Date:** 30 April 2020

Banyan, a Mauritius based fund, invested USD fifty million into Axiom Cordages Limited after negotiations with Axiom's promoters. The promoters were two entities—Responsive Industries Limited and Wellknown Business Ventures Private Limited.

Of the several exit options Banyan had under the transaction, there was a put option in a Put Option Deed.

Several disputes arose in 2014-15 among the parties. Banyan exercised the put option. The other side claimed the put option agreement was illegal and unenforceable under the laws of India. Banyan initiated arbitration under the Singapore International Arbitration Centre (SIAC) rules and claimed damages because it was not able to exercise the put option. The arbitral tribunal found for Banyan and awarded it damages.

Banyan filed for enforcement of this foreign award in the Bombay High Court. The court identified four objections to the enforcement. It rejected all of them.

A. The objection as to inadequate stamping of the put option

The court found that Axiom could not run this argument because: –

- (a) The stamp duty was payable by the promoters, and they had paid it.
- (b) The objection was never raised earlier, not even when the objections to the enforcement were first filed. It was built first by an additional affidavit as an afterthought.
- (c) At the time of execution of the agreement, Axiom confirmed that stamp duty had been paid. Axiom's argument that the initial confirmation was based on a piece of different legal advice than the one received now is quite peculiar.
- (d) The argument that the objection was rightly taken during enforcement when, as a statutory requirement, the put option deed is required to be produced¹ is untenable because:
 - (i) The respondents' position before the arbitral tribunal was that the document is stamped. It was admitted in evidence. Under Section 35 of the Maharashtra Stamp Act, when an instrument is admitted in evidence, the admission cannot be called into question at any stage of the same suit or proceedings on the ground of stamping.
 - (ii) The respondents are now precluded from raising the argument [citing to *Javer Chand v. Pukhraj Surana*, (1962) 2 SCR 333]. This mandate of the law applies to enforcement proceeding also.
 - (iii) If the plea were *bona fide*, the respondents would have taken steps to rectify or at least inform Banyan about the new legal opinion. Instead, they hid matter to be used as a technical tool to

¹ This is a reference to Section 47 ACA.

defeat enforcement.

- (iv) The plea merits rejection even in merits. In reply to Axiom's additional affidavit, Banyan said that the stamping was adequate. This was not denied by Axiom.
- (v) A party which had an obligation to get the stamping done always took a position for ten years that the stamping was adequate. It is too late and a frivolous contention to raise the plea now.
- (vi) There cannot be any dispute with the principle of law laid down in the decisions of *SMS Tea*, (2011)14 SCC 66 and *Garware*, (2019) 9 SCC 209. But the parties took a position on the document, and the tribunal had admitted the document into evidence and adjudicated the rights based on this document. Reopening the plea is not the enforcement court's jurisdiction.

B. The put option deed and its illegality under the SCRA

After a lengthy survey of the legal regime and the authorities, the court found that the Securities Contracts (Regulation) Act, 1956 ("SCRA") do not prohibit put option. Further, a contract between two shareholders containing a put option, like in this case, is entirely different from an options contract or derivatives.

The court also found that the tribunal's view on the matter, on an interpretation of the put option deed, was neither impossible nor illegal

C. The put option deed was unenforceable and illegal under FEMA

Axiom argued that the award overlooked that: –

- (a) FEMA 20, issued on 03 May 2020 regulated and restricted the transfer of securities and purchased shares of an Indian company by a person resident outside India. This did not permit optionality clauses. When Banyan invested in Axiom in 2008, it was in breach of FEMA 20. Optionality clauses were permitted for the first time in 2013. An RBI circular issued on 09 January 2014 leaves no doubt that optionality clauses were not permitted in 2008.
- (b) Further, the sale of shares of a non-listed company must be at fair market value. There cannot be any guaranteed assured return.

The court rejected these arguments by concluding the following: –

- (a) Axiom's argument is fundamentally wrong both in fact and law (on the point that a put option is illegal under FEMA):
 - (i) The put option deed did not provide for an open-ended assured return to Banyan as an exit option. It could be exercised within a specified time and was contingent on the respondents not completing an IPO.
 - (ii) Banyan is right in contending that the amounts permitted by the FDI regulations (the fair market value) were to be remitted to Banyan in foreign exchange. The balance amount, if any was to be deposited with a nominee at an account in India as would be requested by Banyan.
 - (iii) No doubt when the amount to be remitted materializes, compliances, if any required under the FEMA would be made by Banyan. The tribunal observed that the Put Option Price was less than the FMV of the Put shares (computed in accordance with the FDR Regulations).
 - (iv) Also, when the foreign investor (referred to as FMO in the said judgment) wished to repatriate the funds, then RBI permission would be necessary. It was observed that even if the RBI permission was not granted then again, there is no infraction of FEMA Regulations [citing to *IDBI Trusteeship Services Ltd. v. Hubtown Ltd.*, (2017)1 SCC 568].

- (b) The arbitral tribunal reviewed the provisions and concluded that FEMA and the subordinate legislation did not deal with the legality of the contract like the put option deed, but with the manner in which the contract could be performed from the foreign exchange perspective. There is no illegality in the conclusion because:
- (i) FEMA concerns regulation and management of foreign exchange and remittances to a foreign country by any entity and the requisite permissions in that regard. There is no provision in FEMA that would void transactions (unlike the predecessor FERA).
 - (ii) It indeed cannot be accepted as a legal proposition that FEMA would invalidate or render void a contract like a put option deed.
 - (iii) Merely because some permissions may be required to be obtained by Banyan under FEMA, the enforcement of the foreign award cannot be refused.
 - (iv) The respondents were not correct in the basic premise; namely, the put option deed would be invalid under FEMA. They indulged in unwarranted hair-splitting in dissecting the notifications issued under FEMA.
- (c) The case laws support the view taken by the court [citing to *POL India Projects Limited v. Aurelia Reederei Eugen Friederich GMBH*, 2015 SCC OnLine Bom 1109; the rejection of SLP by the Supreme Court on 19 January 2018 (SLP (C) No. 32244/2017) which was filed against the Delhi High Court judgment in *Cruz City*, 2017 SCC OnLine Del 7810; *Vijay Karia and others v. Prysmian Cavi E Sistemi SRL & Ors.*, 2020 SCC OnLine SC 177.
- (d) After *Vijay Karia*, a challenge to the enforceability of a foreign award on the ground that the contract violates the provisions of FEMA and regulations made thereunder and/or if the award is enforced, it may violate the provisions of FEMA is no more *res integra*.

D. The award is not contrary to fundamental policy of Indian law

The court noted that the ground urged were no different from the arguments based on a violation of FEMA and SCRA. The court also surveyed the law on public policy. It concluded that none of the grounds raised by the respondents falls into any of the three categories as enumerated in *Renusagar Power Co. Ltd. v. General Electric Co.* (1994 Supp (1) SCC 644).