

# HEPI v. India: Stay Denied but Public Policy Prevents Enforcement

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In *Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Natural Gas*, Civ. Action No. 16-140 (D.D.C. 7 June 2018), the U.S. District Court for the District of Columbia ("**District Court**") refused to stay the enforcement of a foreign arbitral award that ordered the Indian Government ("**India**") to reinstate an investor as the operator of a hydrocarbons block in India pending set-aside proceedings in Indian courts. However, the District Court went on to conclude that it could not enforce the award because the award's order of specific performance against India violated the public policy of the United States. The District Court also refused to confirm a portion of the award that had granted interest on the investment up until the time that the investor was reinstated as the operator of the block.

## **Background to the Dispute**

Hardy Exploration & Production (India), Inc. ("**HEPI**") entered into a production sharing contract with India that allowed HEPI to search for and extract hydrocarbons from a block in southeast India. In 2006, HEPI claimed that it had discovered natural gas, which, under the contract, granted HEPI a five-year appraisal period to determine whether the extraction was commercially viable.

India, however, claimed that the discovery was of crude oil, which only entitled HEPI to a two-year appraisal period. After this two-year period ended, India relinquished HEPI's rights to the block on the basis that HEPI failed to submit its declaration of commercial viability in a timely manner.

HEPI then initiated arbitration proceedings against India. The tribunal consisted of three former Chief Justices of the Supreme Court of India, and the "venue" for the arbitration was Kuala Lumpur, Malaysia, as per the contract. In 2013, the tribunal issued an award in which it concluded that the discovery was of natural gas and ordered India to allow HEPI back into the block for another three years to continue to assess whether the natural-gas discovery was commercially viable. The tribunal also awarded HEPI interest on its original investment in the block until such time it was reinstated.

India thereafter filed a petition with the Delhi High Court to invalidate the award, and HEPI filed a separate application with the same court to enforce the award. The High Court initially dismissed India's plea for lack of jurisdiction on the ground that the proper venue for the application was the Madras High Court (because it was the court in closest geographical proximity to the block) and, following an appeal, on the ground that the seat of arbitration was in Malaysia. India filed for leave to appeal the dismissal and stay the award with the Supreme Court of India.

In 2016, HEPI, having not been granted access to the block, filed a petition with the District Court for enforcement of the arbitral award. India responded by arguing that (1) the District Court should stay enforcement of the award pending a final decision from the Indian courts and (2) confirmation of the portions of the award on specific performance and interest would contravene U.S. public policy. In a Memorandum Opinion ("**Mem. Op.**") dated 7 June 2018, the District Court refused to grant a stay but concluded that enforcement of the award would violate U.S. public policy.

### **Request for Stay**

India maintained that the District Court should stay enforcement of the award pending a final decision from the Indian courts on set aside pursuant to Article VI of the New York Convention. In response, HEPI argued that Article VI did not apply because India had brought proceedings in India rather than Malaysia, the seat of the arbitration.

The District Court noted that the record before it did not indicate whether the Supreme Court of India had ruled yet in the set-aside proceedings. The District Court also noted the disagreement between HEPI and India regarding whether the Indian courts were a competent authority under the New York Convention given that the arbitration occurred in Malaysia. Rather than delving into this issue directly, the District Court turned to the broader issue of whether it was proper for it to issue a stay assuming that the Indian courts were a competent authority.

In assessing whether to grant a stay of proceedings, the District Court looked to *Europcar Italia, S.p.A v. Maiellano Tours, Inc.*, 156 F.3d 310 (2d Cir. 1998), which set forth six factors to be considered by courts when assessing whether to stay an enforcement proceeding, namely (1) the expeditious resolution of disputes, (2) the estimated time for foreign proceedings to be resolved, (3) whether the award will receive greater scrutiny in the foreign proceedings, (4) the characteristics of the foreign proceedings, (5) a balance of the hardships of the parties, and (6) any other circumstance that could shift the balance in favour of or against granting the stay.

The District Court denied India's request to stay the proceedings on the basis of these factors. In relation to the first, second, fourth, and fifth factors, the District Court focused on the delay of the proceedings in India. The District Court noted that the proceedings in India have "been delayed over and over again due to the actions of the Government of India and the Supreme Court" and the parties could provide no "indication of how long they expect it will take the Indian court system to reach a final resolution in this case." (Mem. Op. at 14.)

With respect to the third factor, the District Court accepted India's argument that Indian courts would apply a greater level of scrutiny since they would consider whether the award comports with Indian law in determining whether to enforce it.

In relation to the sixth factor, the District Court noted "in particular the fact that the Supreme Court of India has already declined to stay the arbitration award pending India's appeal regarding the Delhi High Court's jurisdiction over the set-aside suit.... This Court is disinclined to question that assessment." (Mem. Op. at 17.)

### **Specific Performance**

On the basis of Article V(2)(b) of the New York Convention, India also argued that

confirmation of the portion of the award on specific performance “would violate the U.S.’s clear public policy preference of respecting the sovereignty of foreign nations, including their right to control their own lands and national resources.” (Mem. Op. at 20.) India also maintained that an order of specific performance under these circumstances would contravene Indian law, would be difficult to enforce and supervise, and would violate the doctrines of comity and act of state. In response, HEPI argued that India overstated the sovereignty issue.

The District Court confirmed that the public-policy exception should be narrowly construed but found that “India does not overstate the United States’ public policy interest in respecting the right of other nations to control the extraction and processing of natural resources within their own sovereign territories.” (Mem. Op. at 21.) The District Court highlighted three reasons why it believed enforcing the order of specific performance would contravene public policy. First, while the District Court made clear that it did not believe that enforcing the award would be complicated for the District Court to supervise or that allowing HEPI back into the block would amount to HEPI possessing the block, the District Court nevertheless concluded that its “forced interference with India’s complete control over its territory violates public policy to the extent necessary to overcome the United States’ policy preference for the speedy confirmation of arbitral awards.” (Mem. Op. at 26.)

Second, the District Court was “persuaded that the FSIA’s contemplation of jurisdiction over foreign countries in suits seeking compensatory (but not punitive) damages, and allowing for specific, domestic methods of ensuring that plaintiffs receive those damages, demonstrates the United States’ public policy commitment to respecting the sovereignty of foreign nations by only holding them liable for certain forms of relief.” (Mem. Op. at 27.)

Third, the District Court noted that the United States had not waived its own sovereign immunity in U.S. courts in relation to specific performance in contractual disputes. As a matter of international comity, therefore, it would be inappropriate for a U.S. court to order specific performance over a foreign state in relation to acts occurring in that foreign state’s territory, and “it would defy comprehension” for U.S. public policy to allow for a foreign court to order specific performance against the United States within U.S. territory. (Mem. Op. at 28.)

## **Interest**

India also urged the District Court to decline the tribunal's decision to award interest on HEPI's USD 113 million investment in the block until HEPI was reinstated. The District Court, however, held that "[t]his portion of the award is so inseparable from the specific performance portion of the award, the confirmation of which would violate U.S. public policy, that the confirmation of the interest portion of the award must also be found, necessarily, [to] violate U.S. public policy." (Mem. Op. at 31.)