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Recent Developments in the Enforcement of New York Convention Awards in India

Sahil Tagotra, Ishita Mishra · Monday, July 6th, 2020

This post analyses the recent developments in enforcement of foreign awards in India that were discussed during the Delos' Tagtime webinar by Mr. Gourab Banerji SA.[1)] The webinar provided an overview of the application of the New York Convention, 1958 (**NYC**) in India. Here, we focus on the salient developments considered by Mr. Banerji.

Field of Application (Article I)

India's history with the NYC is as old as the convention itself. India signed the NYC on 10 June 1958 and ratified it in on 13 July 1960 with two caveats, "…the Government of India declare that they will apply the Convention to the recognition and enforcement of awards made only in the territory of a State, party to this Convention. They further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of India."

The NYC is applied in India through Part II of the Arbitration and Conciliation Act, 1996 (**the Act**) titled as 'Enforcement of Certain Foreign Awards'. The Act is broadly based on UNCITRAL Model Law and India's reservations under the NYC, can be found in Part II of the Act at Section 44.

Under the first reservation, India only enforces binding awards from 48 NYC notified territories (even though there are currently 164 contracting states to the NYC). Under the second reservation, India has agreed to enforce NYC awards arising from relationships that are '*commercial*' in nature. But, how does one define a commercial relationship under Indian law? This question assumes significance considering pending investment treaty awards against India. Would awards arising from investment treaty arbitrations be enforceable in India under Part II of the Act? As the term '*commercial*' has not been defined in the Act, there is confusion over how this reservation is to be applied *qua* investment treaties. Two judgments of the Delhi High Court have sought to demystify the issue.

In ***Union of India v. Vodafone Group PLC United Kingdom & Anr.*** (2017) and ***Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.*** (2019), suits seeking anti-arbitration injunctions had been filed by the Union of India before the Delhi High Court. The court, in both these cases,

while refusing to grant injunctions, noted that investment treaty awards arose out of relationships that were fundamentally different from commercial disputes as they were based on state guarantees and assurances, and consequently, the NYC under Part II of the Act could not be utilised to enforce such awards.

While this holding of the Delhi High Court doesn't directly apply the NYC to investment treaty awards, it is possible that these observations will be seen as *obiter dicta* and hence do not reflect the accurate position of Indian law. This may be a likely scenario because of how the meaning of the word '*commercial*' has been interpreted in India through the years as construed, for instance, by the Gujarat High Court in ***Union of India v. Owner & Parties interested in Motor Vehicle M/V Hoegh Orchid***) (1983). Here, a charter party contract provided for a London arbitration clause; yet, the Union of India filed an anti-arbitration suit on the ground of commercial reservation under the NYC *i.e.* the relationship between the parties was not commercial in nature. Denying the injunction request, the court held that the word *'commercial'* must be given a wide import.

In ***R.M. Investment and Trading Co. (P) Ltd. v. Boeing Co.*** (1994), which was a case on the enforcement of a foreign award under the Foreign Awards (Recognition & Enforcement) Act, 1961 (**1961 Act**, the erstwhile framework under which foreign arbitral awards were enforced in India before the enactment of the newer Act in 1996), the question was whether R.M. Investment's consultancy agreement with Boeing, under which it had promised to help Boeing sell their aircrafts in India, could be considered a '*commercial*' agreement. The underlying agreement had an arbitration clause, despite which R.M. Investment filed a suit at the Calcutta High Court. Boeing applied for a stay of the suit in favour of the arbitration. The Supreme Court relied on UNCITRAL Model Law, to observe that, "*the expression 'commercial' must be construed broadly having regard to the manifold activities which are part of International trade today"*, and upheld the stay of the suit.

Even though India has no 'national law' specific to the NYC, to ascertain what is considered as commercial under Indian law, the views enunciated above are in consonance with the definition of '*commercial dispute*' as used in Section 2(1)(c) of the Commercial Courts Act, 2015. A wide number of activities have been enumerated under this definition as being commercial. More pointedly, the Explanation to Section 2(1)(c) states that merely because one of the contracting parties is the state does not mean that a commercial dispute will cease to be one. Additionally, Article 27 of India's Model BIT also states that disputes submitted to arbitration under this BIT would be considered as '*commercial*' and are enforceable under the NYC.

Therefore, it is likely that Indian courts will interpret the term '*commercial*' in a broad manner because that seems to be the approach of both the Indian judiciary and the legislature. Consequently, it is possible that investment treaty awards may be enforceable in India under the NYC. Mr. Banerji also appeared to support this view.

Grounds for refusal to enforce a New York Convention Award (Article V)

Article V of the NYC states the grounds for refusal to enforce an arbitral award. These are conditions such as violation of public policy, non-adherence of principles of natural justice etc., which if met, may result in courts refusing to enforce a NYC award made in a Contracting State. In India, Article V finds its place under Section 48 of the Act. The webinar focussed on the ground of

public policy. To define this oft-used term, Mr. Banerji quoted Justice Burrough in ***Richardson v. Mellish*** (1824), where he observed *re* public policy that "*it is a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law*".

Over the years, the Indian judiciary's approach to the enforcement of foreign awards has been inconsistent both under the 1961 Act and the 1996 Act. India's arduous journey of jurisprudence on public policy reached a pivotal moment with the celebrated judgment of ***Renusagar Power Co. Ltd. v. General Electric Co.*** (1994), which formulated the "***Renusagar test***". It held that enforcement of a foreign award would be refused on the grounds of public policy only if such enforcement contravenes:

1. fundamental policy of Indian law; or
2. the interests of India; or
3. justice or morality.

This test has now been largely adopted by the Indian legislature and is codified in the Explanation 1 to Section 48(2)(b) of the Act.

Over the years, the judiciary has interpreted the *Renusagar test* in myriad ways. However, a visible pro-enforcement shift was seen in the Indian judiciary after the Supreme Court's judgment in ***Shri Lal Mahal Ltd. v. Progetto Grano Spa*** (2014). In *Shri Lal Mahal,* a Grain and Feed Trade Association award was sought to be enforced. Resisting enforcement, Shri Lal Mahal argued that public policy was defined widely under the Act. Rejecting this argument, and upholding the *Renusagar test*, Justice Lodha, in a display of intellectual honesty, overruled his own earlier judgment in ***Phulchand Exports Limited v. O.OO. Patriot*** (2011) and enforced the present award. Taking a cue, the subsequent Arbitration and Conciliation (Amendment) Act, 2015 significantly narrowed the definition of public policy.

Recently, the Supreme Court pronounced a landmark judgment on enforcement of foreign awards in ***Vijay Karia v. Prysmian Cavi*** (2018), where it emphasised that a party resisting enforcement can only have "*one bite of the cherry*." Where a party loses in the high court, the Supreme Court's standard of review only permits interference in an exceptional case of blatant disregard of Section 48. Relying on *Renusagar* and *Shri Lal Mahal*, the Supreme Court held it was not permitted to review the merits of the decision, and that an enforcing court cannot interfere by second guessing an arbitrator's interpretation of the agreement under the guise of public policy. The Supreme Court advanced the international jurisprudence on NYC Article V by holding that a residual discretion remains with the court to enforce a foreign award, despite grounds for its resistance having been made out. On the public policy aspect, it held that a rectifiable breach under Foreign Exchange Management Act, 1999 cannot be held to be a violation of the fundamental policy of Indian law. This judgment re-affirmed the pro-enforcement stance of Indian courts with respect to foreign awards.

However, this position was challenged by the Supreme Court itself in ***NAFED v. Alimenta S.A.*** (2020), a judgment delivered a few weeks later in April 2020. In *Alimenta*, the Supreme Court conducted a review of the case on merits, and held that since there was absence of permission to export a commodity, such "*export without permission would have violated the law, thus, enforcement of such award would be violative of the public policy of India*".

Nevertheless, soon after *Alimenta*, the Bombay High Court in ***Banyan Tree Growth Capital LLC***

v. Axiom Cordages Ltd. (2020) pronounced a judgment permitting enforcement of a SIAC award, and in ***Centrotrade Minerals & Metals Inc. v Hindustan Copper Limited*** (2020), a case argued by Mr. Banerji, the Supreme Court, reiterated its judgment in *Vijay Karia*, and enforced the foreign award.

Conclusion

Towards the end of the webinar, Mr. Banerji noted that Indian judges are '*ultra-pro-enforcement*' and that an overwhelming number of foreign awards are enforced in India. Since *Shri Lal Mahal*, a very few foreign awards have been refused enforcement in India. While the judgment in *Alimenta* may make us doubt this statement, it appears that *Alimenta* is an exceptional break from the norm in Indian arbitration (as can be seen in *Banyan Tree* and *Centrotrade*). Supporters of the holding in *Alimenta* may argue that the award ought to have been refused because there were serious infirmities in the arbitral process. Nevertheless, critics also make a strong point. *Alimenta* adopted an unduly expansive definition of public policy and an enforcing court likely shouldn't foray into the merits of an award.

Nonetheless, a reason why even a pro-enforcement Indian judiciary is not seen as such, is because of the time taken in enforcing foreign awards in India. For instance, in *Centrotrade*, an award from 2001 was finally enforced in 2020. While *Alimenta* may be an aberration, lengthy timelines for enforcement of awards in India are not so. While the recent developments in Indian arbitration point towards consistent enforcement of foreign awards, it is urgent for the judiciary and legislature to work together to ensure that foreign awards are not only enforced, but enforced within a reasonable period of time.

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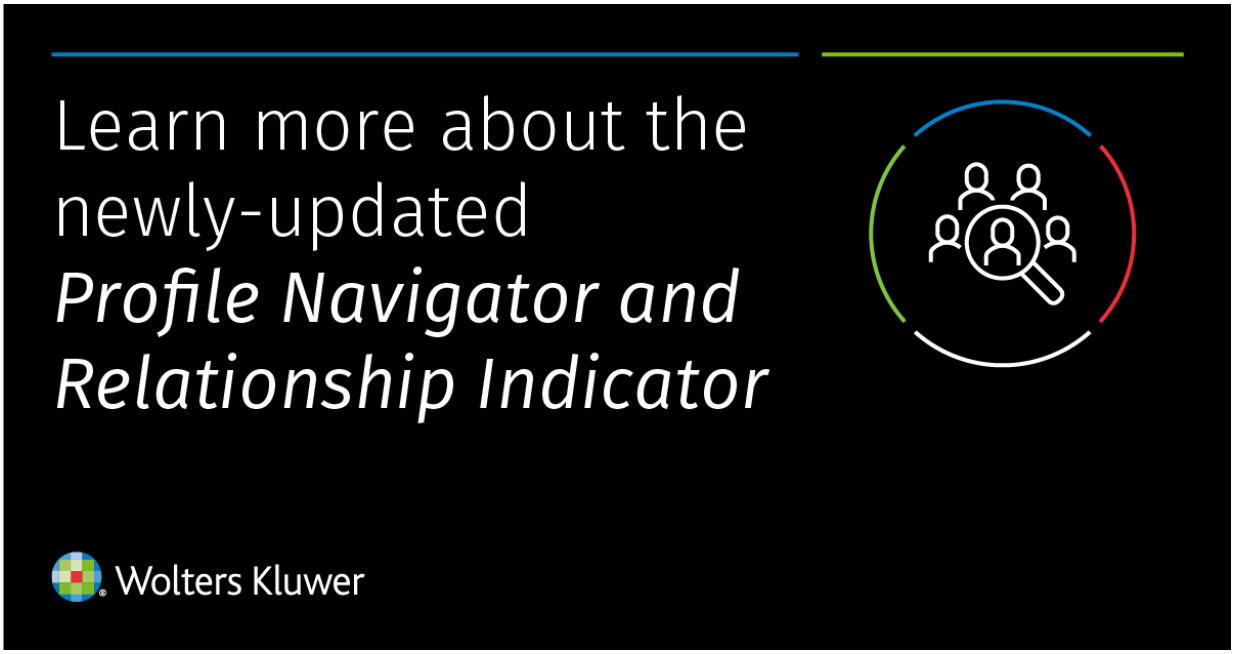

References

?1 who was “tagged” by Sir Bernard Eder. Mr. Banerji then “tagged” his colleague from the Nigerian Bar Ms. Funke Adekoya SAN to appear in the next Tagtime webinar by Delos.

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