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The Public Policy Exception – Is the Unruly Horse Being Tamed in the Most Unlikely of Places?

Matthew Gearing (Allen & Overy LLP) · Thursday, March 17th, 2011

The public policy exception under Article V(2)(b) of the New York Convention is well recognised as the amorphous exception. To the extent it has been capable of definition, it has been found to embrace nebulous concepts such as a state's most basic notions of morality and justice. No doubt it is for this reason that it was described by an English judge almost two centuries ago as an unruly horse which carries its rider to unpredictable destinations. While more established arbitration friendly jurisdictions have developed a restrictive approach to the public policy, elsewhere it has remained the refuge of last resort for the dissatisfied party to an arbitral award. This concern was succinctly put in the 2009 Hong Kong case *A v R* where the court said:

“Public policy is often invoked by a losing party in an attempt to manipulate an enforcing court into re-opening matters which have been (or ought to have been) determined in an arbitration. The public policy ground is thereby raised to frustrate or delay the winning party from enjoying the fruits of a victory. The court must be vigilant that the public policy objection is not abused in order to obtain for the losing party a second chance at arguing a case. To allow that would be to undermine the efficacy of the parties' agreement to pursue arbitration.”

Two recent decisions may be a sign that the “unruly horse” is being tamed in the most unlikely of places – India and Belize.

India has long been perceived as a jurisdiction which can be problematic for enforcement of foreign arbitral awards. At least that was the recorded perception of corporate users of arbitration according to the Queen Mary/PWC 2008 survey “International Arbitration: Corporate attitudes and practices”. This perception was bolstered by the Supreme Court decisions of *ONGC v Saw Pipes* in 2003 and *Venture Global Engineering v Satyam Computer Services Ltd* in 2008. In *Saw Pipes* the Supreme Court took a broad approach to the meaning of public policy and held that a domestic arbitral award could be set aside on the grounds of public policy if it was “patently illegal”; i.e. contravened Indian legislation. In *Venture Capital*, the Supreme Court set aside another arbitral award on the same basis, but this time it was a foreign arbitral award. It held that the provisions of the Indian Arbitration Act which allow an arbitral award to be set aside on the basis of domestic public policy applied because the relief ordered was for the sale of shares in an Indian company which could only be effected under Indian law. The concern was therefore that the Indian courts

would apply a broad test of public policy to foreign arbitral awards where there was a sufficient connection with India – out of keeping with the reluctance in more developed jurisdictions to invoke the public policy exception.

The recent decision of the Delhi High Court in *Penn Racquet Sports v Mayor International Ltd* (delivered in January 2011) appeared to buck this trend. It held that a more restrictive approach to the definition of public policy should be applied to the enforcement of foreign arbitral awards. Contrary to the approach taken by the Supreme Court in *Saw Pipes* and *Venture Capital* to the meaning of public policy, the Delhi High Court held that recognition and enforcement of a foreign award cannot be denied just because the award contravenes Indian law. Rather it must be contrary to the fundamental policy of Indian law, the interests of India or justice or morality. In reaching this conclusion, the Delhi High Court took into account a 1994 decision of the Indian Supreme Court in *Renusagar Power Co Ltd v General Electric Co* where the same distinction was drawn between the approach to domestic and foreign arbitral awards based on international texts and court authorities.

Does this herald a great step forward in the approach of the Indian courts to the application of the public policy exception? It is certainly a welcome development but it does not entirely resolve the fears that sprung up after the decisions of *Saw Pipes* and *Venture Capital*. The allegation in *Penn Racquet Sports* was that the award was contrary to public policy because the arbitral tribunal had incorrectly interpreted a term of the contract which was itself governed by Austrian law. It was therefore not an award to which it could be easily argued that it fell within the provisions of the Indian Arbitration Act which relate to domestic arbitral awards (as was the case with the award in *Venture Capital*). That risk may still remain for foreign awards where there is a connection with India and the scope of the Indian Arbitration Act has not been restricted to exclude a challenge to the award on the grounds it is a domestic award.

Like India, recent anti-arbitration decisions from the Belize courts have made it a jurisdiction with a question mark over it. In 2009 in *Attorney General v Belize Telemedia Limited and Belize Social Development*, the Belize Supreme Court issued a world wide injunction restraining the enforcement of an arbitral award before steps had even been taken to enforce it. It was held that the Attorney General was entitled to the interim injunction because he had an arguable case that an international arbitral award obtained by Belize Telemedia was contrary to public policy. The basis for this argument was that the award concerned a contract between the parties which was alleged to contravene the laws of Belize, despite the fact that the Tribunal had expressly considered these issues. In 2010 two anti-arbitration injunctions were issued by the Belize court restraining international arbitration proceedings brought against the Government of Belize under the UK-Belize Bilateral Investment Treaty (*Attorney General v Jose Alpuche & others* and *Attorney General v The British Caribbean Bank Limited*). While these injunctions did not directly relate to public policy in the context of enforcement, they failed to acknowledge the competence of the Tribunal to determine its own jurisdiction. This mirrors a classic error that may be adopted when considering the public policy exception; to accept that this allows them to review the merits of the decision of the Tribunal.

However, in December 2010, in stark contrast to the preceding decisions, the Belize Supreme Court gave a pro-enforcement decision in *BCB Holdings Limited and The Belize Bank Limited v Attorney General*. In this case the court specifically considered the grounds of public policy. An application had been made by BCB Holdings and The Belize Bank to enforce an international arbitral award which concerned a settlement agreement between the parties pursuant to which they

had been granted certain tax treatment. The application for enforcement of the arbitral award was made under the Belize Arbitration Act which incorporated the provisions of the New York Convention. The Attorney General argued that the award should not be enforced because the underlying agreement was contrary to the laws of Belize and so fell within the public policy exception. The Belize court disagreed. Drawing on a number of international decisions and authorities, it held that the public policy exception had to be construed narrowly and that the court should avoid interfering with the Tribunal's decision on the substantive issues. As the Tribunal had considered the illegality issues now raised by the Attorney General on enforcement, it rejected the submission that it should find the arbitral award contrary to public policy on the grounds of illegality. This decision was clearly a progressive step in keeping with an increasingly international standard approach to the public policy exception.

There is an emerging international consensus that public policy in the context of enforcement should have a restrictive interpretation. Are the recent decisions of the Indian and Belize courts a sign that this consensus is now embracing previously uncertain jurisdictions? While it might be too early to draw any firm conclusions, these decisions do represent a good indication that the self-reinforcing effect of international jurisprudence is starting to reap its rewards.

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