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Second Look At The Foreign Award Forbidden On Enforcement – Indian Supreme Court

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The Supreme Court of India handed down a judgment earlier this month that restates Indian position on the enforcement of foreign arbitral awards in line with the international standards. In the case of *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, a three judge bench of the apex court held that review of a foreign arbitral award on its merits is untenable as it is not permitted under the New York Convention. The judgement clearly exposes the difference in the scope of inquiry during the annulment of a domestic award and the enforcement of a foreign award. It stated that the expression 'public policy of India' under section 48 of the Arbitration & Conciliation Act, 1996 (the Act) should be construed narrowly; whereas the same could be given a wider meaning under section 34 of the Act.

Background

On 12th May 1994, Shri Lal Mahal Ltd, an Indian company concluded a contract with Progetto Grano Spa, an Italian corporation for the sale of Indian origin durum wheat. After the delivery of goods at the destination, the Respondent (buyer) informed the Appellant (Seller) that the consignment did not match the contractual terms and therefore the seller is in breach of the contract. The Respondent initiated arbitration through the GAFTA and the arbitral tribunal seated in London rendered two awards against the Appellant company. After its unsuccessful attempts to frustrate the arbitral process through Indian Courts, the appellant company challenged these awards before the Board of Appeal, GAFTA. On rejection of these appeals by the Board, the seller invoked the challenge proceedings under the English Arbitration Act before the High Court of Justice, London. However, the appeal was dismissed. Later, the respondent company (buyer) instituted enforcement proceedings in the High Court of Delhi, India, where the seller's assets are located. The seller argued before the High Court that the awards are contrary to the public policy of India, which the court rejected; hence a special leave petition was filed by the appellant in the Supreme Court.

Public Policy – Domestic and International

The Court considered the interpretation of the term public policy in the context of enforcement of an award under section 48 (2)(b) of the Act, which is codified from Article V(2)(b) of the New York Convention. The same expression has been included as a ground for setting aside a domestic award under section 34 of the Act, which is adopted from the UNCITRAL Model Law. According to the Model Law, public policy is a ground for setting aside an award by the courts at the place of

arbitration (Article 34) as well as a ground for refusing the enforcement of a foreign award (Article 36). The expression, undoubtedly, is a nebulous concept as it varies from one country to other. Nevertheless, there exist different ideas in the international arbitration jurisprudence with respect to the application of this defence. Some argue that, the interpretation must be based on 'truly international' considerations as opposed to the individual State notions of public policy in order to have a uniform application of this defence. However, in the context of recognition and enforcement of foreign awards, both New York Convention and Model Law explicitly state the application of the 'public policy of the country', where the enforcement is sought. The pertinent question here is, whether these conventions regulating international commercial arbitration, limit the application of this ground to 'domestic' public policy? The Supreme Court answered this in the negative.

The International Law Association Report on Public Policy as a Bar to Enforcement of International Arbitral Awards recommends the use of 'international' public policy as a ground to refuse the recognition and enforcement of an international arbitral award (which has a material foreign element), the scope of which is narrower than the 'domestic' public policy that is applicable only in the case of a domestic award. Here, the court rightly construed this as the notion of public policy applicable in the conflict of laws theory. Indian Supreme Court has dealt with these two opposing positions on public policy, namely – the narrow view (where the courts do not create new heads of public policy) and the broad view (where a certain degree of judicial review is allowed) – earlier also.

In its landmark decision in *Renusagar Power Ltd. v. General Electric Co.*, the Supreme Court addressed this question under section 7(1)(b)(ii) of the Foreign Awards(Recognition & Enforcement) Act 1961 and concluded that the public policy in an enforcement setting shall include: i) fundamental policy of Indian law, ii) the interests of India; or iii) justice and morality. This clearly was a narrow interpretation of international public policy reflecting on the pro-enforcement bias of the New York Convention.

However, the apex court in two significant judgments, namely, *Oil and Natural Gas Corporation v Saw Pipes* and *Venture Global Engineering v Satyam Computer Services Ltd.*, deviated from this precedent by giving an undesired and expansive interpretation to the public policy exception. In *Saw Pipes*, while dealing with a domestic award, the court held that the award could be set aside on the ground that the tribunal violated the Indian law and eventually, added "patent illegality" as an additional ground to the *Renusagar* formula. In *Venture Global*, the court relying on the this ratio and of *Bhatia* annulled a foreign arbitral award based on pure domestic notions of public policy, and thereby afforded India the image of an arbitration-hostile jurisdiction. Therefore, the underlying fact is that, although both the notions – domestic and international – comes under the purview of national public policy, the application of the domestic public policy must be limited to domestic award.

Apart from the limited scope of public policy defence available under Article V, New York Convention does not permit the judicial review of the merits of a foreign arbitral award. But, in *Phulchand Exports Ltd v OOO Patriot*, the Supreme Court, yet again departing from the philosophy of the convention, re-opened the arbitral tribunal's decision on its merits. Fortunately, the court (interestingly, the same judge) realised the mistake and overruled it as stated in Paragraph 28 of this judgment:

> "It is true that in Phulchand Exports, a two-Judge Bench of this Court speaking

> through one of us (R.M. Lodha, J.) accepted the submission made on behalf of the appellant therein that the meaning given to the expression "public policy of India" in Section 34 in Saw Pipes must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in paragraph 16 of the Report that the expression "public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal" does not lay down correct law and is overruled."

Annulment & Non-Enforcement – antithetical!

According to both New York Convention and UNCITRAL Model Law, any recourse against an arbitral award including the possibility of an annulment, is left to the national courts of the country in which the arbitration has its seat. The Arbitration and Conciliation Act provides for the setting aside proceedings against an arbitral award under Section 34, which falls within Part I of the Act; whereas the enforcement process would be as per Part II of the Act.

Here, it should be noted that the criteria for the setting aside of a domestic award and the criteria for refusal to enforce a foreign award are consistent with each other, as Section 34 (2) (b) and Section 48(2)(b) uses identical language. However, the scope of review under these provisions prescribes for different standards of treatment. Enforcement is a stage which comes only after an award has attained its finality and section 34 deals with a stage in arbitration where the award made by an arbitral tribunal is yet to become final. As discussed in the *Saw Pipes* decision, the jurisdiction of the court is much wider where the validity of award is challenged before it becomes final and enforceable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage could be limited.

It is said that, "finality is good but justice is better." However, as the ILA report recommends, an enforcement court must carry out a balancing exercise between finality and justice. The New York Convention and the Model Law permit such an exercise by making the court's power discretionary, *i.e.* enforcement 'may' be refused, but only under exceptional circumstances. I think the Supreme Court has upheld India's international arbitration obligations in its right sense. In doing so, the court furthered the fact of India emerging as an arbitration friendly jurisdiction, after its historic verdict in *Bharat Aluminium v. Kaiser Aluminium* which was delivered in September last year.

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