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ONGC v Western GECO – A new impediment in Indian Arbitration

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Recently, the Indian courts have seen a heartening change with respect to the court adopting a pro-arbitration approach. However, for arbitrations seated in India, the decision of ONGC v Western GECO marks a regressive step in the non-interference trend. The Court assumed power to modify the subject matter of an award for violation of the ground of fundamental policy of the Indian State under Section 34(2)(b)(ii) of the Indian Arbitration and Conciliation Act 1996.

In Renusagar Power Plant Ltd. v. General Electric co. (1994) the Supreme Court of India noted that public policy was a ground for refusal of enforcement of an award. It laid down three grounds for the same, namely: fundamental policy of India, interest of India, and the morality of the India. These three grounds were accepted as valid in *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* ('Saw Pipes', 2003) by the Supreme Court. In this context the ground of 'fundamental policy of the Indian state' was referred to in both decisions but has never been expounded upon by the court. On September 4, 2014 the Supreme Court in *Oil & Natural Gas Corporation Ltd. v Western Geco International ltd.* (September, 2014) (hereinafter'Western GECO') laid down the scope of fundamental policy of India.

The decision in Western GECO

Oil and Natural Gas Corporation ('ONGC') contracted with the Respondent, Western Geco international limited ('GECO') for procuring U.S. origin "Geophone" Hydrophones ('U.S. Hydrophones'). Due to regulatory measures post 9/11 in the U.S. GECO intimated ONGC that it would not be possible to provide for the desired U.S. Hydrophones. It sought to exempt itself from liability under the force majeure clause. ONGC refuted GECOs claim of force majeure and required the immediate delivery of the U.S. Hydrophones. Unable to procure U.S. origin Hydrophones GECO provided for compatible options to the US origin Hydrophones.

On 16th October 2001 GECO communicated its inability to adhere to U.S. origin hydrophones. In March 2002, ONGC conditionally accepted GECO's offer subject to it deducting the liquidated damages. The deductions gave rise to the arbitration in the present case. The Arbitral Tribunal held that ONGC could not validly deduct the damages. ONGC filed for a setting aside proceedings in the Bombay High Court. The High Court held that the award or *pendente lite* and future interest shall stand deleted. However the award was partially allowed by the Bombay High Court. ONGC appealed to the Supreme Court against the award. GECO contended that there was no provision under Section 34 which allowed for the court to interfere with the award. Furthermore it contended

that the Court could not sit in appeal on the content of an award given by the Tribunal.

The Court stated that the Saw Pipes decision had included fundamental policy of India and that in the opinion of the Court without conferring an exhaustive meaning, fundamental policy meant: *first*, adopting a 'judicial approach' which involves the application of judicial mind by the authority and bodies (Ridge v Baldwin), *second*, adhering to the principles of natural justice and *third*, that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law.

Thus the Court held that if the arbitrators failed to make an inference which should have been made, or have made a *prima facie* wrong inference, then "*[t]he adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified.*.." (at para 30)

Applying this principle the court rejected GECOs contention of non-interference of the Court with the award and went on to modify the quantum of damages awarded to ONGC. It 'overturned' the arbitral award and allowed for ONGC to deduct liquidated damages.

Effect of the Western GECO decision

Section 5 of the Indian Arbitration Act 1996, which mirrors the provisions of Article 5 of the UNCITRAL Model Law ('Model law'), prohibits court interference unless provided for in the Act. Section 34 of the Indian Arbitration and Conciliation Act 1996 ('Indian Arbitration Act'), which is also a replica of the Model Law, provides for recourse against the award "*only by an application for setting aside*". Nowhere does the Act prescribe the power to the Court to interfere with the award.

In Western GECO, the court blurred this distinction. It stated that a perverse and irrational finding could not be sustained in law. With this premise the Court would solely have the power to set aside the award. Instead the court assumes the power to modify the content of the award, which is not founded in any statutory provision.

In international arbitration it has been a well-established principle that the Courts cannot interfere with the subject matter of an award. As an illustration the Singapore High Court in *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* (2007) held that an arbitral award could not struck down on the basis that it was incorrect in law. To justify this premise, it reasoned that Section 34 (in pari material with Indian Arbitration Act) does not give the court a power to hear an issue in appeal. Greenberg, Kee and Weeramantry in their treatise, agree with this view when they state that Article 34 (Model Law) particularly by reason of the exhaustive nature of setting aside, does not afford the court reconsideration of the award on the merits. This view has further been resonated in *Hall Street v Mattel* (2008) by the United States Supreme Court where they refused to permit a contractually agreed review of merits. In fact the Indian Supreme Court itself in 2014 February 2014 in its decision of *Enercon v Enercon GmBH* (February, 2014) held that 'least intervention by the Courts' was a uniformly accepted principle which is reflected in Section 5 of the Indian Arbitration Act.

The Western GECO decision runs contrary not only to the practice under international arbitration but also against the scheme of the act. The decision may plummet Indian seated arbitration into a sea of uncertainty and unpredictability being forced into the rigours of the Courts.

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