Kluwer Arbitration Blog

NAFED v. Alimenta S.A.: Has the Indian Supreme Court Opened a Pandora's Box on Enforcement of Foreign Awards?

R. Harikrishnan · Saturday, July 11th, 2020

In a recent decision, *National Agricultural Co-operative Marketing Federation of India (NAFED) v. Alimenta S.A.* ("NAFED"), the Indian Supreme Court ("SC") refused to enforce a foreign award on the ground of it being opposed to public policy under Section 7 (1) (b) (ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 ("the 1961 Act"). The decision raises questions on the propriety of a court reviewing the merits of a foreign award at the stage of enforcement and the scope of public policy exception to enforcement of foreign awards in India.

The Facts in *NAFED*

In 1980, NAFED and Alimenta S.A entered into a contract under which NAFED would supply a fixed quantity of Indian HPS groundnut. Clause 11 of the contract incorporated the terms and conditions as per the FOSFA 20 (Federation of Oils, Seeds and Fats Association Ltd.) contract. Clause 14 of the FOSFA 20 contract provided that, in case of prohibition of export by executive order or by law, the contract would be treated as cancelled. [Para. 32]. NAFED was only able to supply a part of the quantity stipulated in the contract. This led to the parties' executing two addenda, which allowed NAFED to supply the remaining quantity in the subsequent year. However, NAFED could not supply the outstanding quantity because it had no permission under the Indian government's Export Control Order- to carry forward the exports from the 1979-80 season to the subsequent year due to a restriction on exports under a quota system. Alimenta treated this as a default and initiated arbitration proceedings before FOSFA, London. FOSFA passed an award in 1989 directing NAFED to pay $4,681,000 as damages (along with interest), to Alimenta. This award was upheld by the FOSFA Board of Appeal in 1990.

Proceedings before the Indian Courts

In 1993, when Alimenta filed a petition to enforce the award before the Delhi High Court ("High Court"), NAFED raised objections *inter alia* on the ground that the award is opposed to the Indian government's export policy and consequently, to the public policy of India. In 2000, a single judge of the High Court rejected NAFED's contentions and held that the award is executable as a decree of the court. NAFED filed an application for review against this decision, which was dismissed.

Thereafter, it filed an appeal before the division bench (comprising two judges) of the High Court, which was dismissed in 2010. Against this dismissal, NAFED filed an appeal before the SC.

The Approach of the SC

The SC extensively reviewed the award on its merits and held that without government's permission, it was not possible for NAFED to carry out its contractual obligations and both the parties knew that the contract would be cancelled in such an exigency for non-supply in quantity. [Para. 57]. The SC then scrutinized whether the award was contrary to the public policy of India. The SC referred to its previous decisions on the interpretation of "public policy" exception to enforcement of awards such as, *Renusagar Power Co. Ltd. v. General Electric Co. Ltd.* ("Renusagar"), *O.N.G.C. v. Saw Pipes*, *Shri Lal Mahal Ltd. v. Progetto Grano Spa* ("Shri Lal Mahal"), *Associate Builders v. Delhi Development Authority* and *Ssangyong Engineering & Construction Co. Ltd. v. NHAI* ("Ssangyong") and observed that the defence of public policy under Section 7(1)(b)(ii) of the Act of 1961 should be construed narrowly. [Para. 65]. However, the SC concluded that the enforcement of the award would contravene the public policy of India relating to export for which permission of the Indian government was necessary. Thus, enforcement of the award was refused as being opposed to the fundamental policy of Indian law and basic concepts of justice. [Para. 69]

Analysis

It is noted that although the 1961 Act has been repealed by the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), Section 7 (1) (b) (ii) of the 1961 Act is retained in Section 48 (2) (b) of the 1996 Act. The SC referred to most of the relevant precedents on the question of when an award can be said to be opposed to the "*public policy of India*" and on the approach to be taken when considering a challenge to foreign award. However, it omitted to refer to another recent judgment in *Vijay Karia v. Prysmian Cavi E Sistemi Srl* ("Karia"), which laid down the following principles on dealing with challenge to enforcement of foreign awards. This omission may be because *NAFED* was reserved for judgment before the decision in *Karia.* Had the SC taken *Karia* into account, the following propositions would be relevant:

1. It would only be in a very exceptional case of a blatant disregard of Section 48 of the 1996 Act that the SC would interfere with a judgment which recognises and enforces a foreign award however inelegantly drafted the judgment may be. [Para. 24]
2. The "pro-enforcement bias" of the New York Convention has been adopted in Section 48 of the 1996 Act. Foreign awards cannot be set aside by second guessing the arbitrator's interpretation of the agreement of the parties. [Para. 45]
3. The "fundamental policy of Indian law", as has been held in *Renusagar*, must amount to a breach of either a legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. The Court also approved the dictum of the High Court in *Cruz City 1 Mauritius Holdings v. Unitech Ltd.* that one of the principal objectives of the New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity to the national laws. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy that is

beyond compromise. The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment. [Paragraphs 82 and 83]

4. Interference and denial of enforcement on the ground that the award offends the most basic notions of justice is an award that either shocks the conscience of the court or is illegal given the prevailing mores of the day. It will be attracted in exceptional circumstances. [See: Footnote no. 1 in paragraph 78, referring to the decision in *Ssangyong*]

Proposition no. 2 above is also reflected in Explanation 2 to Section 48 (2) (b)of the 1996 Act inserted by the 2015 Amendment, that a review on the merits of the award is impermissible to find out whether the award is in contravention with the fundamental policy of Indian law. The failure to consider the above propositions will result in unnecessary judicial intervention at the stage of enforcement of the award, which is against the policy of minimal judicial intervention envisaged by Article V of the New York Convention and the 1996 Act.

The SC in *NAFED* treats the contravention of export policy as contravention of public policy of India but does not offer any reason as to how or why it contravenes the public policy of India. The High Court in *C.O.S.I.D. Inc. v. SAIL*, ("C.O.S.I.D."), which was also in the context of the 1961 Act, held that contravention of export policy contravenes the public policy of India. However, *C.O.S.I.D.* is distinguishable for the following reasons:

Firstly, *C.O.S.I.D.* was before the judgment in *Renusagar* which took a narrow interpretation of the term "public policy" under Section 7 (1) (b) (ii) of the 1961 Act. **Secondly,** *C.O.S.I.D.* was a case where the award was against the government order banning exports. While any contravention of an order banning exports will fundamentally affect the export policy, contravention of a restriction or quota in the export policy may not necessarily do so. Such a narrow interpretation of an export policy is in tune with the dictum in *Renusagar*, as explained in *Karia*, that every violation of an economic legislation cannot amount to violation of public policy. In other words, something more than contravention of the law is required to refuse enforcement of a foreign award as being contrary to the public policy of India.

The finding that the award is opposed to the basic concept of justice is also without any reasoning. Normally, this ground will apply in very exceptional circumstances when the conscience of the court is shocked by infraction of fundamental notions or principles of justice. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator's view and does what it considers to be "justice".

The decision in *NAFED* is also problematic in terms of its precedential value. The decisions in *Renusagar*, *Shri Lal Mahal* and *Karia*, from which *NAFED* made a departure, are all decisions of three-judge benches of SC like *NAFED*. *NAFED* has neither distinguished nor offered any reason to depart from these decisions. *NAFED* has thus put the Indian law on public policy exception to enforcement of foreign awards in a state of confusion.

Conclusion

The decision in *NAFED* opens the door for a review on merits at the stage of enforcement, a view that is contrary to the pro-enforcement bias stipulated in Section 48 of the 1996 Act. The finding that contravention of export policy contravenes public policy of Indian law expands the scope of

public policy exception enunciated by the earlier decisions. It will prompt award debtors to engage in speculative litigation with hope that "some mud flung would stick" – an approach reprimanded by the SC in *Karia* [Para. 102]. The uncertainty caused by *NAFED* as a precedent is likely to be a challenge for Indian Courts in the coming days. However, considering that the facts of *NAFED* arose at a time when the Indian economy had rigid export-import policy restrictions, it is possible that the SC may restrict its applicability to its particular facts. Otherwise, it will be detrimental to India's push as a hub of international arbitration.

R. Harikrishnan is an Advocate in the High Court of Kerala.

---

response, or trackback from your own site.