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India's Territorial Reservation: Approach of Indian Courts in Referring Parties to Foreign Arbitration

Abhijnan Jha, Urvashi Misra, Durga Priya Manda (AZB & Partners) · Monday, April 8th, 2024

The Territorial Reservation under Article 1(III) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**Convention**") presents an interesting conundrum. Despite widespread acceptance of the Convention, the Territorial Reservation continues to be a domestic limitation on the Convention's applicability.

In this post, we analyse how the Territorial Reservation ought to be interpreted and shed light on its integration into the Indian statutory framework through the Indian Arbitration and Conciliation Act ("**Act**"). Specifically, we discuss whether the Act makes it discretionary for Indian courts to refuse a request to refer parties to a foreign-seated arbitration, seated in a Contracting State under the Convention which is not included in India's notified list of Reciprocating Territories.

What Does the Territorial Reservation Entail?

The Convention forms the foundation of present-day international commercial arbitration. Its success is attributable to the Convention being one of the foremost treaties to document a uniform approach to enforce foreign awards. As of today's date, the Convention has 172 signatories and a similar number of ratifications through its integration into domestic law.

At the time of its formulation, however, the Convention did not enjoy the same level of popularity. There were only 25 signatories when the Convention came into force in 1958. To accelerate its acceptance, the Convention's drafters introduced a 'Territorial Reservation' under Article 1(III).

This Reservation permits Contracting States to "on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." Thus, Contracting States were given the discretion to decide the foreign awards of which country (each a "**Reciprocating Territory**") were enforceable in its territory under the terms of the Convention.

The Convention does not specify the manner in which Reciprocating Territories ought to be notified. A Contracting State, therefore, was free to notify its Reciprocating Territories through separate government orders.

The Territorial Reservation was intended to incentivise the Contracting States and their trade allies

to adopt the Convention. The Convention would provide access to a uniform mechanism for enforcing awards which, in turn, would strengthen existing economic ties. At the same time, it preserved a Contracting State's right to self-determination as different Contracting States have their own different legislative and judicial approaches. This balancing act propelled the Convention to its current success.

Notwithstanding the Territorial Reservation's contribution to the Convention's popularity, it resulted in an interesting conundrum. Undisputedly, the Convention was conceived to encourage parties to resolve their disputes through arbitration. However, the Territorial Reservation led to a situation where a party having a valid arbitration agreement under the Convention and a favourable award issued in a Contracting State could not reap the Convention's benefits, if it sought to enforce the award in a non-Reciprocating Territory.

This is not to say that the Territorial Reservation by itself invalidates the agreement and the consequent award. It only takes away the Convention's benefit of a uniform and predictable enforcement mechanism.

India's Territorial Reservation

India is one of the countries which included a Territorial Reservation when signing the Convention and notified only around 50 Reciprocating Territories till date under the Act. Other countries which included a similar Territorial Reservation when signing the Convention include China, Malaysia, Turkey, New Zealand, and Nepal.

Interestingly, India's Territorial Reservation is more restrictive than Article 1(III) of the Convention. Section 44(b) of the Act restricts Reciprocating Territories to only those countries which have been officially notified by the Indian government. If a Contracting State recognises India as a Reciprocating Territory, or a Contracting State does not have a Territorial Reservation, it will not be considered a Reciprocating Territory by India unless officially notified to be one by the Indian government. This is done by the relevant Ministry (such as the Ministry of Foreign Trade or the Ministry of Commerce) by publishing a notification in India's official gazette.

In this regard, the former Legal Advisor to the Indian Ministry of External Affairs has argued that this formulation is restrictive in scope and contrary to Article 51 of the Indian Constitution, which engenders respect and adherence to international law.[1)] He argued that the lack of a formal notification from the Indian government, when another country recognises awards from India, should not hinder the recognition and enforcement of foreign awards arising out of Convention States in India. This argument is consistent with one of the foundational principles of the Convention, i.e., international uniformity. However, India still continues to retain this Territorial Reservation.

Integration of the Convention into the Indian Statutory Framework

Part II of the Act implements the Convention and incorporates the Convention's mandate to recognise and enforce foreign awards seated in Convention States. Section 44, which is the opening provision in Part II, defines a 'foreign award' using a twin test. The first condition (set out

in Section 44(a)) is that the award in question should be pursuant to a written agreement to which the Convention applies – which embodies Article II of the Convention. The second condition (contained in Section 44(b)) is that the award should have been passed in a Reciprocating Territory – which embodies India's Territorial Reservation in terms of Article 1(III) of the Convention.

These two distinct requirements, which are independent from each other, together form a 'foreign award' for purposes of Part II.

The first condition, i.e., Section 44(a), also comes into play when a party to an arbitration agreement (seated in a Convention State) approaches an Indian court seeking a referral to arbitration. Section 45 of the Act deals with these referral requests making a reference to "an agreement referred to in Section 44."

Section 45 is a statutory mandate to Indian courts, requiring them to refer parties to an arbitration agreement to arbitration. The only limited exception carved out in Section 45 is if the Court has a *prima facie* opinion that the arbitration agreement in question is (a) null and void; or (b) inoperative; or (c) incapable of being performed. Unless these grounds are established, Indian courts ought to refer parties to arbitration. The Supreme Court of India has in, *inter alia*, *Sasan Power Ltd. vs. North American Coal Corporation (India) (P) Limited* [¶46] and *World Sport Group (Mauritius) Limited vs. MSM Satellite (Singapore) PTE. Limited* [¶29] confirmed that the scope of a Court's enquiry in a Section 45 is limited to only these grounds and the Court cannot go into any other aspects.

Can Indian Courts Refuse a Referral Request to an Arbitration Seated in a Non-Reciprocating Territory?

Given the second reciprocity condition contained in Section 44(b), it is worth considering whether an Indian Court can reject a referral request under Section 45 if the arbitration is seated in a Contracting State which is not a Reciprocating Territory.

In this scenario, the first condition in Section 44(a) (i.e., an arbitration agreement naming a Contracting State as the seat) is satisfied, even if the second condition of reciprocity contained in Section 44(b) is not. Thus, the question which emerges is whether the non-fulfilment of the reciprocity requirement in Section 44(b) forms an additional ground for rejecting a referral request under Section 45.

In order to understand the true import of Section 45, it is helpful to analyse the manner in which India has incorporated the Territorial Reservation into its statutory framework. The fact that Section 44(b) refers *only* to 'enforcement' necessarily implies that it is only triggered at the enforcement stage and not at the referral stage. This is also consistent with a harmonious interpretation of Sections 44 and 45. The Bombay High Court considered this issue in *Rashmi Mehra and Ors. vs. EAC Trading Ltd.* and agreed with this interpretation and found that Section 44(b) and Section 45 ought not to influence each other.

The Convention's preparatory documents also show that the drafting committee (which included India) intended for the Territorial Reservation to operate only against awards, as opposed to the more restrictive scope of only notified Reciprocating Territories. Therefore, from inception, the Territorial Reservation was intended to apply only at the stage of enforcement.

There is also a practical justification behind this interpretation. Keeping Section 44(b) and Section 45 separate accounts for situations where India notifies fresh Reciprocating Territories. Consider a situation where, at the time of seeking a referral, the seat in question is not a notified Reciprocating Territory but is subsequently declared to be one. It is in the parties' interests for a court to only assess whether the arbitration agreement satisfies the test under Section 44(a) at the time of referral. The second assessment in Section 44(b), i.e., whether the seat is a Reciprocating Territory such that the resultant award can be enforced in India, is a separate consideration which should not be undertaken at the referral stage.

The above view is also supported by commentators such as Gary Born[2)]who opine that the Territorial Reservation in Article 1(III) is limited to assessing the enforceability of foreign awards and is not applicable at the referral stage. Another commentator goes a step ahead and argues that the principle of comity should be used to liberally expand the scope of the Territorial Reservation from only reciprocating territories to any Convention State. This is not far from two fundamental principles of the Convention – uniformity and consistency.

These authorities reinforce the argument that India's Territorial Reservation in Section 44(b) of the Act does not dilute a Court's ability to refer parties to foreign seated arbitrations under Section 45.

Conclusion

There is no doubt that India was entitled to raise a Territorial Reservation as an extension of its sovereignty at the time of signing and ratifying the Convention. However, as discussed above, this Reservation ought to be applied only at the stage of enforcing a foreign award and not prior, i.e., at the stage of referring parties to arbitration. The Territorial Reservation should not be mechanically associated with the reference mandated by Section 45 of the Act, as it is inconsistent with the intention behind the Territorial Reservation. Therefore, the only requirement for an Indian court to refer parties to a foreign seated arbitration is for the seat to be located in a Contracting Party (and not a notified Reciprocating Territory).

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Note: The views in this post are of the authors and not their law firm, AZB & Partners.

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