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Arbitrator's Bias as a Ground for Challenging a Foreign Award: The Indian Perspective

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In the last decade, India has emerged as a prominent pro-arbitration jurisdiction owing to several factors including legislative changes to the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). Indian courts have been at the forefront of this movement and consistently interpreted Indian law in favour of arbitration rather than against arbitration.

A noticeable trend has been the recognition, by Indian courts, of the high standard required to challenge enforcement of foreign arbitral awards in India. The Indian Supreme Court ("**Supreme Court**") in ***Government of India v. Vedanta***, (2020) 10 SCC 1, upheld the principle of minimal judicial intervention to a foreign award, where interference could only be based on the exhaustive grounds mentioned under Section 48 of the Arbitration Act. These grounds replicate Article V of the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958** ("**New York Convention**") and include public policy, arbitrability of the dispute, and composition of the arbitral tribunal, amongst others.

The Supreme Court has recently bolstered this view in ***Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings (Mauritius) Limited***, 2024 SCC Online SC 345, where it rejected a challenge to the enforcement of a Singapore-seated foreign award on the ground of arbitrator's bias. This post discusses the Supreme Court's analysis and its impact on the enforcement regime in India.

Factual Background

The arbitration was initiated in 2012 by HSBC PI Holdings (Mauritius) Limited ("**HSBC**") against Avitel Post Studioz Limited ("**Avitel**") and its founder and directors under a Share Subscription Agreement executed in April 2011 ("**SSA**"). Under the SSA, HSBC had invested USD 60 million in Avitel to acquire 7.8% of its equity on the condition that this investment would be utilised to service a contract with the British Broadcasting Corporation. However, HSBC subsequently discovered that the invested money was siphoned off to different companies which led to the arbitration. The arbitration was conducted under the **Singapore International Arbitration Centre Rules** with Singapore as the seat. In September 2014, a three-member arbitral tribunal issued the final award ("**Award**") directing Avitel, its founder, and directors ("**Award Debtors**") to pay USD 60 million as damages to HSBC. The Award Debtors objected to the enforcement of the Award in India before the Bombay High Court under Section 48 of the Arbitration Act primarily on the

ground of bias, alleging that the presiding arbitrator and the emergency arbitrator appointed in the case had failed to disclose a vital connection and identity of interest with HSBC, which vitiated the Award. However, the Bombay High Court rejected the challenge on the grounds that the circumstances of bias alleged by Avitel did not pass the reasonable third person test, contemplated under General Standard 2(b) of the **IBA Guidelines on Conflict of Interest in International Arbitration, 2004** ("**IBA Guidelines 2004**"). Following the said test, the Bombay High Court determined that the facts of the present case, did not, in the eyes of a reasonable third person with knowledge of the relevant facts, give rise to justifiable doubts about the independence and impartiality of the arbitrator. Accordingly, the Bombay High Court held that there was no question of bias or likelihood of bias and that the Award was enforceable.

Appeal before the Supreme Court

The Award Debtors appealed the Bombay High Court's judgment before the Supreme Court, claiming that the enforcement of the Award was contrary to the public policy of India as the presiding arbitrator had failed to disclose his conflict of interest; particularly, that he was an independent non-executive director of two private companies which conducted business with an HSBC group company. The Award Debtors argued that this compromised the arbitrator's independence and impartiality as per General Standard 3 of the IBA Guidelines 2004. However, the Supreme Court upheld the Bombay High Court's judgment and rejected the challenge to the enforcement for the reasons summarised below:

- **Public Policy is a limited ground**: The Supreme Court held that the grounds for resisting enforcement of a foreign award are much narrower than the grounds available for challenging a domestic award under Section 34 of the Arbitration Act. Indian courts can reject enforcement of a foreign award if enforcement is contrary to the public policy of India. However, in such cases, 'public policy' must be interpreted narrowly, as opposed to the wide interpretation given for challenge to domestic arbitral awards. The Supreme Court referred to a decision of the US Court of Appeal in ***Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier***, 508 F.2d 969 (1974), which held that enforcement of a foreign award can be denied on the ground of public policy only where enforcement would violate the forum state's more basic notions of morality and justice. This decision was followed by the Supreme Court previously in ***Renusagar Power Co. Ltd. v. General Electric Co***, 1994 Supp (1) SCC 644 and the articulation of the 'most basic notions of morality and justice' was legislatively adopted in the Arbitration Act.
- **Bias as a ground to refuse enforcement can only apply in exceptional circumstances**: The Supreme Court observed that an arbitrator's bias can be a ground for refusing enforcement on the ground of public policy under the New York Convention. However, considering the greater risk, efforts, time, and expenses involved in non-recognition of an award as opposed to the removal of an arbitrator during the arbitration proceedings, courts across the world have applied a higher threshold of bias to prevent the enforcement of an award than the standards set for ordinary judicial review. Further, the Supreme Court noted that there is no uniform test for dealing with allegations of bias. The courts of different jurisdictions apply different tests including the "real possibility of bias" test in the UK, the "real danger" test in Australia, and the "reasonable suspicion" test in Singapore (discussed **here**). In India, the endeavour must be to adopt the internationally recognised narrow standard of public policy when dealing with the aspect of bias. The ground of bias will be attracted only when the most basic notions of morality or justice are

violated, which have been interpreted to mean when the conscience of the court is shocked by the infraction of fundamental notions or principles of justice (***Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India***, (2019) 15 SCC 131 discussed **here**). The enforcement of an award is to be refused only in exceptional circumstances. The Supreme Court held that the facts of this case do not show any bias that would violate the most basic notions of morality and justice or shock the conscience of the court.

- **Belated challenge**: The Supreme Court also took into account that the Award Debtors had not challenged the Award on the ground of bias in the Singapore Courts (*i.e.*, the courts of the seat) within the limitation period. The Supreme Court relied upon previous judgments of Indian courts including ***Vijay Karia v. Prysmian Cavi E. Sistemi SRL***, (2020) 11 SCC 1, and observed that challenges to arbitral appointments should be made in a timely fashion and not as a tool to delay enforcement. The Supreme Court also noted that even though the remedy was available, no challenge on this ground was raised at the pre-enforcement stage.
- **No bias under IBA Guidelines 2004**: One of the grounds under Clause 3.5.1 of Part II of the **IBA Guidelines 2004** (as incorporated in Schedules V and VII of the Arbitration Act) to allege arbitrator bias is if the arbitrator holds shares, either directly or indirectly, in either party or its privately held affiliate. The Bombay High Court applied the reasonable third person test contained in General Standard 2(b) of the IBA Guidelines 2004 to conclude that the circumstances alleged fall under the green list and thus there is no requirement of disclosure. It was observed that the two private companies, in which the presiding arbitrator was an independent non-executive director, were not affiliates of HSBC. On this basis, the Supreme Court affirmed the decision of the Bombay High Court and found that no reasonable third person aware of all the facts would conclude that there were justifiable doubts about the impartiality or independence of the arbitrator in this case.

Position under the Revised IBA Guidelines 2024

While discussing challenges to the enforcement of arbitral awards on the ground of bias, it is relevant to refer to the revised version of the **IBA Guidelines on Conflicts of Interest in International Arbitration** ("**IBA Guidelines 2024**") released in February 2024 (discussed **here**).

The IBA Guidelines 2004 provide for deemed waiver of potential conflict of interest of an arbitrator if no objection was raised by a party within 30 days of learning the fact and circumstances constituting such conflict. General Standard 4(a) of the IBA Guidelines 2024 now additionally provides for deemed knowledge by a party of any facts and circumstances giving rise to justifiable doubts if a reasonable enquiry conducted at the outset or during the proceedings would have yielded the same.

Further, under Clause 7(a)(i) of the IBA Guidelines 2004, a party is duty bound to disclose relationships that would lead to potential conflicts of interest such as a relationship between the arbitrator and the party, its group company, etc. Under Clause 7(a)(i) of the IBA Guidelines 2024, a party must now also disclose details of any person or entity which it believes the arbitrator must consider while making disclosures. Both these provisions impose additional obligations on the parties to conduct reasonable enquiries at the time of disclosures with a view to eliminate objections on conflict of interest at a later stage.

Conclusion

It is well settled that the rule against bias is a fundamental principle of natural justice. However, the Supreme Court's judgment in *Avitel v. HSBC* makes it clear that Indian courts will apply a high standard when enforcement of a foreign award is challenged on the ground of arbitrator's bias.

For instance, the objection to impartiality and independence of the arbitrator has to be raised at the earliest point of time – at the time of disclosure, at any stage during the arbitration proceedings, or at least while seeking setting aside of the award in the courts of the seat. By contrast, if this objection is raised for the first time at the enforcement stage, then the threshold to sustain such challenge is (justifiably) very high, considering the efforts and costs that have gone into the arbitration and the various opportunities available to the challenge at pre-enforcement stages. This position is fortified with the revisions contained in the IBA Guidelines 2024, which contemplate a party's knowledge of facts and circumstances leading to allegation of bias by conducting a reasonable enquiry at pre-enforcement stage. These guidelines thus provide an additional safeguard against resisting enforcement of arbitral awards.

Further, the judgment also reinforces the need for minimum judicial interference in enforcement of foreign arbitral awards. Taking into consideration that it took over a decade for the party, in whose favour the award was issued, to obtain a verdict on enforcement, the Supreme Court emphasised the need for early enforcement of arbitral awards.

A robust enforcement mechanism is one of the most important features of an arbitration friendly jurisdiction. This judgment demonstrates the approach of following international best practices with the intent of making India a leading hub for international arbitration.

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