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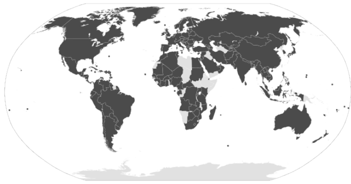
Recent Judicial Trends Concerning Public Policy And Setting Aside Of Foreign Arbitral Awards



Supreme Court Ruling - Scope of interference with foreign arbitral awards in India.

Over the past decade, judicial rulings concerning setting aside of arbitral awards have gone a long way in helping India shed its anti-arbitration image and to build itself as a favourable jurisdiction for enforcement of arbitral awards. However, a recent judgment of the Supreme Court ("**SC**") seem to, yet again, significantly expand the scope of interference with foreign arbitral awards in India, potentially setting us back a few steps.

The SC's ruling in *National Agricultural Cooperative Marketing Federation of India v. Alimenta SA*[1] has expanded the grounds for interference with a foreign award under Section 48 of the Arbitration and Conciliation Act, 1996 ("**the Act**"). In doing so, it has diverted from previously well settled principles of the limited scope of challenge under Section 48 of the Act.

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Judicial Background

Section 48(2)(b) of the Act provides that the enforcement of a foreign award may be refused on the ground that the enforcement would be contrary to the public policy of India.

In *Renusagar Power Co. Ltd. v. General Electric Co.*[2], the SC had observed that that the term "public policy" as a ground for interference with a foreign award under the erstwhile Foreign Awards Act, 1961 has been used in a narrow sense and constitutes something more than the violation of the law of India. It further laid down that in proceedings for enforcement of a foreign award under Foreign Awards Act, 1961, the scope of enquiry is limited to grounds mentioned in the Act and the award cannot be impeached on merits.

In *Shri Lal Mahal Ltd. v. Progetto Grano SPA*[3] the SC clarified that the principle laid down in *Renusagar* would continue to apply to inquiries under Section 48 of the Act. It also observed that in spite of public policy being a ground for interference in both domestic and arbitral awards, the scope of the term under Section 48 (foreign awards) was more limited than under Section 34 (domestic awards).

Following the *Renusagar* principle, the Arbitration and Conciliation (Amendment) Act, 2015 inserted two explanations to Section 48(2)(b). Explanation 1 defines the scope of public policy and includes a contravention of the fundamental policy of Indian law. Explanation 2 provides that interference with an award for contravention of the fundamental policy of Indian law shall not entail a review on merits of the dispute. The Explanation is analogous to that inserted in Section 34(2)(b)(ii) of the Act, pertaining to domestic awards.

The principle of limited scope of interference with foreign awards was most recently reiterated and applied by the SC in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)*[4] and *Vijay Karia* and *Ors. v. Prysmain Cavi E Sistemi SRL & Ors.*[5]

In *Vijay Karia*, the SC noted the pro-enforcement bias of the New York Convention on which Section 48 of the Act is modelled. It reiterated the principle that contravention of local laws would not constitute contravention of the fundamental policy of India, and the ground of public policy cannot be used as a means to second guess an Arbitrator's interpretation of the contract between the parties.

The Supreme Court's View In NAFED v. Alimenta

Facts

i. NAFED and Alimenta S.A. had entered into a contract for the supply of 5,000 metric tonnes of Indian HPS groundnut. Only 1900 metric tonnes could be shipped, and the remaining quantity could not be shipped due to damage caused to the crop. On

October 8, 1980, a second addendum to the contract came to be executed between the parties for supply of 3100 metric tonnes of the commodity.

ii. However, NAFED did not have the requisite permission from Government of India to carry forward the permission for exports for the year 1979-80 to the year 1980-81. The Ministry of Agriculture, Government of India prohibited NAFED from shipping any leftover stock from previous years.

iii. Pursuant to the aforesaid, Alimenta S.A. initiated arbitration proceedings before Federation of Oil, Seeds and Fats Association (FOSFA).

iv. FOSFA passed an award by which NAFED was directed to pay damages of USD 4,681,000 along with interest at 10.5% per annum. On an appeal filed by NAFED before the Board of Appeal, the interest was enhanced to 11.25% p.a., although no appeal had been preferred by Alimenta.

v. Alimenta S.A. filed a suit before the Delhi High Court seeking enforcement of the foreign award passed by FOSFA, as enhanced by the Board of Appeal.

vi. NAFED objected to the enforceability of the award, inter alia on the grounds that it was opposed to the public policy as such unenforceable. The learned Single Judge of the High Court held the award enforceable and not in violation of public policy of India.

vii. The order of Delhi High Court was challenged by NAFED in the present matter before the SC.

Decision

Taking a different view from *Renusagar*, *Shri Lal Mahal*, *Ssanyong* and *Vijay Karia*, the SC has taken a wide and liberal approach to "public policy of India" and "fundamental policy of Indian law". Referring to and interpreting Clause 14 of the Contract between the parties, the SC observed that the contract itself provided that in the event of any prohibition by the government, the relevant part of the contract shall be cancelled. It held that it was on account of the government's refusal, that NAFED could not export the balance commodity. It held that the contract was a contingent contract within the meaning of Section 32 of the Indian Contract Act.

The Court noted- "*the matter is such which pertains to the fundamental policy of India and parties were aware of it, and contracted that in such an exigency as provided in clause 14, the Agreement shall be cancelled for the supply which could not be made. It became void under section 32 of the Contract Act on happening of contingency…*"

In light of this, the SC observed that the enforcement of the award would be against the export policy of India and therefore in violation of the fundamental policy of India. Pertinently, the SC has not even made a reference to its latest judgment on the matter in *Vijay Karia*.

Analysis

By substituting its interpretation of clauses of the Contract between the parties, the SC appears to have opened up and given its review of the merits of the matter. A consideration on merits in proceedings for enforcement of a foreign award is expressly barred by Explanation 2 to Section 48(2) and contrary to the previous judgments of the SC.

It is surprising that the SC has regarded one export policy of the Government as a "fundamental policy of international law", significantly widening its scope. This is in derogation of its earlier view in *Vijay Karia* where it interpreted "fundamental policy of international law" to mean "*the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts*."
The decision erroneously elevates an executive decision to the level of a core value of Indian public policy.

Violation of a single enactment ought not be considered as a violation of fundamental policy of Indian law. In this context it is interesting to note the following extract from a judgment of the Delhi High Court in Cruz City 1 Mauritius Holdings v. Unitech Ltd. (quoted with approval in *Vijay Karia*) -

"*.....One of the principal objective 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 and which it cannot be expected to 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.*"

In light of this, clarifications from the Parliament or higher Judiciary as to the limited scope of public policy, as one that does not encompass statutory violations and executive actions would bring clarity and be of assistance to those seeking to enforce foreign awards.

Conclusion

The above decision of the SC in NAFED v. Alimenta SA has hampered significant progress made by India legislatively and judicially in the sphere of arbitration, and more particularly the enforceability of foreign awards. In light of this, clarifications from the Parliament or higher Judiciary as to the limited scope of public policy, as one that does not encompass statutory violations and executive actions would bring clarity and be of assistance to those seeking to enforce foreign awards.

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[1] Civil Appeal No. 667 of 2012, Supreme Court of India

[2] 1994 SCC Suppl. (1) 644

[3] (2014) 2 SCC 433

[4] Civil Appeal No. 4779 of 2019

[5] Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019

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