"Public Policy Exception in Enforcement of Foreign Awards" – The Achilles Heel In India's Dream of Becoming A Global Arbitration Hub

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Introduction

The Indian arbitration regime has made considerable efforts to change the existing judicial discourse and legislative intent to make India a global hub of arbitration.[1] However, excessive judicial intervention has been plaguing the success of this vision. The reason for this can be partially attributed to the 'public policy exception' employed by the Indian courts. Sections 34, 48 and 57 of the Arbitration and Conciliation Act, 1996 ["Act"] provide for challenges/enforcement exceptions with respect to domestic and foreign awards respectively, *inter alia* on the touchstone of the public policy of India.[2] Prior to the 2015 amendment, the term 'public policy' did not find any definition/explanation in the Act, leaving the job of interpretation completely to the courts. With the 2015 amendment, Explanation 2 to section 34(2) as well as Section 2A have been added, and the scope of public policy was restricted. However, such an amendment also lacked comprehensive meaning and application as some terms were still left undefined.

Apropos the public policy exception, the courts have observed two crucial distinctions. *Firstly*, there is a subtle distinction between the jurisdiction under sections 34 and 48 of the Act; under the former, the court deals with a challenge to the award before it becomes final and executable, whereas, under the latter, the court deals with the enforcement of an award after it becomes final and executable. *Secondly*, in conformity, the courts have established a varying standard of applicability of the public policy exception with regards to domestic awards and foreign awards.[3] The courts have applied the

[1]Parikh S, and Sambyal S, 'Enforcement of Foreign Awards In India – Have The Brakes Been Applied? | India Corporate Law' (*India Corporate Law*, 2020) <https://corporate.cyrilamarchandblogs.com/2020/04/enforcement-of-foreign-awards-in-india-have-the-brakes-been-applied/> accessed 18 July 2020

[2]Patkar A, 'Indian Arbitration Law: Legislating For Utopia' 4 Indian Journal of Arbitration Law <http://www.ijal.in/sites/default/files/IJAL%20Volume%204_Issue%202_Armaan%20Patkar.pdf> accessed 18 July 2020

[3]Rajasekaran V, and Ravipati R, 'Enforcement Of Foreign Arbitral Awards: Supreme Court Promotes A "Minimal Interference" Approach' (*Mondaq*, 2020), <https://www.mondaq.com/india/trials-appeals-compensation/897470/enforcement-of-foreign-arbitral-awards-supreme-court-promotes-a-minimal-interference-approach> accessed 11 August 2020

public policy exception liberally in relation to domestic awards, in contrast with foreign awards, where they have followed a narrower and stricter approach.[4]

From *Renusagar* to *Venture Global*: The divergent approach of courts on the public policy exception vis-à-vis enforcement of arbitral awards

The question of what constitutes public policy was first dealt by the Supreme Court ["SC"] in the case of *Renusagar Power Co. Ltd. vs. General Electric Co.*[5] ["**Renusagar**"]. The court propounded that *"the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality"*. This case took place before 1996 and hence it was decided under the Arbitration Act of 1961, however, had a great impact on the decisions that followed. Moreover, the court observed that there exists a distinction between domestic awards and foreign awards, and the public policy doctrine should not be applied uniformly. Thus, the court established the narrow application of the public policy exception regarding foreign awards.

However, in a turn of events, the SC in *Oil Natural Gas Corporation Ltd. v. SAW Pipes Ltd*[6] ["**SAW Pipes**"] added patent illegality within the meaning of public policy of India. Patent illegality was interpreted to mean any award which was contrary to the terms of the contract or substantive provisions of law.[7] In essence, it allowed a broader scope of review before the courts, harming the autonomy of the arbitration process.

While the decision was with respect to domestic arbitral awards, this proposition was extrapolated to foreign arbitral awards in the case of *Phulchand Exports Ltd. v. OOO Patriot*[8] ["**Phulchand**"]. In this case, the court deriving from SAW Pipes held *inter alia* that the scope of public policy under Section 48 should be widened and the award be set aside, if it was found to be patently illegal. Additionally, the court in *Bhatia International v. Bulk Trading SA*[9] ["**Bhatia International**"] observed that the

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[4] Ben Giaretta and Akshay Kishore, 'Public Policy In Indian Arbitration' (*Ashurst.com*, 2015) <https://www.ashurst.com/en/news-and-insights/legal-updates/public-policy-in-indian-arbitration> accessed 18 July 2020

[5] [1994] AIR 860 (SC).

[6] [2003] AIR 262 (SC).

[7] *Hindustan Zinc Ltd. v. Friends Coal Carbonisation* [2006] 4 SCC. 445 (SC); *McDermott International Inc. v. Burn Standard Co. Ltd.* [2006] 11 SCC 181 (SC).

[8] [2011] 10. SCC 300 (SC).

[9] [2002] 4. SCC 105 (SC).

provisions of Part I of the Act could also apply to arbitrations seated outside India. It meant that the provisions of Part I, including challenging under Section 34 could be applied to foreign arbitral awards, dealt under Part II of the Act. A result of a concomitant interpretation of these principles augurs an abuse of the public policy exception. This abuse was witnessed in the case of *Venture Global v. Satyam Computers*[10] ["**Venture Global**"], where the court broadly applied the exception to foreign arbitral awards. In this case, the award was given in London, and the governing law of the contract was of Michigan. However, the SC allowed an application under Section 34 and set aside the award, considering it to be patently illegal.[11] This decision, in essence, disregarded the distinction created by Renusagar and equated to both domestic arbitral awards as well as foreign arbitral awards. This decision opened the floodgates to numerous petitions where parties to International Commercial Arbitration ["**ICA**"] had an opportunity to virtually re-open the case and argue on its merits.

Balco **and** ***Lal Mahal*****: The remedial measures**

In a bid to rectify the mistakes, the apex court overturned its past decisions and held them to be bad in law. In *Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc.*[12] ["**Balco**"], the court reaffirmed the distinction created in Renusagar between a domestic arbitration and a foreign seated arbitration. Moreover, it held that Part I of the Act will be inapplicable to foreign seated arbitrations, thus negating the ratio propounded in Bhatia International. Thus, the courts reinforced the narrow scope of public policy exception vis-à-vis the enforcement of foreign arbitral awards. Likewise, the SC in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[13] ["**Lal Mahal**"] dealt with patent illegality under public policy as a ground for challenging the enforcement of foreign arbitral awards under Section 48 of the Act, as propounded by the apex court in Phulchand. The court explicitly overruled its dictum in SAW Pipes and Phulchand and held *inter alia* that patent illegality could not act as a ground for challenging the enforcement of awards in a foreign-seated arbitration. The court further remarked that Section 48 should not be exploited to act as a method for re-arguing the case by the losing party. The legislature further acted upon the judicial impetus and introduced the 2015 amendment. The amendment mentioned that an award arising out of an ICA cannot be challenged under a Section 34 petition.[14]

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[10][2008] 4. SCC 190 (SC).
[11]Dar W, Paulsson M, and Sun W, 'Has The Public Policy Exception Returned To Haunt Indian Courts? - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2017) <http://arbitrationblog.kluwerarbitration.com/2017/12/20/public-policy-exception-returned-haunt-indian-courts/> accessed 19 July 2020
[12] 2012] 9. SCC 552 (SC).
[13] [2014] 2. SCC 433 (SC)
[14] The Arbitration and Conciliation (Amendment) Act 2015.

Moreover, with regard to Section 48, the amendment explicitly mentioned that a challenge to the enforcement of foreign awards should not entail a review of the merits of the case. Thus, the Apex court granted sanctity to foreign awards.

Ssangyong **and** ***Vijay Karia*****: The settled position of law**

The judicial position established in Balco and Lal Mahal has been treated as the settled principle which has been upheld in a plethora of cases afterwards. In *Ssangyong Engineering & Construction Co. v. National Highways Authority of India*[15] ["**Ssangyong**"], the SC clarified that the ground of patent illegality was restricted to a challenge under Section 34 of the Act and did not extend to a Section 48 petition. Moreover, the court elucidated upon the scope of patent illegality and held that such illegality must go to the very core of the matter. The Delhi High Court in *Cruz City 1 Mauritius Holdings v. Unitech Limited*[16] ["**Cruz City**"] remarked that a mere violation of a particular law cannot be equated with the violation of the fundamental policy of Indian law. Placing reliance on Cruz city, the SC in *Vijay Karia v. Prysmian Cavi E Sistemi SRL*[17] ["**Vijay Karia**"] observed that the expression "fundamental policy" connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country.[18]

In addition, the court stated that foreign arbitral awards should be read as a whole without "nit-picking". Further, if *prima facie*, it appears that the award has considered the arguments of both parties and is in consonance with the provisions of the contract, then enforcement must follow. Thus, after two-three decades of judicial confusion, the SC awarded a degree of sanctity to the arbitral process, where judicial intervention was limited to manifest and egregious injustice.[19]

NAFED v. Alimenta S.A.**: The Anti-thesis of the judicial discourse**

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[15] [2019] 15. SCC 131 (SC).
[16] [2017] 239 DLT 649 (Delhi).
[17] *SRL* [2020] SCC OnLine 177 (SC).
[18] Singh A, 'Fundamental Policy Of Indian Law And Enforcement Of Foreign Arbitral Awards In India: A Judicial Ping-Pong?' (*CADR - Centre for Alternative Dispute Resolution, RGNUL*, 2020) <https://rgnulcadr.wordpress.com/2020/04/28/fundamental-policy-of-indian-law-and-enforcement-of-foreign-arbitral-awards-in-india-a-judicial-ping-pong/> accessed 19 July 2020.
[19] Parikh S, and Sambyal S, 'Enforcement Of Foreign Awards In India – Have The Brakes Been Applied? | India Corporate Law' (*India Corporate Law*, 2020) <https://corporate.cyrilamarchandblogs.com/2020/04/enforcement-of-foreign-awards-in-india-have-the-brakes-been-applied/> accessed 18 July 2020

The apex court, on 22nd April 2020, delivered its judgement in the case of *National Agricultural Cooperative Marketing Federation of India* ["**NAFED**"] *v. Alimenta S.A.*[20] The contract between the two parties required NAFED to supply Alimenta with a particular quantity of a commodity. Owing to certain circumstances, NAFED failed to supply the commodity within the stipulated time. Alimenta invoked arbitration against NAFED, which ultimately resulted in the passing of an award against NAFED, ordering them to pay damages to Alimenta. In pursuance, Alimenta applied before Indian courts for the enforcement of the arbitral award passed in London. The SC passed its judgement stating that the award could not be enforced because it was against the fundamental public policy of India.

In arriving at its decision, the SC seems to have shifted from the established practice as discussed above and has entered into an examination of the merits of the case. In the case, the SC stridently interpreted Clause 14 of the contract, where Clause 14 stated that in the event of an embargo on export or any other legislative or executive act by the Indian government, the remaining part of the contract shall stand cancelled.[21] In arriving at its decision, the court has departed from the established practice and has entered into an examination of the merits of the case. The court seems to have equated a contravention of an enactment as a contravention of the public policy, which is *per incuriam* considering its decision in Vijay Karia. Thus, the court explicitly ignored the practice of not delving into the substantial matters of the contract.[22] Thus, the SC seems to have reverted to its position in SAW Pipes, where the arbitration process was ridden with substantive judicial intrusion.

Conclusion

The principle of judicial non-interference is regarded as the cornerstone of arbitration worldwide. The autonomy of the arbitrator, along with the parties, is essential to any arbitration. Thus, every arbitration focuses on minimizing judicial intervention and respecting party autonomy. Countries like Singapore and France, have accorded the expression "public policy" a very narrow meaning and rendered its

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[20] Civil Appeal No. 667 of 2012, delivered on April 22, 2020.

[21] Sahoo S and Jammula I, '*The NAFED Decision: Conundrum of Enforcing a Foreign Award*' (*IRCCL*, 2020), <https://www.irccl.in/single-post/2020/06/06/The-NAFED-Decision-Conundrum-of-Enforcing-a-Foreign-Award#:~:text=Clause%2014%20stated%20that%20in,the%20contract%20shall%20stand%20cancelled.> ACCESSED ON 11 August 2020

[22] Menon N, and Ahmed S, 'Has Supreme Court Taken A Step Back In Its Recent Judgment In "NAFED v. Alimenta S.A."?' (*Mondaq.com*, 30 April 2020) <https://www.mondaq.com/india/trials-appeals-compensation/925604/has-supreme-court-taken-a-step-back-in-its-recent-judgment-in-nafed-vs-alimenta-sa> accessed 19 July 2020

application to limited cases. The Indian arbitration regime has made considerable efforts to bring its policy in tandem with international arbitration standards. The judgements of the apex court in Renusagar, Balco, and Vijay Karia, reflect a transformation of the judicial mindset towards a pro-arbitration regime. The minimal-interference approach adopted by the court will help in upholding the essentials of arbitration, which are efficiency and party autonomy. The limited intervention by Indian courts will also help build a robust arbitration mechanism as it will instil more confidence in the finality of the awards. Thus, such decisions reflect a shift of attitude of the judiciary towards facilitating arbitration in the country.