Enforcement of Foreign Awards in India: Key Lessons

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Before the advent of the Arbitration and Conciliation Act, 1996 ("**the 1996 Act**"), arbitrations in India were governed by the Arbitration Act, 1940 (**"the 1940 Act"**). The 1940 Act was an attempt by the British-colonial government to consolidate the different arbitration provisions contained in the Indian Arbitration Act, 1899 and Code of Civil Procedure, 1908 ("**CPC**").[1] Yet, in doing so, enforcement of foreign arbitral awards was one aspect which the 1940 Act failed to address effectively. Instead, the issue of enforcement of foreign awards was governed by two different legislations - *The Arbitration (Protocol & Convention) Act, 1937* ("**APCA**") and *The Foreign Awards (Recognition & Enforcement) Act, 1961* ("**FAREA**"). While the former concerned itself with the enforcement of awards passed under the Geneva Convention on Execution of Foreign Arbitral Awards, 1927 ("**Geneva Convention**"), the latter contemplated awards made under the aegis of the celebrated New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (**"New York Convention"**).

When India finally liberalized its economic policies in 1991[2], the loopholes in the then arbitration regime stood exposed. Proceedings under the 1940 Act were often complex and time-intensive. In fact, the Supreme Court ("**SC**"), on one occasion, even condemned the unnecessary hassles created by the 1940 Act and held that *"the way in which the proceedings under the (1940) Act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep."*[3]

With foreign entities entering the market, the Indian dispute resolution sector too was expected to rise to the occasion. After all, expeditious and streamlined disposal of matters was the need of the hour. The solution to India's arbitration woes was found in the UNCITRAL Model Law on International Commercial Arbitration, 1985 ("**Model Law**"). Therefore, based on the Model Law came the 1996 Act, indeed a step in the right direction. From the viewpoint of foreign arbitral

[1] Law Commission of India, *Report on Arbitration Act, 1940* (Law Com No.78, 1978)
[2] Rohit Moonka and Silky Mukherjee, 'Impact Of the Recent Reforms on Indian Arbitration Law' (2017) 4 BRICS Law Journal 58.
[3] *Guru Nanak Foundation v. Rattan Singh and Sons* [1981] 4 SCC 634.

awards, it repealed FAREA and APCA by consolidating their provisions within Part II of its own scheme.[4]

The Bhatia-Balco Tussle: Applicability of Part I of the 1996 Act

Even post the enactment of the 1996 Act, India's issues with enforcement did not abate. Throughout its initial days, the 1996 Act was riddled with instances of court intervention in the enforcement of awards without even appreciating whether the award sought to be enforced was foreign or not.

The first in the line of decisions, which was a cause for a lot of consternation amongst the arbitration community, was *Bhatia International v. Bulk Trading SA*[5] ("**Bhatia**"). In *Bhatia*, the SC had held that "*provisions of Part I would apply to all arbitrations and to all proceedings relating thereto." Bhatia,* till date, is oft-quoted as an example of what plagued arbitration under the 1996 Act.

Relying upon the judgement in *Bhatia*, in *Venture Global Engg v. Satyam Computer Services Ltd.*[6] ("**Venture Global**"), the SC further held that the grounds for challenging domestic arbitral awards mentioned in §34 of Part I of the 1996 Act would be available to an Award-debtor for challenging foreign awards as well. Such interference by the Indian courts at the time of enforcement, being incompatible with the intent of the New York Convention, was condemned globally.[7]

In 2012, the constitutional bench of the SC, with its now celebrated decision in *Bharat Aluminium Co. Technical Services v. Kaiser Aluminium Inc.*[8] ("**BALCO**"), finally put to rest this debate. *BALCO,* amongst addressing many other issues, prospectively over-ruled *Bhatia* and *Venture* and clarified that arbitrations seated outside India could only be dealt with Part II of the 1996 Act. Thus, when dealing with the enforcement of foreign arbitral awards, it was no more open for the parties to seek application of any of the provisions of Part I of the Act, including §34. The ruling in BALCO was indeed a reassuring step ahead taken by the Indian judiciary. By clarifying that Part I of the Act would have no application over foreign awards, it effectively curtailed the interference that a court could mount while enforcing foreign awards. The ethos of the New York Convention thus stood reinstated in the Indian enforcement process.[9]

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[4] Indu Malhotra, *Commentary On The Law Of Arbitration* (4th edn, Wolters Kluwer 2020).
[5] 2002] SCC 4 SCC 105.
[6] [2008] 4 SCC 190.
[7] Gary B. Born and Suzanne A. Spears, 'International Arbitration And India: "A Truly Excellent Judgment!"' (2012) 1 Indian Journal of Arbitration Law 4,6.
[8] [2012] 9 SCC 552.
[9] Born and Spears (n 7).

Public Policy: Both an unruly horse and a black sheep

'Public policy' is often described as an 'unruly horse'.[10] However, during the initial days of enforcing foreign awards under the 1996 Act, the 'public policy' exception to enforcement of foreign awards contained in §48 and §57 of the 1996 Act also held the additional distinction of being the proverbial 'black sheep'.

It may be noted that SC had already defined 'public policy' in a narrow compass even before the enactment of the 1996 Act. In *Renusagar Power Co. Ltd. v. General Electric Co.*[11] (**"Renusagar"**), though in the context of FAREA, it had held that a foreign award could not be impeached on merits and "*'public policy' in Section 7(1)(b)(ii) had been used in a narrower sense".* As per *Renusagar,* to attract the bar of public policy, enforcement of the award must invoke something more than the violation of the law of India. The enforcement of a foreign award would be refused on the ground of being against public policy only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

However, when it came to interpreting the public policy exception under §34(2)(b)(ii) of the 1996 Act, the SC in *Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*[12] **("SAW Pipes")**, opted to rule in favour of a slightly expansive approach. In addition to the public policy definition propounded by *Renusagar*, the decision in *SAW Pipes* also added 'patent illegality,' i.e. illegality going to the root of the matter, as a ground for setting aside the award.

Subscribing to the view held in *SAW Pipes,* in *Phulchand Exports Ltd. v. O.O.O. Patriot*[13] ("**Phulchand Exports**"), SC further stated that "*the expression 'public policy of India' used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, 'if it is patently illegal'"*. This adoption of 'patent illegality' as a ground for refusing enforcement of foreign awards was again seen as being excessively interventionist. By allowing the award-debtor to point out any 'patent illegality' in the award, the court had effectively opened the flood gates to parties seeking a review of the merits of the award.

However, it didn't take long for the SC to remedy this shortcoming. The judgement in *Phulchand Exports* was soon over-ruled in *Shri Lal Mahal v. Progetto Grano SpA*[14] (**"Shri Lal Mahal"**). In *Shri Lal Mahal*, the SC held that for the purposes of §48(2)(b), the expression "public policy of India"

[10] *Richardson v. Mellish* [1824] 2 Bing 229.
[11] [1994] Supp (1) SCC 644.
[12] [2003] 5 SCC 705.
[13] [2011] 10 SCC 300.
[14] [2014] 2 SCC 433.

must be given a narrow meaning, and enforcement of a foreign award would be refused on the ground that it is contrary to the public policy of India only if it is covered by one of the three categories enumerated in *Renusagar*. Inter alia, *Shri Lal Mahal* also clarified that *SAW Pipes* would not be applicable to enforcement proceedings under §48(2)(b) and the scope of inquiry under §48 did not permit review of the foreign award on merits.

Having overcome the ghosts of *Venture Global* and *Phulchand Exports*, the judgement in *Shri Lal Mahal* was truly a turning point in the Indian saga of enforcement of foreign arbitral awards.[15]

Turning over a new leaf: The 2015 Amendment and continued pro-enforcement approach

The judgement in *Shri Lal Mahal* paved the way for legislative reforms as well. When the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment**") was finally enacted, it narrowed the scope of 'public policy' to the *Renusagar* standard and further excluded "interests of India" as a ground for refusing enforcement.[16]

The judgement in *Shri Lal Mahal* and the changes brought by the 2015 Amendments unequivocally set out that both, the Indian judiciary as well as the legislature, value their obligations under the New York Convention. Since then, there have been a string of decisions that have held, time and again, that while enforcing foreign awards, the scope of interference by courts is minimal.

In *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*[17] ("**Ssangyong**"), the SC clarified that the expression "public policy of India", whether contained in §34 or §48, would mean the "fundamental policy of Indian law" and that the expression 'fundamental policy of Indian law' is to be understood as per the *Renusagar* standard. Though in the context of §34, *Ssangyong* also held that contravention of a statute not linked to public policy or public interest could not be brought in by the backdoor when it came to setting aside an award on the ground of patent illegality. Since it is settled law that the scope of interference in a foreign award is narrow, it appears that the said reasoning of SC in the context of §34 would also appeal to enforcement of foreign awards.

Most recently, in *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors.*[18] ("**Vijay Karia**"), the SC reiterated that the object of §48 of the 1996 Act was to enforce foreign awards *"subject to certain well-defined narrow exceptions"* and that *"awards must always be read supportively with an inclination to uphold*

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[15] Arpan Gupta, 'A New Dawn For India - Reducing Court Intervention In Enforcement Of Foreign Awards' (2014) 2 Indian Journal of Arbitration Law 10, 21.
[16] Arbitration and Conciliation Act 1996, s 48; Arbitration and Conciliation Act 1996, s 57.
[17] [2019] 5 SCC 131.
[18] [2020] SCC OnLine SC 177.

rather than destroy, given the minimal interference possible with foreign awards under Section 48". Upholding the decision in *Cruz City 1 Mauritius Holdings v. Unitech Limited*[19], the decision in *Vijay Karia* has also made it amply clear that the 'fundamental policy of Indian law' must amount to *"a breach of some legal principle or legislation which is basic to Indian law"*.

To further supplement its pro-enforcement stand, the courts have also clarified that an order allowing enforcement of a foreign award is not appealable. Following the judgement in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*[20], in *Kandla Export Corporation & Anr. v. OCI Corporation & Anr.*[21] ("**Kandla**"), the SC, in the context of §50, held that the 1996 Act was by itself a self-contained and exhaustive code on matters pertaining to arbitration and, therefore, appeals not mentioned therein, including the appeals available under §13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015, would not be permissible. The said clarification has also been included in the 1996 Act vide §12 of the Arbitration and Conciliation (Amendment) Act 2019.

The Clouds on the Horizon

There is no denying the fact that in the last few years, India has significantly improved its stance on the enforcement of foreign awards. Considering the recent developments, India may perhaps even be perceived as an enforcement-friendly jurisdiction. Having said that, there still exist certain creases which may have to be ironed out by judicial or legislative intervention in the coming future.

Soon after its decision in *Vijay Karia*, the SC refused to enforce a foreign award under FAREA in *National Agricultural Cooperative Marketing Federation of India v. Alimenta SA*[22] ("**NAFED**"). In *NAFED*, the petitioner and the respondent had entered into a contract of supply of groundnuts. As the entire contracted quantity could not be supplied by the petitioner, the petition sought to supply the leftover quantity in a subsequent shipment. The subsequent supply was not permitted by the Ministry of Agriculture under its export policy. The ensuing arbitration found in favour of the respondent and therefore directed the petitioner to pay damages. Observing that the government had declined permission to the petitioner to supply and, therefore, the contract had become void, the SC held that the supply, if made, would have contravened the public policy of

[19] [2017] 239 DLT 649.
[20] [2011] 8 SCC 333.
[21] [2018] 14 SCC 715.
[22] [2020] SCC OnLine SC 381.

India relating to export and enforcing such an award would be against the fundamental public policy of India.

When read along with *Vijay Karia,* the judgement in *NAFED* appears problematic for two primary reasons. *Firstly,* in *NAFED*, the Court did in fact, venture into both - the interpretation of the contract and the merits of the award. *Secondly,* by holding that contravention of export policy would be against the fundamental policy of India, the Court has again mooted the question of what constitutes fundamental policy of India, a debate very ably settled by *Vijay Karia.* It may be noted that while the judgment in *NAFED* considers *Renusagar, Saw Pipes, Shri Lal Mahal* and *Ssangyong,* it fails to make any mention of *Vijay Karia.* It remains to be seen whether the conflict between *Vijay Karia* and *NAFED* has watered down the test of fundamental policy of India or not.

Additionally, in light of the decision in *Bank of Baroda v. Kotak Mahindra Bank*[23] ("**Bank of Baroda**"), the question regarding the applicable period of limitation for enforcement of award has also been revived. In *Cairn India Ltd. v. Government of India & Ors.*[24], *M/s. Compania Naviera 'SODNOC' v. Bharat Refineries Ltd. & Anr.*[25] and *Imax Corporation v. E-City Entertainment (I) Pvt. Ltd. and Ors*[26], the Delhi, Bombay and Madras High Courts, respectively, had held that the limitation period for seeking enforcement of a foreign award was 12 years under Article 136 of the Limitation Act. However, in *Bank of Baroda*, in the context of the execution of foreign judgements under §44-A of CPC, the SC stated that the limitation law of the country where the decree is issued would be applied even when enforcement is sought in a different jurisdiction. In addition, it also held that Article 136 of the Limitation Act would be inapplicable to a foreign decree as it contemplated execution of decrees of 'civil courts' and a civil court, as defined in India, may not be the same as that in a foreign jurisdiction.

While *Bank of Baroda* didn't involve enforcement of a foreign award, it is hoped that its findings would be applied to the enforcement of foreign awards *mutatis mutandis*. However, its application to foreign awards can also be resisted as Explanation 2 to §44-A of CPC expressly mentions that the word "decree" used therein excludes arbitration awards.

The aforementioned issues aside, perhaps the biggest impediment in India's path to being recognized as a pro-enforcement superpower is the 'gazetting' requirement under §44(b) of the 1996 Act. As per §44(b), for an award to qualify as a 'foreign award', it must be made in the territory

[23] [2020] SCC OnLine SC 324.
[24] Del. HC, 19 February 2020 in O.M.P.(EFA)(COMM.) 15/2016 & I.A. Nos. 20459/2014 & 3558/2015.
[25] [2007] AIR Mad 251.
[26] [2020] (1) ABR 82.

of a nation which *"by notification in the official gazette"* is declared by the Central Government as a territory to which the New York Convention applies. It is noteworthy to mention that along with being in direct contravention to the spirit of New York Convention, such a pre-condition is also against the reservations expressed by India while signing the New York Convention. The Indian reservation to the New York Convention had, *inter alia*, contemplated application of the New York Convention to all awards made in the territory of another contracting State irrespective of any gazetting requirement.

Conclusion

From *Renusagar* to *Vijay Karia,* the Indian regime for enforcement of foreign awards has indeed come a full circle. By substantially reducing court intervention, the Indian courts seem to have finally cracked the code behind embracing a firm 'pro-enforcement' stance.

While it may be argued that the judgement in *NAFED* has again brought the enforcement machinery to cross-roads, as was the case with *BALCO* and *Shri Lal Mahal,* it shouldn't be long before the judiciary rectifies this anomaly in favour of enforcing foreign awards.

As is borne out from the above, the present enforcement regime for foreign awards is still far from being perfect. However, the fact that both the legislature and judiciary have been working collectively towards achieving their pro-enforcement ambition is truly promising.