Enforcement of foreign arbitral awards and scope of judicial intervention: a minimalist approach

02 July 2020 | Contributed by Khaitan & Co

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Introduction

The enforcement of a foreign arbitral award in India is founded on the fundamental principle of minimal judicial intervention in order to further India's pro-arbitration and consequently pro-foreign investment climate. In order to achieve this goal, the laws relating to the enforcement of foreign arbitral awards have been systematically amended to limit the scope of defences available to unsuccessful parties and prevent the courts from undertaking a wide interpretation of the available defences. As such, a large number of foreign arbitral awards are successfully enforced in India.

Further, the amended arbitration laws provide a simplified and settled one-stop-procedure. The enforcement of a foreign award in India is initiated by filing a petition for enforcement. The unsuccessful party can object to such petition as per the defences available under the Arbitration and Conciliation Act 1996, after which the court will determine whether the award adheres to the act. Once an award is found to be enforceable, it may be enforced in the same way as a court decree. This simplified procedure has reduced the time that it takes the courts to render a judgment on the enforcement of a foreign arbitral award. As the courts are in favour of prompt enforcement of foreign arbitral awards, foreign parties which succeed in arbitration proceedings can generally benefit from such proceedings in India.

However, in its recent decision in *Campos Brothers Farms v Matru Bhumi Supply Chain Pvt Ltd* (OMP(EFA)(COMM) 1/2017), the Delhi High Court refused to enforce a foreign arbitral award under the Arbitration and Conciliation Act. This article analyses the court's decision, its reasons for refusing the enforcement of the award and whether this judgment is a step back for Indian arbitration law.

Legal background

Foreign Awards (Recognition & Enforcement) Act

The Foreign Awards (Recognition & Enforcement) Act 1961 was the first in a series of laws on the enforcement of foreign awards. Section 7 of the act is the foundational provision on which the enforcement of foreign arbitral awards in India today is based.

Section 7(1)(a) contains technical and procedural grounds for refusing enforcement, which include:

- the parties' legal incapacity;
- the arbitration agreement's invalidity as per the governing law or in the absence of a governing law as per the law of the country where the award was rendered;
- a lack of awareness as to the appointment of the arbitrator or the arbitration proceedings;
- a party's inability to present its case;
- the award being rendered beyond the scope of reference;
- the composition of the arbitral tribunal or its procedure contravening the agreement between the parties or the absence of an agreement in contravention of the procedural law of the country in which the award was rendered; and
- the award not being binding between the parties, in any manner, as per the applicable law.

Further, Section 7(1)(b) provides grounds based on the substantive laws of India, which include:

- the subject matter being non-arbitrable as per Indian law; and
- the award rendered being against Indian public policy.

The phrase 'public policy' is undefined and can be interpreted widely by the courts. In the landmark judgment *Renusagar Power Company Limited v General Electric Co* (1994 Supp (1) SCC 644), the court interpreted that the term 'public policy' in Section 7(1)(b)(ii) has been used in a narrower sense and that in order to rely on this ground, an award's enforcement must invoke something more than a violation of Indian law.

Arbitration and Conciliation Act

The Foreign Awards (Recognition & Enforcement) Act was followed by the Arbitration and Conciliation Act, Section 48 of which provides for the enforcement of foreign arbitral awards. Section 48(1), which corresponds with Section 7(1) of the Foreign Awards (Recognition & Enforcement) Act, sets out the technical and procedural grounds on which the enforcement of a foreign arbitral award can be prevented. The Arbitration and

Conciliation Act brought no effective change. Further, the technical and procedural grounds which can result in the refusal of a foreign arbitral award's enforcement remain unchanged following the amendments to the Arbitration and Conciliation Act which took effect from 23 October 2015. Section 48(2) of the Arbitration and Conciliation Act corresponds with Section 7(1)(b) of the Foreign Awards (Recognition & Enforcement) Act and provides that any award whose subject matter is non-arbitrable under Indian law and whose enforcement is contrary to public policy cannot be enforced.

The Arbitration and Conciliation Act did not represent a major overhaul of its predecessor, the Foreign Awards (Recognition & Enforcement) Act. This was because *Renusagar* made clear that it is not a foreign arbitral award but its enforcement that must be against public policy for the public policy provision to apply. *Renusagar* further elaborated that a foreign award's enforcement will be refused on the ground that it is contrary to public policy if such enforcement would be contrary to:

- the fundamental policy of Indian law;
- national interests; or
- justice or morality.

The Supreme Court's narrow interpretation of public policy in *Renusagar* ensured a delicate balance between the broadly worded provision and the legislative intent of minimal judicial intervention. The Supreme Court also applied *Renusagar*'s narrow interpretation under the Foreign Awards (Recognition & Enforcement) Act when interpreting Section 48(2)(b) of the Arbitration and Conciliation Act in *Shri Lal Mahal Ltd v Progetto Grana SPA* ((2012) 2 SCC 433).

Need for amendment to Arbitration and Conciliation Act

In 2014 the Supreme Court, while interpreting the term 'public policy' as provided for in Section 34 of the Arbitration and Conciliation Act, included the Wednesbury principles of reasonableness within the phrase "fundamental policy of Indian Law" (*ONGC Ltd v Western Geco International Limited* ((2014) 9 SCC 263)).

The court further added that:

> *if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal... will be open to challenge and may be cast away.*

This was followed by another Supreme Court judgment, *Associate Builders v Delhi Development Authority* ((2015) 3 SCC 49), in which the court also interpreted the term 'public policy' widely. This permitted the courts to review an award on the merits in enforcement proceedings.

Both of the abovementioned judgments interpreted the term 'public policy' as provided for in Section 34 of the Arbitration and Conciliation Act, which concerns domestic awards.

The fact that the phrase 'public policy' appears identically in Section 48 of the Arbitration and Conciliation Act deterred the courts from adopting the narrow interpretation of *Renusagar* in case of enforcement of a foreign award. As such, it became imperative to amend the law.

Amendment

The anomaly regarding the enforcement of foreign awards was remedied in 2015 by amending the Arbitration and Conciliation Act. The amendment added two explanations to the existing Section 48(2) of the act, which sought to regulate the discretion available to the courts while interpreting the terms 'public policy' and 'fundamental policy of Indian law'.

According to the first explanation, a foreign award will conflict with public policy only if it:

- was induced by fraud or corruption;
- contravenes the fundamental policy of Indian law; or
- contravenes the basic notions of morality and justice.

The 2015 amendment further added a second explanation by which it clarified that a contravention of the fundamental policy of Indian law will not entail a review on the merits of the dispute.

The below table sets out these changes.

Foreign Awards (Recognition & Enforcement) Act (Section 7(1)(b))	**Arbitration and Conciliation Act (Section 48(2))**	**Amended Arbitration and Conciliation Act (Section 48(2))**

1. the subject matter of the difference is not capable of settlement by arbitration under the law of India; or *2. the enforcement of the award will be contrary to public policy*	*a. the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or* *b. the enforcement of the award would be contrary to the public policy of India.*	(*a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or* *(b) the enforcement of the award would be contrary to the public policy of India.* *Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,— (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.* *Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.*

Following the 2015 amendment, the courts have consistently followed the minimal judicial intervention approach when ruling on objections to the enforcement of a foreign award.

In *GEA EGI Contracting Ltd v Bharat Heavy Electrical Limited* ((2016) 233 DLT 661), the Delhi High Court refused to prevent the enforcement of a foreign award, stating that although the award was incorrect, it could be considered reasonable. The court also refused to interfere in a foreign award's enforcement in *Xstrata Coal Marketing AG v Dalmia Bharat (Cement) Ltd* (2016 SCC OnLine Del 5861), in which it had to decide whether the calculation of damages provided for in the award in the absence of any evidence contravened the fundamental policy of Indian law. The court stated that the findings on the calculation of damages were not perverse and that the award could be set aside only on limited grounds under Section 48 of the Arbitration and Conciliation Act, which would not entail a review of the award on the merits.

Recently, in *Daiichi Sankyo Company Limited v Malvinder Mohan Singh* (2019 SCC OnLine Del 7836), the Delhi High Court held that the 'fundamental policy of India' under Explanation 2 to Section 48(2)(b) of the Arbitration and Conciliation Act does not mean provisions of Indian statutes, but rather the substantial principles on which Indian law is founded.

Facts

The petitioner in *Campos Brothers Farms* entered into three contracts with the first respondent and one agreement with the second respondent for the sale of nonpareil in-shell almonds. One of the conditions in the contracts was that the parties agreed to abide by the Uniform Almond Export Contract (UAEC) 2007.

Clause 42 of the UAEC provides for arbitration in accordance with the Arbitration Rules of the Combined Edible Nut Trade Association (CENTA Rules), which later came to be known as The Nut Association (TNA). Further, as per Clause 41, the contract was to be governed by English law.

Disputes arose between the parties regarding the non-payment of delivered and accepted shipments. In addition, the respondents refused to accept some shipments and cancelled one shipment. The petitioner submitted a claim for:

- the value of the accepted shipments and the amounts outstanding;
- the value of the rejected shipments; and
- losses for the cancelled shipments.

The petitioner sent the respondents two separate legal notices dated 23 March 2016, in which it invoked arbitration under the CENTA Rules and nominated its arbitrator. On 1 April 2016 the first respondent replied, denying the existence of an arbitration agreement and contending that the shipments had been made under purchase orders, the terms of which superseded the contracts. On 4 April 2016 the petitioner refuted the first respondent's claims and reiterated its demand for arbitration. On 8 April 2016 the respondents jointly refuted the existence of an arbitration agreement. However, in an email dated 19 June 2016, the petitioner advised the respondents that if they did not appoint an arbitrator, its arbitrator would act as the sole arbitrator. The petitioner subsequently requested the TNA to appoint its arbitrator as the sole arbitrator.

In a letter dated 25 April 2016, the TNA sought a confirmation of whether the dispute between the parties was technical in nature and whether the contracts specifically provided that disputes were to be adjudicated as per the CENTA Rules. Further, the letter stated that the TNA would give the respondents another opportunity to appoint an arbitrator and would appoint the petitioner's arbitrator as the sole arbitrator only if they failed to do so. In addition, the letter made it clear that each contract would be regarded as the subject of a separate arbitration.

The petitioner immediately filed a common statement of claim stating that both respondents were represented by the same person and that the first respondent had been appointed as the second respondent's agent. The respondents did not file their reply; instead, in an email to the TNA dated 6 May 2016, the first respondent refuted the existence of the arbitration agreement and the petitioner's claims on the merits. Subsequently, in an email dated 12 May 2016, the TNA – without referring to the first respondent's email – requested the respondents to appoint their arbitrator by 19 May 2016. The respondents did not respond to the email and did not appoint an arbitrator.

On 7 June 2016 the sole arbitrator called on the petitioner and the respondents to submit additional documents by 13 June 2016. On 13 June 2016 the respondents sent separate emails denying the existence of an arbitration agreement and requesting the complete set of documents filed by the petitioner, including all correspondence between the petitioner and the TNA. Further, the respondents:

- refuted the statement of claim on the merits;
- submitted the requested documents; and
- requested that the issue of the arbitrator's jurisdiction be decided as a preliminary issue.

The respondents wrote additional emails on 22 June 2016 and 6 July 2016.

In an email dated 22 June 2016, the sole arbitrator asked the head of the TNA whether she had to consider the material submitted after the prescribed date (ie, 13 June 2016). On 28 June 2016 the head of the TNA advised the sole arbitrator to ignore the late submissions.

The sole arbitrator passed the final award for a total of $1,008,830.47 excluding interest and arbitrator fees, which also had to be paid by the respondents. The award stated that the respondents had not made the submissions in time (ie, before 13 June 2016). The sole arbitrator further reasoned that although the purchase orders had not been submitted, they were in complete agreement with the contracts and such contracts had been signed before the commencement of any shipment. The arbitrator further found that the respondents had received five loads but had failed to pay for these. The respondents had also refused the delivery of four loads and cancelled the delivery of one load, thereby breaching the contracts and rendering them liable to pay damages. Under the award, both respondents were jointly and severally liable for the total awarded amount.

Arguments

The petitioner initiated enforcement proceedings in the Delhi High Court. The respondent challenged the enforcement on the following grounds:

- The issue of the arbitration agreement's existence and the challenge to its maintainability had been raised before the sole arbitrator and the TNA but the impugned award did not deal with these matters.
- The arbitration agreement had come into existence by way of two-tiered incorporation by reference as:
    - the contract mentioned the UAEC terms and conditions which provide for the CENTA Rules to apply; and
    - Clause 42 of the CENTA Rules provides for arbitration.

  However, the contract itself made no specific reference to either arbitration or the CENTA Rules. The respondents argued that an arbitration agreement cannot come into existence by way of such two-tiered incorporation by reference.

- The award violated the principles of natural justice as the sole arbitrator had not considered any of the respondents' submissions; therefore, the award was against public policy. The finding in the award that the respondents had not made submissions by the prescribed date (ie, 13 June 2016) was factually incorrect.
- The consolidated claims made by the petitioner were not maintainable.
- The award made both respondents jointly and severally liable for the entire awarded amount, which was impermissible as the respondents were separate legal entities.

Decision

The Delhi High Court rejected the respondents' argument that no arbitration agreement existed as two-tiered incorporation by reference was impossible. The court relied on *Inox Wind Ltd v Thermocables Ltd* ((2018) 2 SCC 519) to state that while a general reference to an earlier contract is insufficient for the incorporation of an arbitration clause, a general reference to a standard form of contract is sufficient. The court noted that the parties had been bound by the UAEC terms and conditions, which in turn contained an arbitration clause. The parties were dealing in almonds and these rules were unique to that commodity and known to the parties.

The court also noted that the award contained factually incorrect findings as it had been based on the fact that the respondents had failed to make any submissions by 13 June 2016, whereas the respondents' email of 13 June 2016 made it clear that they had made submissions to the sole arbitrator which had not been considered. Again, the award incorrectly stated that the purchase orders had not been submitted when the respondents had done so in their 13 June 2016 email. The sole arbitrator made no finding as to why the respondents' submissions had been ignored.

The court noted that the sole arbitrator had granted the parties time to make submissions and that the time limit had been duly complied with. Therefore, the arbitrator could not ignore the submissions without giving a reason. The court held that without going into the merits of the respondents' submissions, once it had found that the arbitrator had ignored the submissions in their totality, the award could not be enforced as it violated the principles of natural justice and contravened public policy as provided for in Section 48(2)(b) read with Explanation 1(iii) of the Arbitration and Conciliation Act. The court submitted that while it could not go into the factual mistakes or legal errors in the award, the complete absence of the contentions raised by the unsuccessful parties rendered the award unenforceable.

The court further noted that the award included no reason for allowing consolidated arbitration proceedings for distinct contracts and claims. The court also noted that even though the petitioner had provided reasons for making a consolidated claim, said reason could not denude the respondents of their separate legal status. Further, the award did not justify lifting the corporate veil, and no reason was provided for this.

The court also noted that on reviewing the award, it could not be said whether the sole arbitrator had considered whether claims under different contracts with separate entities could be consolidated. Further, the sole arbitrator had clearly not considered whether the respondents could be found jointly and severally liable without lifting the corporate veil.

The court noted that based on the facts of the case, separate claims had been levied against each respondent. Further, the arbitration had also been invoked via separate notices addressed to each respondent. Thus, from a *prima facie* view, there had been no reason for the arbitrator to find the respondents jointly and severally liable. The court was careful to state that even though it could not go into the sufficiency of the merits, in the complete absence of reasons, the award clearly qualified as non-speaking and non-enforceable as it violated the principles of natural justice and contravened public policy.

Comment

Campos Brothers Farms yet again proves that while the courts cannot go into the merits of and reasoning provided in an award, a complete failure to consider the issues and contentions raised by the losing party will trigger Section 48(2)(b) of the Arbitration and Conciliation Act and can render the award unenforceable. In view of this, the non-enforcement of the award in this case was within the realms of the law.

Campos Brothers Farms is an exception to the normal approach as the court refused to allow the award's enforcement because it violated the principles of natural justice and contravened public policy. The decision is significant and was relied on and discussed by the Supreme Court in its recent decision in *Vijay Karia v Prysmian Cavi E Sistemi SRL* (2020 SCC Online SC 177).

Vijay Karia was an appeal of a decision of a single judge of the Bombay High Court, wherein several final awards made by a sole arbitrator in London were held to be enforceable in India. The appellants claimed that the awards violated Sections 48(1)(b) and 48(2)(b) of the Arbitration and Conciliation Act (ie, they contravened Indian public policy and violated the most basic notions of justice, respectively).

The appellants argued that the tribunal had failed to rule on several contentions raised in their counterclaim, which showed bias and perversity and amounted to a breach of the principles of natural justice. The appellants argued that the Bombay High Court had also failed to make any real determination on all of the points argued before it. Conversely, the first respondent argued that the awards had considered every aspect of the matter argued by the parties. It also stressed the fact that the appellants had made no challenge to the awards in the UK courts. The Supreme Court agreed with the respondents and held that the awards had exhaustively discussed the evidence and conclusively provided detailed findings for each of the issues, claims and counterclaims. The court stressed the fact that the appellants had argued on the merits of the matter and reiterated that it cannot go into the merits of a case to set aside the enforcement of a foreign award as this is prohibited under Section 48 of the Arbitration and Conciliation Act as read with the New York Convention. The court dismissed the appeal and imposed costs of Rs5 million on the appellants.

In dismissing the appeal, the Supreme Court discussed *Campos Brothers Farms*, observing that an award may be set aside if it would contravene the most basic notion of justice and that the Delhi High Court had been correct to do so.

Therefore, the Supreme Court's approval of *Campos Brothers Farms* categorically shows that the Delhi High Court's judgment is good law and that the principles set out therein should be followed.

The Supreme Court's recent judgment in *National Agricultural Cooperative Marketing Federation of India v Alimentia SA* (Civil Appeal 667/2012, 22 April 2020) is a testament to the fact that the courts continue to refuse the enforcement of foreign awards if they contravene Indian public policy of India (for further details please see "Supreme Court refuses foreign award enforcement – return of public policy challenge"). In this case, the parties entered into a contract for the supply of 5,000 metric tonnes of Indian handpicked and selected groundnuts. The petitioner was a canalising agency of the government and required its express permission and consent to carry exports forward from previous years. Further, according to the contract, if the government prohibited the export, the contract would stand cancelled. The petitioner could not supply the agreed amounts of the commodity to the respondent due to a cyclone in India. The government did not grant the petitioner permission to carry the exports forward to another season. Accordingly, the petitioner informed the respondent not to nominate its vessel for shipment of the commodity as the government had prohibited it from carrying the exports forward to another season.

The respondent treated this request as a default in supply by the petitioner and invoked the arbitration clause. The arbitration proceedings were conducted before the Federation of Oil, Seeds and Fats Associations Ltd in London. The tribunal directed the petitioner to pay damages to the respondent. The petitioner challenged the award before the Board of Appeal; however, the board enhanced the interest provided for in the award. Interestingly, no plea of enhancement was made by the respondent.

The respondent filed a petition before the Delhi High Court to enforce the award, which was allowed. The respondent subsequently filed an execution petition. The petitioner challenged the enforcement and execution of the award before the Supreme Court.

The Supreme Court observed that the contract provided for cancellation in the event that the government prohibited the petitioner from exporting the commodity. The court held that since such an event had occurred, the contract between the parties was void under Section 32 of the Contract Act 1872. Thus, the court held that it would be against Indian public policy to enforce the impugned award as any supply made by the petitioner would contravene Indian public policy as regards the export which required the government's permission.

By refusing to enforce the award, the court once again reiterated the settled position of law that an award that violates Indian law cannot be enforced on the grounds of Indian public policy.

However, in its recent judgment in *Centrotrade Minerals and Metals Inc v Hindustan Copper Ltd* (Civil Appeal 2562/2006), a three-judge bench of the Supreme Court allowed an appeal challenging the enforcement of a foreign award and paved the way for its enforcement.

In terms of the agreement between the parties, a dispute arose over the dry weight of copper concentrate delivered. Clause 14 of the agreement envisaged a two-tier arbitration agreement. Under the first tier, disputes were to be settled by arbitration in India. Thereafter, if either party was aggrieved with the result, they could appeal in a second arbitration before the International Chamber of Commerce in London. Centrotrade commenced arbitration and its claims were dismissed by way of a 15 June 1999 award. As per the agreement, it subsequently appealed against the award but was successful. The matter reached the Supreme Court, which had to consider the award's enforceability. The Supreme Court took an arbitration-friendly stance and allowed the appeal, paving the way for the award's enforcement. Taking into account *Vijay Karia*, the Supreme Court held that 'misconduct' as a ground for setting aside an award (as provided for in Section 8(1)(b) of the Arbitration and Conciliation Act) is conceptually much wider than a party being unable to present its case before the arbitrator.

Following the 2015 amendment to the Arbitration and Conciliation Act, the Indian courts have maintained their approach of minimal intervention in cases concerning the enforcement of foreign awards. The courts have stepped in to prevent enforcement only on limited grounds and in a few select cases. Even in such select cases, the threshold for convincing the court that an award should not be enforced is high. Therefore, it appears that enforcement is the norm and refusal is the exception. The fact that the law on the enforcement of foreign awards has been subject to several changes has made India an Asian arbitration hub, and the courts have acted as a catalyst in the enforcement of awards. This is positive, as otherwise the Arbitration and Conciliation Act's purpose would not be fulfilled and it would become just another piece of legislation.

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