

India—Supreme Court refuses enforcement of foreign arbitral award finding underlying contract void (National Agricultural Cooperative Marketing Federation of India v Alimenta)

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Arbitration analysis: In a case relating to an international commercial arbitration seated in London, the Supreme Court of India ruled that when the underlying contract is rendered void as a result of the operation of a contingency event contemplated by the contract, the enforcement of an arbitral award upholding such a contract would be contrary to the public policy of India. Vyapak Desai, Head of the International Dispute Resolution and Investigations at Nishith Desai Associates, Kshama Loya and Bhavana Sunder, members of the team, discuss this decision.

National Agricultural Cooperative Marketing Federation of India v Alimenta SA 2020 SCC OnLine SC 381 (Indian judgments not reported by LexisNexis® UK)

What are the practical implications of this decision?

In a rare decision of this kind, the Supreme Court of India refused the enforcement of a foreign arbitral award on the ground that it would be contrary to the public policy of India. In doing so, the Supreme Court interpreted the terms of the contract to find that the agreement between the parties should have been rendered void due to a contingency clause in it. Therefore, the arbitral award upholding the agreement could not be enforced.

The ruling of the Supreme Court in this decision is worrying for several reasons. The court conducted a detailed review of the merits of the dispute—nearly 40 years after the dispute arose between the parties. The court also did not discuss the reasons for applicability of provisions of the Indian Contract Act, 1872 to a contract which was in fact governed by English law. Further, the court missed an opportunity to interpret several other pressing issues in the award such as the petitioner's ability to present its case in the arbitration, and the independence of the arbitration itself.

Indian courts have consistently been following the internationally accepted approach of minimum intervention while interpreting objections to enforcement of foreign arbitration awards. The Supreme Court's approach here will hopefully be viewed by enforcing courts as an anomaly, and foreign arbitral awards will continue to be assessed based on the principles laid down in the cases of *Renusagar Power v General Electric Co* 1994 Supp (1) SCC 644, *Shri Lal Mahal Ltd v Progetto Grano SPA* (2014) 2 SCC 433 and *Vijay Karia v Prysmian Cavi E Sistemi* (2014) 2 SCC 433.

What was the background to this decision?

A dispute arose between the parties when the petitioner was unable to export the contracted quantity of ground nuts to the respondent, due to denial of export permission by the Government of India (the Government). The agreement between the parties contained a clause which provided that during the contract period, in the event of prohibition of export by an executive or legislative act by the Government, such restriction shall be 'deemed by both parties to apply to the contract'. The clause further provided that in the event the shipment proved impossible, in the extended period, the contract fulfilment would be cancelled (the Contingency Clause).

The respondent, initiated arbitration proceedings before the Federation of Oil, Seeds and Fats Association Ltd (the FOFSA) in London. In 1981, the petitioner sought a stay on the arbitration proceedings as the agreement between the parties did not contain an arbitration clause. The Delhi High Court issued a stay on the arbitration proceedings (the Order). Disregarding the Order, the FOFSA appointed an arbitrator on behalf

of the petitioner. The petitioner approached the courts in India to restrain the respondent and the FOFSA from continuing the proceedings. The Supreme Court issued an order to restrain the proceedings, however, the FOFSA continued the arbitration by communicating to the court that it had no power to act in the matter or stay the arbitration proceedings. In its final judgment, the court ordered that the arbitration proceedings may continue.

The arbitral award was issued in favour of the respondent in 1989. Aggrieved, the petitioner appealed against the award before the FOFSA Board of Appeal (the Board). The Board disallowed the petitioners request to be represented by its solicitor firm. In its decision, the Board upheld the initial award and enhanced the interest component of the award even in the absence of an appeal by the respondent (the Award). In fact, the arbitrator who made the Award, represented the respondent in the appellate proceedings before the Board.

The respondent filed an application to enforce the Award in 1993. The petitioner objected to its enforcement stating that the Award was contrary to Section 7(1)(a)(ii) and Section 7(1)(b) of the Foreign Awards (Recognition and Enforcement) Act, 1961 (the Foreign Awards Act) which provides:

7. Conditions for enforcement of foreign awards.

(1) A foreign award may not be enforced under this Act-

(a) if the party against whom it is sought to enforce the award proves to the court dealing with the case that...

(i) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case—or.

....

(b) if the court dealing with the case is satisfied that-

(i) the subject-matter of the difference is not cap-able of settlement by arbitration under the law of India—or

(ii) the enforcement of the award will be contrary to public policy.

The Supreme Court was faced with the question of whether a foreign arbitral award, the Award, was enforceable under the Foreign Awards (Recognition and Enforcement) Act, 1961 (the Foreign Awards Act). The court interpreted the Foreign Awards Act (which is a precursor to the present Arbitration and Conciliation Act, 1996 (the A&C Act)) as the enforcement application was filed in 1993.

The Supreme Court considered the following issues:

(1) Whether the petitioner was unable to carry out its contractual obligations due to the Government's refusal to provide permission to export, thereby rendering the contract void and unenforceable pursuant to the Contingency Clause—

(2) Whether the Government's prohibition to export was sufficient to render the Award unenforceable—

(3) Whether the arbitrator was appointed in violation of the Order—

(4) Whether the petitioner was not permitted to have legal representation before the Board—

(5) Whether the arbitrator appearing as a counsel for the respondent before the Board was bad in law—and

(6) Whether the Board could have enhanced the interest rate in the absence of an appeal.

What did the court decide?

On the first issue and the second issue, the Supreme Court held that the export of groundnuts could not have taken place without the approval of the Government. Considering that the Contingency Clause would have become applicable, the contract itself would have been cancelled. The contract was thereby rendered void under Section 32 of the Indian Contract Act, 1872 which provides that, 'Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void'. Thus, enforcing an award

seeking payment of damages for breach of a contract (which was rendered void) is contrary to the fundamental policy of Indian law. The court further held that export without the Government's permission would have violated the law, thus, enforcement of the award would be violative of the public policy of India and basic notions of justice.

On the third issue, the Supreme Court held that the question of appointment of the arbitrator in violation of the Order should have been raised at the relevant time when the Supreme Court permitted the arbitration proceedings to continue. The court held that it was not inclined to examine the merits of this argument at the stage of enforcement.

On the fourth issue, the court held that the petitioner had been unable to show prejudice caused to it due to the refusal of the Board to permit the petitioner from being represented by a legal firm.

On the fifth issue, the Supreme Court held that while it would be opposed to Indian law and ethical standards for the arbitrator to defend the award passed by him, no material had been placed to substantiate this objection under the prevailing practice and English law at the relevant time. On the final issue, the Supreme Court held that it was not open to the Board to enhance the interest amount in the absence of an appeal.

The Supreme Court concluded that since it had held that the Award is unenforceable under section 7 of the Foreign Awards Act, the other submissions did not require determination. The court concluded that the enforcement of the Award was contrary to the fundamental policy of Indian law as the petitioner had been held liable under an Award to pay damages under a contract that was rendered void and unenforceable.

Why is the decision of interest?

The Foreign Awards Act and the A&C Act both contain similar grounds for refusal of enforcement of an arbitral award as they are both based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The Supreme Court noted in *Shri Lal Mahal*, that the expression public policy in the A&C Act has the same import as the expression public policy under the Foreign Awards Act. While interpreting the Foreign Awards Act and the A&C Act, the Supreme Court has consistently held that the scope of enquiry by the enforcing court does not entail a review of the foreign award on merits.

However, in the present case, it appears that the Supreme Court adjudicated the merits of the dispute in a manner that a court would adjudicate an appeal. The court interpreted the terms of the contract and the entire factual matrix to hold that the arbitral tribunal had incorrectly decided the matter, as the underlying contract had become void due to the occurrence of a contingency event. The court applied Section 32 of the Indian Contract Act, 1872 to hold that the contract has become void upon the occurrence of a contingent event, while the contract was agreed to be governed by English Law.

The Supreme Court in the present case not only expressed its views on the merits and the correctness of the arbitral award, but also held that, 'The export without permission would have violated the law, thus, enforcement of such award would be violative of the public policy of India'. Upon perusing the judgment, it is clear that the arbitral award did not contemplate that export should be conducted without Government permission. Rather, it merely prescribed that damages should be paid for a breach of the contract. Thus, the finding on a breach of 'fundamental policy of Indian law' appears to be misplaced. Further, this finding deviates from the carefully constructed, well-settled meaning of 'fundamental policy of Indian law' laid down by the Indian Supreme Court. In the Supreme Court's judgment in *Renusagar*, it was clearly held that the award must invoke something more than merely a violation of Indian law to be refused enforcement. In *Vijay Karia*, the Supreme Court held that even violation of the Foreign Exchange Management Act, 1999 is not necessarily a violation of the fundamental policy of Indian law. Further, it re-iterated its ruling in *Renusagar*, wherein it was held that, "'fundamental policy" refers to 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 courts'. Thus, the Supreme Court's finding in the present case, even if considered *obiter dictum*, does not comply with the meaning of fundamental policy of Indian law as set out in its previous judgments.

The Supreme Court has also missed an opportunity to interpret the other, perhaps more jarring, issues in the Award, such as the appointment of an arbitrator without the petitioner's consent, the petitioner's inability to present its case as it was disallowed legal representation before the Board, and the fact that the arbitrator

who issued the award in fact represented the respondent in an appeal before the Board. These procedural issues would perhaps create sufficient ground to refuse the enforcement of the Award under Section 7 of the Foreign Awards Act. However, the court refused enforcement on the ground of public policy and refrained from providing a substantive determination on the remaining issues.

Case details

- Court: Supreme Court of India
- Judges: Arun Mishra, MR Shah, BR Gavai JJ
- Date of judgment: 22 April 2020