Foreign award: Scope of 'public policy' challenge

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In a recent decision in the case of *Shri Lal Mahal Ltd v Progetto Grano SpA*, a three-judge bench of the Supreme Court, comprising Justice Lodha, Madan B Lokur and Kurian Joseph, held that for the purposes of section 48(2)(b) of India's Arbitration and Conciliation Act, 1996 – grounds on which enforcement of foreign awards may be refused – the expression "public policy of India" is to be construed narrowly as provided in *Renusagar Power Co Ltd v General Electric Co* (1993). Accordingly, it refused to allow "patent illegality" to be raised as an argument against recognition and enforcement of a foreign arbitral award.

Renusagar case

In Renusagar, a three-judge bench, while interpreting section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, held that the application of the expression in the field of conflict of laws is more limited than in domestic law and the courts are slower in invoking public policy against a foreign element than where purely domestic legal issues are involved. The expression "public policy" in this section meant public policy of India. Further, the expression is used in a narrow sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than violation of law of India.

Accordingly, the court held that the enforcement of a foreign award would be refused on the basis that it is contrary to the public policy of India if such enforcement is contrary to any of three categories, namely: (a) fundamental policy of Indian law; or (b) the interests of India; or (c) justice or morality.

Other precedents

In this context, it is pertinent to take note of *ONGC v Saw Pipes* (2003), a two-judge bench decision in which the expression was interpreted in the context of jurisdiction of the court where the validity of the award was challenged before it became final and executable, in contradistinction to the enforcement of an award after it became final.

Section 34 of the act (setting aside of a domestic arbitral award) was given a wider meaning and a new category of "patent illegality" was added for setting aside the award. It was also held that illegality must go to the root of the matter and should not be trivial. Additionally, the award could be set aside if it was so unfair and unreasonable that it shocked the conscience of the court.

Further, in *Phulchand Exports Ltd v OOO Patriot* (2011), a two-judge bench comprising Justice Lodha and JS Khehar accepted the submission of the appellant that the meaning of the expression in section 34 in Saw Pipes must apply to the expression in section 48(2)(b) of the act.

Current decision

The Supreme Court in Shri Lal Mahal expressly overruled Phulchand and refused to consider the merits of a foreign arbitral award in an enforcement proceeding. It held that what is provided in Renusagar in relation to section 7(1)(b)(ii) must equally apply to the ambit and scope of section 48(2)(b). For the purposes of section 48(2)(b), the expression 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 if it is covered by any of the three categories enumerated in Renusagar. The application of the expression in section 48(2)(b) differs in degree in so far as section 34(2)(b)(ii) is concerned and is limited.

The court also noted that the principles laid down in Saw Pipes would govern the scope of a proceeding under section 34. Additionally, the statement in Phulchand that section 48(2)(b) must be given a wider meaning and the award could be set aside if it is patently illegal is not correct law and is overruled.

Finally, noting that after the arbitral tribunal issued its order, a board of appeal took into consideration all documentary evidence, the court held that section 48 did not provide an opportunity for a "second look" at the foreign award in the enforcement stage and/or a review on merit. Procedural defects, if any, would not necessarily lead to refusing enforcement of an award on the ground of public policy.

Conclusion

The precedent above is a welcome development towards a pro-arbitration trend and restricts the review of an award on merits at an enforcement stage. The overruling of the Phulchand case significantly reduces the ability of the Indian courts to refuse enforcement of foreign arbitral awards. The inclusion of "patent illegality" in the expression under section 48 is definitely curtailed whereas it remains a valid ground for setting aside an arbitral award under section 34.

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