RECOGNITION AND ENFORCEMENT

INTRODUCTION

We noted in the chapter on setting aside of arbitral awards that the public policy defense is the most used—in almost every case—in resisting enforcement.

Public policy in enforcement of arbitral awards is a narrow doctrine—*Renusagar Power Co. Ltd.* v. *General Electric Co.* 1994 Supp (1) SCC 644 considered both broad and narrow views and held that it is the narrow version that applies to enforcement actions.

In the line of authorities that guard against using public policy *Richardson* v. *Mellish*[1] is one of the earliest. Parties were warned against relying on public policy. Best J noted that contravention of public policy must be "unquestionable."[2] Burrough J's observations became more famous: "it is a very unruly horse …It may lead you from the sound law. It is never argued at all but when other points fail".[3]

One of the earliest Indian cases which deal with public policy is a 3-judge bench judgment in *Gherulal Parakh* v. *Mahadeodas*, 1959 Supp. (2) SCR 406. The doctrine is summarised at paragraphs 23 and 28 of the judgment as follows:- (a) public policy is an elusive concept, untrustworthy guide, of variable quality, uncertain one, an unruly horse; (b) the paramount public policy is freedom of trade and contract and courts will not interfere lightly with the freedom of contract; (c) The doctrine is to be applied in clear and incontestable cases.

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1 *Richardson* v. *Mellish,* (1824) 2 Bing. 231

2 *see* paragraph 241 of *Richardson* v. *Mellish,* (1824) 2 Bing. 231

3 *see* paragraph 252 of *Richardson* v. *Mellish,* (1824) 2 Bing. 231

The amendments in 2015 have narrowed the scope further. Two explanations have been introduced: - (i) an award would be contrary to public policy of India "only if it is contravention with the fundamental policy of Indian law"[4]; and (ii) "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."

The origin of the expression "fundamental policy of Indian law" is in *Renusagar*. The court considered several foreign cases and commentators[5]. It also relied on the commentary of Cheshire and North on Private International Law, 12th edition where they set out the categories of cases in which the English courts refuse to enforce a foreign acquired right on the ground that it would affront some moral principle maintenance of which admits of no possible compromise.[6]

In *Cruz City* v. *Unitech Limited*,[7] Vibhu Bakhru J of the Delhi High Court held that the expression "fundamental policy" connotes the basic and substratal rationale, values, and principles that form the bedrock of laws in our country.[8] The objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise. The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment.[9]

Renusagar also established something which is part of the statute now that the review of the award on merits is not permissible. The first question formulated was, "what is the scope of enquiry in proceedings for enforce-

4 Section 48 (2) (b), Explanation 1 (ii). The other two clauses of Explanation 1 are not applicable in this case, since they have not been invoked.

5 Discussing the question as to meaning of public policy at paragraphs 46 to 66.

6 *See* in particular paragraph 44 onwards. *Also see Municipal Corporation of Greater Mumbai* v. *Jyoti Construction Company*, 2003 (4) Mh.L.J.

7 *Cruz City* v. *Unitech Limited*, 2017 SCC Online Del 7810.

8 *see* paragraph 97 of *Cruz City* v. *Unitech Limited*, 2017 SCC Online Del 7810.

9 *see* paragraph 98 of *Cruz City* v. *Unitech Limited*, 2017 SCC Online Del 7810.

ment …?[10]. It was answered in paragraphs 31 to 37. *See* in particular para 32, "… foreign judgment which is final and conclusive cannot be impeached *for any error either of fact or of law*". Also, *see* para 33, "the English courts would not refuse to recognize or enforce a foreign award merely because the arbitrators (in its view) applied the wrong law to the dispute or misapplied the right law"; further, para 35, "Albert Jan van den Berg … has expressed the view … a national court should not interfere with the substance of the arbitration"; then, at para 37, the afore-stated principles were approved.

Even in *Shri Lal Mahal Ltd.* v. *Progetto Grano SpA* (2014) 2 SCC 433, the court reiterated, "Section 48 of the 1996 Act does not give an opportunity to have a "second look" at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits".[11]

Section 48 now expressly bars a review on the merits of a foreign award in enforcement proceedings when considering the public policy defense.

Also, what must be seen in Section 48 proceedings is the disposition of the award. Section 48 plainly states, "enforcement of an arbitral award may also be refused if the court finds that … the *enforcement* of the award would be contrary to public policy of India". Thus, it is the disposition of the award which is relevant in a Section 48 proceeding.

(A) THE 2019 CASES

Ssangyong Engineering & Construction Co. Ltd. v. *National Highway Authority of India* 2019 SCC OnLine SC 677, already considered in the chapter on setting aside, considered the law on Section 48 also and identified the scope of the provision.

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[10] *see* paragraph 30 of *Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994. Supp. (1) 644.

[11] *see* paragraph 45 of *Shri Lal Mahal Ltd.* v. *Progetto Grano SpA*, (2014) 2 SCC 433

In *Glencore International AG* v. *Indian Potash Limited and Another* (2019) 263 DLT 663, Rajiv Shakdher J of the Delhi High Court emphasized that there was no requirement to stamp a foreign award. He was also concerned with an agreement that specified a wrong arbitral institution (and therefore a non-existent one). The tribunal read that clause, relying on extrinsic evidence, to mean that the parties intended SIAC Rules to apply. The court found no fault with the approach. It also concluded it caused no prejudice.

There was another issue. Should a jurisdictional issue be decided ahead of others? Not necessary. The court said.

Kakade Construction Company Ltd. v. *Vistra ITCL (India) Ltd.* 2019 SCC OnLine Bom 152, a Bombay High Court decision, was concerned with appealable orders.

Imax Corporation v. *E-City Entertainment (I) Pvt. Ltd. and others* 2020 (1) ABR 82, another Bombay High Court decision considered the limitation to enforce a foreign award. It said the period is 12 years. It distinguished, on what appears to be weak logic, another coordinate bench on the issue which after considering everything in detail had held it is three years.