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Local public policy exceptions in India to the enforcement of international conventions or treaties

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Overview of the Indian arbitration landscape

Previously in India, three separate provisions, that is, the Arbitration Act 1940, Arbitration (Protocol and Convention) Act 1937 and Foreign Awards (Recognition and Enforcement) Act 1961, formed the legislative framework for domestic and international arbitration. Later, these laws were repealed and a single act (for both international and domestic arbitration), known as the Arbitration and Conciliation Act 1996 (the 'Act'), was enacted. This act is an amalgamation of the provisions of the previous acts and incorporates provisions of international arbitration conventions such as the New York Convention 1958 and United Nations Commission on International Trade Law (UNCITRAL) Model Law. There are provisions relating to arbitration in certain central and state laws in India; however, the chief enactment governing all facets of domestic and international arbitration is the Act.

The Act brought various changes to the arbitration landscape in India. The predominant change was the alignment of the scope of judicial intervention in arbitration processes and awards with the New York Convention and UNCITRAL Model Law. While Part I of the Act deals with all aspects of domestic arbitration and awards, Part II, governs the enforcement of New York Convention awards. The cornerstone of the New York Convention is Article V, which limits interference by the court while enforcing awards.

Article V of the New York Convention has been reproduced in section 48 of the Act. Under the Act, if a foreign award is challenged on the grounds of lack of enforceability, it is tested under section 48. An identical provision, section 34, exists to test grounds of enforceability for domestic awards.

The Act was majorly amended in 2015 largely based on the 246th Report of the Law Commission of India. With regard to section 48, the amendment led to the addition of 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'.

Indian treatment of the public policy exception

The public policy exception finds its footing in various international instruments, such as Article 1(e) of the Geneva Convention 1927, Article V(2)(b) of the New York Convention 1958 and Article 36 of the UNCITRAL Model Law on International Commercial Arbitration. Most countries have integrated the public policy doctrine into their legal systems; however, the scope of interpretation of the term 'public policy' is left for local judicial authorities to determine. The essence of Article V of the New York Convention and its 'pro-enforcement bias' is recognised by Indian legislation in section 48 of the Act, which stresses the importance of minimal judicial intervention with foreign arbitral awards.

However, the public policy test for the enforcement of foreign awards as stated under Article V(2)(b) of the New York Convention and section 48(2)(b) of the Arbitration and Conciliation Act is contentious as neither defines the term 'public policy'. As per former Supreme Court Judge, Justice Indu Malhotra, an exhaustive definition of public policy is neither feasible nor desirable. Even though the concept is open-ended, courts in India have rarely invoked this exception to refuse the enforcement of a foreign award.[1] The Indian judiciary's role has been crucial in narrowing the public policy exception. Recently, in *Aircon Beibars FZE v Heligo Charters Private Limited*,[2] the Bombay High Court held that only instances wherein the most basic notions of morality and justice are tampered with (eg, bribery and fraud) can rise up to the level of violating the fundamental public policy of India.

The most common objection against the enforcement of foreign awards is that the award or agreement contravenes the provisions of the Foreign Exchange Management Act, 1999 and the Rules and Regulations ('FEMA Regulations') made thereunder. The most recent case concerning this is *ay Karia v Prysmian Cavi*,[3] wherein the Supreme Court of India rendered a foreign award enforceable regardless of its contravention with FEMA ɿgulations. The rationale behind this judgement was heavily based on the Delhi High Court's judgement in the *Cruz City* case,[4] wherein it was ablished that a mere contravention of a statutory enactment is inadequate to render a foreign award unenforceable on the grounds of the lation of the fundamental public policy of India. The court highlighted that Indian entities entering agreements with foreign counterparts should : conveniently use violations of FEMA Regulations as a defence against their own liability. The court maintained a distinction between contractual igations and the violation of FEMA Regulations, indicating that the enforcement of awards and remittance of funds are separate matters, with former falling under the court's jurisdiction and the latter under the Reserve Bank of India's (RBI's) purview.

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ther, in *NTT Docomo Inc v Tata Sons Ltd*,[5] the court rejected the RBI's intervention application, asserting that the award's discussion of FEMA Regulations did not necessitate the RBI's involvement in the execution proceedings. The court determined that the agreement in question did not contravene Indian public policy or the fundamental principles of Indian law, thus declaring the foreign award enforceable in India. Overall, the

court's decisions underscore the importance of distinguishing between contractual obligations and statutory/regulatory violations. While acknowledging the need for compliance with regulatory provisions, the court prioritises the enforcement of foreign arbitral awards, unless public policy concerns cannot be addressed without rejecting the award.

Public policy vis-à-vis Indian maritime arbitration

India boasts an ancient and rich maritime culture, emphasising the profound significance of maritime laws within the country. The Indian Council of Arbitration in general and the Maritime Arbitration Rules 2022 (the 'Maritime Rules') in particular provide oversight of the procedure of international and domestic maritime arbitration. Clause 6 of the Maritime Rules duly acknowledges the Arbitration Act as the principal legislation governing the arbitration of maritime disputes. Key legislation, such as the Merchant Shipping Act of 1958 and the Admiralty Act of 2017, is pivotal to addressing matters pertaining to shipping, transportation and maritime claims in India. These acts collectively serve as the cornerstone of maritime laws and arbitration practices in the country.

In alignment with global standards, the Indian Government established the Gujarat International Maritime Arbitration Centre to ensure India's alignment with globally renowned arbitral institutions. This initiative is primarily aimed at expediting and ensuring effective dispute resolution within the maritime and shipping sector. Foreign maritime awards typically do not undergo scrutiny in Indian courts as per section 48(2)(b) of the Act. Several potential reasons can account for this:

- Contractual relationship: Maritime disputes often stem from contractual agreements among parties. The resolution of these disputes primarily revolves around the terms of the contract, agreement or charterparty. Consequently, parties tend to settle these matters among themselves without necessitating judicial intervention.
- International nature: Maritime contracts possess an international dimension, extending beyond national borders and frequently involving foreign laws. Consequently, Indian courts lack jurisdiction over such matters, thus precluding their involvement in trying these disputes.
- Minimal judicial intervention: The Indian judiciary traditionally maintains a stance of limited interference in contractual disputes. Courts adopt a stringent approach towards interference, intervening only in exceptionally compelling cases.

A notable maritime dispute, *NNR Global Logistics (Shanghai) Co Ltd v AARGUS Global Logistics Pvt Ltd*,[6] sheds light on this matter. In this instance, the defendants contested the enforcement of a foreign award under section 48. The principal defendant, AARGUS, an Indian company engaged in freight forwarding and international cargo services, entered into an agency agreement with NNR, a Chinese company offering similar services. A dispute concerning invoices, payments and costs arose between the parties, leading them to resort to arbitration under the International Chamber of Commerce (ICC) rules as per their agreement. The arbitration tribunal ruled in favour of NRR, awarding eight per cent compound interest. AARGUS contended that such an award violated Indian public policy. The court, while upholding the award, emphasised that the foreign arbitration decision did not compel AARGUS to act against Indian law in any way. Therefore, it cannot be interpreted as breaching India's fundamental public policy.

Conclusion

The contractual nature inherent in maritime disputes, coupled with India's strong pro-enforcement stance, has led to a minimal number of cases challenging the enforcement of foreign maritime awards. Through the ratification of international treaties and conventions, coupled with its judicial stance and the elucidations accompanying section 48(2)(b) of the Act, India has successfully balanced a pro-arbitration position, while safeguarding its sovereignty.

Indian courts have acknowledged that maintaining an independent and fair judicial system is crucial for the interests of Indian businesses, particularly concerning the enforcement of international awards. This approach not only instils confidence in foreign parties to engage in business with Indian companies but also fosters trust in the Indian judiciary. It assures foreign entities that, in the event of a breach of contract by an Indian party, the dispute resolution mechanism agreed in the shipping contract will be upheld and any resulting award will be duly enforced in India.

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[1] J Indu Malhotra*, Commentary on the Law of Arbitration,* Fourth Edition, vol II, p 1187.
[2] Commercial Arbitration Petition No 1130 of 2019.
[3] AIR 2020 Supreme Court 1807.
[4] EX.P.132/2014 & EA(OS) Nos 316/2015, 1058/2015 & 151/2016 & 670/2016.
[5] 2017 (4) Arb LR 20 (Delhi).
[6] OMP Nos 61 and 201 of 2012.

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