OPENING NEW DIMENSIONS OF ARBITRATION PROCEEDINGS: ANALYSING THE CONCEPT OF TWO-TIER ARBITRATION IN INDIA vis-à-vis PUBLIC POLICY

SONAL PRIYA[1]

INTRODUCTION

Over the years, arbitration has evolved, making it a desirable mode for resolution of disputes. It saves the Court's time and is instrumental in assisting the parties to quick remedial remedies. The Arbitration and Conciliation Act, 1996 adopted a radical shift from the 1940 Act and is in line with the ethos of UNCITRAL Model Law. It seeks to minimise judicial intervention of the court and at the same time, upholds the principle of "Party Autonomy" . This very doctrine of party autonomy, gives the contracting parties the required freedom to mould their contractual obligations to suit their purposes; facilitating them to decide the procedural as well as the substantive law. Party autonomy is the heart and soul of the 1996 Act. Two tier arbitration, which has been a contested domain and has been a subject of several case laws, provides for separate stages of arbitration – a first instance and then an appeal. The 1996 Act remains silent on the topic of Appellate Arbitration; hence there have been several questions regarding the legality and validity of second instance arbitration. The Hon'ble Supreme Court of India in the case of, *M/s. Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd*[2], validated the notion of two tier arbitration, in India; hence taking a pro-arbitration approach. Appellate arbitration amasses support from the UNCITRAL Model Rules and further it is in consonance with the public policy of India; and hence elevates the doctrine of *party autonomy*.

FACTS

Centrotrade, an U.S. incorporated company, entered into a contract with HCL, which was an undertaking of the government. The contract embodied an arbitration clause (Clause 14) which aided for second instance arbitration. The subject matter of the dispute was the quantity of dry weight of copper concentrate delivered. In consonance with Clause 14, Centrotade invoked the arbitration clause and knocked the doors of the first arbitrator, i.e., Indian Council of Arbitration which passed a 'Nil' award. Being unsatisfied with ICA's decision; the appellant approached the second tribunal, which was headed by Jeremy Cooke. Complying with the rules of International Chambers of Commerce, Cooke, passed an award in favour of the appellant (Centrotrade) which ordered HCL to pay over $ 550000 plus interest.

With the passage of the arbitral award, in favour of Centrorade , an Application under Section 48 of the 1996 Act was preferred by HCL . The Learned Single Judge permitted the enforceability of

[1] Student of LL.B, 2nd Year, Campus Law Centre (CLC), Delhi University.
[2] **(2006) 11 SCC 245.**

the ICC award, subsequently, an appeal was preferred by HCL to the Division Bench of Calcutta High Court. The Division Bench found both the awards mutually destructive of each other and should be sent back to the ICC for fresh disposal. Appalled by the decision of the Division Bench, both the parties, came before The Hon'ble Supreme Court of India in cross-appeals.

The matter was heard by a bench of Two Learned Judges of the Supreme Court in 2006 who rendered a contradictory verdict on the permissibility of second instance arbitration, which complicated the things further. Almost a decade later, a Three Judge Bench of the Hon'ble Supreme Court, bifurcated the issues into two parts. While the first issue focussed mainly on the permissibility and validity of two-tiered arbitration in India, the second issue lingered around the enforceability of the 'Foreign Award' in accordance with the provisions of Section 48 of the 1996 Act.

The Three Judge Bench gave considerable emphasis to the fact that the Arbitration Act is governed by the principle of ***party autonomy*** which is **'virtually the backbone of arbitration'**. If the parties to the contract intend to reserve a right to appellate review of the first award, nothing erroneous can be found with it. In the words of the Judges, 'It is not the intention of the Arbitration & Conciliation Act to throttle the autonomy of parties or to preclude them from adopting any other acceptable method of redressal, such as appellate arbitration." Notably, the Bench also observed that the 1996 Act, neither explicitly nor impliedly bars the parties to resort to appellate arbitration clauses; hence giving the parties two bites at the cherry.

The Supreme Court also maintained that two tier arbitration does not fall foul of the public policy of India. HCL's stance on two tier arbitration was flavoured with concerns regarding Indian public policy, in answering this question the court looked at the meaning of the Arbitration Act and chose to strictly interpret the wording of the Act, so that it would not preclude two tier arbitration. Citing the noted authors on Arbitration Law, *Mustill & Boyd*, the Hon'ble Supreme Court held that an arbitral award would be against the public policy if the terms of the arbitration agreement are such which either exclude or restrict the supervisory jurisdiction of the court, or, allow the arbitrator to conduct the arbitral reference in an unacceptable manner, or, empower the arbitrator to carry out procedures or exercises which lie exclusively within the jurisdiction of courts.

The concept of public policy has been a debated issue of interpretation by the Supreme Court of India in various arbitration matters before it. The 1996 Act which allows under sections 34 and 48, for domestic awards to be set aside and foreign awards to be refused recognition and enforcement respectively, on public policy considerations, there have been several judgments on the issue. In the case of Renusagar Power Co. v General Electric Co[3], the Court proceeded to lay down the scope of the public policy consideration as being restricted to: –

(i) The Fundamental Policy of Indian Law;
(ii) The interests of India;
(iii) Justice and Morality.

[3] 1994 Supp (1) SCC 644.

The narrow interpretation of public policy was magnified in the case of Oil and Natural Gas Corporation Ltd v SAW Pipes Ltd.[4] This judgement has been massively criticized for widening the ambit of public policy by adding a new ground of 'patent illegality' and for reverting to a pre1996 phase where arbitral awards could be challenged on the error of law. The Arbitration Act does not include error of law as a ground of setting aside arbitral awards, hence, by including patent illegality the Saw Pipes judgement went beyond the scope of the 1996 Act and created a backdoor to review the merits of an arbitrator's decision. Justice Nariman was not in support of the Saw Pipes judgement and went ahead saying that 'the 1996 Act might as well be scrapped.'

This lack of conclusive definition of public policy has been recognised by the Law Commission of India and it has aimed at providing clarity in the context of arbitration. In tune with the recommendations of the Law Commission, the 2015 Act amended Section 48 of the 1996 Indian Arbitration Act to restrictively define the scope of the 'public policy' exception. The amendment was inspired by the Renusagar case which laid down the three-pronged test.

In the Centrotrade case, while deciding on the validity of foreign arbitral award the Hon'ble Supreme Court referred to the case of Associate Builders Vs. Delhi Development Authority[5], which was dealing with domestic arbitral awards (which includes patent illegality).

AN END TO THE CENTROTRADE SAGA

Furthermore, in June 2020, an entirely different Three-Judge bench was formed which dealt with the issue of enforcement of foreign awards, hence stiffening its stance towards the pro-enforcement bias set by the New York Convention by providing a narrow interpretation of the grounds for enforcement of foreign arbitral awards.

HCL argued that it did not receive adequate opportunity to present its case before the ICC tribunal; in an attempt to thwart the enforcement of the award against it. Rejecting HCL's contentions, the S.C. held that," HCL chose not to appear before the arbitrator, and thereafter ***chose*** to submit documents and legal submission outside the timelines granted by the arbitrator." The court relying massively on the *Vijay Karia[6]*[6] case, observed that the expression "was otherwise unable to present his case" appearing in Section 48(1)(b) of the 1996 Act, cannot be given an expansive meaning and would have to be read in the context of the words preceding it. This expression being a facet of Natural Justice could be breached only if a fair hearing was not given by the arbitrator to the parties. It would apply at the hearing stage not after the delivery of the award as held in *Ssangyong (supra).* It held that the provisions of sec 48 are watertight and, hence deviation from it should be avoided. The present judgement

[4] (2003) 5 SCC 705
[5] (2015) 3 SCC 49
[6] 2020 SCC OnLine SC 177

accentuated on the mistake of fact in Justice Chatterjee's judgement (2006) and took a different stance altogether, saying that, HCL was indeed given a fair opportunity to present its case and the ICC award was not in contravention of Section 48 (1)(b) of the Act. Accordingly, the Award was enforced by the Supreme Court of India. The debate regarding the validity of multi-tiered arbitration has finally been put to rest and is a step towards making India a viable hub for arbitration.

SCOPE OF PUBLIC POLICY – THE NAFED CASE [7]

Even today public policy remains an important weapon in the hands of national courts wishing to interfere with the arbitral process. The Supreme Court itself thinks of public policy to be an 'untrustworthy guide'. Recently, in the NAFED case, the Supreme Court extensively reviewed the award based on its merits and refused to enforce a 'FOFSA' award as it held it to be against the public policy of Indian law and gave the following reasons:

- **Clause 14** of the agreement contained a *force majeure* clause, whereby in the event of an embargo on export by the GOI, the unfulfilled part of the contract shall remain cancelled;
- Under **section 32** of the **contract act**, the agreement being a contingent contract became void on the happening of the contingency i.e. refusal of the permission by the Government
- The enforcement of such an award in violation of the export policy and the GOI's order would be against the public policy as envisaged in section 7 of Foreign Awards Act.

This ruling of the SCI is inconsistent with its previous rulings and convolutes the public policy exception under ICA. The Supreme Court went against the Amending Act, 2015 which puts restriction on the court for setting aside an award on the ground of 'erroneous application of law or re-appreciation of evidence'. According to Sections 34 and 48 of the Indian Arbitration Act, an award is in conflict with the public policy of India only if it is – firstly, induced or affected by fraud; secondly, in contravention of the fundamental policy of Indian law; and thirdly, in conflict with basic notions of morality and justice. The court also ignored the Delhi High Court's decision Cruz City 1 Mauritius Holdings v. Unitech[8] which was referred to with approval in Vijay Karia, and which *inter alia* held that the mere contravention of a provision of law would not amount to a contravention of the fundamental policy of Indian law justifying the setting aside of a foreign award. The NAFED case *ex facie* appears to be in contradiction with the evolving judicial discourse.

CONCLUSION

The judiciary needs to adopt a balanced approach while interpreting the law keeping the previously laid precedents in mind. In the present case of NAFED, the Supreme Court chose to sail in a different direction from Renusagar, Ssangyong, Associate Builders and more particularly recently passed judgment of Vijay Karia, which adopted a more "pro-enforcement" approach which has further left the foreign investors remediless.

[7] 2020 SCC OnLine SC 381 (NAFED vs. Alimenta S.A.)
[8] (2017) 239 DLT 649

Emphasis should be on foreign investments, as well as the investors, as it is the need of the hour, more as of now, as we need to elevate the corona virus hit economy. Even today public policy remains to be an untrustworthy guide and an illustrative concept. Whether the Supreme Court has taken a pragmatic approach and made India ‘Arbitration friendly’ or has it taken a step back in its NAFED decision, only time would tell.