ENFORCEMENT OF ARBITRAL AWARDS UNDER NEW YORK CONVENTION: A STUDY OF THE U.S AND INDIAN SCENARIO[1]

AN OVERVIEW OF THE NEW YORK CONVENTION

The New York Convention is a result of international efforts to make arbitration and its enforcement a certain and efficient process. The US Supreme Court said:

" The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."[2]

Since the signing of the Convention, 159 states have accepted to be a part of it. Almost all of the major trading countries are signatories to the convention.

General Provisions of the New York Convention

Article 1 sets out the scope of the Convention:

"1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It

[1] Kumari Nisha & Ankush Kejriwal, Alliance University.
[2] Scherk v. Alberto-Culver, (1973) SC 417 USSCR.

shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."[3]

Article 1 also provides two reservations which a nation may adopt when giving effect to the Convention. The first allows a nation to apply the New York Convention on the basis of reciprocity, in the sense that the only arbitral awards made in the co-signatory states may be given effect. The second reservation allows a nation to apply the Convention only to those transactions considered "commercial" under its own national law.' Almost all the States have made the first and second reservation and implemented the provisions of the Convention in their domestic arbitration laws.

Article 3 of the Convention requires a Signatory State to "recognize arbitral awards as binding" and to enforce the awards according to the State's own rules of procedure. A State should not charge "more onerous conditions or higher fees or charges" for the recognition or enforcement of awards under the New York Convention when compared to the fees or charges of enforcing a domestic award. The procedure for obtaining enforcement of an award is straightforward under Article 4 of the Convention. The party seeking enforcement must supply the court with a "duly authenticated original award" and either the original or certified copies of the arbitration agreement.

The continued strength of the New York Convention lies in Article 5, which recognizes only seven grounds for refusing enforcement of an arbitral award. A party wishing to block the enforcement of an award bears the burden of proving that one of the seven grounds for refusing enforcement exists. However, the Article also talks about an arbitral award being refused on the

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

basis of public policy. This establishes a grey area in implementing the Convention as public policy will differ from state to state.

PRACTICE OF US COURTS IN ENFORCING FOREIGN ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

The United States acceded to the New York Convention in 1970 and implemented its provisions by enacting Chapter 2 of the Federal Arbitration Act. The Act confers jurisdiction on the U.S. federal district courts over actions arising under the Convention. A party must seek confirmation within 3 years of receiving the arbitral award under the New York Convention. This time limit is a very reasonable and convenient one when compared to the 1 year time limit in case of a domestic arbitral award.

Section 207 of the enabling legislation makes it very clear that Article 5 is an exhaustive provision. The relevant wording of the provision is as follows:"

"Shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the awards specified in the Convention."[4]

The liberal federal policy recognizing arbitral provisions in contracts is essential to be looked into before analyzing the provisions of the Convention talking about enforcement. The Supreme Court in 1974 gave an opinion which is authoritative in the interpretation of the New York Convention with respect to the recognition of arbitral provisions. In ***Scherk* v. *Alberto-Culver Co.,***[5] a U.S. corporation, Alberto-Culver, made a contract with Scherk, a German citizen, for the

[4] Federal Arbitration Act, 1925 s.207.
[5] Scherk v. Alberto-Culver (1973) SC 417 USSCR.

transfer of business enterprises and trademark rights held by Scherk to Alberto-Culver. The contract contained an agreement to arbitrate any claim that might arise from the transaction. After the transfer, Alberto-Culver claimed it had discovered that the trademark rights were subject to undisclosed encumbrances. Scherk refused to rescind the contract, and Alberto-Culver brought suit in U.S. district court, alleging that Scherk was in violation of U.S. securities laws. Scherk attempted to stay the litigation by placing reliance on the arbitration clause. The district and circuit courts denied Scherk's pleading to stay the litigation, relying on the Supreme Court's decision in ***Wilko* v. *Swan***.[6]

In that case, the Court held that agreements to arbitrate claims covered by federal securities law were invalid, because the Securities Act of 1933 was designed to provide investors with special protection.

The Supreme Court in Scherk, however, found the Wilko precedent inapplicable factually and therefore upheld the provisions of arbitration. Contracts with Arbitration clauses which choose the jurisdiction for arbitration is contained with the objective to reduce the burden of the arbitration proceedings and make it efficient. The Courts, while dealing with such cases shall take that into consideration and judge accordingly.

The guidelines established in Scherk have brought in a culture of promoting international arbitral awards, which is a transparent representation of the enforcement culture of foreign arbitral awards in the US.

The United States amended its accession to the New York Convention by its optional adherence to the "reciprocity" and "commercial" reservations. However, U.S. courts have construed these

[6] Wilko v. Swan, (1953) SC 4 USCR (SC).

reservations narrowly. Consequently, application of the reservations has not provided a formula for parties to subvert the broader goals underlying the Convention. For example, "reciprocity" was narrowly construed to permit enforcement of an award under the New York Convention in ***Fertilizer Corp. of India* v. *IDI Management, Inc.***[7]

The extent of the "commercial" reservation has also been narrowly defined. Section 202 of the implementing legislation provides as follows:

"An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in section 2 of this title, falls under the Convention".[8]

In ***Sumitomo Corp.* v. *Parakopi Compania Maritima***[9] two Japanese corporations brought a suit in U.S. district court to compel Parakopi, a Panamanian corporation headquartered in Greece, to abide by the arbitration clause of their ship construction contract. Parakopi challenged the jurisdiction of the district court, claiming that because both parties were foreign to the United States, the dispute was not a "commercial" transaction under U.S. law. The court rejected Parakopi's argument, concluding that the definition of "commerce" under the Federal Arbitration Act could not be applied to limit the application of the New York Convention. The court gave a reason that "to hold that subject matter jurisdiction is lacking where the parties involved are all foreign entities would certainly undermine the goal of encouraging the recognition and enforcement of arbitration agreements in international contracts".

[7] Fertilizer Corporation of India v. IDI Management Inc., (1981) USDC, 3 SD 314.
[8] Federal Arbitration Act, 1925, S. 202.
[9] Sumitomo Corp. v. Parakopi Compania Maritima [1979] USDC 1 SD 477.

Article 5 of the Convention and its Implementation in US

Apart from the reciprocity and commercial reservations, the Convention provides 7 grounds of refusal to enforce a foreign arbitral award. One of the most essential and widely interpreted refusal being that of "Public Policy".[10] It is covered in Article 5(2)(b) of the Convention.

The interpretations of the US courts have been very liberal so as to implement the Conventions in its true sense. In the case of ***Fotochrome, Inc.*** **v.** ***Copal Co.,***[11] the US Supreme Court held that the defense shall be upheld only where the enforcement would violate the "most basic notions of morality and justice".

Further, to support such narrow interpretation of the public policy defense, the Court, in the case of ***Parsons & Whittemore Overseas Co.*** **v.** ***Societe General de l'Industrie du Papier (RAKTA)***[12] explicitly noted that:

"The general pro-enforcement bias informing the Convention . . .points toward a narrow reading of the public policy defense. An expansive construction of this defense would violate the Convention's basic effort to remove pre-existing obstacles to enforcement . . . .We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice".

Thus, from the landmark precedents analyzed, the US has a very narrow interpretation of the two reservations of reciprocity and commercial nature of the arbitral award and the public policy defense. This simply represents the attitude of the US business environment and the role of the

[10] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article 5(2)(b).
[11] Fotochrome Inc. v. Copal Co. (1975) USDC 4 SD 133.
[12] Parsons and Whittemore Overseas Co. v. Societe General de Industrie du Papier (1974) NYDC 2 SD 508.

judiciary in supporting such an environment which is very investor friendly and wants to implement the New York Convention in its real and purest sense and not undermine its provisions and objective in any way.

THE PRACTICE OF INDIAN COURTS IN ENFORCING FOREIGN ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

The practice of Indian Courts in enforcing and giving effect to the New York Convention is on a much more conservative side when compared to US. Part II of the Indian Arbitration & Conciliation Act, 1996 ("the Act") deals with Enforcement of certain foreign awards and Chapter I therein (Sections 44-52) deals exclusively with Convention awards. As per Section 44(b) of the Act, a "foreign award" must be made in one of such territories as the Government of India, upon being satisfied of reciprocity, may by notification in the Official Gazette, declare to be the territory to which the Convention applies. So, evidently, India has subscribed to the reservation of Reciprocity under the Convention. But, there are certain major flaws with the provision under the Arbitration and Conciliation Act.

Firstly, the reservation of reciprocity implies that any arbitral award made in a non-signatory state to the New York Convention is not enforceable in India. Secondly, the requirement of the State's name to be published in the Official Gazette poses a very confusing situation to a signatory state's name not being in the Official Gazette. No provision covers the issue where a state is a signatory to the Convention but not mentioned in the Official Gazette.

In the case of ***Transocean Shipping Co. Pvt. Ltd* v. *Black Sea Shipping***[13], the Bombay High Court held that an arbitral award given in Ukraine cannot be enforced in India because on the

[13] Transocean Shipping Co. Pvt. Ltd. v. Black Sea Shipping, AIR (1996) 3 SC 723.

date of the award, Ukraine was not a signatory to the Convention separately as it was a part of the USSR. This shows how strictly the Courts interpret the reservation of reciprocity.

India has opted for the second reservation of Commercial nature of the award too. The problem with this is that the word commercial has been defined very narrowly in the Commercial Courts Act, 2015.

The act defines a "commercial dispute" as:

"a dispute arising out of—
(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents; (ii) export or import of merchandise or services."14

This largely limits the scope of the New York Convention's applicability in India, especially with the Indian Courts widely interpreting such reservations made in the domestic implementing legislation to the Convention.

Article 5 of the New York Convention and its Implementation in India

Section 48 of the Arbitration and Conciliation Act, 1996 is the implementing provision of Article 5 of the New York Convention. It exhaustively sets out under what grounds can a foreign arbitral award be denied by the Court. The Act places the burden of proof on the party against whom the award is to prove any of those grounds set out in Section 48.

Although the provision is exhaustive in nature, the Indian courts have room for interpretation in the "public policy defense" clause. The legislature of India used of the words "if the Court finds that" in the Section. This makes it absolutely clear that it is not necessary for the party to plead

[14] Commercial Courts Act, 2015 s. 2(i).

that the arbitral award violates Public Policy but the duty is cast on the court itself to see that the arbitral award is not in violation of Public Policy.

The Supreme Court in the case of ***Oil & National Gas Corporation Ltd.*** **v.** ***SAW Pipes Ltd.,***[15] upon being enlightened that the term 'Public Policy' shall not be given a specific definition and be given a wide connotation and the award can be set aside if it is:

a) Fundamental policy of Indian Law;

b) The interests of India;

c) Justice and morality;

d) Is patently illegal; or

e) It is so unfair and unreasonable that it shocks the conscience of the Court.

The Bombay High Court, in ***Open Sea Maritime Inc.*** **v.** ***R. Pyarelal International Pvt. Ltd.,***[16] observed that wherein the enforcement of foreign award, is objected on the ground that suit was filed by the petitioners in Bombay High Court on original said. This was in respect of the same issue which was referred to for the arbitration. Notice in respect of the said suit was also given to the arbiter. Hence the petitioners could not have preceded with the arbitral proceedings. It was held that it amounted to fraud and hence the enforcement of the foreign award would be contrary to the public policy of India. It is violation of Section 48 (2) (b) of the Arbitration Act, 1996.

An important aspect of the ***Renusagar*** *and* ***Open Sea Maritime Inc.*** is that the SC emphasizes the rules of morality and conduct as separate from Public Policy. Under most other national laws, on the other hand, Public Policy is taken as including the rules of morality. The New York Convention (1958) provides for the non-enforcement of awards, if they contravene Public Policy

[15] Oil & National Gas Corporation Ltd. v. SAW Pipes Ltd., AIR (2003) 4 SCC 621.
[16] Open Sea Maritime Inc. v. R. Pyarelal International Pvt. Ltd., AIR (1995) SC 144.

of the enforcing country, without specifying ethical rules. The serious problem with the above Indian provision is that no clear distinction is made between Domestic and International Public Policy. Moreover, it is not clear whether the Indian court, when considering enforcement of a foreign award, takes into account International Public Policy or otherwise. For instance, may a breach of a sanction regime imposed by the UN result in the non-enforcement of an award made outside India.

More importantly, the above Case of the SC does not specify which kinds of moral rules must be complied with. Are awards assessed against fundamental moral rules or moral rules in general? Also, it is not clear whether internationally accepted moral standards are the criteria for refusing enforcement of foreign awards or moral standards prevalent in Indian society. Indian society, as a traditional Hindu & Muslim society, has moral standards many of which do not correspond with the moral values accepted in the other States particularly Secular West. Although Indian Law does not explicitly refer to Hinduism or Islamic teachings as standards of morality, such teachings are embedded in Indian culture.

HAS INDIA IMPLEMENTED THE NEW YORK CONVENTION IN ITS TRUE SENSE?

Upon the analysis of all the case laws adduced above, it is safe to come to a conclusion that India has not implemented the New York Convention it its true sense. The judicial interpretation of the reservation provisions and the public policy defense is too wide to enforce foreign arbitrary awards in the sense intended in the New York Convention. India has a very peculiar business environment and the nature of India's implementation of the Convention is the proof of such an environment. Indian courts have followed a very national-centered approach in implementing the

New York Convention, which is absolutely detrimental in achieving the true objectives of the Convention.

CONCLUSION

The enforcement of foreign arbitral awards under the New York Convention in US and India are entirely different. While US implements the provisions of the Convention in its true sense, India follows a very state-centric approach in implementing the provisions of the Convention. US courts interpret the reciprocity, commercial and public policy defense very narrowly, whereas, the Indian courts have been pro-active in interpreting it widely so as to deny the enforcement of many foreign arbitral awards. Such practices resorted to by these states are mirrored representations of their respective business cultures and the ease of doing business in these states. US, being the leader of the free world, having a capitalistic and free economy is much more business centric than India, which places a lowly 97th rank in the Global Ease of Doing Business list.

This proves the hypothesis mentioned earlier that India has not truly delivered on its obligations under Articles 1 and 5 of the New York Convention over the last 60 years. This is a real bad practice with respect to Private International Law practices. The ultimate objective or intention of Private International Law is to give effect to foreign laws and elements even if they are not under the jurisdiction of the domestic courts. With the New York Convention given such a traditional and pre-dated implementation in India, it has only taken a step backwards in respecting and promoting good practices of Private International Law. There is a dire need for India to liberalize and be more accommodating to foreign arbitral awards in order to stay relevant in the international trade scenario.