Foreign award cannot be enforced if the matter involves violation of export-restrictions (Supreme Court of India)

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National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.

Court: Supreme Court of India | **Case Number**: Civil Appeal No. 667 of 2012 | **Citation**: 2020 SCC OnLine SC 381 |**Bench**: Arun Mishra, MR Shah, BR Gavai JJ | **Date**: 22 April 2020

On 22 April 2020, a 3-judge bench of the Supreme Court of India ruled on the enforceability of a foreign award (of 15 November 1989, confirmed in an arbitral appeal on 14 September 1990). The enforcement application was filed in the High Court of Delhi in 1993 and allowed on 28 January 2000 by K Ramamoorthy J. Several proceedings then followed—review, appeal, execution petition, etcetera—leading to the petition in the Supreme Court in 2010.

The Supreme Court denied the enforcement on the ground that it "would be violative of the public policy of India" within the meaning of Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 ("FARE").

FARE is a repealed statute, but this decision is significant because of several reasons. One, the law on the public policy defence in matters of enforcement of a foreign award is today substantially the same as it was under FARE. Two, the law on the public policy defence in a set-aside application is the same as that defence is applied in the enforcement of a foreign award (as explained in *Ssangyong*, cited infra). Three, ordinarily, any judgment of the Supreme Court is significant, let alone a decision by a 3-judge bench.

This decision offers an opportunity to summarise for the reader the law on the defence of public policy in matters of enforcement of a foreign award. Additionally, reading and re-reading the judgment, several issues come to mind. This Case Comment briefly explores some of them.

I. PUBLIC POLICY

The concept of public policy escapes a precise and fixed definition. The Aristotelian formula of definitions is that they give the essence of a thing. One would imagine that the spirit of an idea or a concept that has been around for centuries may be easier to state. But that is not so. It is to be seen and understood in practice from the way it is applied by judges in individual cases, for judges have a critical role in determining public policy.

The idea of public policy in arbitration has developed from the principles of private international law. The content of the public policy defence today in arbitration is substantially the same as was explained by a 3-judge bench of the Supreme Court in the *Renusagar case* (cited *infra*) while interpreting the provisions of FARE.

Let us first briefly see how the concept has developed in Indian arbitration law.

A. The development of public policy defence in the enforcement of awards in India

A1. The New York Convention and *Parsons Case* in the United States

Several trading nations came together to adopt the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958 ("the New York Convention" or "Convention"). The Convention provided "common legislative standards" for contracting states to adopt in recognition and enforcement of arbitration agreements and arbitral awards.

The Convention also provided for some grounds (set out under Article V) based on which a signatory state may refuse enforcement of an award made in another country. One of the grounds conceived was that the enforcement would violate the country's public policy where the enforcement is sought.

These grounds were inevitable. A state cannot blindly allow its law enforcement mechanism to enforce just about anything. It would like to conduct an inquiry as to what is being enforced. As Vibhu Bakhru J said in the Delhi High Court's decision in *Cruz City* (cited *infra*), "the ground that enforcement of an award opposed to the national public policy would be declined perhaps provides the strongest expression of a Sovereign's reservation that its executive power shall not be used to enforce a foreign award which conflicts with its policy. The other grounds mainly relate to the structural integrity of the arbitral process with focus on inter-party rights."

In the United States, which ratified the Convention in 1970, *Parsons &Whittemore Overseas Co.* v. *SocieteGenerale (RAKTA)*, 508 F.2d 969 (1974), is one of the earliest cases which considered Article V of the Convention. Speaking for the court, the circuit judge, J Joseph Smith, noted that the "legislative history of the provision offers no certain guidelines to its construction". He, however, said that the inference to be drawn from the history of the Convention as a whole was perhaps more probative. Then, in words that would be repeated later in many cases, he observed that "the general pro-enforcement bias informing the Convention… points toward a narrow reading of the public policy defence. An expansive construction of this defence would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement."[1]

J Joesph Smith J then concluded that the public policy defence should be construed narrowly, and enforcement of a foreign arbitral award may be denied only where enforcement would violate the forum state's most basic notions of morality and justice.

A2. India became a signatory to the New York Convention, and FARE was India's ratifying Instrument

India signed the Convention in 1958 and ratified it in 1960. The instrument of ratification was the FARE, which was enacted in 1961. Section 7 of FARE borrowed from Article V and set out the same conditions for enforcement of a foreign award.

Renusagar is perhaps the earliest case that discussed the Convention and its public policy defence in detail.

A3. The *Renusagar's Case*

(a) The Court examined the scope of a public policy inquiry and concluded that there could be no review on merits (because the court should not interfere with the substance of arbitration)

Renusagar Power Co. Ltd. v. *General Electric Co.*, 1994 Supp (1) SCC 644 is a landmark case in the real sense of that misused term. Speaking for the 3-judge bench, SC Agrawal J made a precise doctrinal analysis on the meaning of the public policy and the scope of the court's power when dealing with this defense in cases involving the recognition of a foreign award, and an interested reader may find a thorough reading of the case very profitable.

Agrawal J first concluded that the scope of the public policy argument under the Convention (and thus FARE) is limited, and a foreign arbitral award cannot be impeached on merits.

Several bases are traditionally offered for this principle, acknowledged to be fundamental. For one, since the parties chose arbitration, they should abide by the arbitrator's decision (with limited remedy). In the words of Redfern and Hunter, "if the tribunal has jurisdiction, the correct procedures

[1]Smith J referred to *Louchs* v. *Standard Oil Co. of New York*, [224 NY 99 (1918)], where Cardozo J said that "the courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."

are followed, and the correct formalities are observed, the award – good, bad, or indifferent – is final and binding."

Apart from this, the other bases can be gleaned from the authorities the Agrawal J cited:

(a) In the words of commentator Albert Jan van den Berg, "the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator."

(b) Then, "this limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration."

(c) "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our Courts." [per *Fritz Scherk Alberto-Culver Co.*, 417 US 506 (1974), which the *Renusagar* court cited in another section while discussing the meaning of public policy].

(d) "Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." [per *Mitsubishi Motors Corpn. Soler Chrysler-Plymouth Inc.*, 87 L Ed 2d 444][2]

After commenting on the scope of the public policy inquiry, the Renusagar court turned to a discussion of the meaning of public policy under FARE.

(b) *Public policy in enforcement matters is similar to the doctrine used in private international law. It connotes "fundamental policy of Indian law*"[3]

After a detailed and yet compact survey of authorities—commentators and cases, including the *Parsons case*–Agrawal J concluded that the expression public policy in FARE "must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law."

The authorities cited by Agrawal J pointed out that the application of the doctrine in private international law is limited as compared to cases that involved purely domestic elements. For instance, note the following authorities and the point they make: –

(a) Halsbury's Laws of England: – "The English court will not enforce or recognize a right conferred or a duty imposed by a foreign law where, on the facts of the particular case, enforcement or, as the case may be, recognition, would be contrary to a fundamental policy of English law."

(b) H. Graveson, Conflict of Laws: – "A foreign element may constitute a less serious threat to municipal institutions than would purely local transactions."

(c) Cardozo J's observations in *Louchs Standard Oil Co. of New York*, [224 NY 99 (1918)] which was cited in *Parsons* too: – "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."

[2]Paragraphs 47 and 48 of *Ssangyong* cites more material to emphasize the point of no-review-on-merits.
[3]The expression "fundamental policy of Indian law" appears to have been first used by GH Guttal J of the Bombay High Court in *Taprogge Gesellschaft MBH* v. *IAEC India Ltd.*, 1987 SCC OnLine Bom 345.

(d) Classification of English cases by Cheshire and North in the treatise Private International Law: – "(i) Where the fundamental conceptions of English justice are disregarded; (ii) where the English conceptions of morality are infringed; (iii) Where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers; (iv) where a foreign law or status offends the English conceptions of human liberty and freedom of action."

It is by applying the authorities described above that Agarwal J speaking for the *Renusagar* court, concluded as follows:

> "the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law, or (ii) the interests of India; or (iii) justice or morality."

The reader would note that this is substantially the same terminology by which public policy is defined in the ACA today (leaving India's interests, and with some additions, as noted below). Today, there are three facets of the public policy defense, as Explanation 1 to Section 48 (2)(b) ACA tells us. An award conflicts with the public policy of India only if: –

(a) The making of the award was induced or affected by fraud or corruption or was in violation of section 75 (relating to confidentiality) or section 81 (relating to admissibility of evidence in other proceedings); or

(b) It is in contravention with the fundamental policy of Indian law; or

(c) It conflicts with the most basic notions of the morality of justice.

This is as far as *Renusagar* went in its definition of the public policy of India. This is as far as the legislature goes.

The facet of the public policy immediately relevant is the "fundamental policy of Indian law" since it is substantially on this ground that Arun Mishra J refused enforcement in *Alimenta*.

A4. The meaning of "fundamental policy of Indian law"—back to *Renusagar*

(a) *Ssangyong*, a case involving a domestic award, summarises the law on public policy and compares the pre-2015 Amendment with the existing law

In the body of case laws which discuss public policy in arbitration, the attention of the reader is invited to *Ssangyong Engineering & Construction Co. Ltd.* v. *National Highways Authority of India*, (2019) 15 SCC 131 in which a 2-judge bench of RF Nariman and Vineet Saran JJ has summarized the law. A description or reference of the leading cases on the topic will be found, together with an analysis of the 2015 Amendments.

Ssangyong observes that the meaning of a fundamental policy of Indian law under Section 48 ACA (enforcement) is as explained in paragraphs 18 and 27 of *Associate Builders* v. *DDA*, (2015) 3 SCC 49.

In turn, Paragraph 18 of *Associate*[4]:

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[4] Paragraph 18 of *the Associate case*: 18. In *Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644], the Supreme Court construed Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961:
"7. Conditions for enforcement of foreign awards. — (1) A foreign award may not be enforced under this Act—
***
(b) if the court dealing with the case is satisfied that—
***

(a) Reproduces (in a slightly erroneous way)[5] that passage from *Renusagar*, where the court used the phrase "fundamental policy of Indian law" to describe the context.

(b) It notes that as per *Renusagar*, contravention of the (erstwhile) Foreign Exchange Regulation Act would be contrary to the public policy of India because it is a statute enacted in national economic interest.

(c) "Disregarding orders passed by the Superior courts in India could also be a contravention of the fundamental policy of Indian law."

(d) But, contravention of an ordinary statute would not be a violation.

Para 37 of *Associate* rehashes paragraph number 18 (noted above)[6] and adds: "to this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law".[7]

(b) Ssangyong was cited with approval in a foreign award case by a 3-judge bench in *Karia* (which also approved Bakhru J's decision in *Cruz City*)

Ssangyong was firmly established as precedent when it was cited with approval by a 3-judge bench decision in *Vijay Karia and others* v. *Prysmian Cavi E Sistemi SRL and others*, 2020 SCC OnLine SC 177, which was a case of enforcement of a foreign award.

Karia also cited with approval a decision of Vibhu Bakhru J of the Delhi High Court in *Cruz City 1 Mauritius Holdings* v. *Unitech Limited*, (2017) 239 DLT 649. According to Bakhru J:

(a) The expression fundamental policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded.

(b) The expression "fundamental policy" connotes the basic and substratal rationale, values, and principles which form the bedrock of laws in our country.

(c) Thus, 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.

(d) The expression must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment.

(ii) the enforcement of the award will be contrary to the public policy."
In construing the expression "public policy" in the context of a foreign award, the court held that an award contrary to
(i) The fundamental policy of Indian law,
(ii) The interest of India,
(iii) Justice or morality,
would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the country (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be an infringement of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).

[5]*Renusagar* was not a set-aside case.

[6]Note also the unintended but different auxiliary verbs used about disregarding orders passed by the Superior courts. Paragraph 18 says there *could be* a violation, paragraph 27 says there *would be* a violation.

[7] Paragraph 27 of the *Associate* case: 27 Coming to each of the heads contained in *Saw Pipes* [(2003) 5 SCC 705: AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law." It has already been seen from *Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644 … that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this, it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

B. Determination of public policy

Bakhru J's observations in *Cruz* are one of the better articulations found in Indian cases as to the meaning of fundamental policy of Indian law. They depict the principle in words that convey the essence more satisfactorily than others. And yet, we come back to the same point—the problem of exact definition. There will be some clear cases in which the application of the doctrine will be apparent. But in circumstances that are not clear or do not have precedent, how is a judge deciding what constitutes a policy of the law and what is fundamental constituting the underlying substratal rationale? The idea of public good and public safety is behind every law. That may also besaid to be the policy of every law. But to bring within the scope of this rule, a judge must be able to say that the interest involved in the matter is fundamental and will trump India's commitment to the Convention. How does a judge do that?

Consider this passage from a 2-judge bench decision in *Murlidhar Aggarwal* v. *State of UP*, (1974) 2 SCC 472 (AN Ray, CJ and KK Mathew J):

> 32. If it is variable, if it depends on the welfare of the community at any given time, how are the courts to ascertain it? The Judges are more to be trusted as interpreters of the law than as expounders of public policy. However, there is no alternative under our system but to vest this power with Judges. The difficulty of discovering what public policy is at any given moment certainly does not absolve the Judges from the duty of doing so. In conducting an enquiry, as already stated Judges are not hidebound by precedent. The Judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction they must cast their gaze. The Judges are to base their decisions on the opinions of men of the world, as distinguished from opinions based on legal learning. In other words, the Judges will have to look beyond the jurisprudence and that in so doing, they must consult not their essential standards or predilections but those of the dominant opinion at a given moment, or what has been termed customary morality. The Judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results. Of course, it is not to be expected that men of the world are to be subpoenaed as expert witnesses in the trial of every action raising a question of public policy. It is not open to the Judges to make a sort of referendum or hear evidence or conduct an inquiry as to the prevailing moral concept. Such an extended extra-judicial enquiry is wholly outside the tradition of courts where the tendency is to "trust the Judge to be a typical representative of his day and generation". Our law relies, on the implied insight of the Judge on such matters. It is the Judges themselves, assisted by the bar, who here represent the highest common factor of public sentiment and intelligence. No doubt, there is no assurance that Judges will interpret the mores of their day more wisely and truly than other men. But this is beside the point. The point is rather that this power must be lodged somewhere and under our Constitution and laws, it has been lodged in the Judges and if they have to consider their function as Judges, it could hardly be lodged elsewhere.

This passage paraphrases from a famous and authoritative paper, Public Policy in English Common Law, Harvard Law Rev. 76, where Prof Winfield suggested a series of propositions of what he believed to be the law.

The question addressed in the passage is how public policy is evidenced and how it is to be ascertained, and the proposition is that the judges themselves, assisted by the bar, who represent the highest common factor of public sentiment and intelligence, must determine it. A guide to this, the author suggested, is to investigate the 'tendency' of the transaction which they are investigating. The reference by Mathew J to the 'social consequences' of the rule propounded, tested in the light of the factual evidence available as to its probable results, is perhaps a reference to investigating the tendency.

C. What should the enforcement court look at? The disposition or the award?

A discussion on *COSID* and *Renusagar* throws up another interesting issue, which may be considered here. What should be the concern of the enforcement court—the dispositive portion of the award which has to has or the award itself?

In *COSID*, it was argued that the arbitrator had merely awarded damages and had not given an award directing SAIL to export in terms of the contract. It was, therefore, suggested that no question of any public policy was involved. Wadhwa J rejected the argument saying, "I fail to see how an arbitrator could have given an award directing specific performance of the contract. If the ban is legal, valid, and binding, the award of damages would also fail. A person cannot do indirectly, which he cannot do directly".

In *Renusagar*, one of the arguments was the enforcement of the award would lead to unjust enrichment. The court did not examine if unjust enrichment (a principle codified in the Indian Contract Act) was part of public policy of India because it held that "unjust enrichment must relate to the enforcement of the award and not to its merits given the limited scope of inquiry in proceedings for the enforcement of a foreign award under the Foreign Awards Act." It found that the objections based on unjust enrichment did not relate to the enforcement of the award because it was not the case that General Electric had already received the amount awarded under the arbitration award and is seeking to obtain enforcement of the award to obtain further payment and would thus be unjustly enriching itself.

Now as to the text of the statute, section 48 (2) uses the expression "enforcement of an arbitral award may also be refused …", while Explanation 1 of that same sub-section clarifies when "an award" is in conflict with the public policy of India."

There does not seem to be a direct authority on the issue in India. Mr. Born believes the better view is that an award should not be enforced if it rests on substantive claims, which are contrary to the public policy of the place of enforcement (International Commercial Arbitration, Wolters Kluwer, 2nd ed., pg. 3690).

Let us now finally turn to the decision in *NAFED* v. *Alimenta*.

II.NAFED v. ALIMENTA

The task of a judge called on to rule on the point of public policy may not be an easy one. Yes, the Convention has a pro-enforcement bias, but it competes with the policy of the law, which gives the court power to test the enforceability of a foreign award. The way the court exercised its power, in this case, is quite thought-provoking for the reader interested in critically examining the topic of public policy.

A. Exports restrictions as Public Policy—the NAFED court clearly erred in its conclusions

First, let us comment on a primary matter of the case—export restrictions as a matter of public policy of India. As has been noted, after reproducing several passages from six cases, the court asserted that "it is apparent from the above-mentioned decisions … Clause 14 of FOSFA Agreement and as per the law applicable in India" that no export could have taken place without the permission of the Government" and the "matter is such which pertain to the fundamental policy of India …".

It is submitted that for several reasons, this is not a properly founded conclusion.

For one, the conclusion lacks reasoning, and we do not have the benefit of the court's opinion on the issue. No doubt, the task of determining public policy, given the imprecise nature of the definition, is lodged with the judge in any given case. But there should be manifest justifications, or an attempt, having regard to the policy of the law in the facts of the case. Here, the court does not assess the nature of the public policy involved. It does not discuss the underlying legal regime. It does not examine with specificity the policy of the law involved and how the solution given in the award violates that policy. It refers to an export control order in the abstract and does not examine its terms. It relates only to several government letters that told NAFED that it could not export without

permission. It does not assess the social or economic consequences in the facts of the case. It does analyze the tendencies the enforcement of the award was capable of exhibiting in the case or future.

In very similar facts but by a different reasoning process, DP Wadhwa J, sitting singly in the Delhi High Court, in *COSID Inc. and another* v. *Steel Authority of India*, 1985 SCC OnLine Del 235 had also refused enforcement of a foreign award. SAIL had to supply steel coils to COSID under a contract governed by Indian law (English law governed the Alimenta contract). It provided the first instalment but not the balance quantity. Its plea, based on a force majeure clause, was that it was excused from performing the contract because a ban had been imposed on exports of the coil by the Government of India. A letter by the Ministry of Steel was produced to establish the prohibition.

The arbitrator examined the provisions of the Imports and Exports (Control) Act, 1947, Article 77(3) of the Constitution and the Government of India (Allocation of Business) Rules, 1961 and also the Exports (Control) Order, 1977 and concluded that the Government's letter did not have the force of law, and did not constitute force majeure.

COSID raised several arguments in support of enforcement of the award. It argued that: -

(a) the court would not go into the merit of the award and would not upset the finding of the arbitrator that the ban was not legal.

(b) the export could be prohibited only by notification in the official gazette by the Central Government.

(c) the court should not establish a new head of public policy to the effect that whenever there is a scarcity of any commodity in India an exporter would be excused of performance.

(d) the fundamental national policy is to earn maximum foreign exchange.

(e) even scarce commodities are exchanged.

(f) there must be some rules as to who was to determine scarcity and how the policy to restrict the export of scarce products was to be regulated.

On the legal position, Wadhwa J concluded that he could interfere with the findings of the arbitrator unless a specific question had been referred to him and answered. He said that the dispute was generally referred to and not with any particular question. He then concluded that enforcement of the award would be against public policy principally for two reasons: one, because under its Articles of Association, SAIL was bound by the directive/order of the Government and, two, the Government's decision to ban the export was given the acute shortage of HR Coils existing in the country at that time.

After *Renusagar,* the law is not what was described by Wadhwa J, and now there is a bar in examining the merits of the case. Nonetheless, the main point here is that *COSID* gives us an overview of the kind of issues that may be there for the court to examine the question of public policy in the context of export restrictions.

While heads under the fundamental policy of Indian law shouldn't be created without a careful assessment, the Supreme Court has done it earlier too. On this point, we should probably note that the court's conclusory approach in identifying the fundamental policy of Indian law is also reflected in *Shriram EPC Ltd.* v. *Rioglass Solar Sa,* (2018) 18 SCC 313. The main question was whether an unstamped foreign award could be enforced. A 2-judge bench of RF Nariman and Indu Malhotra JJ concluded that a foreign award does not require stamping as a matter of law. They also, however, referred to and rejected an argument that even if the law required a foreign award to be stamped, it would not be unenforceable if unstamped. Nariman J said:

"Equally, the argument that under Section 48(2)(b), even if stamp duty is payable on a foreign award, it would not be contrary to the public policy of India, must be rejected. The fundamental policy of Indian law, as has been held in *Renusagar*, makes it clear that if a statute like the Foreign Exchange Regulation Act, 1973 dealing with the economy of the country is concerned, it would certainly come within the expression "fundamental policy of Indian law." The Indian Stamp Act, 1899, being a fiscal

statute levying stamp duty on instruments, is also an Act which deals with the economy of India, and would, on a parity of reasoning, be an Act reflecting the fundamental policy of Indian law. This argument on behalf of the respondent must also, therefore, be rejected".

Must all statutes which deal with the economy of the country be wholesale considered as reflecting the fundamental policy of Indian law?

When *Renusagar*—the case from which the *Shriram court* drew parity–held the Foreign Exchange Regulation Act, 1973 ("FERA") to be part of the public policy, it did so on the following reasoning:

(a) It was a recognized principle of private international law (the field in which the modern public policy grew) in English case laws that a contractual obligation may be invalidated or discharged by exchange control legislation (provided that the legislation is applied with the object of protecting the economy of the foreign State, not as an instrument of oppression or discrimination).

(b) Dicey and Morris commented on the rule that an English court would refuse to enforce a contract the making or performance of which was prohibited by the foreign exchange legislation (as an overriding statute) irrespective of the proper law of the contract and irrespective of the place of performance.

(c) The House of Lords recognized the principle in *Boissevain Weil*, 1950 AC 327.

(d) defence *Terruzz*i (1976) 1 QB 683 was refused recognition, and enforcement in the Italian courts on the view that the contracts violated the Italian Exchange Control Regulations and their enforcement would amount to infringement of Italian public policy.

(e) The Supreme Court of Austria refused enforcement in a similar context in a case dated 11 May 1983, which is extracted, in brief, in Yearbook of Commercial Arbitration, Volume X (1985) pp. 421-23. The Austrian Supreme Court said that "the transactions concluded between the parties are not subject to Austrian but to Dutch law is irrelevant because domestic law A foreign law governs the underlying agreement to the examination whether there has been a sale and purchase on a margin basis, for determining whether enforcement is to be refused. According to Article 81, para 4, of the Austrian Law on Enforcement Procedure, enforcement has to be refused if sought for awards rendered in respect of claims which, under Austrian law, cannot be brought before Austrian courts. This is a specific, special provision of domestic Austrian law on public policy".

(f) FA Mann has also expressed views that a foreign judgment rendered in disregard of foreign exchange regulations operating in the country in which it is to be enforced, must be rejected by the courts of the latter country as being contrary to *ordre public*.

(g) FERA is a statute enacted for the "national economic interest" and the object of various provisions in the enactment is to ensure that the nation does not lose foreign exchange, which is very much essential for the economic survival of the country. [per, *LIC Escorts Ltd.*, (1986) 1 SCC 264 and *MG Wagh* v. *Jay Engineering Works Ltd.*, (1987) 1 SCC 542].

On these bases–the objects underlying FERA and the principles governing enforcement of exchange control laws followed in other countries— the Renusagar court was of the view that FERA to enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India. *Renusagar* had the benefit of established precedent and authority before it held FERA as part of the public policy.

It is submitted that the observations in *Shriram EPC* should now be read in the light of the decision in *Karia*.

Getting back to the courts' conclusory approach in determining fundamental policy, still closer to the *Alimenta* facts is a 2-judge bench of the Supreme Court in *Smita Conductors Ltd.* v. *Euro Alloys*

Ltd., (2001) 7 SCC 728. The court allowed enforcement but concluding that the question of public policy would have arisen if the restriction on import placed by the Reserve Bank of India was a 'complete restriction' (as opposed to being partial in the case, which left the scope of adjustment and fulfilling the contract).

B. Legality of the underlying contract at time of enforcement: void on contract law or hit by public policy? The NAFED court conflated two issues

The *Alimenta* court tested the underlying contract between NAFED and Alimenta under the provisions of the Contract Act. NAFED's exact argument is not set out in the judgment. From the analysis of the court, it appears one of the arguments was that the underlying contract had been frustrated. The court rejected the argument of frustration but provided another basis and said the agreement was void because it was contingent on the permission of the Government. Since that contingency (the permission) did not come about, the contract was unenforceable (hence void).

Can the enforcement court examine the underlying contract (whether made under the law of the place of the enforcement were foreign law)?

As a matter of principle, it will not be possible to suggest that the enforcement court does not have any jurisdiction to examine the legal status of the underlying contract when reviewing the argument of public policy. A party may argue that the underlying contract is void or illegal and no relief should have been granted based on such a type of contract. For example, one of the arguments in *Cruz* was that the agreement itself violated the foreign exchange laws. It will be wrong to suggest that the enforcement court cannot examine the matter.

But, it is one thing to say that a contract is void, or prohibited because of public policy (as used in arbitration), it is entirely another thing to say that it is void because of purely contract law grounds (like, say, the contingent event not happening).

In its reasoning process in *Alimenta*, the court conflated both aspects. To rule that the contract breached how public policy, it was not necessary to examine if it was unenforceable under the Indian Contract Act. It is quite a circular reasoning to say that the contract became void under the Indian Contract Act (because the Government did not grant permission) and hence the award is unenforceable. An examination of the public policy argument does not have to have a necessary connection with the status of the underlying contract under the contract law of the domestic policy at the place of enforcement. Unless, of course, a court says that the relevant provision of the Indian Contract Act reflects the fundamental policy of Indian law.

C. Can the enforcement court examine the legal status of the underlying contract on the grounds that were considered already by the arbitrator? The NAFED court did not explicitly examine the issue

There was no necessity to examine the status of the underlying contract in *Alimenta*, but the fact that the court did, and how it did, raises another interesting issue.

What happens when enforcement is resisted on the ground that the underlying contract is void or illegal, and the arbitrator has examined that same question?

In *Alimenta,* for example, NAFED's defence in arbitration was the same argument that founded the public policy argument in the enforcement petition. The arbitrators made a finding on it. Ramamoorthy J had reproduced passages from the operative part of the award in his decision in the High Court. These passages tell us that the tribunal had found from two communications (of 01 December 1980 and 06 December 1980) that NAFED itself had proposed to the Government that a restriction should be placed on the contract in order to encourage Alimenta to pay a higher price and this was a case of self-induced frustration upon which NAFED could not rely. The tribunal also ruled that no evidence was presented to establish that the Ministry's letters were promulgated into Indian law or announced in the official gazette. The tribunal then concluded that neither the force majeure clause nor the prohibition clause of the contract applied.

The High Court had also rejected NAFED's argument by observing that "the circumstances under which the ban was imposed was elaborately considered by the Arbitrators and the finding it that it was a self-imposed ban. The same questions cannot be permitted to be projected indirectly when the award is enforced in India …"

Even at the time of the *Alimenta* decision, the law (declared in *Renusagar*, another 3-judge bench decision) was that in an enforcement action, the court could not look into the merits of the case while considering the public policy defence. Today, that restriction is part of the statute [Explanation 2 to Section 48 (2) (a) and (b)]. A prohibition on the review of the merits means that the courts cannot subsequently correct errors of fact and errors of law by the arbitrator.

But, what if the public policy argument is intertwined with the error of fact or the law? The question-whether or not there is a violation of the public policy of India can be determined only by a court in India. Bakhru J said in *Cruz* that "only the courts in this country are competent to consider whether the award is to be recognised and enforced in this country." He also found that "a decision on an issue contained in a foreign award will not preclude the party resisting its recognition and enforcement, to re-agitate the issue unless that award is recognised as binding by the enforcing court. Given this position, it can hardly be contended that a challenge to recognition and enforcement of a foreign award must be rejected on the ground that the award also adjudicates the issue on the ground of which its enforcement is resisted."

But he did not precisely consider if in light of the statutory bar on reviewing the merits, what course the court must follow if the argument of public policy is based fundamentally on an issue on which the tribunal has given a finding? Suppose an agreement involves elements of corruption, or say prostitution. The underlying agreement is governed by a foreign law. The arbitrators find that there is no illegality under foreign law. Can a court in India examine the legality of the agreement in an enforcement proceeding? Take the same situation, except, in this case, the place of performance of the contract is in India, and the tribunal considered the argument if the underlying contract was illegal under Indian law and public policy. Again, can a court in India examine the legality of the agreement in an enforcement proceeding?

It is not clear if the *Alimenta* court used this technique consciously, but it excluded the award and its reasoning totally from its consideration. The underlying contract was governed by English law, and the arbitrator's findings were (presumably) made after a review of the English law. The Alimenta court simply ignored those findings and examined the matter under Indian law and public policy.

At any rate, the charge that the court reviewed the merits of the case does not seem very well-founded. What was the alternative before Arun Mishra J? Must he have said the court would not examine the public policy argument because the arbitrator had examined the issue involved in that argument (that is, whether there was an export restriction, and its effect on NAFED's contractual obligation to perform)? That would be surrendering the court's jurisdiction to the arbitrator's word? Must he have identified what the arbitrator said and given the court's reasons for disagreement? That would make the charge of reviewing on merits sharper. Was there a way to examine the public policy argument completely dissociating with the facts and circumstances? Is a decision by the arbitrators that no question of public policy is involved binding on the enforcement court because a review of merits is prohibited?

How and what balance a court strikes in a case where the issue comes up will have to wait another day in some court and another decision. It is likely that the courts will take a view that while examining the arguments in an enforcement action, the source of court's power is the ACA. Its jurisdiction rests on that power. Incidentally, however, if the arbitrator has decided on the same matters, the enforcement court will nonetheless make a *de novo* inquiry into the issue, and this will be a legitimate exercise of powers and jurisdiction under the ACA and not a review of the merits of the award.

There are some cases in England and Singapore which have addressed the question of whether the enforcement/set aside court can examine the illegality of contract. The difference in these and the position in India is the statutory bar under Explanation 2. Singapore's Court of Appeal decision

contains an illuminating discussion in *AJU* v. *AJT* [2011] SGCA 41. A reader interested in the issue will find that the English authorities are very lucidly summarized by Chan SekKeong CJ, delivering the judgment for the court.

D. The *Karia Case* was rightly not referred to by Alimenta

Karia reinforces a basic point about public policy. It is variable, even in the same branch of law (using Prof Winfield's observations). The second important point is that rules of public policy in cases of statutes dealing with the economy are not crystallized. Their application depends on the facts of each case, and the type and object of the statute. Violation of *FERA* was a violation of public policy in *Renusagar* then. The violation of FEMA was not a violation of public policy in *Cruz* and *Karia*.

Karia reiterates the *Renusagar* principle and also suggests that a reading of *Renusagar* does not lead to a conclusion that all statutes dealing with foreign exchange in all cases constitute a reflection of the fundamental policy of Indian law.

Several authors have criticised the decision The *Alimenta* court did not refer to *Karia* (presumably) because the judgment in *Karia* was delivered after the arguments in *Alimenta* were reserved.