



ARTICLE: ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND ITS IMPLEMENTATION

INTRODUCTION

International business has grown exponentially in recent years and so have trade disputes. Parties having either commercial or non-commercial relationship are opting Arbitration as an efficient dispute resolution mechanism for resolving disputes quickly and amicably instead of engaging in lengthy litigation procedures. Accordingly, Arbitration has become the most preferred mechanism for resolving cross-border commercial disputes with minimal intervention of the courts.¹ Furthermore, Article 51 (c) of the Indian Constitution is a directive principle that promotes Arbitration for settling international disputes.

The cross-border disputes cover matters of commercial nature whether contractual or not. Relationship of commercial nature includes but not limited to the following transactions: any trade transaction for the supply of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting engineering, licensing, investment, financing, banking, insurance, joint venture and other forms of industrial or business co-operations².

The Arbitration and Conciliation Act, 1996 (herein referred to as the 'Act') provides provisions for International Commercial Arbitration and Enforcement of Foreign Awards. Before the enactment of the 1996 Act, enforcement of foreign awards was governed by the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Enforcement and Recognition) Act, 1961. The Act is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration.

The United Nations Commission on International Trade Law (UNCITRAL) had adopted the UNCITRAL Model Law in International Commercial Arbitration in 1985. The General Assembly of the United Nations had recommended that all countries should give due consideration to the said Model Law in view of desirability and uniformity and specific needs of International

¹ <https://iccwbo.org/media-wall/news-speeches/icc-tops-most-preferred-arbitral-institute-chart/>

² https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf



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Commercial Arbitration practice and provide efficient settlement of disputes arising in international commercial relations³.

ENFORCEMENT OF FOREIGN AWARD

There are two mechanisms for the enforcement of foreign award viz. **New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958** and **Geneva Convention on the Execution of Foreign Arbitral Award 1927**.

Enforcement of Foreign Arbitral Award provides a common legislative standard for the recognition of Arbitration agreements and court recognition and enforcement of foreign and non-domestic Arbitral Awards. The conventions aim is that there should be no discrimination between foreign and non-domestic foreign awards (award made in a particular State between two foreign parties) and it ensures that the awards passed are recognized and enforceable within the jurisdiction of the country similar to domestic award.⁴

India is a signatory to both the New York Convention and Geneva Convention. Section 44 of the Act provides that for a foreign award to be recognized under Part II, Chapter I (New York Convention Awards) certain conditions need to be fulfilled, which are as under:

- a. The territory should be a signatory to New York Convention.
- b. The Indian Central Government should have notified in the Official Gazette that it has reciprocal provisions with such a territory⁵.

Once the court is satisfied that the foreign award is enforceable under this chapter, the award shall be deemed to be a decree passed by the court. Further, the award can be executed under Order

³ https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

⁴ <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>

⁵ Australia; Austria; Belgium; Botswana; Bulgaria; Canada, Central African Republic; Chile; China (including Hong Kong and Macau) Cuba; Czechoslovak Socialist Republic; Denmark; Ecuador; Federal Republic of Germany; Finland; France; German Democratic Republic; Ghana; Greece; Hungary; Italy; Japan; Kuwait; Mauritius, Malagasy Republic; Malaysia; Mexico; Morocco; Nigeria; Norway; Philippines; Poland; Republic of Korea; Romania; Russia; San Marino; Singapore; Spain; Sweden; Switzerland; Syrian Arab Republic; Thailand; The Arab Republic of Egypt; The Netherlands; Trinidad and Tobago; Tunisia; United Kingdom; United Republic of Tanzania and United States of America.



XXI of the Code of Civil Procedure, 1908 in the same manner as if it were a decree by an Indian court.

REQUIREMENTS OF ENFORCEMENT OF FOREIGN AWARDS

Section 47 of the Act provides that a party seeking enforcement of a foreign award has to produce following documents at the time of filing of the application before the court:

- a. The original award copy which is duly authenticated in the manner as per the country's law in which the award is made.
- b. Original agreement of the arbitration or duly certified copy.
- c. The evidence necessary to prove that the award passed is a foreign award.
- d. An English translated copy in case the award is in any other language.

As per the **Arbitration & Conciliation (Amendment) Act, 2015** – "Court" means the High Court that vested with the original jurisdiction to decide the questions forming the subject-matter of an Arbitral Award. Accordingly, the District Courts do not have jurisdiction to decide the questions forming the subject-matter of the Arbitral Award and the parties can expect speedy and efficacious determination of any arbitral issue directly by the High Court.

Section 47 of the Act further provides that the party seeking enforcement of foreign award "shall" produce the above-stated documents before the court. However, in a recent judgment⁶, the Hon'ble Supreme Court interpreted the word "shall" to be read as "may" for the production of the evidence as specified in the provision at the time of submission of the application for the enforcement of the award. The party applying for the enforcement of the foreign award is not required to produce before the Court a document mentioned therein "at the time of the application". Further it was clarified that the said interpretation of the word "shall" as "may" is restricted only to the initial stage of the filing of the application and not thereafter.

CONDITIONS FOR THE CHALLENGING ENFORCEMENT OF FOREIGN AWARD (SECTION 48 OF THE ACT)

⁶ PEC Limited v. Austbulk Shipping SDN BHD (Civil Appeal No. 4834 of 2007) decided on 14 November 2018



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Courts in India have secondary jurisdiction while enforcing the Foreign Commercial Arbitration award. The role of the judiciary is either to enforce the foreign award or reject it. No provision is envisaged for setting aside of a Foreign Arbitral award.

To resist or challenge the enforceability of a foreign award,⁷ the burden of proof lies on the award debtor. Therefore, to challenge the enforceability of an award any of the below-mentioned conditions are required to be fulfilled:

- a) Parties to the agreement were under some incapacity or the said agreement is not valid under the law or the said agreement is not valid under the law to which the parties have subjected to under the law of the country.
- b) Failure to give proper notice of the appointment of an arbitrator or otherwise were unable to present his case.
- c) Award passed does not fall within the terms of submission to arbitration or contains decisions on matters that are beyond the scope of the submission to Arbitration.
- d) Composition of the arbitral authority or procedure was not as per the agreement entered between the parties, or the agreement is not in accordance with the law of the country in which it was made.
- e) The award (specifically a foreign award) has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.
- f) The subject matter of the difference is not capable of being settled by arbitration under the Indian law.
- g) The enforcement of the award would be contrary to the public policy of India

In **Renusagar Power Co. Ltd. v. General Electric Co., [1994 SUPP. (1) SCC 644]** the meaning of the expression "public policy" under section 7(1)(b) (ii) of the Foreign Awards Act came up for consideration and distinction was drawn while applying the rule of public policy between the matter involving domestic law, and that involving conflict of laws was explained. The court observed that because of the absence of a workable definition of 'international public policy' in Article V(2)(b) of the New York Convention it is difficult to construe the expression "public

⁷ Arbitration & Conciliation Act 1996, Section 34



policy” in Section 7(1)(b)(ii) and opined that the doctrine of public policy under the said provision would mean as the courts in India apply it. The Apex Court held that enforcement of the foreign award would be refused on the ground that it was contrary to public policy if such enforcement would be contrary to – a) Fundamental policy of Indian Law b) Interest of India and 3) justice or morality.

In the year 2003, the Apex court in its decision in **ONGC vs Saw pipes**⁸ widened the scope of "public policy" and stated that any award that violates the statutory provisions of Indian Law or terms of the contract, such an award is termed as "patently illegal" and therefore, in violation of the public policy.

The Hon'ble Supreme Court in the case of **Vijay Karia and Ors. v. Prysmian Cavi E Sistemi SRL & Ors.**⁹ set the law in motion by narrowing the judicial interference in the enforcement of foreign awards under Section 48 of Arbitration and Conciliation Act, 1996 ('the Act'). While hearing the Special Leave Petition against the decision of the Bombay High Court, the Apex court held that the award passed by the Arbitral Tribunal is enforceable, as the objections did not fall within any of the condition laid down under Section 48 of the Act.

Following the principle in Renusagar case (supra), the Act was amended by Arbitration and Conciliation (Amendment) Act, 2015, by which the explanation to Section 48(2)(b) was substituted to the effect that, the fundamental policy of Indian law shall not entail a review on the merits of a dispute. However, while doing so, the 2015 Amendment also introduced *pari materia* explanation defining the scope of 'public policy' under Section 34 and 48 of the Act, placing them on the same pedestal. This is in slight departure to the Supreme Court's decision in Shri Lal Mahal's case where it was held that the parameters laid down in the phrase 'public policy' under Section 34 shall not apply to Section 48(2)(b). However, the 2015 Amendment also inserted Section 34 (2A) in the Act which has placed the international commercial arbitrations and enforcement of a foreign award on the same pedestal since both cannot be challenged on the ground of patent illegality.

In **Shri Lal Mahal Limited v. Progetto Grano Spa, [(2014) 2 SCC 433]** the ratio of Renusagar case (supra) was applied, and it was held that expression and concept of public policy of India in its application is narrower in the enforcement of foreign award than in respect of the enforcement

⁸ (2003) 5 SCC 705

⁹ 2020 SCC Online 177



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of domestic arbitral awards. Any contravention of the law is required for refusal of enforcement of a foreign award on the ground that it is contrary to the public policy of India. This court further opined that the expression “public policy of India” in section 48 (2)(b) has the same import as that of expression “public policy” in section 7(1)(b)(ii) of the Foreign Awards Act.

In the recent judgment of **NAFED Vs. Alimenta S.A.**¹⁰, the Hon’ble Supreme Court opined that the award could not be said to be enforceable as it would be against the fundamental policy of India, given the provisions contained in Section 7(1)(b)(ii) of the Foreign Awards Act.

PERIOD OF LIMITATION

Application for the enforcement of a foreign award can be filed within the period of 12 years from such date when the award becomes enforceable.

The Hon’ble Supreme Court in **Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.**¹¹ held that when a foreign award is already stamped as a decree, the award holder can apply for enforcement of the foreign award within a period of 12 years from the date of the award, similar to a usual decree-holder executing a decree arising out of a civil or commercial suit.

APPROPRIATE FORUM FOR ENFORCEMENT OF FOREIGN AWARDS

The Supreme Court in **Sundaram Finance Ltd. v. Abdul Samad and Anr**¹² held that an award holder can initiate execution proceedings before any court in India where assets are located. In case the subject-matter of the arbitration is of a specified value, commercial courts established under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 (“Commercial Courts Act”) would have jurisdiction.

When the court is satisfied that the award is enforceable, it will enforce it under Section 49 of the act and the award shall be deemed to be a decree of the court, in the following manner:

- A. Where the subject-matter of the foreign award is money, the Commercial Division of any High Court where the assets of the party lie shall have the jurisdiction. Relying on the judgment of

¹⁰ Civil Appeal No. 1544 of 2020

¹¹ AIR 2001 SC 2293

¹²(2018) 3 SCC 622

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Hon'ble Supreme Court in **Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd., Saudi Arabia & Ors.**, the Delhi High Court also held that a foreign award can be enforced anywhere depending on the location of the Judgment Debtor's assets or where his money lies.

- B. In case the subject matter is other than relating to money, the jurisdiction shall lie with the Commercial Division of the High Court as if the subject matter of the award was the subject matter of the suit.

ENFORCEMENT OF DECREE IN INDIA

Once the award is deemed to be enforceable, it is termed as a decree passed by Indian Court, the execution proceedings can be initiated for the enforcement of decree under Order XII of the Code of Civil Procedure.

ENFORCEMENT UNDER GENEVA CONVENTION

Section 53 to Section 60 of the Arbitration and Conciliation Act, contains provisions for enforcement of a foreign award under Geneva Convention.

As per the Geneva Convention "foreign award" means an arbitral award on differences relating to the matters considered as commercial under the law in force in India made after the 28th day of July, 1924 –

- a) In pursuance of an agreement for arbitration to which the Protocol outlined in the Second Schedule applies; and
- b) Between persons of whom one is subject to the jurisdiction of someone of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid;
- c) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter, an award shall not be deemed to be final, if any; and



- d) Proceedings for the purpose of contesting the validity of the award are pending in any country in which it was made

Section 53 of the Act provides the conditions for the enforcement of foreign awards under Geneva Convention in India:

- a) The award has been made in pursuance of a submission to arbitration valid under the law applicable;
- b) The subject-matter of the award is capable of settlement arbitration under Indian Law;
- c) The award has been made by the tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- d) The award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
- e) The enforcement of the law is not contrary to the public policy or law in India.

Arbitration and Conciliation (Amendment) Act, 2015 has narrowed the scope of "public policy" for international commercial arbitration which states that an award is in conflict with the public policy if:

- a) It has been induced or affected by corruption or fraud;
- b) It is in contravention of the public policy of Indian Law;
- c) It conflicts with notions or morality or justice.

Further, it clarifies that whether the award passed is in contravention of the fundamental policy or not, the Indian Courts will not involve in reviewing the merits of the disputes or correct the interpretation of the arbitrator on the facts of the case.

In the said section, it was further laid down that even when above-mentioned conditions are fulfilled, the award shall be refused if:

- a) the award has been annulled in the country in which it was made;



- b) the party was not given the notice of arbitration proceeding in sufficient time to enable him to present the case or was under some legal incapacity was not represented properly;
- c) the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

Furthermore, under clause (3) it states that the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent Tribunal if the party against whom the award has been made proves that under the law governing the arbitration procedure there is any ground, entitling him to contest the validity of the award.

ENFORCEABILITY OF AWARD

Section 58 provides that where the Court is satisfied that the foreign award is enforceable under the Arbitration and Conciliation (Amendment) Act, 2015, the award shall be deemed to be a decree of the Court.

CONCLUSION

Recent amendments have reduced the scope of interference of the Indian Courts in the matters of arbitration. Be it domestic arbitration or International commercial arbitration, the Supreme Court is making efforts to ensure that the courts do not interfere in the arbitral process. The main aim is to provide a swift and efficient method of dispute resolution among the parties and steps for speedy execution of foreign awards and thereby, increasing the purview of Arbitration in India.

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