

IMPLEMENTATION OF FOREIGN ARBITRAL AWARDS IN INDIA- ISSUES AND CONCERNS

Abstract

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The term 'Arbitration' denotes settlement of dispute between persons whether physical or legal, arising out of indifferences between them which are administered either by appointment of arbitrators or by permanent arbitral institution. As far as businesses are concern, the relationship of commercial nature includes widened facets that are can't be easily adjudicated in courts. In the context of International Commercial Arbitration, both New York Convention and Geneva Convention plays vital role in the enforcement of foreign arbitral award. Under the Arbitration and Conciliation Act, 1996 the foreign arbitral award denotes interim relief or an award granted to the parties (of different countries) to the dispute who have legal relationship, whether contractual or not provided that the cause for the allegation must be arisen out of commercial value. For enforcement of foreign award both the intended parties must have reciprocal agreements between their nations and such country must be the signatory to New York or Geneva Convention. The underlying protocols for arbitration includes foreign agreements, conventions and treaties, national laws and procedural rules of concern arbitral institution increases ambiguity as to its recognition, enforcement and execution of award. Generally, India refuses to enforce foreign arbitral award if proceedings was against the principles of natural justice, subject matter is not binding to be settled under arbitration or under which law it is subjected to, involvement of fraud or corruption, and against the notions of morality and justice.

Thus the author sifts on the general provisions available in India and the enforceability(including the grounds regarding the non-enforceability) of the foreign awards through doctrinal research in detail.

Key words: Arbitral Award, New York Convention, Geneva Convention, Arbitration and Conciliation Act, 1996

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Implementation of Foreign Arbitral Awards in India- Issues and Concerns

1.0 Introduction

Arbitration is the dispute settlement technique, the submission for determination of disputed matter to a private person responsibly skilled in the subject matter, in a manner provided by law or an agreement. It is substituted of their award or decision for judgment in court. According to Cowell Termes de la Levy, the term arbitration in a wider sense denotes the whole method of settlement of controversies, including submission and hearing, decision and award. An award is a judgment or decision of arbitrators or referees on a matters submitted to them.

In this modern era the development seen in the field of Commerce entailed several systematic methods of resolution which are highly welcoming such as arbitration, implementation of the resulting awards etc. It plays a significant role in deciding the rights and the duties of the parties. What is seen to be very genuine in the Indian context is that it becomes just a fight that is half won involving situations where the award or final judgment has been secured from the courts. It is possible to have witnessed situations where the opposite party doesn't even give a second thought in looking forward to either participate in the arbitral processes or they just leave it mid-way which in turn makes it more complicated than the arbitral process where the opposite party has actually participated.

2.0 Evolution of International Arbitration

The Multinational commercial structures and economic interest of the jurisdictions in seeking to arbitration is an important factor in the evolution of many arbitration laws in the world. On growing concerns from stakeholders of various businesses and transformations in terms of commercial transactions, the International arbitration has gained its significance. The unceasing feature of international trade is its disputes arising therefrom. However, disputes arise frequently between traders and mostly between government authorities in the entities with which trading occurs. Modern business relationships have become utmost complex,

particularly in terms of its growth in all commercial aspects including trading of goods and services, e-data collections, information technology and patenting systems.

International Chambers of commerce was established in 1919 became a solution to issues arisen among transnational during the post-world war period. Furthermore after globalization of businesses, Geneva Convention 1927 and New York convention 1958 were created to administer the enforcement and recognition of foreign arbitral awards. In addition to the conventions, the United Nations Commission of International Trade Law Arbitration Rules of 1976 and the UNCITRAL Model law of 1985 were also enacted to impose statutory obligation on contracting parties regarding arbitration clause and procedural rules for conducting proceedings. These Rules are applicable to all countries of different developmental stage that follows either civil or common law systems and hence UNCITRAL has significance in terms of its acceptance on arbitral process.

As far as India is concerned the important provisions or the laws governing the execution of decrees and their implementation is the Code of Civil Procedure, 1908. In order to give effect to the international instrument, India enacted Foreign awards (Recognition and Enforcement) Act, 1961 and at present domestic arbitration, International Commercial Arbitration and enforcement of foreign arbitral awards are consolidated as Arbitration and Conciliation Act, 1996. The Arbitration and Conciliation (Amendment) Act, 2015 amended the part II of the Arbitration and Conciliation Act, 1996 thereby dealing with the implementation or the enforcement of foreign awards. The New York Convention and the Geneva Convention are the two major avenues available for the implementation of foreign awards in India². The same i.e the foreign awards in India are recognized under the New York Convention and the Geneva Convention respectively.

As seen earlier the foreign award has been defined under section 44 of the act as an arbitral award that arises among the parties to the arbitration respectively regardless of whether the relationship is contractual or non-contractual with the significant condition being that the country should be a signatory to the New York Convention and it has to be recognized by the central Government Of India. It is the section 45 of the Arbitration and the Conciliation Act 1996 that authorizes the judicial authority to refer the parties to arbitration. The

²Singhania and partners, India: Enforcement of foreign awards in India, mondaq, (July 28, 2016), <http://www.mondaq.com/india/x/514290/Arbitration+Dispute+Resolution/Enforcement+Of+Foreign+Awards+In+India>

implementation of any foreign arbitral award in India is initiated by filing an execution petition that consequently results in a two-stage process. A duty is imposed on the courts to decide whether or not the requirements have been adhered to by the award. The award becomes enforceable only when a binding award has been received by a party from a country which is a signatory to either the New York Convention or the Geneva Convention provided that the award is made in a territory which is observed to be the convention country by India.

3.0 International Arbitration

International Arbitration is a private procedure, autonomous in terms of conducting proceedings, governed under the rules of bilateral or multilateral treaties, international public policy, or any laws therein after mentioned under arbitration contract. Any foreign arbitration has to rely upon the arbitration agreement which should cover extents of the disputes arisen out of defined legal relationship and such dispute should be capable of being settled by arbitration³.

The principle of validity of arbitration agreements in international contracts does not depend on the national applicable substantive law. This tendency is to free their validity from national constraints in respect of *lex contractus* and local restrictions to enter into an arbitration agreement which may apply to public bodies or state owned companies. The ICC award rendered in 1986 stated that public company may not argue that the arbitration agreement entered into is of no effect, since this conflicts with international public policy which cannot be set aside by national legislation⁴.

4.0 Foreign Arbitral Awards

Foreign Awards denotes an arbitral award made in pursuance of an arbitration agreement in the territory of a reciprocating country other than India. The seat of Arbitration may have taken place in different jurisdiction which abide by the law of the (foreign) land where the decision is sought for the purpose of settlement of commercial dispute and such decision are

³According to Article 2 of New York convention 1958, “each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration”

⁴Mauro Rubino-Sammartano, International Arbitration Law and Practice, 143 (Third Ed.2014)

to be binding upon the fundamental policy, notions of morality & justice and law of the country where the award required to be enforced.

The parties to the agreement have to decide upon the rules to be incorporated in the proceedings of the arbitration regarding what law desired to be applied on conduct of proceedings and for enforcement of award. General rule applicable to all arbitration is from the standard elements present in arbitration agreement, right from venue of the arbitration, rules governing arbitral procedures, appointment of competent arbitrators, governing law of arbitration agreement and language of the proceedings⁵.

According to recent amendment in 2015, the interim relief under section 9, court's assistance in seeking evidence under section 27 and appealable orders under section 37- 1(a) & 3 shall be applicable to the foreign awards seeking its enforcement in India in addition to provisions of Part II unless expressly excluded by the parties in the arbitration agreement. The Judicial intervention in foreign arbitration is restricted in case of setting aside the award or decree passed by court. The court cannot decide the case based on merits and the conduct of proceedings under foreign Arbitration rules. The grounds under section 48 has enacted in resonance with section 34 wherein most of the domestic awards are prejudiced by the courts⁶. Thus the stand of implied exclusion of part I is now overruled after the amendment of 2015⁷.

5.0 Challenges involved in Foreign Arbitration

5.1 Conflict of laws between both the countries

Arbitration and mode of conducting it differs from each contracting country. In some jurisdiction, there is lack of professional experts preside in courts in the field of arbitration that may cause discrepancy with the enforcement where parties relied to. The parties and their representatives may come from countries with different ways of conducting litigation and the arbitrators may come from yet other legal systems. It is not strange that they may have radically different ideas as to how the arbitration should be conducted. Thus consensus

⁵International Arbitration Laws and Regulations, ICLG, <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/australia>

⁶ Section 34 clause 2(v): The composition of arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this part from which parties cannot derogate or failing such agreement, was not in accordance with this part. This is an exception to Arbitration placed outside India. Hence Indian courts cannot intervene into the procedures of arbitration where the award is made but only exception is patent illegality found on the face of record.

⁷ Government of India, Law Commission of India Report No 246, Amendments to the Arbitration and Conciliation Act 1996 21-25 (2014), <http://lawcommissionofindia.nic.in/reports/Report246.pdf>

is developing among arbitration practitioners regarding uniform pattern of conducting arbitration⁸.

The rule of conflict of laws can be applied in case of no clauses included with reference to choice of law applicable to arbitral agreement, arbitral proceedings, and the agreement to arbitrate the procedural aspects of international commercial arbitration including means of recourse against awards and to merits of the dispute. Such law should be nearest possible law of the parties if they had made an express choice of the applicable law of the contract. Nevertheless, application of conflict of laws ultimately depends upon the national law of the place of arbitration and the nature of dispute⁹.

5.2 Applicability of interim relief under Domestic law in foreign award

The question as to whether interim relief awarded by tribunal under section 17 or interim relief by courts under section 9 can be applied in the foreign award recognized and enforced under part II was clarified in many judgments but the recent amendment failed to address it in the statute. In *McDermott International Inc v. Burn Standard Co Ltd & Ors*, the Supreme Court analyzed the meaning of an interim award. An award has been defined under section 2 (c) to include an interim award. Similarly section 31 (6) contemplates interim award. An interim award in terms of said provisions is not one in respect of which a final award can be made, but it may be a final award on the matters covered thereby, but made at an interim stage. The conceptual difference between an interim award (final decision of one of the dispute) and interim order (that does not decide any issue in dispute, but provides for interim relief) is firmly entrenched under Indian law. The definition under section 2 (1) (c) though not strictly applicable for Part II, is likely to be followed. The Model Law of UNCITRAL under Article 17¹⁰ deals with powers of arbitral tribunal to order interim measures wherein it specifies that interim orders issued by an arbitral tribunal would be recognized as binding and

⁸United Nations conference on Trade and Development, Dispute Settlement, 32 (2005) https://unctad.org/en/Docs/edmmisc232add38_en.pdf

⁹Filip De Ly, The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning, *Northwestern Journal of International Law & Business*, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1329&context=njilb>

¹⁰ Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

enforced upon an application to the competent court, irrespective of the country in which it was issued¹¹

5.3 Judicial intervention- Huge obstacle in enforcement of foreign award

The intervention of courts in deciding the cases to be set aside is based on the conditions imposed under Article V of New York convention. The international instrument policy approach to restrain judicial review culminates as far as recognition and enforcement is concerned. The convention has provision for discretionary, non-mandatory and judicial refusal to recognize, therein stated as 'A court is not required to refuse recognition or enforcement of an award if one of the grounds under section 48 or article V is established on the facts'. However scope for judicial review is enhanced in section 48 1 (e) that how far the court can exercise its power in challenging award in enforcement state has already been set aside by a court in the country of the seat of arbitration. The difficult question relates to the identification of the situations in which a court in the state of enforcement should be free not to follow the decision of the court in the jurisdiction of origin. The careful consideration of the effect in law of the decision of the court at the place of arbitration and an examination of grounds that led to set aside the arbitral award should be basis for the solution¹².

In *R. Vishwanathan v. Rukn-UI-Mulk Syed Abdul Wajid* AIR 1963 SC , It was observed by the Supreme Court of India that on the non-observance of the judicial process the implementation of the foreign awards could be vitiated, that is to say that whenever the court rendering the judgment fails to notice the minimum requirements relating to principles of natural justice. It is to be made sure that the parties are given adequate opportunity to present their cases by providing a reasonable notice for the same.

5.4 Issue in validity of Jurisdiction

The courts with jurisdiction to recognize and enforce a foreign award are identified in the explanation to section 47. A foreign award can only be enforced by high court having original jurisdiction to decide the questions forming the subject matter of arbitral award, if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the

¹¹Gracious Timothy, Recognition And Enforcement Of Interim Measures:The Inadequacy Of The Indian Arbitration Amendment Act, 2015, [livelaw.in](https://www.livelaw.in), (Nov.22 2016, 5:14 pm) <https://www.livelaw.in/recognition-enforcement-interim-measuresthe-inadequacy-indian-arbitration-amendment-act-2015/>

¹² Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, 10 (2010)

high court having jurisdiction to hear appeals from the decrees of courts subordinate to such high court. The landmark decision in *Bharat Aluminium company v. Kaiser Aluminium technical service*, acknowledges that Section 47 in part II dealing with the enforcement of certain foreign awards has defined the term 'court' as a court having jurisdiction over subject matter of the award. This has clear inference to the assets/person is located, against whom the enforcement of foreign award is sought¹³.

5.5 Issue in enforcement of award

The challenge in enforcing arbitral awards as equal as that of decree issued by courts arises in the subject matter of foreign award and in terms of arbitration agreement in case the said agreement is not valid under the law to which the parties have subjected it. By virtue of the Commercial Courts Act, 2015 and the amendment in Act of 1996 in 2015, where the subject matter of foreign award is money, the Commercial Division of any High Court in India where assets of the opposite party lie shall have jurisdiction. In case of any other subject matter, Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit shall have jurisdiction¹⁴. In *Sundaram Finance Ltd v. Abdul Samad and Anr* (2018) 3 SCC 622 the Supreme Court of India elucidated clearly that execution proceedings could be commenced by the award holder in front of any court in India where the assets are said to be pinpointed or found. It is also observed that the Commercial Courts established under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 ("Commercial Courts Act") are said to have jurisdiction in matters where the subject matter to the arbitration being an enumerated value.

Section 48 (3) had been analyzed in *Yeshwant Deora v. Walchand*, the Supreme Court in this case held that rules of equity are observed to have no implementation where there are explicit statutory provisions stating the grounds on the basis of which alone adjournment or stoppage of running of time can emerge. This is a conspicuous principle.

6.0 Statutory Conditions and Requirements for the Enforceability of Foreign Award

¹³George A. Bermann, Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts, 471(2017)

¹⁴Jayanth Balakrishna, Enforcement of Foreign Arbitral Awards: Issues and Challenges, NJA gov.in http://nja.gov.in/Concluded_Programmes/2018-19/P1145_PPTs/3.Enforcement%20of%20Foreign%20Arbitral%20Awards%20Issues%20and%20Challenges.pdf

The conditions and the requirements for effectively enforcing the foreign award have been scrutinized. It is from the Article V of the New York Convention, stemmed the conditions for enforcement of a foreign award. The requirements for the enforceability includes the authentic award or a duly validated copy in a manner that is actually required by the very country in which the same is made, Authentic agreement or officially recognized copy and there has to be sufficient evidence wherever it is appropriate to prove that the award is genuinely a foreign award. It is the section 47 of the Arbitration and the Conciliation Act, 1996 that makes it mandatory that whatever conditions that have been mentioned before must be complied with and produced before the court of law.

The following grounds could be relied upon by the parties for challenging an award. Under section 57 of the Arbitration and Conciliation Act, 1996 conditions for the enforcement of the foreign awards had been laid down under the Chapter-II (Geneva Convention awards).The section 57 had been later amended by the Arbitration and Conciliation Act, 2015¹⁵. The award would be rendered unenforceable when it comes to the observation that the parties to the agreements were undergoing some sort of incapacity, the agreement is seen to be not in accordance with the law or it is seen to be not under the law of the country where such awards are made categorically in the case involving the foreign awards, failure in furnishing a genuine notice regarding the appointment of the arbitrator or the arbitral proceedings, awards consisting of decisions with regard to the matters that are beyond the reach of submission to arbitration, the subject matter of the dispute being incapable of the settlement under the Indian Law by arbitration, the implementation of the award being contradictory to the public policy etc¹⁶.

In *M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd*, it was held by the Supreme Court of India that a foreign award has already been stamped as a decree under the act. The registration requirements that must be adhered to for a foreign award includes that “The foreign award is not liable to be stamped as declared by the Supreme Court of India explicitly”, it is not a requirement that the foreign award has to be compulsorily registered, they are still enforceable as a decree and in the matter of deciding whether the foreign award

¹⁵Section 57, Arbitration & Conciliation Act 1996: Conditions For Enforcement Of Foreign Awards, Corporate Cases, <https://www.corporate-cases.com/2018/02/section-57-conditions-for-enforcement-of-foreign-awards.html>

¹⁶Nishithdesai associates, *Enforcement of Arbitral awards and Decrees in India*, (January 2019), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Enforcement_of_Arbitral_Awards.pdf

is enforceable or not the concern on the stamp duty cannot stand in the way (pronounced by the High Court of Delhi in *Naval Gent Maritime Ltd v Shivnath Rai Harnarain(I) Ltd*. Having known about the requirements and the conditions of the implementation of foreign awards, it is significant to know the grounds based on which the courts in India genuinely scrutinize the awards. Firstly it is observed that the courts do proper inspection or enquiry regarding whether or not the award is enforceable and then move on to the holding regarding the award's enforceability¹⁷. Thus for the execution process for the implementation of the foreign award, the format given under order 21 Rule 11(2) of the Code of the Civil Procedure has to be followed¹⁸.

7.0 Limitation Period for the Implementation of Foreign Award

The Limitation Act, 1963 could be applied in this regard. To put it more precisely section 29(2) of the aforementioned Act could be taken into consideration as it contains the basic rule that the provisions provided would have its application regarding the computation of the time period¹⁹. It is also pertinent to note that the different High Courts of India has come up with varying interpretations as far as the limitation period of the administration of the foreign awards are concerned. As the foreign award is not considered to be a decree per se and would have no possibility of binding on parties to the dispute unless and until a court that is competent, records it to be enforceable, it would have to undergo a two-step process.

Any application regarding the enforceability of a foreign award would categorically come within the ambit of the schedule containing the residuary provision to the Limitation Act, that is to say explicitly that the limitation period would be three years. After the award has been validated explicitly as a decree, the limitation period is about 12 years with regard to the execution of such a decree. Thus only upon the real receipt the duration for challenging an award genuinely gets initiated. Also it is observed that the duration of time mentioned under section 34(3) of the Arbitration and Conciliation Act, 1996 lapses after three months of time. But surprisingly a proviso to the section 34(3) of the Arbitration and Conciliation Act, 1996

¹⁷Nishithdesai associates, Enforcement of Arbitral awards and Decrees in India, (January 2019), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Enforcement_of_Arbitral_Awards.pdf

¹⁸Enforcement Of Foreign Awards in India, Helpline Law, <http://www.helplinelaw.com/business-law/FOIA/enforcement-of-foreign-awards-in-india.html>

¹⁹Devansh Mohta, Application of law of limitation in computing timeperiod under section 34(3) of the Arbitration and the Conciliation Act, 1996, Kluwer Arbitration Blog, (January 8, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/01/08/application-of-law-of-limitation-in-computing-time-period-under-section-343-of-the-arbitration-conciliation-act-1996/>

gives an additional benefit to the party by providing that the party can make an application even after the lapse of three months' time upon a clear demonstration that the applicant was "averted by adequate cause" from doing so.

8.0 Conclusion

Thus making an effectual service either on the opposite party or on the judgment debtor is seen to be very pivotal to avert any cavil at the later stage, not to forget that the principles of natural justice also applies in these execution proceedings. The execution and its modes are to be given foremost significance as in India the foreign awards or the domestic awards has to be implemented as a decree passed by the courts of India. The modes includes attachment, sale or, through consultation of a receiver, by delivery of any property precisely decreed etc. Thus it is up to the court in deciding to uphold the foreign award and implement the same as far as the enforcement is concerned, only then it would be considered as a decree of the court. It is pertinent to note that each and every final arbitral award is implemented in the same way as if it were the decrees of the court. Thus as far as the enforceability is concerned, the court has to first determine whether the award is capable of being enforced or not with regard to the requirements provided under the provisions of the act, next comes the effectual steps for the execution process of the same. This is how the foreign awards are being enforced in India.