

ENFORCEMENT AND EXECUTION OF FOREIGN ARBITRAL AWARD IN INDIA

Enforcement of Foreign Awards

Enforcement of foreign awards is covered by Part II of the Arbitration and Conciliation Act 1996 (1996 Act). However due to a recent Supreme Court decision¹ the distinction between the grounds and procedures in Part I and Part II have become blurred.

The provisions of Part II of the Act give effect to the New York Convention and the Geneva Convention. This article discusses only provisions dealing with enforcement of New York Convention awards.

1. Conditions for Enforcement

a. Foreign Award Defined²

In order to be considered as a foreign award (for the purposes of the Act), the same must fulfil two requirements. First it must deal with differences arising out of a legal relationship (whether contractual or not) considered as commercial under the laws in force in India.

The second requirement is more significant and that is that the country where the award has been issued must be a country notified by the Indian Government to be a country to which the New York Convention applies.³

2. Comparison with Domestic Enforcement Regime

There are two fundamental differences between enforcement of a foreign award and a domestic award. As noted above, a domestic award does not require any application for enforcement. Once objections (if any) are rejected, the award is by itself capable of execution as a decree. A foreign award, however, is required to go through an enforcement procedure. The other difference between the domestic and foreign regime is that (unlike domestic awards) there is no provision to set aside a foreign award.

3. Conditions for Enforcement

Where the Court is satisfied that the foreign award is enforceable under the 1996 Act the award shall be deemed to be a decree of that Court.

¹ *Venture Global Engineering v Satyam Computer Services* CA No 309 of 2008 (10 January 2008) ('*Venture Global*') has held that the wider interpretation of 'public policy' would apply to foreign awards as well.

²*Definition.*—In this Chapter, unless the context otherwise requires, 'foreign award' means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 –

(a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, by notification in the Official Gazette, declare to be territories to which they said Convention applies.

³ The 1996 Act, s 44(b)

Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that-

- a. the parties under some incapacity. or the said agreement is not valid under the law to which the parties have subjected it; or
- b. the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- c. the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
- d. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- e. the 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.

In *Renu Sagar*,⁴ the Supreme Court construed the expression 'public policy' in relation to foreign awards as follows:

Applying the criteria it must be held that 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.

4. Judicially Created New Procedure and New Ground for Challenge to Foreign Award

There is no statutory provision to set aside a foreign award under the 1996 Act. Foreign awards may be set aside or suspended in the country in which or under the laws of which the award was made⁵ but there is no provision to set aside a foreign award in India.

However, the Supreme Court on appeal, extending its earlier decision in the case of *Bhatia International v Bulk Trading*,⁶ held that even though there was no provision in Part II of the 1996 Act providing for challenge to a foreign award, a petition to set aside the same would lie under section 34 Part I of the 1996 Act (*ie* it applied the domestic award provisions to foreign awards).

The *Venture Global* case is far reaching, the new procedure is that a person seeking to enforce a foreign award has not only to file an application for enforcement under s 48 of the 1996 Act, it has to meet an application under s 34 of the 1996 Act seeking to set aside the award. The new ground is that not only must the award pass the New York Convention grounds incorporated in section 48, it must pass the expanded 'public policy' ground created under section 34 of the 1996 Act.

5. Procedural Requirements

A party applying for enforcement of a foreign award is required to produce before the court:

⁴ 1994 Supp (1) SCC 644 ('*Renu Sagar*')

⁵ The 1996 Act, s 48(1) (e), corresponding to Art V (e) of the New York Convention.

⁶ 2002 (4) SCC 105

- (a) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- (b) The original agreement for arbitration or a duly certified copy thereof; and
- (c) Such evidence as may be necessary to prove that the award is a foreign award.⁷

a. Relevant Court

Section 47 of the Act, has defined the term "court" as a court having jurisdiction over the subject-matter of the award. The expression 'subject matter' of the award to the explanation under section 47 is different from the expression subject matter of the arbitration under section 2(e) of Part I of the Act⁸.

b. Time Limit

The 1996 Act does not prescribe any time limit within which a foreign award must be applied to be enforced. However, various High Courts have held that the Limitation Act 1963 (No 36 of 1963), *ie* the period would be three years from the date when the right to apply for enforcement accrues.

Evidence required for Enforcement

A party applying for enforcement of a foreign award in India must at the time of filing of the application produce before the court the following evidence:

- (a) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
- (b) The original agreement for arbitration or a duly certified thereof; and
- (c) Such evidence as may be necessary to prove that the award is a foreign award.

6. Post-enforcement Formalities

The Supreme Court has held that once the court determines that a foreign award is enforceable it can straightaway be executed as a decree. This was so held in the case of *Fuerst Day Lawson Ltd v Jindal Exports Ltd*,⁹ where the court stated:

Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court / decree again.

An appeal shall lie only if the court holds the award to be non-enforceable. Hence a decision upholding the award cannot be appealed against. However, a discretionary appeal would lie to the Supreme Court of India under Art 136 of the Constitution of India. Such appeals are entertained only if the court feels that they raise a question of fundamental importance or public interest.

⁷ The 1996 Act, s 47(1)

⁸ *Tata International v. Trisuns Chemical*, 2002 (2) Bom CR 88

⁹ 2001 (6) SCC 356

Appeal against enforcement of award

Section 50(1) (b) of the Act provides for an appeal only against an order refusing to enforce a foreign award under section 48. No letters patent appeal will lie against an order which is not appealable under section 50 of the Act. The Letters Patent is only indicative of the forum to which an appeal against an order of the Single Judge would lie. It does not confer an additional right to file an appeal.¹⁰

Grounds of resistance to Enforcement

A foreign award will not be enforced in India if it is proved by the party against whom it is sought to be enforced that the parties to the agreement were, under the law applicable to them, under some incapacity, or, the agreement was not valid under the law to which the parties have subjected it, or, in the absence of any indication thereon, under the law of the place of arbitration; or there was no due compliance with the rules of fair hearing; or "the award exceeded the scope of the submission to arbitration; or the composition of the arbitral authority or its procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the place of arbitration; or the 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".

"Public Policy" ground

The expression "public policy" means the doctrine of public policy as applied by the courts in India. The enforcement of the foreign award must not be contrary to the public policy or the law of India. 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 morality¹¹.

In Shri Lal Mahal Ltd. v. Progetto Grano Spa,¹² ("**Lal Mahal**"), it has been held that enforcement of foreign award would be refused under Section 48(2) (b) only 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 Supreme Court further discussed Phulchand Exports Limited v. O.O.O. Patriot¹³ ("**Phulchand**"), wherein it was accepted that the meaning given to the expression "public policy of India" in Section 34 in Saw Pipes, must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. The Supreme Court concluded that "public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal" does not lay down correct law and has hence overruled the earlier decisions on this point.

Challenge on merits

¹⁰ Shivnath Rai Harnarain India Company v. Glencore Grain Rotterdam, AIR 2010 Delhi 31

¹¹ Ibid

¹² 2013 (8) SCALE 489

¹³ 2011 (10) SCC 300

The expression "set aside or suspended", in clause (e) of section 48(1) cannot be interpreted to mean that, by necessary implication, the foreign award sought to be enforced in India can also be challenged on merits in Indian courts. The power to annul an award is provided under section 34 in Part I of the Act. The applicability of that provision is limited to the awards made in India or domestic awards. The powers of the Indian courts to set aside an award relating to international commercial arbitration are confined to those seated in India¹⁴. Therefore Indian courts do not have jurisdiction to entertain a challenge to a foreign award on its merits.

Scope of enquiry before the Indian court in Enforcement proceedings

The award must be executed as it is and there is no scope for any addition to any award in executing a foreign award but the award to be executed must be properly construed and given effect to. The scope of inquiry under section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

Enforcement of Foreign Award as a Judgment

An award is not a decision which the court will recognize as a foreign judgment. A plaintiff filing a suit based on a foreign award and seeking from the court a judgment in his favour for the amount stated in the award must prove:

- (1) That there was a contract between the parties where under disputes between them could be referred to arbitration to a tribunal in a foreign country;
- (2) That the award is in accordance with the terms of the agreement;
- (3) That the award is valid according to the law governing arbitration proceedings obtaining in the country where the award was made;
- (4) That it was final according to the law of that country; and
- (5) That it was a subsisting award at the date of suit.¹⁵

Conclusion

Recent decisions of the Supreme Court of India show a shift of stance. The attitude of the higher judiciary in India is taking a positive turn, and they are approaching international arbitration with caution and pragmatism, in line with courts in some other parts of the world. The business community also awaits steps from the Indian legislature to amend the Act, to put an end to the varied interpretations provided over the years by the Indian judiciary.

¹⁴ Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 (625)

¹⁵ Badat and Co. v East India Trading Co., (1964) 4 SCR 19