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# Constitution, Enforcement and Refusal of Foreign Arbitral Awards

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## ABSTRACT

*This research explores the constitution, enforcement, and refusal of foreign arbitral awards within the legal framework of India, both domestically and internationally. The study delves into the fundamental principle of minimal judicial intervention, crucial for fostering a pro-arbitration environment and attracting foreign investment. Despite efforts to streamline enforcement procedures, numerous obstacles impede the recognition and enforcement of arbitral awards, necessitating international cooperation and treaty agreements such as the New York Convention and UNCITRAL Model Law.*

*Drawing from existing literature, the paper analyzes various aspects of foreign arbitral award enforcement in India. It reviews multilateral treaties, such as the New York Convention of 1958 and the Geneva Protocol of 1923, shedding light on the requirements and limitations surrounding enforcement. Additionally, it scrutinizes the legal frameworks adopted by different countries, highlighting deviations and emerging trends.*

*The research identifies key issues pertaining to the enforcement of foreign arbitral awards, including challenges related to public policy, judicial intervention, and compliance with international standards. Through a comprehensive examination of relevant literature, the study aims to contribute to a deeper understanding of the enforcement landscape in India and its alignment with international best practices.*

**Keywords:** *Foreign Arbitral Awards, Enforcement, India, New York Convention, UNCITRAL Model Law, Judicial Intervention, Public Policy, International Commercial Arbitration.*

## I. INTRODUCTION

The enforcement of a foreign arbitral award in India is founded on the fundamental principle of minimal judicial intervention in order to further India's pro-arbitration and consequently pro-foreign investment climate. In order to achieve this goal, the laws relating to the enforcement of foreign arbitral awards have been systematically amended to limit the scope of defenses available to unsuccessful parties and prevent the courts from undertaking a wide interpretation of the available defenses. As such, a large number of foreign arbitral awards are successfully

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enforced in India.

The practice shows that, however, growing numbers of arbitral awards face various obstacles when they come to recognition and enforcement. Consequently, arbitration would be rendered worthless unless its final outcome; the arbitral award, is duly recognized and enforced with minimal procedural delay. Therefore, international efforts have been made to enhance and foster recognition and enforcement of international arbitral awards. Those efforts have resulted in a number of international treaties were entered into between different countries, aiming at creating unified and harmonized rules for recognition and enforcement of foreign arbitral awards. The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (NYC) is considered, worldwide, to be the most important treaty in respect of recognition and enforcement of foreign arbitral awards. It followed by the UNCITRAL Model Law 1985 which provides, with the Convention, for international legal framework for recognition and enforcement of foreign arbitral awards.

This study is concerned with enforcement of Foreign Arbitral Awards under the relevant regimes in India, both local and International. The easy enforceability of arbitration awards is considered one of the main factors in success of International Commercial Arbitration. This paper attempts a comprehensive analysis of requirement and procedures for recognition and enforcement of foreign awards in India but also evaluate whether Indian laws and practice comply with best international practice standards.

#### **(A) Literature Review**

1. **Adi Shroff** in her paper titled *“Enforcement in India of Foreign Commercial Awards”* talks about multilateral treaties wherein agreements regarding commercial trade arbitration is found like the Geneva Protocol on Arbitration Clauses of 1923, the Geneva Convention on the Execution of Foreign Awards of 1927, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The author further discusses, in detail, the enforcement in India of foreign awards of commercial arbitration.
2. **Himanshu Handa** in his paper titled *“Enforcement of Domestic and Foreign Arbitral Awards in India”*, deals with foreign awards which are in consonance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 or Convention on the Execution of Foreign Arbitral Awards, 1927. The author also focuses on the requirements and limitations of enforcement of arbitral award in India.
3. **Michael Hwang**, in the book, *“The Asian Leading Arbitrators' Guide to International Arbitration”*, talks about the power of recognition and enforcement of foreign arbitral

awards and their fundamental importance in the arbitral process. The author lays down the legal framework generally adopted by countries around the world for the enforcement of arbitral awards. He further sets out the various ways in which Asian countries had deviated from this general practice.

4. **A. K. Ganguli** in his paper titled “*Emerging Trend in the Enforcement of Arbitration Awards*”, details out the public policy of India and how it connects to the enforcement of foreign arbitral awards. The author deals with domestic as well as international arbitration laws. He has laid out various cases dealing with international commercial arbitration and the enforcement of their arbitral awards, while also studying the limitations of enforcement of such awards.
5. **Gourab Banerji** in his article, “*Judicial Intervention in Arbitral Awards: A Practitioner's Thoughts*”, outlines the problem areas of arbitration laws in India and analyses Section 34 of the Arbitration Act, under which an arbitral award can be challenged. The author also examines the history of the 1996 Arbitration and Conciliation Act briefly, outlining how it evolved from the UNCITRAL Model Law. He argues that the criticism levelled at the Supreme Court's conception of public policy is misplaced.

#### **(B) Statement of research problem**

India forms a vital cog of the wheel of the global economy. The ever-increasing level of globalization has led to raise international business disputes too. In this context, the enforcement of foreign judgment and foreign Arbitral Awards becomes significant. A foreign judgment may be enforced in India either by proceedings in execution or by a suit upon it. An arbitral award is a determination on the merits by an arbitration tribunal in arbitration, and is analogous to a judgment in a court of law. Arbitration is particularly popular as a means of dispute resolution in the commercial sphere. One of the reasons for doing so is that in international trade, it is often easier to enforce an arbitration award in a foreign country than it is to enforce a judgment of the court. The enforcement of foreign arbitration awards in India is governed by the Arbitration and Conciliation Act, 1996 through New York Convention and Geneva Convention and a nonconventional award will be enforceable in India under the common law grounds of justice, equity and good conscience.

The recognition and enforcement of arbitral awards is of fundamental importance in the arbitral process. Proper recognition and enforcement of arbitral awards serves both as a means of ensuring the effectiveness of the arbitral process, and also as a key factor favouring the use of arbitration in preference to other modes of dispute resolution. Parties choose arbitration as a

dispute resolution process with the expectation that, absent a settlement, an award will be rendered at the end of the arbitral process.

The Arbitration Act of 1996, though a good piece of legislation, in its actual operation and implementation by all concerned - the parties, the arbitrators, the lawyers and the courts - proved ineffective. This paper analyses these concepts of recognition and enforcement of foreign arbitral awards and lays down the shortcomings present in our system.

### **(C) Research Question**

1. What constitutes as a foreign arbitral award?
2. What is the process of enforcement of foreign arbitral awards in India?
3. What are the requirements and conditions of enforcement of foreign arbitral awards?
4. How is court intervention a hurdle in enforcement of foreign arbitral awards?
5. What is the status quo of the enforcement of foreign arbitral awards?

### **(D) Research Methodology**

The research paper is an attempt of exploratory research, based on the secondary data sourced from journals, magazines, articles, books and media reports. Keeping in view of the set objectives, this research design was adopted to have greater accuracy and in-depth analysis of the research study. Available secondary data was extensively used for the study. The investigator procures the required data through secondary survey method. Different news articles, Books and Web were used which were enumerated and recorded.

### **(E) Limitation**

The study is only theoretical in nature and does not collect empirical data from a sample. Further, the study is taken in the perspective of India as well as other countries. Future studies may also include an analysis of enforcement of foreign arbitral awards across all countries.

## **II. DEFINITION OF FOREIGN ARBITRAL AWARDS**

Foreign award is vaguely defined by the 1937 Arbitration Act as well as by 1961 Arbitration Act. The term is used in connection with arbitration in foreign lands by foreign arbitration to which foreign law is applicable and which a foreign national is involved.

Section 2 of the 1937 Act states that, in this Act “foreign award” means an award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924. The term “foreign award” came up for discussion between Punjab and

Haryana High Court in *Lachman das Sat lal v. Parmeshri Das*<sup>2</sup> dispute arose between parties regarding the quality and quantity of goods sent to purchasers. An arbitrator was appointed by respective firm but appellants failed to appoint anyone. The sole arbitrator made an award in favour of respondent. It was this award which respondent sought to enforce under provisions of Indian Arbitration Act of 1940. The contention of appellants was that an award in question was a foreign award and hence Indian Arbitration Act 1940 had no application.

### III. PROCEDURE FOR ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

#### (A) The Principle Of Lex Fori

This issue is addressed by the conventions that with the enforcement of foreign arbitral awards in India actual enforcement procedure is governed by the *lex fori*<sup>3</sup>. The New York Convention clearly indicates that the rules of procedure for recognition and enforcement are governed by the national law of the place where the enforcement is sought. Article III of the Convention provides that “*Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.*”

The principle of attribution of the rules related to *lex fori* has been adopted from various conventions that apply in India. An award rendered in accordance with the Washington Convention has the effect of *res judicata* in all member States, as if it were a final judgment of the court of the state. However, the Convention assigns the rules of procedure to the national law of the place where an award is enforced, stating that “the execution of an award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought.”

#### (B) Procedural rules for enforcing foreign arbitral awards

Generally national rules of procedure governing enforcement of foreign arbitral awards fall into one of the following categories:

- (1) specific provisions governing rules of procedure;
- (2) one rule of procedure is used for all foreign awards;
- (3) employment of same rules of procedure as pertains to enforcement of foreign judgment;
- (4) employment of same rules of procedure as pertains to enforcement of domestic awards.

In this section there is examination of detailed rules of procedure to be followed. The ultimate

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<sup>2</sup> Lachman das Sat lal v. Parmeshri Das AIR 1958 P H 258

<sup>3</sup> Sulamérica Cia Nacional De Seguros S.A.v. Enesa Engenharia S.A. [2013] 1 WLR 102

goal of parties concerned with International Commercial Arbitration is that when losing party fails to carry out the award, the winning party will take steps to enforce performance of it without delay. The losing party may challenge the award with the hope that it will be set aside or at least varied in some way to benefit it. Majority of awards are performed voluntarily but sometimes it is necessary to ascertain the means by which an award can be enforced in law. A state may not be willing to give credit to awards rendered by foreign arbitral tribunal or those based on some foreign legal procedure. The ultimate sanction for non-performance of an award is an execution by court proceedings varies from country to country in respect of enforcement of foreign arbitral award<sup>4</sup>.

A foreign award could be enforced under multilateral convention viz; Geneva Convention 1927 and New York Convention 1958 which were effect by enacting Arbitration (Protocol & Enforcement) Act, 1937 and Foreign Awards (Recognition & Enforcement) Act, 1961. Enforcement in case where parties to either of convention were enforceable in India on the same ground and in the same circumstances as in which they were enforceable under general law on ground of justice, equity and conscience.

#### IV. CONDITIONS FOR ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The conditions for enforcement of a foreign award are as per the New York Convention. The only addition is an ‘Explanation’ to the ground of public policy which states that an award shall be deemed to be in conflict with the public policy of India if it was induced or affected by fraud or corruption.

Indian courts have narrowly construed the ground of public policy in relation to foreign awards. In *Renu Sagar Power Co. v. General Electrical Corporation*<sup>5</sup>, the Supreme Court construed the expression ‘public policy’ in relation to foreign awards as follows: “*This would mean that ‘public policy’ in s 7(1)(b)(ii) has been used in narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India ... Applying the said 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.*”

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<sup>4</sup> Ulian D. M. Lew, ‘Final Report on Intellectual Property Disputes and Arbitration’ (ICC 1997) [https://library.iccwbo.org/content/dr/COMMISSION\\_REPORTS/CR\\_0013.htm](https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0013.htm) (visited on 16 October 2021)

<sup>5</sup> *Renu Sagar Power Co. v. General Electrical Corporation* (1994) Supp (1) SCC 644.

## V. PROCEDURE AND GROUND TO CHALLENGE FOREIGN AWARD: A JUDICIAL CREATION

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 made but there is no provision to set aside a foreign award in India. This fundamental distinction between a foreign and a domestic award has been obliterated by the Supreme Court in the recent ruling of *Venture Global Engineering*<sup>6</sup>. Here, the Supreme Court was concerned with a situation where a foreign award rendered in London under the Rules of the London Court of International Arbitration ('LCIA') was sought to be enforced by the successful party (an Indian company) in the District Court, Michigan, United States of America ('USA'). The dispute arose out of a joint venture agreement between the parties. The respondent alleged that the appellant had committed an 'event of default' under the shareholder's agreement and as per the said agreement it exercised its option to purchase the appellant's shares in the joint venture company at book value. The sole arbitrator appointed by the LCIA allowed the claim and directed the appellant to transfer its shares to the respondent. The respondent sought to enforce this award in the USA. The appellant filed a civil suit in an Indian district court seeking to set aside the award. The district court, followed by the High Court, on appeal, dismissed the suit holding that there was no such procedure envisaged under Indian law.

However, the Supreme Court on appeal, extending its earlier decision in the case of *Bhatia International v. Bulk Trading*<sup>7</sup>, 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 (i.e. it applied the domestic award provisions to foreign awards). The court held that the property in question is situated in India and necessarily Indian law would need to be followed to execute the award. In such a situation the award must be validated on the touchstone of public policy of India and the Indian public policy cannot be given a go through the device of the award being enforced on foreign shores.

The *Venture Global* case<sup>8</sup> is far reaching as it creates a new procedure and a new ground for challenge to a foreign award not envisaged under the 1996 Act. The new procedure is that a person seeking to enforce a foreign award has not only to file an application for enforcement under Section 48 of the 1996 Act, it has to make an application under Section 34 of the 1996 Act seeking to set aside the award. The new ground is that not only the award must pass the

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<sup>6</sup> *Venture Global Engineering v. Satyam Computer Services*, (2008) 4 SCC 190

<sup>7</sup> *Bhatia International v. Bulk Trading* 2002 (4) SCC 105

<sup>8</sup> *Supra* note 6



New York Convention grounds incorporated in Section 48, it must pass the expanded 'public policy' ground created under Section 34 of the Act. In practice, the statutorily enacted procedure for enforcement of a foreign award would be rendered superfluous till the application for setting aside the same is decided. The statutorily envisaged public policy grounds for challenge to an award would also be rendered meaningless as the award would have to meet the expanded 'public policy' test and virtually have to meet a challenge to the award on merits before it can be enforced. The Venture Global case, thus, largely renders superfluous the statutorily envisaged mechanism for enforcement of foreign awards and replaces it with judge-made law.

#### (A) Requirements For Enforcement Of Foreign Arbitral Awards

The procedure for enforcement of arbitral awards is pretty much the same in the new Act as under the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention), Act 1937. The reason that there are no qualitative differences is because the New York Convention and the Geneva Convention themselves provide for the procedure for enforcement which are merely given statutory recognition by way of an enabling legislation and the same continues under the new Act. The requirements that are essential for a foreign arbitral award to be enforceable under the Arbitration and Conciliation Act are listed as follows:

- a) **Commercial Transaction:** The award must be given in a convention country to resolve commercial disputes arising out of a legal relationship. In the case of *RM Investment & Trading v. Boeing the Supreme Court*<sup>9</sup> observed that the term "commercial" should be liberally construed as having regard to manifold activities which are an integral part of international trade.
- b) **Written Agreement:** The Geneva Convention and the New York Convention provide that a foreign arbitral agreement must be made in writing, although it need not be worded formally or be in accordance with a particular format.
- c) **Agreement must be Valid:** The foreign award must be valid and arise from an enforceable commercial agreement. In the case of *Khardah Company v. Raymon & Co. (India)*<sup>10</sup>, the Supreme Court held that an arbitration clause cannot be enforceable when the agreement of which it forms an integral part is declared illegal.

In the case of *Koch Navigation v. Hindustan Petroleum Corporation*<sup>11</sup>, the Supreme Court

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<sup>9</sup> RM Investment & Trading v. Boeing AIR 1994 SC 1136

<sup>10</sup> Khardah Company v. Raymon & Co. (India) AIR 1962 SC 1810.

<sup>11</sup> Koch Navigation v. Hindustan Petroleum Corporation AIR 1989 SC 2198

held that courts must give effect to an award that is clear, unambiguous and capable of resolution under Indian law.

### **(B) Appropriate Jurisdiction**

The Indian Supreme Court has accepted the principle that enforcement proceedings can be brought wherever the property of the losing party may be situated. This was in the case of Brace Transport Corporation of *Monrovia v. Orient Middle East Lines Ltd*<sup>12</sup>. The court here quoted a passage from Redfern and Hunter on Law and Practice of International Commercial Arbitration<sup>13</sup>, inter alia, as follows: “A party seeking to enforce an award in an international commercial arbitration may have a choice of country in which to do so; as it is sometimes expressed, the party may be able to go forum shopping. This depends upon the location of the assets of the losing party. Since the purpose of enforcement proceedings is to try to ensure compliance with an award by the legal attachment or seizure of the defaulting party’s assets, legal proceedings of some kind are necessary to obtain title to the assets seized or their proceeds of sale. These legal proceedings must be taken in the state or states in which the property or other assets of the losing party are located.”

## **VI. GROUNDS FOR REFUSAL OF FOREIGN ARBITRAL AWARDS**

Section 48 of the New York Convention and Section 57 of Geneva Convention of the Act of 1996 lay down the grounds where the enforcement may be refused if the objector can prove one of the following grounds:

- i. Incapacity:** That a party to the arbitration agreement was, under the law applicable to him, under some incapacity;
- ii. Invalid Arbitration Agreement:** That the ‘arbitration agreement’ was invalid under the law to which the parties subjected it, or, failing any indication thereon, under the law of the country where the award was made;
- iii. Due Process:** That a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
- iv. Jurisdictional Defect:** that the award deals with a difference not contemplated by the terms of arbitration agreement.
- v. Composition:** That the composition of the arbitral authority or the arbitral procedure was

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<sup>12</sup> Brace Transport Corporation of Monrovia v. Orient Middle East Lines Ltd. 1995 Supp (2) SCC 280

<sup>13</sup> Redfern and Hunter on Law and Practice of International Commercial Arbitration (Sweet and Maxwell, First Edition, 1986).

not in accordance with the agreement of the parties, or failing such agreement, with the law of the country where the arbitration took place.

- vi. That the award has not yet becomes 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, it was made.

**Section 48 and 57 further enumerate the grounds where the court may also refuse to enforce a foreign award if it finds:**

- i. That the award is in respect of a matter which is not capable of settlement by arbitration under the laws of India. In the case of *Fuerst Day Lawson Ltd. v. Jindal Export Ltd*<sup>14</sup>. the Supreme Court held that once the court determines that a foreign award is enforceable it can straightaway be executed as a decree. In other words, no other application is required to convert the judgment into a decree.
- ii. That the enforcement of the foreign award would be contrary to public policy of India. The violation of rules of public policy is a ground for refusal of enforcement or a ground for setting aside. Indian law does not restrict (or extend) this ground to violation of International Public Policy even where the arbitration is an international commercial arbitration. Where enforcement of a foreign award is sought in any Court in India, the rules of public policy applicable will only be the “Public Policy of India”.

## VII. CONCLUSION

Simplifying the process of enforcing foreign arbitration awards is considered to be one of the main factors in success of International Commercial Arbitration. If an award had no effective enforcement mechanism, the value of International Commercial Arbitration would be significantly diminished. If an award could not be enforced, the whole system of arbitration would collapse and arbitration awards would become mere words written on paper.

New separate provisions governing enforcement of foreign arbitral awards in India should be inducted. The words used by new provisions should leave room for courts in India to exercise their residual discretion to grant enforcement when ground for refusing is established. This can be achieved by using word may rather than shall in context of provisions dealing with grounds for resisting enforcement of foreign arbitral awards.

A requirement should be introduced that minimal evidence should have to be tendered by party applying for foreign arbitral awards. A provision should be created making distinction between domestic and international public policy in context of foreign arbitral awards. Public policy is

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<sup>14</sup> Fuerst Day Lawson Ltd. v. Jindal Export Ltd. 2001 (6) SCC 356

potentially unlimited in scope a distinction between domestic and international public policy can encourage enforcing courts in India to adopt a narrower definition of public policy as ground for refusing foreign arbitral awards.

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