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Enforceability of Foreign Awards in India: Issues and Challenges

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ABSTRACT

Arbitration and Conciliation Act, 1996 (hereinafter referred as "Act") governs the enforcement of foreign arbitration awards through Geneva and New York Convention. Recent years remark an expansion in the international trade which necessitates speedier mechanism of dispute resolution mechanism for dispute arising out of international contracts. However, it is still a complicated and time-consuming process to enforce an award in one country which is announced in any other country.

This paper deals with the position of India. It explores the meaning of Foreign Awards as prescribed under the Act and various laws relating with the enforcement of Foreign Awards in India. It further discusses the role of Indian judiciary in enforcement of Foreign Awards through landmark judgments.

Even after enactment of various laws in this regard enforcement of Foreign Arbitral Awards is still problematic. So, this paper describes various problems which make it quite difficult to execute foreign awards in India. Further it depicts the impact of Public Policy on Foreign awards and the lastly it concludes with the suggestions as a way forward to strengthen the ADR mechanism in general and to overcome the difficulties faced so far in enforcement of foreign awards in particular.

I. INTRODUCTION

With the recent expansion of International trade, there is a great need for a justice mechanism to settle the dispute arising out of contract between various states of the world. Due to complicated and time-consuming procedure of court system Arbitration has emerged as one of the favourites Alternative Dispute Redressal mechanisms on the world stage. There has been a significant increase in the number of business organization opting for Arbitration proceeding as the preferred method for resolving their disputes.

India being an arbitration friendly nation, govern the enforcement of foreign arbitral award

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through New York Convention and Geneva Convention as provided under the Act. But still there are various problems affecting the smooth implementation of Foreign Arbitral Awards in India. Despite the Constitution of India advocating for the resolution of disputes through Arbitration, the enforcement of a Foreign Arbitration Award still remains a major challenge in India.

An Arbitral award refers to the decision given by an arbitral tribunal. The definition of arbitral award also includes an interim award by tribunals. This definition of arbitral award is as per Section 2(1) (c) the Act. Both Code of Civil Procedure, 1908 (hereinafter referred as CPC) and Arbitration and Conciliation Act, 1996 govern the enforcement and execution of Arbitral awards in India. Public policy concept also plays a major role in deciding whether the arbitral awards which are passed by foreign courts outside the territorial limits of India are enforceable in India or not. The role of Indian Judiciary also becomes significant in establishment of the smooth ADR regime and enforcement of foreign awards.

This paper aims to describe the manner and procedure in which the arbitral awards which are passed in any foreign nation outside the territorial limits of India are enforced in India and various complexities which arises during this process. Further the paper depicts the recent judgment related to foreign awards enforcement and the interventionist role played by Indian Judiciary to solve various complexities arising in the enforcement mechanism.

II. FOREIGN AWARDS, MEANING

Section 44 of the Arbitration and Conciliation Act, 1996 defines a Foreign Award as an arbitral award on the differences relating to the matters considered as commercial under the law in force in India. Two conditions are needed to be fulfilled in order for an award to be qualified as a "Foreign Award". One, it needs to deal with the differences arising out of a legal relationship that is commercial or is considered commercial, under the laws in force in India. Two, the country issuing the award must be a country that has been notified by the Indian government to be a country to which the New York Convention applies. India itself is a signatory to this convention. Only those awards, as issued by these countries, are recognized as Foreign Awards and are enforced in India. The enforcement of these awards is governed by the second part of the Arbitration Act.

The provisions of this section are a verbatim reproduction of Section 2 of the Foreign Awards (Recognition and Enforcement) Act, 1961 except few minor changes. In order to come to conclusion that a particular award is a foreign award, the following conditions have to be satisfied. Firstly the legal relationship between the parties must be commercial. Secondly, the

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award must be made in pursuance of an agreement in writing. And thirdly the award must be made in a convention country.[3]

The expression "commercial" should be construed broadly having regard to the manifold activities which are integral part of the international trade today. While construing the expression Commercial Relationship aid can also be taken from the Model Law prepared by the UNICITRAL wherein relationships of a commercial nature include "commercial representation or agency" and "consulting". Etymologically, the expression commercial relationship takes its colour from the word commerce and connotes a relationship arising out of commerce.[4]

The expression legal relationship whether contractual or not, considered as commercial under the law in force in India means that not only the relationship should be commercial but such relationship should be considered as commercial under the law in force in India. The use of word under is deliberate and that predicates courage. If the expression commercial relationship is interpreted as normally understood in the legal parlance, it would render the words "under the law in force in India".[5]

When the statutes uses the words "law in force in India", such use of words could never have contemplated a reference to any particular law and while it may, in a given case in the context, refer to a law on the particular subject, generally such words are used when reference is made to the general body of laws operated in India.[6]

The mere use of the word 'under' preceding the words 'law in force in India' would not necessarily mean that one has to find a statutory provision or a provision of law which specifically deals with the subject of particular legal relationship being commercial in nature. If the word under is construed in the sense of the meaning according to the law of India or according to the law in force in India, such a construction cannot mean that the court is not giving a meaning to all the words used in Section 2 or that any part of the section is being ignored.[7]

A three-step process is followed for the enforcement of a Foreign Award in India. First, the party, in whose favour the award is issued, will make an application under Section 47 of the Arbitration and Conciliation Act along with all the evidence. Second, the party against whom

[3] Centro Trade Minerals & Inc v. Hindustan Copper Ltd, 2006 (2) Ard LR 547 (SC).
[4] Indian Organis Chemicals Ltd v. Chemtex Fibers Inc., AIR 1978 Bom 106.
[5] C.O.S.I.D.Inc V. Steel Authority of India, AIR 1986 Del 8.
[6] European Grain& Shipping Ltd.v. Bombay Extraction Pvt. Ltd., AIR 1983 Bom 36.
[7] Tamil Nadu Electricity Board v. Videocon Power Ltd, 2009 (4) Arb LR 563.

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the award is issued is required to raise a defense prescribed under Section 48 of the act along with all the evidence. Lastly, if, on the basis of all the evidence adduced by the parties, the court is satisfied that the award is enforceable, it will enforce it under Section 49 of the act.

There are two major differences in the enforcement of a domestic award and a Foreign Award. First, a Foreign award is not capable of being executed as a decree by itself. A procedure is required to be followed for its execution, Second, the provision of setting aside a foreign award is absent. The only power that an Indian court has in this regard is to either enforce it or refuse to enforce it. The problems created by this gap has been recently rectified by the Supreme Court in *Venture Global Engineering v. Satyam Computer Services Ltd and Anr*[8], where it said that a foreign award can be set aside by an Indian Court under Section 34 of the Act.

Where the subject matter of a Foreign Award is money, the jurisdiction will lie with the Commercial Division of those High Courts, in whose jurisdiction, the assets of the opposite party shall lie. In case the subject matter of the award is otherwise, the jurisdiction will lie with the Commercial Division of those High Courts which would have jurisdiction if the subject matter of the award was a subject matter of a suit.

As for the question of limitation on foreign awards, different High Courts have given divergent views. The High Court of Bombay, in *Noy Vallesina v Jindal Drugs Limited*[9], has said that since a Foreign Award is not a decree per se and requires enforcement by a competent court, its application would fall within the residuary provisions of the Limitation Act, i.e., the limitation period will be 3 years. On the other hand, the High Court of Madras, in *Compania Naviera 'Sodnoc' v. Bharat Refineries Ltd*[10], referred to the Foreign Awards as deemed decrees and held that the limitation period will be 12 years. The Calcutta High Court, in *Rudolf A Oetkar v. Mohammed Ori*[11] held that the residuary Article 113 of the Limitation Act, 1963 would apply in the case if a suit is filed seeking to enforce the foreign arbitration award and if an application seeking enforcement of the domestic arbitration award is filed Article 137 would apply.

The Supreme Court, in *M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd*[12], held that a single proceeding can have different stages. A court can, in one stage, decide upon the enforceability of the award. Once the enforceability is decided, it can take further steps for execution of the

[8]Venture Global Engineering v. Satyam Computer Services Ltd and Anr Appeal (civil) 309 of 2008.
[9] Noy Vallesina v Jindal Drugs Limited, 2006 (3) ARBLR 510 Bom.
[10] Compania Naviera 'Sodnoc' v. Bharat Refineries Ltd AIR 2007 Mad 251.
[11] Rudolf A Oetkar v. Mohammed Ori 1999 SCC Online Cal.
[12] M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd, Appeal (civil) 3594 of 2001.

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same.

The Arbitration and Conciliation Act, 1996 has distinguished between an award that is awarded by an Arbitration tribunal seated in India and that which is awarded by a foreign seated Arbitration tribunal. The process to be followed for the execution of a domestic award is different from that of a Foreign award.

The language of Section 45 read with Schedule I of the Act 1996 Act is worded in favour of making a reference to arbitration when a party or any person claiming through or under him approaches the court and the court is satisfied that the agreement is valid, enforceable and operative. Because of the legislative intent, the mandate and purpose of the provisions of Section 45 being in favour of arbitration the relevant provisions would have to be construed liberally to achieve the objects. Section 45 is enacted materially on the lines of Article II of this convention. This section opens with a non obstante clause giving overriding effect to the provisions contained therein and making it prevail over anything to the contrary contained in any other Act or the Code of Civil Procedure.[13]

III. LAWS REGARDING ENFORCEMENTS OF FOREIGN AWARDS IN INDIA

Foreign Awards in India are governed by multiple laws and principles laid down by the Courts in various landmark judgments. This part explains those principles and laws in detail.

Doctrine of merger

A foreign judgment only creates a new obligation to pay but does not distinguish the original cause of action for the debt, and that a foreign judgment involves no merger of the original cause of action and creditor who obtained a foreign judgment has two remedies open to him; either to bring an action in domestic tribunal on the foreign judgment or to bring an action in the tribunal on the original cause of action.

The doctrine of merger equally applies in case of appellate arbitrations, such that on the issue of appellate award, the original award merges with it and the appellate award is valid and capable of enforcement.

Doctrine of merger is no bar to the enforcement of a foreign award. A foreign award cannot be enforced if it has as yet not become binding on parties or has been set aside or suspended by a competent authority of the country in which or under the law of which the award was made.

[13] Remusagar Power Co. Ltd v. General Electric Co. Ltd., AIR 1985 SC 1156.

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Doctrine of Severability

The principle of severability permits the parties to agree that law of one country would govern the substantive contract and laws of another country would apply to the arbitration agreements. The parties can also agree that even the conduct of the reference would be governed by the law of another country. This would be rare, as it would lead to extremely complex problems. It is with this objective in mind that the business men would not intend absurd results. Under the Arbitration and Conciliation (Amendment) Act, 2015 there are two avenues for enforcement of foreign awards in India, viz., the New York Convention and the Geneva Convention, as the case may be.

Sections 44 to 52 of the Arbitration and Conciliation (Amendment) Act, 2015 deals with foreign awards passed under the New York Convention. It defines "foreign award" as 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 may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

There are two prerequisites for enforcement of foreign awards under the New York Convention. These are:

a. The country must be a signatory to the New York Convention.

b. The award shall be made in the territory of another contracting state which is a reciprocating territory and notified as such by the Central Government.

Section 47 deals with the evidence which the parties shall produce before court:-

(a) Original award or a duly authenticated copy

(b) Original arbitration agreement or a duly certified copy

(c) Any evidence required to establish that the award is a foreign award.

The new Act prescribes that the application for enforcement of foreign award will only lie to High Court. Once an application is made, the other party has opportunity to file an objection against enforcement on the grounds recognized under Section 48 of the Act.

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These grounds include:

a. the parties to the agreement referred in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made

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

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.

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced

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

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.

f. the subject-matter of the difference is not capable of settlement by arbitration under the law of India

g. the enforcement of the award would be contrary to the public policy of India.

The Amendment Act has restricted the ambit of violation of public policy for international commercial arbitration to only include those awards that are:

(i) Affected by fraud or corruption,

(ii) In contravention with the fundamental policy of Indian law

(iii) Conflict with the notions of morality or justice.

It is further provided that if an application for the setting aside or suspension of the award has been made to a competent authority, the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may if required can order the other party to give suitable security.

Section 49 provides that where the Court is satisfied that the foreign award is enforceable under

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this Chapter, the award shall be deemed to be a decree of that Court.

IV. INDIAN JUDICIARY AND RECENT TRENDS IN ENFORCEMENT OF FOREIGN AWARDS

This chapter deals with how the Indian judiciary has looked at the enforcement of the foreign arbitral award in recent cases. World over in order to usher in a pro arbitration regime, the focus of the national courts across jurisdictions has been to uphold party autonomy and limiting the role of the courts in the arbitral process. The situation is same in India wherein the courts have constantly been upholding the doctrines of minimum interference and party autonomy in all stages of arbitration.

In India, the party can approach the court in all three stages of arbitration proceeding. Indian courts have always made the parties arbitrate their disputes if the same had been envisaged in their agreement, rather than litigate the disputes in the national courts. The aforementioned assertion is made in the view of the fact that courts in the country have constantly refused anti-arbitration injunctions and have also refused to interfere with the enforcement of the foreign arbitral awards as well.

Interpretation of the term "Public Policy"

Even if the drafters of the New York Convention did not seek overtly to attempt to harmonize public policy by establishing an international standard, the Convention refers to the "public policy of that country".[14]

It is noted in the Committee's report that it intended to limit the application of the public policy provision to cases in which recognition and enforcement of the award would be "distinctly contrary to the basic principles of the legal system of the country where the award is invoked". In this context, it must be realized that art.V.2 of the Convention reduces the application of the public policy in two ways: firstly, in the introductory sentence, by the word "may", permits, but does not mandate refusal and thus gives the court discretion in this regard; and secondly, the paragraph (b) requires that not only the award, but the recognition and enforcement itself would be contrary to public policy.

Public policy exception is referred to in most other enforcement conventions. The 1927 Geneva Convention on enforcement of foreign arbitral awards stated that an award would be enforceable unless "contrary to the public policy to the principles of the law the country in

[14] Retrieved from https://www.lawteacher.net/free-law-essays/international-law/public-policy-as-a-limit-to-the-enforcement-of-foreign-arbitral-law-essay.php Last Seen 03/03/2019

which it is sought to be relied upon". The 1975 Inter-American Panama Convention on international commercial arbitration makes reference to the "public policy of that State". The 1979 Montevideo Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards requires that the award be "manifestly contrary to the principles and laws of the public policy of the Exequatur State".

The UNCITRAL Model Law on international commercial arbitration of 1985 includes "public policy" as a ground for refusing arbitral awards, in essence reflecting the New-York Convention. It doesn't, however, define "public policy".

An award, issued in violation of the Public Policy of India, will not be enforceable in India. An award issued against public policy is a defence against the enforcement of such awards. The courts in India are bound to refuse the enforcement of an award, which is in contravention of the public policy in India.

Law Commission Report (246th), August 2014

- Settling aside the Arbitration Awards:
- As the Act is currently drafted, the grounds for setting aside an award under Section 34 and conditions for refusal of enforcement of an award under Section 48 are in *pari materia*.
- The Commission recommends addition of Section 34(5) and 48(4) which require that an application under those sections shall be disposed of expeditiously and in any event within a period of one year from the date of service of the notice.
- An award to be set aside on the grounds "public policy" only if it is opposed to the "fundamental policy of Indian law" or if it is in conflict with "most basic notions of morality or justice".

In the case of, ***Shri Lal Mahal Ltd. v. Progetto Grano Spa***[15] the Hon'ble Supreme Court passed a landmark ruling on its own decision and significantly curtailed the scope of the expression, "public policy" as present under Section 48(2) (b) of the Arbitration Act and thereby limited the scope of the challenge to enforcement of the foreign arbitral awards in the country. It is important to note that previously the national courts were giving a very wide import to the word "public policy" to interfere with the foreign arbitral awards. The court had observed that Section 48 of the Arbitration Act does not in any way offer an opportunity to have a second look at the foreign award at the enforcement stage. The court affirmed that section 48 does not

[15] *Shri Lal Mahal Ltd. v. Progetto Grano Spa* Civil Appeal No. 5085 of 2013 arising from SLP(c) No. 13721 of 2012.

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permit review of the award on merits, and that the procedural defects in course of foreign arbitration do not necessarily imply that foreign award would be unenforceable.

Settling the dispute as to what will amount to the violation of Public Policy of India, the Supreme Court, in ***Renusagar Power Co. Ltd v. General Electric Co.*** [16] held that the bar of public policy will be attracted only when there is a violation of something more than Indian Laws. The enforcement would be refused if the award is contrary to the *fundamental policy of Indian law or justice or public morality.*

The Court in ***ONGC v. Saw Pipes Ltd***[17] held that any arbitral award which violates Indian statutory provisions is "patently illegal" and contrary to "public policy." By equating, "patent illegality" to an "error of law", the Court effectively paved the way for losing parties in the arbitral process to have their day in Indian courts based on any alleged contraventions of Indian law, thereby resurrecting the potentially limitless judicial review which the 1996 Act was designed to eliminate. The ONGC case's decision was widely criticized in International community. Three years later the Supreme Court had an opportunity to refer the matter to a larger Bench which it did not though it accepted that ONGC's case had invited considerable adverse comments.

The Bench in Renusagar case held that the term 'public policy of India' was to be interpreted in a narrow sense, the Division Bench in ONGC case went ahead unmindful of the prior precedent and expanded the same to such an extent that arbitral awards could now be reviewed on their merits. This is a huge step backwards in laws relating to alternate dispute resolution in an era of globalization.

The Delhi High Court, in ***Daiichi Sankyo Company Limited v. Malvinder Mohan Singh and Ors.***[18], held that the defence of the ground of public policy can be taken only when the award is against the fundamental policy of India, the interest of India or justice/ morality. It does provide the Indian Courts with an opportunity to take a second look at the award. It further held that claims barred by the limitations, awards of consequential damages and awards against minors are liable to set aside by the Indian Courts.

Other Grounds

The Supreme Court in its judgment in ***Venture Global Engineering v. Satyam Computer Services Ltd***[19] stated: "The provisions of Part I of the Act would apply to all arbitration

[16] Renusagar Power Co. Ltd v. General Electric Co. 1994 SCC Supl. (1) 644.
[17] ONGC v. Saw Pipes Ltd., AIR 2003 SC 2629.
[18] Daiichi Sankyo Company Limited v. Malvinder Mohan Singh and Ors 2018.
[19] Venture Global Engineering v. Satyam Computer Services Ltd., AIR 2008 SC 1061

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including international commercial arbitration and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part-I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part-I. It is also clear that even in the case of international commercial arbitration held out of India provisions of Part-I would apply unless the parties by agreement, express or implied, exclude al or any of its provisions."

Further, in the case of, ***Cruz City 1 Mauritius Holdings v. Unitech Limited***[20] the Delhi High Court refused to intervene in the award wherein one of the challenges to enforcement of foreign arbitral award was that the same is in violation of the foreign exchange laws of India, and it held that "*Even if it is accepted that the Keepwell Agreement was designed to induce Cruz City, to make investments by offering assured returns, Unitech cannot escape its liability to Cruz City. Cruz City had invested in Kerrush on the assurances held out by Unitech and notwithstanding that Unitech may be liable to be proceeded against for the violation of provisions of FEMA, the enforcement of the Award cannot be declined." "... And thirdly, if Cruz City has been induced to make an investment on a false assurance of the Keepwell Agreement being legal and valid, Unitech must bear the consequences of violating the provisions of Law, but cannot be permitted to escape their liability under the Award*."

In another recent case of ***Zee Sports Ltd. v. Nimbus Media Pvt. Ltd***[21] the Bombay High Court refused to interfere with the arbitral award on merits and relied on the judgement in ***McDermott International Inc. v. Burn Standard Co. Ltd***[22] where in the Supreme Court had observed that as under: *The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at a minimum level, and this can be justified as parties to the agreement makes a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.*"

The Hon'ble Kerala High Court in the case of, ***Emmanuel Cashew Industries v. CHI Commodities Handlers Inc***[23], while dealing with challenge to an arbitral award, observed that

[20] *Cruz City 1 Mauritius Holdings v. Unitech Limited, 2017 SCC OnLine Del 7810.*
[21] Zee Sports Ltd. v. Nimbus Media Pvt. Ltd, 2017 SCC OnLine Bom 426.
[22] *McDermott International Inc. v. Burn Standard Co. Ltd,* (2006) 11 SCC 181.
[23] *Emmanuel Cashew Industries v. CHI Commodities Handlers Inc,* MANU/KE/0329/2017.

the mere filing of objections to the foreign award under Section 48 was not enough, and the objector has to furnish "proof" of circumstances to satisfy any of the conditions mentioned in Section 48 of the Arbitration Act to refuse enforcement of the foreign award.

The Delhi High Court in the very recent judgment passed on 31 January 2018, in the case of ***Daiichi Sankyo v. Malvinder Mohan Singh***[24] has refused to intervene in the foreign arbitral award passed in the favour of Daiichi Sankyo and it observed that under Section 48(2)(b) of the Act, the enforcement could be refused only if the award was contrary to the (i) fundamental policy of India (ii) interest of India and (iii) justice or morality. Further, the Delhi High Court affirmed that an award could not be said to be against the fundamental policy of Indian law in case there was violation of provisions of a statute but, only if there was a breach of a substantial principle on which is Indian law is based upon.

Lastly in a very recent judgment, passed in the case of, "***Kandla Export v. Oci Export Corporation***[25] the Hon'ble Supreme Court had the opportunity to interpret the scope of Section 13 of the Commercial Courts Act and Section 50 of the Arbitration Act in the light of the challenge to the execution of the foreign award under Section 13 of the Commercial Courts Act. The Hon'ble Supreme Court took a very pro-arbitration stand and refused to intervene by holding that appeals in respect of the arbitration proceedings are exclusively governed by the Arbitration Act and thereby the appeal provision of the Commercial Courts Act cannot be used be to circumvent the provisions of the Arbitration Act if no appeal is provided under the provisions of the Arbitration Act. In Line with the ***Fuerst Lawson Ltd. v. Jindal Exports***[26] judgment, it was observed that the Arbitration Act was a self-contained code and thereby the amended Section 37 would hold precedence over the general provision contained in Section 13(1) of the Commercial Courts Act. The Hon'ble Supreme Court emphasized that interpretation given in the case was in consonance with the objective of the Arbitration Act, which is to ensure the speedy resolution of the disputes.

These judgments affirm the fact that the Indian courts have taken a very strict adherence to the principle of non-interference with foreign arbitral awards and have taken proactive steps to ensure their speedy execution, and thereby bolstering India's credentials as an arbitration friendly regime which is generally characterized by minimal intervention by the national courts and the speedy resolution of the arbitration proceedings.

[24] Daiichi Sankyo v. Malvinder Mohan Singh on 31 January 2018.
[25] *Kandla Export v. Oci Export Corporation, CIVIL APPEAL NO. 1661-1663 OF 2018 @ SLP(CIVIL) No. 28582- 28584 of 2017*
[26] *Fuerst Lawson Ltd. v. Jindal Exports, (2011) 8 SCC 333.*

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V. PROBLEMS OF EXECUTING FOREIGN ARBITRAL AWARDS IN INDIA

Getting an award issued in your favour, from an international tribunal, does not always mean good news as you still have to get your award enforced in India. Most Arbitral awards are voluntarily complied with. The problem occurs when one of the parties disputes the award and need for its enforcement arises. There have been various cases, where, despite receiving a favourable award, the party failed to get it enforced by a competent court in India. The reasons for these failed enforcements range from one party deciding not to participate in the Arbitral proceedings to other situations where the party has challenged the award on the grounds of cost awarded or the jurisdiction of the Arbitration Tribunal.

Litigation

The Arbitration and Conciliation Act, 1996 was enacted with the purpose to provide a swift method of dispute resolution in the national and international arena. As discussed above, an award issued by a foreign arbitral seat is not automatically enforced in India. The amount of Litigation that is involved in enforcing a foreign arbitral award almost beats its purpose of ensuring swift disposal of disputes. Only a handful of the parties agree to the award issued by the Arbitrators. A majority opts the option of fighting the awards in the Indian Courts at the stage of execution and enforcement. A foreign Arbitration award can be challenged under Section 48 of the Act. It provides for the grounds on which a foreign Arbitral award can be challenged.

These grounds are:

Either party is under some Incapacity

If one or both of the parties, involved in the arbitral proceedings were under some incapacity as per the applicable law, then such an award cannot be enforced. This incapacity can be due to reasons such as involuntariness, fraud, duress, undue influence or misrepresentation.

The Supreme Court, in *Bhaurao Dagdu Paralkar v. State of Maharashtra and Ors*[27], observed that, "*By fraud is meant an intention to deceive; ..... The expression, "fraud" involves two elements, deceit and injury to the person deceived." The* Court further observed that, "*A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe, and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury in ensues therefrom .....*"

[27] Bhaurao Dagdu Paralkar v. State of Maharashtra and Ors, Appeal (civil) 5162-5167 of 2005.

Either party was not given Notice

If either party has not received a notice regarding the appointment of the arbitrator or regarding the arbitral proceedings, it would amount to a violation of the principles of natural Justice. Such awards are liable to be set aside. But if a party has voluntarily decided to sit out of the arbitral proceedings, such awards will be enforced because such sitting was with his free will. Only those awards can be challenged where one of the party was left out for reasons that were beyond its control.

The Arbitral Award is beyond the scope of Arbitration

The Jurisdiction of an Arbitration Tribunal is limited by the terms of reference. No tribunal is supposed to flout these limitations. They are only supposed to adjudicate on the questions that have been submitted and not go beyond that. An award, which is issued in excess of the scope of Arbitration, is liable to be set aside by the Courts.

It is important to note here that if it is possible to separate the awards which are awarded within limits of the terms of the arbitration from those that are awarded by exceeding those limit, it is possible to enforce the former.

Legality of the Composition or Procedure of the Arbitration Tribunal

An award is liable to be quashed if:

1. i) the tribunal that has been composed is not in accordance with the agreement signed between the parties
2. ii) the procedure followed during the arbitration proceedings was not as per the agreement between the parties

iii) if the composition or the procedure of the arbitration is not in accordance with the law of the country where the seat of the arbitration was situated.

Award set aside before its enforcement

If an award, before it becomes binding on the parties, is set aside or suspended by the authorities of that country, in whose jurisdiction it was awarded, it will not be enforceable in the Indian Courts as the Courts of the country which issued the award has the exclusive jurisdiction to set aside the award.

Dispute not capable of being resolved under Arbitration

If the nature of a dispute is such that it cannot be settled under arbitration, either because the subject matter is not capable of being settled under different laws which are currently in force

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in different countries for the time being, or, the subject matter is such that, it is not capable of being enforced under the law currently in force in India. In such a case, the court will refuse the enforcement of the award.

Pressure by the Local Governments

A local party to Arbitration will exercise more political power than a Foreign party. They will try to exert this power to annul the award or at least decrease the quantum of the award. This may result in frustrating the award issued by an International Arbitration Seat. This is due to lack of an authority to supervise the substantive as well as the procedural examination of the enforcement of these awards.

Inconsistent Application of Law

A Foreign Arbitral Award can be enforced in all those jurisdictions where the assets of the opposite party is situated. The possibility that the courts belonging to different jurisdictions will interpret the same award differently, cannot be ruled out. Even if an award issued by Arbitration seated in India, it may not be enforceable in the Jurisdiction of some other country.

VI. CONCLUSION & SUGGESTIONS

Although there exists a proper procedure for the enforcement of Foreign Arbitral Awards in India but still the multiple confusions subsist regarding the enforcement of awards. The already existing procedure is not an effective one and the various instances it has been severely criticized. One of the major criticisms is that the enforcement mechanism of foreign arbitral awards is not a quick and speedy one as it has been stipulated under the Act. The Arbitration and Conciliation Act, 1996 provides that the award can be enforced only once the time available for the court to strike down the same has passed. But it is extremely inconvenient as it leads to inordinate delays in the enforcement of awards passed in an arbitration proceeding by a foreign court which concerns Indian parties. Further, the interventionist role played by Indian Judiciary to solve various complexities arising in the enforcement mechanism is also a bone of contention for many as the main purpose of the Act was to minimize the interventionist role of courts in the arbitral proceedings.

The Act is divided into four parts. The first two parts consists as follows: Part I of the 1996 Arbitration Act deals with domestic arbitration, i.e., those arbitrations where the seat of arbitration is in India. Part II deals with provisions relating to enforcement of New York Convention Awards and Geneva Convention Awards in India.
This has been the basis of all the Arbitration clauses incorporated in the contract between

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various Indian and Foreign companies until now. However, with the recent judgment by the Supreme Court of India in the case of Venture Global Engineering v Satyam Computer Services Limited, Part I of the Act is now made applicable to all international commercial arbitrations, which consequently has led to a great deal of mistrust, confusion and uproar amongst the foreign companies.

Though, Indian legal system has a well establish procedure for the enforcement of foreign awards in India still there is much needed clarity required to establish the trust among the parties choosing Arbitration as the preferred method of ADR. The amendments coupled with the judgments pronounced are a step in the right direction.

With the rising international trade there is a need to reform the existing procedure in order to make it more business friendly and in order to reduce our overburden judiciary. In order to attract foreign investment it is very necessary to have a proficient legal system providing speedier remedies to the foreign investors as well as the parties involved in the dispute including the people of nation country. So, in order to facilitate effective arbitration proceedings and to smoothen the enforcement of foreign arbitral awards certain measures are required to be taken. Indian legislature should take adequate steps to preserve the sanctity of the Alternative Dispute Resolution as unnecessary judicial legislation has affected it severely. Indian courts should avoid the temptation to intervene in the arbitration proceeding as most of the judges have no or less knowledge of various international conventions dealing with the arbitration proceedings like New York and Geneva Convention. It is very essential to maintain the integrity of nation legal system so that the trust of people is maintained in it and unnecessary delays in the proceedings are removed.

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