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Enforcement of Foreign Arbitral Awards in India

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ABSTRACT

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 not only 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 especially embodied in New York Convention 1958 on enforcement of foreign arbitral awards.

This report comprises of five chapters. The first chapter examines legal framework and provides a brief history of rules governing arbitration and enforcement of foreign arbitral awards. Chapter two looks at general principles governing regarding enforcement of foreign arbitral awards. Chapter three covers jurisdiction in enforcement of arbitration awards in India. chapter four examines procedural steps demanded by each state for enforcement of an award, looking particularly at import of relevant international conventions on other issues. Chapter five deals with the limitations in the enforcement of foreign arbitral awards. The concluding chapter talks about discusses brief summary of all the problems and suggest common way forward for legal system of state in dealing with these issues.

There needs to be a lot to be done in the area of arbitration with regard to foreign awards. The Act itself need a review and the precedent set up by the courts are somewhat perplexing. The enforcement of foreign awards require a cooperation at both national and international level. There needs to strike a balance between the New York Convention and Arbitration & Conciliation Act, 1996.

Keywords: *Arbitration, Foreign, Award, Enforcement & India*

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I. INTRODUCTION

Alternative Dispute Resolution is not new experience for people of this country. It has been prevalent since time immemorial. Legal history indicates that down the ages man has been experimenting with procedures for making it easy, cheap and convenient to obtain justice. Ancient system of dispute resolution made a considerable contribution in reaching resolution of disputes relating to family, group and also minor disputes.[2] In 1982, the dispute settlement of court in India started as what is called Lok Adalat, which then brought up in the form of a law Arbitration Act, 1940 which then transform with the dynamic system of globalization as Arbitration & Conciliation Act, 1996. The enforcement of the domestic arbitration award has been well provided under Indian Law, difficulty arises where award is given in any country other than one where it is sought to be enforced. A state may not be willing to give credit to awards rendered foreign national or other based on foreign legal procedure.[3] The domestic court that works under national laws provided for enforcement of domestic awards, there is unquestioned jurisdiction of court to enforce domestic arbitral award. The judicial system in one country does not have inherent jurisdiction in the matters resolved in other country. Thus, recognition and enforcement of an award in international commercial arbitration stands on different footing as compared to domestic arbitral awards.

This report concludes with a few observations on trend of enforcement in India while setting out that in order to preserve the scope and purpose of arbitration. With the right approach, India will soon become one of the leading arbitral jurisdictions of South-East Asia. This is evident from the sincere efforts taken by the Government of India and the change in approach of the national courts dealing with arbitration matters. The new era for international arbitration in India is already in sight. Firstly, the paper discusses about the general history and definition of foreign arbitral awards. Secondly, it talks about the competent authority dealing with enforcement of foreign awards with the role of national courts. Thirdly, it highlights the procedure that is to be followed in the enforcement of foreign awards. Fourthly, I tried to put forwards the limitations or the hurdles in the enforcement of the awards. Lastly, put up the conclusion with some suggestions to make process more efficient.

The enforcement of foreign arbitral awards requires both national and international cooperation. The New York Convention governs the international sphere and the Arbitration

[2]United States Agency for International Development, 1998, 'Alternative Dispute Resolution Practitioners' Guide', Center for Democracy and Governance, USAID, Washington, D.C., https://gsdrc.org/document-library/alternative-dispute-resolution-practitioners-guide/ accessed on 13 March 2021

[3] kumar sumit, Arbitral Award Its Challenge & Enforcement (Legal service India) accessed on 13 March 2021 http://www.legalservicesindia.com/article/433/Arbitral-Award-Its-Challenge-&-Enforcement.html

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& Conciliation Act, 1996 the domestic sphere. The enforcement procedure still lacks certain safeguards which are needed in order to make the procedure more efficient.

II. BRIEF HISTORY

Before analysing the problems concerning enforcement of foreign arbitral awards in India under its existing regulatory enactments, it may be useful to provide a brief description of position before advent of law relating to enforcement of foreign arbitral awards in India. In this chapter an attempt has been made to highlight the problem concerning enforcement of foreign arbitral awards in its historical perspective.

A foreign award may have worldwide recognition in respect of its nature but different legal system on account of their policies takes different views as to its legal effects. Early in development of common law, commercial arbitration was regarded with disfavour by law courts. In kill v Hollister[4] the Kings Bench stated that "extra-judicial attempts to solve disputes by arbitration tended to oust the jurisdiction of the court." This fear led the courts to declare that an agreement to settle further disputes by arbitration was revocable at any time prior to handing down of arbitral award. In common law countries, British law has turned from harsh rule of kill v Hollister towards a policy favouring commercial arbitration. Although arbitration machinery has generally changed, some inconsistencies still exists. There have been multilateral methods to resolve such inconsistencies.

First approach came with the adoption of 1923 Geneva Protocol on Arbitration Clause and 1927 Geneva Convention on Execution of Foreign Arbitral Awards. The award must arise from a valid arbitration agreement, the award must have been handed down by a properly constituted tribunal in conformity with local laws and it must violate public policy of country in which enforcement is sought. There has been an increase in International Commercial Contracts which led to the adoption of UN convention on Recognition & Enforcement of foreign arbitral awards the major disadvantage of the Geneva Conventions was that it before the enactment of foreign awards the matter would have become final in the country where it was rendered.[5] This problem was resolved with the adoption of New York Convention 1958, followed by Foreign Award Recognition & Enforcement Act, 1961 which implement and give effect to New York Convention. The most recent model adopted the UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985 recommended "that all States give due

[4] *kill v Hollister* (1746) 1 Wills. 129.

[5] Jain, Sankalp, Enforcement of Foreign Arbitral Awards: International Conventions and Legal Regime in India (October 11, 2015) SSRN: https://ssrn.com/abstract=2778548 or http://dx.doi.org/10.2139/ssrn.2778548

consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".[6]

Before passing of Arbitration (Protocol & Convention) Act, 1937 there is no law which governed the applicability of enforcement of foreign arbitral awards in India. after 1937 india actively acceded to Geneva Protocol on Arbitration clause of 1923 and also the Convention on Execution of foreign Arbitral Awards 1927. The Foreign Awards Act, 1961 ensured recognition and enforcement of foreign Arbitral Awards in India in accordance with scheme evolved under New York Convention.[7]

III. DEFINITION OF FOREIGN ARBITRAL AWARDS

Foreign award is vaguely defined by the 1937 Act as well as by 1961 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.

Sec 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.[8] The term “foreign award” came up for discussion between Punjab and Haryana High Court in *lachman das Sat lal v. Parmeshri Da*s 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.[9]

IV. COMPETENT AUTHORITY DEALING WITH FOREIGN ARBITRAL AWARDS

Arbitral tribunal itself has no power to enforce its award apart from making an order giving a party authority to enforce the award. Thus, if losing party fails to comply voluntarily with the award, the winning party will seek to enforce in any country where assets of losing party are located. The competent authority dealing with this differs from country to country. Main competent enforcement authorities are either judicial or public offices[10]. Most countries issues

[6] Gamaliel G. Bongco ‘The Enforcement of Foreign Arbitral Agreements and Awards in the Philippines’, (1996) 21Dispute Resolution Journal
[7] K. Venkatramaih, ‘Enforcement of Foreign Arbitral Awards in India’, *Law of International Trade Transaction*
[8] Section 2 The Arbitration (Convention & Protocol) Act, 1937
[9] *lachman das Sat lal v. Parmeshri Das* AIR 1958 P H 258
[10] David, R., *Arbitration in International Trade* , (Kluwer Law Taxation Publishers, Deventer, 1985), pp. 368-369

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enforcement order to give jurisdiction to court to enforce foreign award but there is ambiguity regarding which particular court is entrusted with such jurisdiction. For example, France and Belgium, the competent court to enforce foreign awards is such court which has jurisdiction to enforce national awards.

In India sec 47 of the Act in Part II dealing with enforcement of certain foreign award defined the term court as having jurisdiction over subject matter of the award.[11] This has clear reference to a court within whose jurisdiction the asset or the person is located against whom enforcement of International arbitral award is sought. When the subject matter of award is monetary, the enforcement application is filed in court within whose jurisdiction the bank account of respondent is located. The explanation subject- matter of award under sec 47 is different from subject matter under sec 2(e) Part I of the Act.[12] In order to enforce and execute an award the party has to initiate proceeding as envisaged under sec 47.[13]

In the case, on a critical appraisal of the judgment of the Supreme Court in Badat Co., Bombay v. East, India Trading Co*[14]*. (i) that the cause of action for the plaintiff's suit on the original side of the Bombay High Court, on the basis that it rested on the judgment of the New York Supreme Court is outside the jurisdiction of Bombay High;

(ii) that the arbitral awards lacking the finality as per the law of New York till they actually culminate in a judgment cannot furnish a valid cause of action for the suit before the Bombay High Court.

The first ground contradicts the "doctrine of obligation." The doctrine clearly lays down that despite the rule of non-merger of the original cause of action in the judgment even when a suit is based upon the judgment which furnishes a new cause of action, the question of lack of

[11] Before 21/11/1999 the Commercial Court was the competent Court. This was repealed by Article 2 of Royal Decree No.90/99 of the Promulgation of Judiciary Authority Law, and Articles 36 and 41 of Civil and Commercial Procedure Law issued in 2003.

[12] 2(1)(e). "Court" means –
in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes; in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.

[13] Sec 47. Evidence
Explanation.—In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

[14] *Badat Co., Bombay v. East, India Trading Co* 1964 AIR 538

jurisdiction for the Bombay High Court to entertain the suit can never arise if the said doctrine which finds incorporation in section 13 of the Civil Procedure Code here in India thus making it res judicata.[15] The rule relating to jurisdictional competence of the court in the international arena, the Supreme Court of India all the same failed to appreciate that the procedural rule of relation between jurisdiction and cause of action has no relevance to actions brought for enforcement of foreign judgment. The second ground on which the court based its decision, relegating foreign awards to an inferior position as compared with foreign judgments. In fact, from the point of view of finality or conclusiveness, there is little difference between a foreign arbitral award and a foreign judgment.[16] The court held there is valid cause of action for the enforcement of the foreign award.

The Supreme Court with this laid down the first instance where the foreign award has been accepted in an Indian Court. The judgment itself raises various questions with regard to the foreign judgment and foreign awards. The cause of action and what will be the jurisdiction of court with regard to foreign awards. It is clear under sec 47 that one has to approach Supreme court or High court for enforcement of foreign arbitral awards.

Role of National Courts

As Dr. F A Mann suggested "every arbitration is necessarily subject to the law of a given State. No private person has the right or power to act on any other level other than that of a municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law". It has been suggested that the role of the court is akin to that of an *executive partner* to provide greater effectiveness to arbitral proceedings.[17]

The national court plays a prominent role in international arbitration and has been recognised in many countries. This is generally because arbitration is regulated pursuant to national laws and national courts. This is particularly true at the enforcement stage where award must survive certain statutory conditions for it to be successfully enforced. Once an arbitral award has been rendered national courts may refuse to enforce based on the ground of Article V of the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958.[18] These

[15] V. C. Govindaraj, 'Foreign Arbitral Awards and Foreign Judgments Based upon Such Awards (Based on Badat & Co., Bombay v. East India Trading Co.)' 1964 13 The International and Comparative Law Quarterly pp. 1465-1468

[16] *Ibid*

[17] F.A. Mann, 'Lex Facit Arbitrum' in P. Sanders (ed.), International Arbitration: Liber Amicorum for Martin Domke (1967) 157 at 159

[18] Article V Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought

conditions have been incorporated in national legislation of most countries is signing the New York Convention and adopting UNCITRAL model law. Since, arbitration is a private process the reason behind surpassing power is to safeguard the basic state of fairness and impartiality. The supervisory powers of court are necessary to provide arbitral process with procedure of checks and balances to ensure fair and impartial trial.

It has been argued by supporters of delocalised arbitration that this review process acts as a further tier of review and is contrary to parties intention when signing the arbitration agreement. However, there is little doubt that court's supervisory powers in respect are necessary as it provides the arbitral process with procedure of checks and balances to ensure fair and impartial process. Article V of the New York Convention safeguard fundamental rights of parties in International arbitration and allows parties to challenge the enforcement of arbitral award. It is incapable of being dependent upon the laws of individual states and as a result of that it varies from one state to another. The New York Convention does not particularly provide any guidance for national courts to interpret the public policy defence. The pro-enforcement bias of the international parlance is in itself a public policy. Due to this the national courts interpret public policy at their own discretion and it is evident that in most developed arbitral jurisdiction public policy has been interpreted narrowly. The Supreme Court affirmed the pro-enforcement bias in recent judgment of Vijay Karia v. Prysmian Cavi E. sestemi[19] the court held that the New york Convention is governed by a Pro-enforcement bias which can be applied to national courts.

Indian courts have shown a great propensity towards interfering with International Arbitration. Judicial intervention at award enforcement stage on grounds of public policy is most controversial. In *Renusagar v General Electric*[20], has always been starting point whether one considers the topic of Indian court intervention on grounds of public policy. This decision was based on private international law and was in line with international practice commonly accepted in most developed arbitral jurisdiction such as France and US. It is confirmed that the position only in exceptional circumstances should national courts interfere with arbitral awards on grounds of public policy.

Indian Supreme Court took different approach in *Oil & Natural Gas Corp. v Saw pipes,*[21] The case of saw pipes arose out of a domestic dispute concerning payment of liquidated damages under a supply contract. The matter was referred to arbitration and an award was rendered by

[19] *Vijay Karia v. Prysmian Cavi E. sestemi* 2020 SCC OnLine SC 177
[20] *Renusagar v General Electric* (1994) AIR SC 860
[21] *Oil & Natural Gas Corp. v Saw pipes* (2003) 5 SCC 705

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tribunal which holds that ONGC was not entitled to any liquidated damages since it has failed to establish any loss as a result of late supply by saw pipes. ONGC applied to set aside arbitral awards before Indian courts on ground of public policy. The case of saw pipes has been criticised for its wide interpretation on public policy defence. by many distinguished commentators. It has been condemned for its wide interpretation of public policy defence. The Indian Arbitration Act does not include error of law as setting aside arbitral awards and it has been widely accepted in India that an arbitrator's decision cannot be received on such grounds. By referring that public policy grounds include error of law by arbitral tribunal the case went beyond Indian tribunal action. The error of law are considered within the ambit of public policy and created a system to review arbitrator's decision which is in contravention of arbitration law.

The Government of India launched a 2010 consultation paper recommending changes to the Indian Arbitration Act in order to deal with the issues posed by excessive judicial intervention. The paper clearly acknowledges that the Indian courts have *mis*interpreted the provisions of the Indian Arbitration Act in such a way so as to defeat its object and purpose. The consultation paper proposes to rectify the problems posed by decisions such as *Saw* Pipes, Bhatia and Satyam.[22] The change that was brought by this paper is limiting the scope of public policy as a ground for setting aside the award. The proposal reflects the common understanding of public policy in developed arbitral jurisdiction. According to the consultation paper an award would be contrary to public policy only if it violates the fundamental policy of India, the interests of India or justice and morality. The amendment would not allow Indian courts to find a breach of public policy on the *Saw Pipes* ground of 'patent illegality'[23] going forward.

NAFED v. Alimenta the Supreme Court reverses the trend in public policy. The court refused to enforce a foreign arbitral award on the ground that a violation of Indian and export restrictions amounts to a violation of public policy in India. The court argues for a pro-enforcement stance while dealing with foreign awards. The decision on Renusagar has put to rest the debate surrounding the interpretation of public policy. This laid the pro-enforcement approach which is affirmed in the recent ruling in Nafed's case. But has overlooked the element of discretion and failed to encourage expeditious enforcement behind introduction of New York Convention.

[22] O Ozumba, 'Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?', available at www.dundee.ac.uk visited on 15 March 2021

[23] *Patel Engineering Limited v. North Eastern Electric Power Corporation Limited (2014) 9 SCC 263*

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Emergency Execution Oof Foreign Awards

The enforcement of foreign award takes time as it is required in same manner as any suit the emergency arbitration grants interim relief only for a specified period of time. It exercises similar function as that of an ad hoc tribunal which has been constituted for a limited time. The New York Convention is leading a soft law on enforcement of foreign arbitral awards. However, New York convention does not recognized an award passed by an emergency arbitration on account of fact that such order has not attained finality. Although a no of arbitrations jurisdictions have recognised importance of emergency arbitration award under its municipal laws. In USA a no of judicial rulings have to be recognised emergency arbitral awards and allowed enforcement of such awards. In England the High court does not have power to grant reliefs in cases where parties have sufficient means to obtain interim relief from emergency arbitration under London court of International Rules.

In India, sec 9 of Arbitration & Conciliation Act, 1996 provides that parties may apply for interim relief to the concerned court at any time before enforcement of arbitral awards passed by in emergency provisions. Under Part II of Arbitration Act which deals with enforcement of foreign arbitral awards only final awards can be enforced before court of law in India and interim awards passed by an emergency arbitration proceeding not to be recognised. In 2014, Law Commission recognised this lacunae in its 246th report[24] and recommended that definition of arbitral tribunal under sec 2(1)(d) Arbitration Act should broadened to include emergency arbitrator so as to ensure that arbitration institutional rules which provides for an emergency arbitrator are statutorily recognised in India. The issue of emergency arbitration has been considered, Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors.*[25]* In the said matter, the Delhi High Court was dealing with an application under Section 9 of the Arbitration Act seeking interim reliefs on the lines of an award passed by the emergency arbitrator appointed by SIAC. However, it further held that it is open to a party to approach the court under Section 9 of the Arbitration Act to seek interim reliefs and that the court may grant interim reliefs to the party without considering the order passed by the emergency arbitrator.

It is clear that enforcing an award passed by an emergency arbitrator lacks legal backing under Indian laws. The advantage of moving before an emergency arbitrators opposed to court are numerous. In various cases, parties mutually agreed to submit their neutral jurisdiction so both

[24] Law commission, *Amendments to the Arbitration and Conciliation Act 1996* (law Com. No.246 2014)
[25] *Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors* (2016) 234 DLT 34

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parties are comfortable with the judicial seat of tribunal. Further, the timeframe for obtaining an interim relief is uncertain whereas an emergency arbitrator is required to pass an award within a stipulated time period.

Partial Enforcement of Foreign Arbitral Awards

Foreign arbitral awards may include parts which are acceptable to enforcement and part which cannot be enforced as it is not in accordance with law of state where enforcement is sought. In this case, the question is whether it is possible to separate the parts which may not be enforced from those that are acceptable so that recognition and enforcement of latter can be granted. In the context of New York Article V (1) (c) shows that partial enforcement is contemplated only when decisions partly exceeds the arbitrator's authority. The other half provides that if decision submitted on matters to arbitration can be separated from that not submitted, that part of the award which contains decision on matters submitted may recognised and enforced.[26] It provides for grant of enforcement of part within arbitrator's authority where it can be effectively separated from the rest. In the Italian Court of Appeal in General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria v S.p.a. SIMER (Società delle Industrie Meccaniche di Rovereto)[27] found that while the arbitration agreement only granted the arbitrators authority to deal with nontechnical matters, the award also covered technical matters. Thus the court granted enforcement of the award only to the extent that it dealt with non-technical matters.

Is the discretion of the court sufficient broad to grant partial enforcement under new york Convention in other circumstances. It is to be pointed that partial enforcement supports the achievement of all International Convention in this areas which favours the enforcement of Foreign arbitral award. According to poundret & Besson "even if partial recognition and enforcement cannot are not expressly provided for in other cases, it must be admitted that they are possible under some condition. Moreover, recommending 1(h) of final International Law Association Report on International Commercial Arbitration concluded that if any part of award which violates international policy can be separated from any part which does not that part which does not violate international public policy may be recognised.[28] However, Convention contains no reference to partial enforcement under Article V (1)(c), enforcing court

[26] Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards The New York Convention in Practice* (Cameron May 2008)

[27] *General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria v S.p.a. SIMER (Società delle Industrie Meccaniche di Rovereto)* (1983) VIII YBCA 386

[28] Poudret & S. Besson, *Comparative Law of International Arbitration*, (London, Sweet&Maxwell 2007) p. 296 N. 347

can exercise its discretion to grant partial enforcement

Procedure for Enforcement of Foreign Arbitral Awards

There must be an acquaintance with rules of procedure for enforcement of foreign arbitral awards. The winning party in order to succeed should follow provisions governing rules of procedure. This chapter will examine most significant question relating to rules of procedure. First it will examine question of which provision governs the rule of procedure, whether they are governed by national law. Secondly, there will be an examination of modes of procedure that have been adopted thereto ought to be followed by winning party to enforce foreign arbitral award. Thirdly, procedure to be followed by an applicant for enforcement of foreign arbitral award. Finally seeks to establish where existing provisions for regulating of rules of procedure are adequate and capable of ensuring enforcement of all categories of foreign arbitral awards in accordance with convention that apply in India.

Section 2(6) of the CPC defines "foreign judgment" as "the judgment of a foreign Court," which refers to a Court situated outside India and not established or continued by the authority of the Central Government. The enforcement of foreign judgment in India depends on reciprocating and non-reciprocating countries. A party seeking enforcement of a decree of a court in a reciprocating country is required to file execution proceedings in India while in case of a decree from a non-reciprocating country, a fresh suit has to be filed before the relevant court in India. In the case of Union of India v. Hardy Exploration and Production (India) Inc [29] held that in cases where the arbitration agreement specifies the "venue" for holding the arbitration sittings by the arbitrators, but does not specify the "seat", the question then arises, 'on what basis and by which principle', the "seat" should be determined, because the 'seat' 'has a material bearing for determining the applicability of laws of a particular country for deciding the post-award arbitration proceedings'. The Court was of the view that the matter needs to be referred to a larger bench, given the conflicting decisions and law laid down by the Supreme Court 'in several decisions by the Benches of variable strength'. The Supreme Court in the recent judgment of BGS SGS SOMA JV v. NHPC Ltd[30] overruled the earlier decision and held that unless it is specified in the arbitration the venue of the arbitration is considered to be seat of the arbitration.

THE PRINCIPLE OF *lex fori*

This issue is addressed by the conventions that with the enforcement of foreign arbitral awards

[29] *Union of India v. Hardy Exploration and Production (India) Inc* (2018) 7 SCC 374
[30] *BGS SGS SOMA JV v. NHPC Ltd* (2019 SCC Online SC 1585)

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in India actual enforcement procedure is governed by the *lex fori*.[31] 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."[32] Moreover, according to van den Berg, the law of procedure of the lex fori can be applied to the aspects incidental to enforcement which are not governed by the New York Convention, e.g. attachment, discovery of evidence, set-off, the effect of bankruptcy, time limits and for requesting enforcement and questions of estoppel. 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."[33]

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 goal of parties concerned with International Commercial Arbitration is that when losing party fails to carry out 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. A challenge is kind of a positive attack on the validity of an international award. However, it is suitable to introduce the subject by discussing question of performance of foreign arbitral award from a wider view point so as to place challenge also

[31] *Sulamérica Cia Nacional De Seguros S.A.v. Enesa Engenharia S.A.*[2013] 1 WLR 102

[32] Article III: 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, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

[33] Jonathan Light & Caroline Swartz-Zern, 'International Arbitration: Spain's claim for sovereign immunity rejected?' (Allens Linkaters 8 February 2021) https://www.allens.com.au/insights-news/insights/2021/02/fca-examines-sovereign-immunity-in-spain-v-infrastructure-services-luxembourg/ (visited on 16 March 2021)

in its proper context. Majority of awards are performed voluntarily but sometimes it is necessary to ascertain the means by which an award can be 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.[34] 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.

Conditions Required for Enforcement of Foreign Arbitral Awards

1. Sec 48(1) provides that a foreign award may not be enforced in India if it is proved by party against whom it is sought to be enforced that;
   (a) parties to agreement has some incapacity to perform under any law to which they were subjected and in absence of any mention of such law of country where the award was made i.e. place of arbitration;
   (b) The agreement was not valid under the law to which the parties have subjected it and absence of any mention of such law or the law of country where award was made.
   (c) Fair trial was not conducted by tribunal passing the award.
2. Award passed was either partly or wholly beyond scope of an arbitration agreement in any case the part of award exceeding scope of arbitration may be separated from rest of the award.
3. Composition of arbitral award, authority or procedure of its appointment was not in accordance with principle of arbitration agreement or there is absence of any mention of same in agreement or it was not accordance with law place of arbitration.
4. Award has not yet been made binding on parties or has been set aside or suspended by competent authority of country which is either the place of seat of arbitration court may

[34] 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 (visited on 16 March 2021)

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call upon such party making an application under sec 48(1) provide evidence to prove existence of any or all of grounds for refusal of enforcement of award

5. As per sec 48(2) of the Act, foreign award may not be enforced in India if it is found by court in India that

   (a) Settlement of award as per Indian Arbitration Law

   (b) Enforcement of award is contrary to public policy of India. This defence should be narrowly construed. An award is said to be in conflict with public policy of India if it has been affected by fraud or corruption or it was in violation of the Act or in contravention with fundamental policy of Indian law.

Sec 48 only provides grounds for refusal of enforcement of foreign award as mentioned above but it does not permit an examination of the error by exercising its appellate enquiry. If application for setting aside or suspension of award has been made to competent authority, the court may if it considers its proper adjourn decision on enforcement of award and may also on application of party claiming enforcement order the other party to give suitable security.

Time Period of Enforcement of Foreign Arbitral Awards

Sec 47-49 of International Arbitration & Conciliation Act, 1996 which forms part of chapter on New York awards are relevant in this regard. Sec 47 states that evidence which party is applying for enforcement is required to produce before court. Sec 48 lays ground for refusal of enforcement of award debtor. Sec 49 provides where court is satisfied that foreign award is enforceable under this regime.[35]

In 2019, Bombay High Court in Imax Corporation v E-City Entertainment took[36] a contrary view after considering Thyssen Stahlunion GMBH v Steel Authority of India [37]and Fuerst Day Lawson v Jindal Exports[38] and held that Article 136 (12 years) applied to an enforcement petition. In Thyssen, the Indian Supreme Court compared the provisions of the repealed Foreign Awards Act, 1961 with those of its replacement and observed that while under the Foreign Awards Act a decree follows the award. In Fuerst, the issue was whether two separate applications are required for enforcement and execution and the Supreme Court held that awards are already stamped as decrees and can be enforced and executed in one and the same

[35] Sec 47. Evidence of foreign arbitral awards of Arbitration & Conciliation Act, 1996, Sec 48. Conditions for enforcement of foreign awards of Arbitration & Conciliation Act, 1996, Sec 49. Enforcement of foreign awards.—Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

[36] *Imax Corporation v E-City Entertainment* Civil Appeal No. 3885 OF 2017

[37] *Thyssen Stahlunion GMBH v Steel Authority of* India 2002 IIAD Delhi 149

[38] *Fuerst Day Lawson v Jindal Exports* EA Nos. 790-91 & 789 of 2012

proceeding. The Bombay High Court in Imax, therefore, concluded that to advance the object of the Act the word "stamped" should be understood as "regarded" and a foreign award should be regarded as a decree.

Though the Supreme Court has not dealt specifically with the question, it recently, in Bank of Baroda v Kotak Mahindra Bank [39]held that the limitation period for execution of a foreign decree under Section 44A of the Civil Procedure Code 1908[40] is governed by the limitation law of the reciprocating country where the decree was issued. It was observed that Article 136 of the Limitation Act, being restricted to decrees of Indian courts, is not applicable. This judgement does not apply to foreign arbitral awards for three reasons. Firstly, the CPC is aware of different legal fields in which the arbitration functions and explains that a foreign decree does not include an arbitration award, even if such an award is enforceable as a decree. Secondly, the Supreme Court applied the reciprocity principle of the countries which is unavailable for application in case of arbitral awards. Finally, a foreign award is regarded as already stamped as a decree but not a 'foreign' decree.[41]

Indian courts continue to grasp with determining limitation period applicable to petitions for enforcement of foreign award. The statue prescribes clear time bars to such applications the question with regard to time period depends on whether foreign arbitral award can be considered as a decree. The point of conflict is sec 49 of Act, state awards can become decree only if court is satisfied that it is enforceable. It is accepted that enforcement consists of stages: (1) deciding the enforceability of foreign award; (2) steps for execution if award is enforceable. The satisfaction under sec 49 is arrived at after clearing first stage 12 years limitation may be applied. However, given pro-enforcement policy of Article III of New York Convention and objective of Act, speedy disposal of disputes, reduced supervisory jurisdiction of court and prompt enforcement of awards including foreign awards, smooth enforcement should be enabled by adoption of a purposive approach. The purpose of interpretation of sec47- 49 of Act implies the application of Art. 136 of limitation Act to enforcement application. The interpretation of Act should not defeat substantive and concluded arbitral proceedings between parties.

[39] *Bank of Baroda v Kotak Mahindra Bank* 2020 267 SC

[40] Section 44A (1) of the CPC states that where a certified copy of a decree of any superior court of a reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court

[41] Jay karnawat, 'Stamping of Foreign Arbitration Awards in India – Analysis of Supreme Court's ruling in M/S. Shri Ram EPC Limited Vs Rioglass Solar SA' (ipleaders , November 23, 2018) https://blog.ipleaders.in/stamping-of-foreign-awards/ accessed on 15 March 2021

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V. LIMITATIONS ON FOREIGN ARBITRAL AWARDS

Court's Intervention Acts as a Hurdle

One of the greatest advantages of International Commercial Arbitration is that it is cross border enforceability. An award rendered in one country can be taken with relevant ease to another country and be enforced. The principle source of this case of enforcement is 1958 New York Convention on Recognition and enforcement Foreign Arbitration Award, which has 145 signatory.[42] Though there are limitations with regard to enforcement of foreign arbitral awards particularly in India. It has been witnessed that enforcement mechanism in this method of alternative dispute resolution is plagued by court intervention. The word 'intervention' does not appear precise as it is considered arbitration is a procedural mechanism based on autonomy of parties and recognised as an alternative way of resolving disputes. Court's role therefore should be limited to assist arbitral award to achieve purpose of arbitration. While there are certain grounds for setting aside the award, but theses should be construed according to the law applicable under Article V of New York Convention and UNCITRAL model law. The recognition and enforcement of foreign arbitral awards rests on agreement between parties but also is a result of policy which is turned into international practice. The only way in which the court interferes with enforcement of foreign award is if the award is against any statutory provision, patently illegal or violating public policy in India.

In Oil & Natural Gas Corporation Ltd. v. Saw Pipes (P) Ltd.[43]the court held that in our opinion, the principle of party autonomy should receive paramount consideration by the apex court, as excessive court intervention in the form of judicial review has retarded the dispute resolution. National laws relating to arbitration could significantly affect the character of the arbitral process. These requirements would entail some form of judicial review of the merits of the arbitral awards at the enforcement stage. In India, the court intervention is facilitated under Part I of the Arbitration and Conciliation Act, 1996 which applies to arbitration conducted in India and the awards thereunder; Part II provides for enforcement of foreign awards and has further been sub-divided into two distinct chapters. Chapter one deals with the Awards as regulated by the New York Convention, defined as per Section 44 of the Act. Chapter two deals with Awards as regulated by the Geneva Convention, section 53 of the Act covers it. The arbitration conducted in India and the enforceability of such awards fall in the category of the

[42] Some academic writers support the idea of a uniform system of international procedural rules of enforcement for foreign awards, and consider of the lack of uniformity of the rules of procedure one of the biggest drawbacks of the New York Convention. See, Martinez, R., op. cit. p.496

[43] *Oil & Natural Gas Corporation Ltd. v. Saw Pipes (P) Ltd* (2003) 5 SCC 705.

Part I whereas the enforceability of foreign awards in India, based on the guidelines laid down in the New York Convention or the Geneva Convention is dealt with in Part II of the Act, 1996. Secondly, the challenges on which the Indian courts can rule is with regard to the question of being in conflict with public policy.

Public Policy Argument

In 1824, public policy was described as an unruly horse, where in once you get astride you'll never where it will carry you and that it is never argued at all but when all points fail.[44] It is governed by fundamental principle of law and justice instances such as bribe and corruption. In 2002, International Law Association committee on International Commercial Arbitration conducted a conference on public policy and adopted public resolution that public policy refers to International Public Policy of the state and includes

(i) fundamental principles, pertaining to justice or morality that the State wishes to protect even when it is not directly concerned;

(ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules"; an

(iii) the duty of the State to respect its obligations towards other States or international organisations.[45]

One of the main objectives of Arbitration & Conciliation Act, 1996 was to minimise authoritative role of courts. In this regard, the Act contemplates only three situations where judiciary may intervene in an arbitral process : matters regarding appointment of arbitrators, deciding on whether the mandate of arbitrator stands terminated owing to his incapacity and inability to perform his functions and invalidating and award when it contravenes provisions relating to enforcement as stated in the Act.[46] It is incapable of being dependent upon the laws of individual states and as a result of that it varies from one state to another. The New York Convention does not particularly provide any guidance for national courts to interpret the public policy defence. The pro-enforcement bias of the international parlance is in itself a public policy. Due to this the national courts interpret public policy at their own discretion and it is evident that in most developed arbitral jurisdiction public policy has been interpreted narrowly. The Supreme Court affirmed the pro-enforcement bias in recent judgment of Vijay

[44] S Sattar, 'National Courts and International Arbitration: A Double-Edged Sword?',(2010) 27(1) Journal of International Arbitration

[45] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted on 10 June 1958), 330 UNTS Art. V(2)(b)

[46] Mohit Agarwal, Arbitration in India (SCRIBD Mar 21, 2017) https://www.scribd.com/document/342563203/Arbitration-in-India accessed on (17 March 2021)

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Karia v. Prysmian Cavi E. sestemi[47] the court held that the New york Convention is governed by a Pro-enforcement bias which can be applied to national courts.

Indian courts have shown a great propensity towards interfering with International Arbitration. Judicial intervention at award enforcement stage on grounds of public policy is most controversial. In Renusagar v General Electric[48], has always been starting point whether one considers the topic of Indian court intervention on grounds of public policy. This decision was based on private international law and was in line with international practice commonly accepted in most developed arbitral jurisdiction such as France and US. It is confirmed that the position only in exceptional circumstances should national courts interfere with arbitral awards on grounds of public policy. The legislation and international recognition principles of judicial intervention can be inferred that courts have no power to get into merit of any arbitral dispute. This principle was put to rest by Supreme Court in saw pipes case, where an award was challenged on ground that arbitral tribunal had incorrectly applied the law of the land in rejecting claim for liquidated damages.[49]Two errors of great magnitude have been committed in this case. First, while reviewing merits of this case, the court failed to consider the external factors like effect of labor strike in entire European continent something which was neither under control nor can be predicted by saw pipes case. This particular aspect has been completely overlooked by courts and its impact on the decision. Second, decision if two judges bench in saw pipes has bypassed the ruling of three judges bench of Supreme Court in Renusagar Power v General Electric car[50]. This shows both judicial indiscipline and violation if binding precedent of a larger bench, while the a bench in renusagar case held that term 'public policy of India' was to be interpreted in a narrow sense, division bench went ahead unmindful of prior precedent and expanded same to such extent that arbitration awards could now be reviewed in their matters.[51] In Mc Dermott case,[52] the Supreme Court admitted that decision laid down in saw pipes was subject to considerable adverse comments and went onto observe that only a larger bench can consider its correctness.

It is one of the grounds mentioned in New York Convention based on which party can challenge enforcement of foreign arbitral award. From the beginning of 21st century, parties have been warned against relying on public policy: "it has been very unruly horse and when you get

[47] *Vijay Karia v. Prysmian Cavi E. sestemi* 2020 SCC OnLine SC 177
[48] *Renusagar v General Electric* (1994) AIR SC 860
[49] Supra note 47
[50] *Renusagar Power v General Electric car* 1994 AIR 860
[51] Uditakanwar, ONGC v Saw Pipes (Legal Service India) http://legalservicesindia.com/article/584/ONGC-v-Saw-Pipes.html accessed on (17 March 2021)
[52] *Mcdermott International Inc vs Burn Standard Co. Ltd. & Ors* (2006) Insc 316

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astride it you never know where it will carry you. It may lead you from sound law public policy is one of the most important weapons in hands of national courts which allows it to refuse enforcement of an arbitral award which is otherwise valid."[53]

Consequential Drawbacks in Enforcement of Foreign Arbitral Awards

The main cause of all delays in enforcement is the increasing ambit of court's power to review awards. Excessive judicial interference resulting in admission of large no. of cases which should never be entertained in first place is yet another evil that hampers settlement of commercial disputes in turn retarding growth and development of economy. Indian courts have at various instances misinterpreted the Act in order to suit their own circumstances and as a result it became impossible to achieve the desired result. The various errors on part of the courts to pass decisions in accordance with convention is not only disappointing but also discouraging for parties opting for arbitration as means of dispute settlement in India.

The criticism can also be the time period which is not accurately provided and as a result causing inordinate delay. By not setting a time limit for enforcement of awards one finds that inordinate delays in arbitration proceedings are no different from that of innumerable pending court cases, thus defeating very provisions of the Act. The reason why arbitration was picked over litigation as ultimate legal procedure to be followed, the reason why it held such an appeal for masses was its cost effectiveness. Traditional litigation as to a humungous amount primarily because it was excruciatingly time consuming. The purpose of arbitration is providing an alternative to litigation with cheaper and less time consuming process. The arbitration does not give promise returns but only become quite expensive. Thus issues of speed and cost efficiency are the hallmarks of procedure and are often identified as core reason why arbitration very clearly surpasses litigation as suitable choice for dispute resolution, especially with respect to commercial disputes. It must be remembered that these shortcomings are capable of hindering economy. One way to mitigate the risk of court intervenes is to provide for an appointing authority. The Act provides a single effective framework for the recognition and enforcement in India and there is need for a review of the Act to meet with the new challenges. The Act was put through various 'Proposed Amendments' suggesting changes to Part I & II, but the amendments put forward does not perceived as a way to curtail the scope of judicial interference.

[53] Albert Jan van den Berg , 'The New York Arbitration Convention of 1958' (1981) T.M.C. Asser Institute at 256

VI. CONCLUSION & SUGGESTIONS

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.

This study concerns with enforcement of foreign arbitral awards in India. The key convention was seen to be New York Convention not merely because of significant number of state acceding to it but because of certain significant provisions requiring minimal of conditions to be fulfilled by party seeking enforcement of convention, removing need for double exequatur. The need for the award to be declared enforced in their country of origin creating powers under presumption in favour of validity of arbitral awards and placing burden of proving invalidity on party resisting enforcement allowing under article VII a winning party the option of relying on a local law or treaty provision which is more favourable towards enforcement of foreign arbitral awards than New York Convention itself. Thus it can be said that India' s ratification of New York Convention would be evidenced that there legal system are well disposed to recognition and enforcement.

The aim of the report was to comprehensively analyse provisions pertaining to recognition and enforcement of foreign arbitral awards under relevant regimes in India. Firstly, it discussed the historical aspects. Secondly, it examines basic terminological problem. Thirdly, the elements of jurisdiction i.e. determining competent authority dealing with enforcement, the role of the authority, how its decision might be challenged and time limits relating to enforcement. Fourthly, the procedural steps demanded by each state for enforcement of award were identified.

This study has explored main controversies and complexities in application of different regimes regarding enforcement of foreign arbitral awards which can undermine the relevant regime's goal of facilitating role of foreign arbitral awards in India. as discussed in chapter three it is unclear which arbitration awards can qualify as awards for recognition and enforcement under relevant regime. The New york convention fails to define precisely which arbitration awards are within the scope of application. Moreover, national laws contains different views relating to question if determining where an arbitral award can be considered foreign. The laws indicate that mode for enforcing awards is normally by exequatur on the other hand, the application must be filed by writ. The combination of these does not comply with civil and criminal

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procedure.

New separate provisions governing enforcement of foreign arbitral awards in India should be inducted. It has been seen that in cases where no treaty or convention is applicable that provision dealing with enforcement of foreign arbitral awards are the same as those governing enforcement of foreign judgments. It has been observed that these provisions contains a list of grounds for refusal, meaning that these grounds are deemed as conditions and therefore the national courts in India are never entitled to grant enforcement of foreign arbitral awards under national provisions less than under other regimes.

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 are 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.

It should be ensured that there are no substantially more onerous conditions or higher fees charges on recognition and enforcement of foreign arbitral awards than are imposed on domestic arbitral awards. This can be achieved by removing distinctions in procedural rules applicable to domestic and foreign arbitral awards in India. this will also ensure that state honour their obligations under international convention particularly Article III of new york convention.

A short time limit of three years for application to enforce foreign arbitral awards should be observed in order to ensure that enforcement is not used improperly. The law should give an idea to govern the validity of a submission to arbitration. It should not be left with controversy to be decided by country where it is sought to be enforced in view with intention of the parties, express or implied in submission to arbitration.

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 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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