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Recognition & Enforcement of Foreign Arbitral Awards in India: Legal Framework & Challenges

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ABSTRACT

This research work explores the recognition and enforcement of foreign arbitral awards in India, with a focus on its legal framework, challenges, and implications. The hypothesis posits that while effective recognition and enforcement are vital for fostering international commercial arbitration and attracting foreign investment, various obstacles within the legal system may hinder the process. It investigates the current legal landscape in India and the complexities foreign parties encounter when seeking to enforce arbitral awards. It also analyzes the impact of recognition and enforcement process on India's appeal as an international arbitration hub and examines the role of international conventions, such as the New York Convention. Furthermore, it delves into the interpretation of the public policy exception by Indian courts and considers recent legislative and judicial developments. Ultimately, the research aims to identify opportunities for enhancing India's legal mechanisms to promote international arbitration and foreign investment, with practical implications for businesses.

I. INTRODUCTION

The pursuit of equitable justice, enshrined in Article 39-A of the Indian Constitution, stands in stark contrast to the traditional judicial system's chronic delays, high costs, and procedural complexities—inefficiencies that have contributed to India's low Ease of Doing Business ranking and created an urgent need for Alternative Dispute Resolution. **Arbitration**, the most prominent ADR mechanism, has emerged as a superior method due to its efficiency, confidentiality, and enforceability, allowing parties to resolve disputes outside national courts with impartiality and binding decisions. The **Arbitration and Conciliation Act of 1996** modernized India's arbitration framework by drawing from the UNCITRAL Model Law, replacing earlier statutes rooted in the Geneva and New York Conventions, and aiming to minimize judicial intervention while establishing a unified legal framework for domestic and

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international commercial arbitration. Under Section 44, a **foreign arbitral award** is defined as one rendered in a New York Convention-recognized country, addressing commercial disputes as per Indian law. The **2021 Amendment** introduced a significant but controversial provision granting an automatic stay on enforcement if courts find prima facie evidence that the award was influenced by fraud or corruption; however, the absence of clear definitions has drawn criticism for potentially undermining India's pro-arbitration stance and the finality of awards, with concerns that such ambiguity may lead to delays and misuse. Despite these challenges, India remains a signatory to the New York Convention, and its courts generally favor the enforcement of foreign awards except in exceptional circumstances, reflecting a continuous effort to balance judicial oversight with the need for swift, fair dispute resolution.

Hypothesis

1. Effective recognition and enforcement of foreign arbitral awards in India is essential for fostering international commercial arbitration and attracting foreign investment.
2. Challenges in the legal framework and enforcement mechanisms may hinder the process of recognizing and enforcing foreign arbitral awards in India.

II. THE NEW YORK CONVENTION AND ITS IMPACT

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, was adopted on June 10, 1958, and entered into force on June 7, 1959. It is universally regarded as a foundational instrument in international trade law and the cornerstone of international arbitration. The convention requires judicial bodies of contracting states to uphold arbitration agreements and to recognize and enforce foreign arbitral awards, subject only to narrowly defined exceptions. Currently ratified by 156 states, its primary purpose is to foster robust commercial ties and create a climate of international cooperation by alleviating the burden on individual states to determine applicable laws and establishing a fundamental threshold of authority for contracting states over arbitral awards and agreements.

Key Actions and Features

The convention facilitates two pivotal actions: the recognition and enforcement of foreign arbitral awards and the referral of disputes to arbitration by courts. Its key features include establishing a standardized framework for international cooperation, obligating states to enforce foreign awards according to the convention's norms, and ensuring no hidden fees or complicated processes are involved, requiring only that a party appear before a competent court in the contracting state where enforcement is sought.

Article I: Scope of Application

This agreement applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where recognition and enforcement are sought, arising out of differences between persons, whether physical or legal. It also applies to arbitral awards not considered domestic awards in the state where enforcement is sought. The term "arbitral awards" includes awards made by arbitrators appointed for each case and those rendered by permanent arbitral bodies. A state may declare, on the basis of reciprocity, that it will apply the convention only to awards made in another contracting state, and it may also declare it will apply the convention only to differences arising from commercial relationships under its national law.

Article II: Arbitration Agreements

Each contracting state shall recognize a written agreement under which parties undertake to submit to arbitration any or all differences concerning a subject matter capable of settlement by arbitration. The term "written agreement" includes an arbitration clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. When seized of a matter covered by such an agreement, a court of a contracting state must, at the request of one party, refer the parties to arbitration unless it finds the agreement is null and void, inoperative, or incapable of being performed.

Article III: General Obligation to Enforce

Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the procedural rules of the territory where the award is relied upon. There shall be no imposition of substantially more onerous conditions or higher fees on the recognition or enforcement of foreign arbitral awards than those imposed on domestic awards.

Article IV: Documentary Requirements

To seek recognition and enforcement, the party applying must furnish at the time of submission the duly authenticated original award or a duly certified copy, and the original arbitration agreement or a duly certified copy. If the award or agreement is not in the official language of the country where enforcement is sought, the party must provide a translation certified by an official or sworn translator or by a diplomatic or consular agent.

Article V: Grounds for Refusing Enforcement

Recognition and enforcement may be refused at the request of the party against whom it is invoked only if that party provides proof of incapacity of the parties or invalidity of the

arbitration agreement under the applicable law, lack of proper notice of the appointment of the arbitrator or the arbitration proceedings, the award dealing with a difference not contemplated by the submission, the composition of the arbitral authority not being in accordance with the parties' agreement, or the award not yet having become binding or having been set aside. Recognition and enforcement may also be refused if the competent authority finds that the subject matter is not capable of settlement by arbitration or that recognition or enforcement would be contrary to the public policy of that country.

Article VI: Application for Suspension

If an application for setting aside or suspension of the award has been made to a competent authority, the court before which enforcement is sought may adjourn its decision and may, on the application of the party seeking enforcement, order the other party to provide suitable security.

Article VII: Relation to Other Treaties

The convention does not deprive any interested party of any right to avail itself of an arbitral award in the manner allowed by the law or treaties of the country where it is sought to be relied upon. The convention supersedes the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 as between contracting states.

Articles VIII through XVI: Procedural Provisions

The convention is open for signature until December 31, 1958, by any member of the United Nations, any state party to the Statute of the International Court of Justice, or any state invited by the General Assembly. It is subject to ratification, with instruments deposited with the Secretary-General. Accession is open to all such states.

A state may declare that the convention extends to territories for whose international relations it is responsible. For federal states, obligations regarding articles within federal jurisdiction are the same as for non-federal states, and the federal government shall bring articles within constituent state jurisdiction to the attention of appropriate authorities.

The convention enters into force on the ninetieth day after deposit of the third instrument of ratification or accession. A contracting state may denounce the convention by written notification, with denunciation taking effect one year after receipt. A contracting state shall not be entitled to avail itself of the convention against other contracting states except to the extent that it is itself bound.

The Secretary-General shall notify states of signatures, ratifications, accessions, declarations, the date of entry into force, and denunciations. The convention, of which the Chinese, English, French, Russian, and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

III. ENFORCEMENT PROCEDURE IN INDIAN COURTS

In India, the framework for enforcement is delineated in Part II of the Arbitration and Conciliation Act, 1996. Section 47 of the Act provides a comprehensive definition of "court" in relation to its jurisdiction over the subject matter of the award. This definition specifically refers to a judicial body with the authority to enforce an international arbitral award against an individual or asset situated within its jurisdiction. In monetary disputes, the enforcement application is typically submitted to the court that holds jurisdiction over the respondent's bank account. To ensure the implementation of an award, the concerned party must undertake the necessary proceedings as outlined in Section 47.

A. Critical Analysis of the *Badat Co. Judgment*

The text undertakes a critical analysis of the Supreme Court's judgment in *Badat Co., Bombay v. East India Trading Co.*, which raised two primary contentions. The first contention argued that the plaintiff's cause of action on the original side of the Bombay High Court was beyond its jurisdiction because it relied on a judgment from the New York Supreme Court. The second contention posited that arbitral awards, until they attain finality under New York law, could not serve as a valid basis for a cause of action.

The author critiques the court's reasoning, arguing that the first premise contradicts established doctrines of obligation. The doctrine of *res judicata*, enshrined in Section 13 of the Civil Procedure Code, establishes that even when a lawsuit is founded upon a judgment that provides a new cause of action, the issue of lack of jurisdiction should never arise. The author contends that the Supreme Court overlooked that procedural rules governing the connection between jurisdiction and cause of action are irrelevant for actions seeking enforcement of foreign judgments. The court's decision was primarily based on the second ground, which the author argues placed foreign awards in a subordinate position to foreign judgments, despite the minimal disparity between them in terms of finality. Nevertheless, the court ultimately affirmed a legally recognized basis for pursuing the implementation of a foreign arbitration decision, marking a significant precedent as the first recorded instance of an Indian court accepting a foreign award.

B. The Role of National Courts

Drawing on Dr. F.A. Mann's proposition, the text asserts that every instance of arbitration inherently falls under the jurisdiction of a specific legal framework established by a state. Individuals lack the authority to act beyond the purview of municipal legislation, as their rights are contingent upon a structure of local legislation. Scholarly discourse suggests that the court's function is analogous to that of an executive partner, augmenting the efficacy of arbitral proceedings.

The pivotal role of national courts in international arbitration is widely recognized because arbitration is subject to national legislation and judicial oversight. This is particularly true during the enforcement phase, where an award must satisfy statutory prerequisites. National courts possess the discretion to deny enforcement under Article V of the New York Convention, provisions which have been integrated into the domestic legislation of most nations. Since arbitration is a private process, the exercise of overriding authority is justified to preserve fundamental principles of equity and neutrality. The court's supervisory powers provide a framework of checks and balances, safeguarding the integrity of the trial.

While proponents of delocalised arbitration argue that this review process deviates from the parties' original intent, the text asserts that such supervisory powers are indispensable. Article V of the New York Convention serves as a crucial safeguard for fundamental rights, enabling parties to challenge enforcement and fostering confidence in the arbitration mechanism. However, the text notes that this reliance on national laws leads to significant jurisdictional variations. The New York Convention, while comprehensive, lacks explicit guidance for national courts in interpreting the public policy defence.

C. The Pro-Enforcement Stance and the Public Policy Dilemma in India

The inherent pro-enforcement inclination within the international discourse is regarded as a manifestation of public policy. This involves national courts exercising discretionary powers in interpreting public policy, which is typically construed restrictively in well-established arbitral jurisdictions. In *Vijay Karia v. Prysman Cavi E. Sistemi*, the Supreme Court unequivocally upheld this pro-enforcement inclination, ruling that the New York Convention is subject to a prevailing tendency towards enforcement, permitting its application within domestic judicial systems.

Despite this, the Indian judiciary has demonstrated a notable tendency towards intervention. The contentious nature of judicial intervention during the enforcement phase, particularly on public policy grounds, has garnered significant scholarly attention.

- **The Renusagar Precedent:** In *Renusagar v. General Electric*, the court's examination of intervention on public policy grounds became a foundational premise. The decision was predicated on private international law principles, aligning with international norms in jurisdictions like France and the United States. It established that national courts should intervene only in rare and extraordinary circumstances.
- **The Saw Pipes Divergence:** In contrast, *Oil & Natural Gas Corp. v. Saw Pipes* adopted a distinct and divergent approach. This case originated from a domestic dispute over liquidated damages. The arbitral tribunal had concluded that ONGC was not eligible for liquidated damages as it failed to substantiate any discernible detriment. ONGC sought to annul the award on public policy grounds. This case drew significant criticism for its expansive interpretation of the public policy defense, particularly for including an error of law as a ground for setting aside an award, which was not explicitly a ground under the Indian Arbitration Act.

D. Legislative Response and Corrective Measures

In 2010, the Indian government initiated a consultation paper to propose modifications to the Arbitration Act, aiming to address the challenges arising from undue judicial interference. The paper acknowledged that Indian courts had misinterpreted the Act's provisions, deviating from its intended objectives. It specifically aimed to rectify challenges presented by landmark judgments like *Saw Pipes*, *Bhatia*, and *Satyam*.

The consultation paper proposed constricting the purview of public policy as a ground for nullifying an award. It posited that an award should be deemed in contravention of public policy only if it transgressed the fundamental policy of India, infringed upon national interests, or deviated from principles of justice and morality. The proposed amendment sought to restrict Indian courts from invoking "patent illegality" to establish a breach of public policy, effectively overruling the *Saw Pipes* approach.

E. Emergency Execution of Foreign Awards

The text addresses the temporal aspects of enforcing foreign awards, noting that procedural requirements mirror those of conventional litigation. Emergency arbitration can bestow interim relief within a delimited timeframe, functioning similarly to an *ad hoc* tribunal. However, the New York Convention does not recognize awards rendered through emergency arbitration due to the absence of finality. While jurisdictions like the United States have recognized such awards, in England, the High Court lacks authority to grant remedies where parties have resources for interim relief via emergency arbitration.

In India, Section 9 of the Arbitration Act allows parties to seek interim relief from courts before enforcement. Under Part II, only final awards are enforceable; interim awards from emergency arbitration are not recognized. In 2014, the Law Commission's 246th report identified this gap and suggested broadening the definition of an arbitral tribunal to include an emergency arbitrator, aiming to grant statutory recognition to institutional rules providing for emergency arbitration. In *Raffles Design International v. Educomp Professional Education*, the Delhi High Court acknowledged that while an emergency arbitrator's award was not directly enforceable, a party could still petition the court under Section 9 for interim remedies, independent of the emergency arbitrator's determinations. The text concludes that the absence of legal support for enforcing emergency arbitrator awards in India is evident, despite advantages such as neutrality, party comfort with the tribunal's seat, and stipulated timeframes for passing awards.

F. Partial Enforcement of Foreign Arbitral Awards

Foreign arbitral awards may contain both enforceable and unenforceable provisions. The text examines the feasibility of partial enforcement, focusing on Article V(1)(c) of the New York Convention. This provision contemplates partial enforcement when arbitrators exceed their authority, allowing that decisions submitted to arbitration can be distinguished from those that are not.

The Italian case of *General Organization of Commerce v. S.p.a. SIMER* is cited as an example, where the arbitration agreement limited the arbitrators to non-technical matters, but the award covered technical matters as well. The court granted enforcement only for the non-technical aspects. The text notes that while the Convention does not explicitly mention partial enforcement beyond Article V(1)(c), the enforcing court possesses discretion to grant it. Recommendations from the International Law Association have also proposed that in cases where an award contains elements contravening international policy, separable parts that do not violate such policy may be acknowledged and enforced.

G. Procedure for Enforcement of Foreign Arbitral Awards

A comprehensive understanding of procedural regulations is deemed imperative. The text explores the determination of governing procedural rules—whether they are subject to national legislation—and the various modes of procedure available for enforcing foreign arbitral awards. Under the Code of Civil Procedure, a "foreign judgment" pertains to a judgment from a court outside India. Enforcement efficacy depends on whether the country is reciprocating or non-reciprocating. Decrees from reciprocating countries are enforced through execution proceedings, while those from non-reciprocating countries require a new legal action. In *Union*

of *India v. Hardy Exploration*, the issue arose regarding the determination of legal jurisdiction when the arbitration agreement designated a venue but not a seat. The court referred the matter to a larger bench due to divergent rulings. Subsequently, in *BGS SGS SOMA JV v. NHPC Ltd.*, the Supreme Court overruled prior decisions, establishing that in the absence of explicit stipulation, the designated venue for arbitration proceedings shall be deemed the seat of arbitration.

H. The Principle of Lex Fori

The principle of *lex fori* dictates that enforcement of foreign arbitral awards is subject to the procedural framework of the jurisdiction where enforcement is sought. Article III of the New York Convention stipulates that enforcement shall follow the procedural rules of the territory where the award is invoked. As elaborated by van den Berg, the law of procedure of the *lex fori* applies to ancillary enforcement matters such as attachment, discovery, set-off, and time constraints. This principle is derived from various conventions applicable in India. For instance, an award under the Washington Convention has the effect of *res judicata*, akin to a final judgment of a state's judicial body.

I. Procedural Rules and Conditions for Enforcement

National regulations for enforcing foreign arbitral awards fall into categories: specific provisions for procedure, a singular procedure for all foreign awards, parallel procedures with foreign judgments, or procedures similar to domestic awards. The text notes that while voluntary compliance is the norm, enforcement mechanisms must be examined when states are reluctant to acknowledge foreign awards. Approaches to enforcement and consequences for non-performance vary significantly across jurisdictions.

Conditions Required for Enforcement under Section 48 of the Indian Act: Section 48(1) stipulates that enforcement of a foreign award in India shall be denied if the party against whom it is invoked establishes grounds such as:

1. Incapacity of the parties or invalidity of the arbitration agreement under the applicable law.
2. The award exceeds the boundaries of the arbitration agreement, though partial enforcement is possible for separable parts.
3. The composition of the arbitral authority or the procedure did not align with the arbitration agreement or the law of the place where the arbitration took place.
4. The award has not yet become binding or has been set aside or suspended by a competent

authority of the country where it was made.

5. Under Section 48(2), enforcement may be denied if the court finds the subject matter is not arbitrable under Indian law, or the enforcement would be contrary to the public policy of India, which is to be interpreted narrowly as covering fraud, corruption, or contravention of fundamental principles.

J. The Time Period for Enforcement

The issue of limitation periods for enforcing foreign awards remains contentious. Sections 47-49 of the Act govern New York awards. In *Imax Corporation v. E-City Entertainment*, the Bombay High Court engaged in a comprehensive analysis of this issue, contrasting with the earlier *Thyssen Stahlunion GMBH v. Steel Authority of India* case.

The general understanding from *Thyssen* and *Fuerst Day Lawson v. Jindal Exports* was that Article 136 of the Limitation Act, providing a twelve-year time frame, applied to enforcement petitions. The Supreme Court in *Thyssen* compared the old Foreign Awards Act with its replacement, observing that unlike its predecessor, the new Act did not require a separate decree. *Fuerst* affirmed that awards, stamped as decrees, could be enforced and executed within a singular legal proceeding. The Bombay High Court in *Imax* interpreted "stamped" to mean "regarded," implying that a foreign award should be treated as a decree.

However, in *Bank of Baroda v. Kotak Mahindra Bank*, the Supreme Court, while not explicitly addressing the arbitration context, ruled on foreign decrees under Section 44A of the CPC, stating that the limitation period for enforcing a foreign decree is governed by the law of the reciprocating jurisdiction where it was issued. The Court noted that Article 136, which applies to decrees of Indian courts, does not apply to foreign decrees. The text argues that this determination is not directly applicable to foreign arbitral awards for three reasons: the distinct legal domain of arbitration, the inapplicability of the reciprocity principle used for foreign decrees, and the fact that a foreign award should not be automatically equated with a foreign decree.

The Indian judiciary continues to grapple with determining the appropriate limitation period. The crux lies in whether a foreign arbitral award can be deemed equivalent to a decree, with Section 49 specifying that awards attain decree status only upon court satisfaction regarding enforceability. Given the pro-enforcement policy of Article III of the New York Convention and the Act's objective of facilitating expeditious dispute resolution, a purposive approach is imperative to ensure a seamless enforcement process, suggesting the use of Article 136 for enforcement applications.

K. Limitations on Foreign Arbitral Awards

1. Court's Intervention Acts as a Hurdle:

A key merit of international commercial arbitration is cross-border enforceability, facilitated by the New York Convention. However, the enforcement mechanism in India is beset by frequent court intervention. While arbitration is rooted in party autonomy, the court's role should be circumscribed to assisting the award's objectives. Intervention should be limited to instances where the award contravenes statutory provisions, exhibits manifest illegality, or transgresses public policy. The *Saw Pipes* case exemplifies excessive judicial review, which the court itself acknowledged as an impediment to expeditious dispute resolution. The impact of national legislation can influence the arbitral process, potentially incorporating judicial review of merits during enforcement. In India, Part I of the Act governs domestic arbitration, while Part II governs foreign awards under the New York and Geneva Conventions.

2. The Public Policy Argument:

The concept of public policy, likened to an untamed steed, remains unpredictable. The International Law Association's committee defined international public policy as encompassing fundamental principles of justice and morality, regulations serving the state's fundamental welfare (*lois de police*), and the state's obligations to other states or the international community.

The primary aim of the 1996 Act was to reduce judicial authority in dispute resolution. The New York Convention does not offer specific guidelines for interpreting the public policy defence, leaving it to national courts' discretion. The *Vijay Karia* judgment reinforced the pro-enforcement bias. Despite this, the *Renusagar* case established a restrictive interpretation, a principle that was seemingly circumvented by the division bench in *Saw Pipes*, which broadened the public policy scope. The *Saw Pipes* decision has faced substantial criticism, and the Supreme Court in the *Mc Dermott* case acknowledged that its correctness could only be assessed by a larger bench. The text underscores that public policy, while a critical safeguard, should not be over-relied upon, as it creates uncertainty.

L. Grounds for Refusal of Enforcement in India

The text distinguishes between domestic awards under Section 34 and foreign awards under Section 48 of the Act. The use of "may" in both sections indicates judicial discretion.

- **Incapacity of the Parties:** This pertains to a party's ability to validly consent to the arbitration agreement, determined by the governing law or, in its absence, by the

tribunal's discretion.

- **Invalidity of the Arbitration Agreement:** If the arbitration agreement is invalid under the chosen law or the law of the country where the award was rendered, the award may be unenforceable.
- **Arbitrability:** Certain matters, like criminal offenses, are inherently non-arbitrable as they fall within the exclusive purview of judicial determination. The key criterion, established in *Booz Allen and Hamilton Inc v. SBI Home Finance Ltd*, is whether arbitration would run counter to Indian legal frameworks and societal principles.
- **Public Policy:** An award is unenforceable if it contradicts India's public policy. *Renusagar* held that refusal is only permissible when the award contravenes the fundamental policy of India, its interests, or principles of justice and morality. Contravention of any law is insufficient. The Supreme Court in *Govt. of India v. Vedanta* further held that the public policy exception should be construed more narrowly for foreign awards than for domestic awards.
- **Patent Illegality:** This ground exists under Section 34 for domestic awards and is considered part of the public policy exception for domestic awards. However, in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, the Supreme Court conclusively established that the enforcement of a foreign arbitral award cannot be denied on the ground of patent illegality.

IV. JUDICIAL TRENDS AND CASE STUDIES

The Indian Government's assertive efforts to attract significant foreign investments have led to a notable surge in Bilateral Investment Treaties (BITs). Over approximately twenty years, India has entered into 83 BITs, with 74 remaining in effect. In November 2011, the Government encountered its first unfavorable arbitral award in an international investment dispute through the landmark *White Industries* case. This decision marked a watershed moment, as investment treaty arbitrations—where investors invoke BIT provisions to seek redress against host states—have since witnessed a notable increase in frequency. According to the Law Commission of India, there are currently fourteen identified claims proceedings initiated against India under various BITs.

A. Chaos Post-Bhatia

Following the judgment in *Bhatia International*, the Supreme Court in *Venture Global Engg v. Satyam Computer Services Limited* held that foreign awards could be challenged under Part I

of the Arbitration and Conciliation Act, 1996. The Court interpreted that the provisions of Part I apply to all arbitrations, including international commercial arbitrations, and to all related court proceedings. For international commercial arbitrations conducted outside India, Part I would apply unless the parties explicitly or implicitly excluded any or all of its provisions.

This interpretation led to expansive judicial intervention. In *Indtel Technical Service Pvt Ltd v. WS Atkins Plc*, the court assumed authority to appoint arbitrators in arbitrations seated outside India under Section 11 of the Act. Conversely, in *Videocon Industries Ltd v. Union of India*, the parties mutually agreed to exclude Part I, demonstrating that such exclusion was possible. Notably, in *Hardy Oil and Gas v. Hindustan Oil Exploration*, the Gujarat High Court determined that Part I was implicitly excluded due to the parties' express choice of foreign law as the governing law for the arbitration.

B. The New Era of BALCO

The landmark case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* fundamentally altered the landscape. The arbitration clause in question specified that disputes would be resolved under English arbitration law, with London as the venue, while the governing law of the contract was Indian law. Disputes arose, and two awards were rendered in England, which were subsequently challenged in India under Section 34 of the Act.

Key Holdings of the Supreme Court in BALCO:

The Court established that the provisions of the Act clearly delineate no overlap between Part I and Part II. Part I applies exclusively to domestic arbitration and Indian-seated international commercial arbitration, while Part II applies to international commercial arbitration seated outside India. Consequently, Part I is not applicable to international commercial arbitration seated outside India.

This ruling significantly curtailed judicial intervention by Indian courts in arbitrations seated outside the country. The decision was given prospective effect, creating two distinct regimes.

Impact 1: Pre-BALCO Agreements Remain Under the Bhatia Regime

Parties that executed arbitration agreements prior to September 6, 2012 continue to be governed by the *Bhatia* regime, unless they expressly or implicitly excluded Part I. The Indian judiciary has shown a discernible inclination to enforce the restrictive doctrine on judicial interference for foreign-seated arbitrations. In *Vale Australia Pty Ltd v. Steel Authority of India Limited*, the Supreme Court declined to reevaluate the merits of a dispute when considering a petition to invalidate a foreign-seated arbitral award. Similarly, in *NNR Global Logistics v. Aargus Global*

Logistics, the Delhi High Court declined to set aside a foreign award under Section 34 on public policy grounds, even though the agreement predated BALCO, holding that the curial law was the law of the seat of arbitration. The Bombay High Court in *Konkola Copper Mines (PLC) v. Stewarts and Lloyds of India Ltd* affirmed that the prospective determination in BALCO should not be interpreted as limiting the interpretation of the Act's provisions to future cases only.

Impact 2: Unavailability of Interim Measures for Foreign-Seated Arbitrations

For arbitral agreements falling under the BALCO regime, recourse to Indian courts for interim measures in support of foreign-seated arbitrations is no longer viable. The Court acknowledged that this doctrine limits Indian courts from granting interim measures, including preserving property or evidence, compelling witness attendance, or securing expenses. It recognized that resolving this limitation requires legislative intervention.

In *Sri Tufan Chatterjee v. Sri Rangan Dhar*, the Calcutta High Court held that a court lacks jurisdiction to consider an application for provisional relief under Section 9 after October 23, 2015, if the arbitral proceedings had already concluded. In *Electrosteel Castings Limited v. Reacon Engineers (India) Private*, the Court addressed the issue of automatic suspension of an award upon filing a setting-aside application. Under the amended Section 36, the mere filing of an application under Section 34 does not automatically render the award unenforceable.

C. The Public Policy Dilemma

The BALCO case eliminated the authority to grant interim relief and to annul arbitral awards for foreign-seated arbitrations, but it did not fully address whether enforcement could be denied under Section 48(2)(b) on public policy grounds.

Pre-2015 Position: Prior to the 2015 amendments, the term "public policy" was subject to broad interpretation. In *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*, the Supreme Court held that an award may be set aside under Section 34 if it contravenes public policy, which includes: (i) fundamental policy of Indian law, (ii) the interest of India, (iii) justice or morality, or (iv) patent illegality.

In *Phulchand Exports Limited v. O.OO. Patriot*, the Supreme Court extended this interpretation to Section 48, holding that public policy under that provision carries the same meaning as in *SAW Pipes*, thereby widening the scope for challenging enforcement of foreign awards.

Post-2015 Position: In *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, the Supreme Court overruled *Phulchand* and provided a more specific interpretation of public policy by excluding patent illegality as a valid ground for refusing enforcement of a foreign award. The Court held

that denial of enforcement under Section 48(2)(b) shall occur only if enforcement would contravene (i) the fundamental policy of Indian law, (ii) the interests of India, or (iii) principles of justice or morality. This measure alleviated the ramifications of prior decisions, ensuring that courts cannot deny enforcement of foreign awards solely on the basis of alleged patent illegality.

D. The White Industries Case: A Watershed

The *White Industries* case serves as a pivotal moment for investment treaty arbitrations in India. White Industries entered into a contract with Coal India Ltd in 1989. Disputes arose in 1999, leading to arbitration where an award of approximately AUD 4 million was rendered in White Industries' favor. Coal India challenged the award before the Calcutta High Court, while White Industries initiated enforcement proceedings before the Delhi High Court. The Delhi High Court stayed enforcement pending the Calcutta proceedings, and the interim order was appealed to the Supreme Court. Unable to secure a prompt resolution, White Industries invoked the dispute resolution provision under the India-Australia BIT, alleging a breach of the Most Favoured Nation (MFN) Clause.

The arbitral tribunal ruled in favor of White Industries on the MFN Clause breach, reasoning that the investor had been deprived of effective mechanisms for asserting claims and enforcing rights, evidenced by the excessive duration of proceedings before the Supreme Court. Through the MFN Clause, the tribunal incorporated an additional obligation regarding the provision of effective means, which India had undertaken in another BIT with Kuwait.

India's Response and the Model BIT:

The White Industries award prompted decisive action from the Indian Government. A revised draft Model BIT was developed to serve as a foundational framework for future treaty negotiations. Notably, the Model BIT under consideration by the Law Commission excluded the MFN Clause. The Commission attributed this removal to India's experience in *White Industries*, where a foreign investor engaged in "treaty shopping" and leveraged the MFN Clause to incorporate supplementary provisions not originally agreed upon.

The Commission recommended the inclusion of a Most-Favoured Nation Clause that is specifically restricted in its applicability to the implementation of domestic measures, aiming to impede systemic treaty shopping while safeguarding both Indian and foreign investors from discriminatory treatment.

E. The 260th Report of the Law Commission

The Commission undertook a suo motu analysis of the draft Model BIT's provisions. The 260th

Report focuses on recommendations regarding dispute resolution provisions, which are crucial for enhancing foreign investments.

Key Recommendations:

- **Tribunal Composition and Appellate Review:** The Commission noted that the draft Model BIT did not incorporate provisions allowing appellate review of arbitral awards, which could present challenges for Indian investments in foreign markets.
- **Exhaustion of Domestic Remedies:** The Commission addressed Article 14 of the draft BIT, noting that while Article 14.3 required exhaustion of domestic legal remedies before initiating arbitration, Article 14.2(ii)(a) prohibited arbitration of claims already adjudicated through domestic channels, effectively nullifying the dispute resolution mechanism. The Commission proposed eliminating such contradictory provisions.
- **Governing Law:** The Commission highlighted the superfluous nature of subjecting the BIT to the Vienna Convention on the Law of Treaties, as India has neither signed nor ratified it, rendering its practical implementation ineffectual.

F. Judicial Intervention and Arbitrator Neutrality

Pre-Arbitral Intervention: The current legal framework acknowledges instances where court intervention is anticipated before the arbitral tribunal is established. The Supreme Court has ruled that judicial authorities may make a prima facie determination regarding the existence of a valid arbitration agreement. If a valid agreement appears to exist, the matter must be referred to arbitration. If the judicial authority determines that no agreement exists, that conclusion carries finality.

Neutrality of Arbitrators: The 2015 amendments require prospective arbitrators to provide written disclosures regarding any circumstances that may raise reasonable doubts about their independence or impartiality. The red and orange lists from the IBA Guidelines on Conflicts of Interest have been incorporated as Schedules to the Act. An express bar applies to specific individuals, subject to waiver only after disputes arise and through a written agreement between the parties.

Institutional Arbitration: The amendments encourage institutional arbitration by recognizing the distinction between ad hoc arbitration, where parties formulate their own procedural rules, and institutional arbitration, where a specialized institution facilitates and oversees the arbitral proceedings under its own rules.

G. Arbitrability of Fraud and Scope of Reference

Fraud Allegations: The arbitrability of disputes involving fraud has been a subject of divergent judicial opinions. In *N Radhakrishnan v. Maestro Engineers*, the Supreme Court held that disputes involving grave accusations of fraud were unsuitable for arbitration. However, subsequent decisions have established that the presence of fraud allegations does not automatically render a dispute incapable of arbitration. Drawing from English law, in *Fiona Trust v. Privalov*, the House of Lords determined that a tribunal possesses jurisdiction even when a party asserts that the arbitration agreement itself was procured through fraud. The final amendments to the Act did not incorporate the Law Commission's recommendation to explicitly encompass fraud within the purview of arbitration.

Statement of Defence and Scope of Reference: Section 23(2A) was incorporated, stipulating that if a respondent presents a counterclaim or set-off, such claims shall be deemed within the purview of the reference and adjudicated by the arbitral tribunal, provided they arise from the arbitration agreement. This provision aims to prevent multiple proceedings and promote final settlement of disputes.

Costs: Section 31A was added to empower arbitral tribunals and courts to allocate costs according to a rational and pragmatic criterion, implementing the loser-pays rule to deter frivolous litigation and promote contractual compliance.

H. Recent Judicial Pronouncements on Jurisdiction

In *Reliance Industries v. Union of India*, the Supreme Court clarified that while BALCO has prospective application, the legal stance preceding it would preclude Indian courts from intervening in foreign awards. The Court affirmed that the designation of the seat of arbitration indisputably constitutes an exclusive jurisdiction clause.

In *Harmony Innovation Shipping Ltd v. Gupta Coal India Ltd*, the Supreme Court disagreed with the High Court's reliance on BALCO to deny jurisdiction in a pre-September 2012 agreement but ultimately concluded that establishing London as the seat evidenced implicit waiver of Part I of the 1996 Act.

In *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*, the Court held that it is not imperative to submit a formal application to petition a court for referral to arbitration under Section 45. The extent of judicial examination is restricted solely to referring the dispute to arbitrations seated in foreign jurisdictions.

In *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, the Supreme

Court interpreted the phrase "person claiming through or under" in Section 45 expansively, holding that in select extraordinary scenarios involving composite transactions and interconnected agreements, entities not directly involved—such as parent companies, subsidiaries, or group companies—can be implicated as parties to an arbitration agreement.

I. Procedural Framework for Enforcement

Appealable Orders: Under Section 50 of the Act, appeals may be filed against orders rendered under Sections 45 and 48. No further appeal is permitted from orders under this Section, though appeals may be lodged before the Supreme Court under Article 136 of the Constitution. In *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, the Court held that Article 136 grants the Supreme Court discretionary power, not an absolute right to appeal.

In *Jindal Exports Ltd. v. Fuerst Day Lawson Ltd.*, the Court ruled that a letters patent appeal is available only if the order is appealable under Section 50. In *Kandla Export Corporation & Anr. v. M/s. OCI Corporation & Anr.*, the Court clarified that under the Commercial Courts Act, 2015, parties opposing enforcement whose objections are dismissed have no appeal before the Commercial Appellate Division and must directly petition the Supreme Court.

Interim Measures: In *R. McDill & Co. (P) Ltd v. Gouri Shanker*, the Supreme Court held that parties in arbitration may seek all interim measures available under the Civil Procedure Code. In *M/s. Sundaram Finance Ltd. v. NEPC India Ltd*, the Court affirmed that interim relief may be sought before arbitration proceedings commence, drawing upon the UNCITRAL Model Law and English precedents.

The decision in *Bhatia International v. Bulk Trading S.A.* settled interpretive ambiguities, holding that Section 2(2) does not limit Part I to arbitrations conducted within India. If parties fail to explicitly exclude Part I, Indian courts may issue interim measures under Section 9 even when arbitration proceedings are conducted outside India.

V. CONCLUSION

The evolution of foreign arbitral award enforcement in India reflects a continuous journey toward balancing judicial oversight with the imperative of swift, efficient dispute resolution. From the expansive interventionist approach under *Bhatia International* to the pro-enforcement stance established in *BALCO*, the Indian judiciary has progressively aligned itself with international arbitration norms. The *White Industries* case marked a watershed moment, catalyzing critical reforms in India's bilateral investment treaty framework. While legislative amendments, including the 2015 and 2021 reforms, have sought to streamline

enforcement and address concerns such as arbitrator neutrality and public policy interpretation, challenges persist—particularly regarding emergency arbitration, limitation periods, and the clarity of fraud and corruption exceptions. As India continues to attract foreign investment, maintaining a robust, predictable, and arbitration-friendly legal framework remains essential for cementing its position as a premier hub for international commercial arbitration.

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