

# ICC India Arbitration White Paper

## Knowledge Partners



## ENFORCEMENT OF FOREIGN AWARDS IN INDIA

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### Introduction

In India, the enforcement of a foreign arbitral award is governed by the provisions of Part II of the Arbitration and Conciliation Act, 1996 (Arbitration Act). India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention), and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention). While Chapter I of Part II of the Arbitration Act relates to New York Convention awards, Chapter II deals with Geneva Convention awards.

In order to be considered a “foreign award” under the Arbitration Act,<sup>47</sup> an award must fulfil the following requirements:

- (i) it must deal with differences arising out of a legal relationship (whether contractual or not) considered commercial under the laws in force in India; and
- (ii) the country where the award has been issued must be a country signatory to either the New York Convention or the Geneva Convention and must be notified by the Indian government as a reciprocating territory.

If either of the above requirements is not satisfied, the award will not be recognised/enforced as a “foreign award” in India.

In this paper, we will analyse the procedure for enforcement of a foreign award under the provisions of the Arbitration Act and the Code of Civil Procedure, 1908 (CPC). This paper will also examine the role of Indian courts in the process of enforcement, and the growing need to adopt a more pro-enforcement regime.

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<sup>47</sup> Sections 44 and 53 of the Arbitration Act.

## Difference between “Enforcement” and “Recognition” of Award

Before discussing the legal issues involved in the enforcement of a foreign award in India, it is important to understand the difference between “enforcement” and “recognition” of an award.

Simply put, *“An award may be recognised without being enforced. However if it is enforced then it is necessarily recognised by the court which orders its enforcement.”*<sup>48</sup>

The purpose of “recognition” is to prevent any attempt to initiate fresh proceedings on issues which have already been decided in the arbitration that gave rise to the award whose recognition is sought. In other words, recognition alone may be asked for as a shield against reargitation of issues with which the award deals. “Enforcement” goes a step further than “recognition”. As Redfern and Hunter have noted, *“...where a court is asked to enforce an award, it is asked not merely to recognise the legal force and effect of the award, but also to ensure that it is carried out, by using such legal sanctions as are available.”*<sup>49</sup>

In India, an award-holder is entitled to apply for recognition and enforcement of the foreign award through a common petition. A proceeding seeking recognition and enforcement of a foreign award has two stages. Provided the necessary evidence (as discussed below) is produced, in the first stage, the court determines the enforceability of the award having regard to the conditions set out in Section 48 (in the case of a New York Convention award) and under Section 57 (in the case of a Geneva Convention award) of the Arbitration Act. Once the enforceability of the foreign award is decided, in the second stage the court proceeds to take steps for the execution of the award.<sup>50</sup>

## Procedure for the Enforcement of Foreign Arbitral Awards

A foreign award is not a decree by itself, which is executable as such under the Arbitration Act. Enforcement of a foreign award takes place only after the court is satisfied that the foreign award is enforceable under Part II of the Arbitration Act.<sup>51</sup>

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<sup>48</sup> Alan Redfern and Martin Hunter (1999), *Law and Practice of International Commercial Arbitration*, third edition., (London: Sweet and Maxwell), Chapter 10, p. 448.

<sup>49</sup> Redfern and Hunter, Chapter 10, p. 449.

<sup>50</sup> *Government of India v. Vedanta Limited & Others* (2020) 10 SCC 1 [Para 83.7].

<sup>51</sup> *Ibid.* [Para 82].

### *Necessary Evidence*

A party applying for the enforcement of a foreign award shall, at the time of the application for execution, produce before the court the requisite documents and evidence. In the case of a New York Convention award, Section 47 of the Arbitration Act requires that the party should produce before the court the following documents:

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

Similar requirements exist for enforcement of a Geneva Convention award under Section 56 of the Arbitration Act.

### *Limitation Period for Filing Application for Execution*

The Arbitration Act does not specify any period of limitation for filing an application for enforcement of a foreign award. Section 43 of the Arbitration Act, however, provides that the Limitation Act, 1963 (Limitation Act) shall apply to arbitrations.

The Limitation Act too does not contain any specific provision for enforcement of a foreign award. The Supreme Court has held that the limitation of time for filing an application for enforcement of a foreign award will be governed by the residuary provision contained in Article 137 of the Limitation Act. Hence, the limitation period is three years from the date on which the right to apply accrues.<sup>52</sup>

### **Grounds for Challenge**

Sections 48 and 57 of the Arbitration Act provide the grounds to challenge a New York Convention award and a Geneva Convention award, respectively. Thus, a person against whom a foreign award is passed may resist enforcement of such award if any of the conditions mentioned in Section 48 or 57

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<sup>52</sup> *Ibid.* [Paras 65-67, 71 and 76].

of the Arbitration Act (as the case may be) are fulfilled. The grounds for challenge are elaborated in paragraph 19 of this paper. It is important to note, however, that the executing court is vested with the discretion to enforce the award even if one or more grounds under Section 48 or 57 of the Arbitration Act are made out.<sup>53</sup>

Once the court is satisfied that the foreign award is enforceable, such award shall be deemed to be a decree of that court and will then be enforced under the relevant provisions of the CPC.

### *Can the Enforcement Court Set Aside a Foreign Award?*

The enforcement court may “refuse” enforcement of a foreign award; however, it cannot set aside the award even if the conditions under Section 48 or 57 of the Arbitration Act are made out. The power to set aside a foreign award vests only with the court at the seat of arbitration, since the supervisory or primary jurisdiction is exclusively exercised by such court.<sup>54</sup>

### **Minimising Court Intervention**

Ease of enforceability of an arbitral award across jurisdictions is cited as an important reason for promoting dispute resolution through arbitration. The universality and global acceptance of international conventions in favour of enforcement play a crucial role in the success of international arbitration.

Minimal judicial intervention is essential for a pro-enforcement regime. In order to achieve that, the Arbitration Act and related statutes have been amended multiple times to ensure that the supervisory role of courts in the arbitral process is reduced. These amendments seek to minimise judicial intervention in the enforcement of foreign awards. They are, therefore, critical in promoting a pro-arbitration climate in India which is conducive to foreign investment.

Decisions of Indian courts have helped in simplifying the procedure for the execution of foreign awards. A party holding a foreign award can, now, directly apply for enforcement of the award to the court in whose jurisdiction the assets of the losing party are located.<sup>55</sup> Once the court finds that the

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<sup>53</sup> *Ibid.* [Para 83.12].

<sup>54</sup> *Ibid.* [Para 83.11].

<sup>55</sup> *Sundaram Finance Ltd. v. Abdul Samad and Anr.* (2018) 3 SCC 622.

award is enforceable, it may be enforced in the same way as a court decree.<sup>56</sup> A foreign award is not required to be stamped under the Indian Stamp Act, 1899.<sup>57</sup> These decisions have helped in ensuring speedy enforcement of foreign awards, and that has improved India’s credentials as an arbitration-friendly regime.

So far as a challenge to a foreign award is concerned, the Arbitration Act has been significantly amended to limit the grounds for challenging the correctness of an award by an unsuccessful party.<sup>58</sup> Essentially, the grounds for resisting enforcement of a foreign award fall into three categories: (i) grounds which affect the jurisdiction of arbitration proceedings; (ii) grounds which affect party interest alone; and (iii) grounds which are contrary to the public policy of India, as set out in Explanation 1 to Section 48(2) (in the case of a New York Convention award) and Explanation 1 to Section 57(1) (in the case of a Geneva Convention award) of the Arbitration Act.<sup>59</sup>

The third ground for challenge to enforcement, namely, “public policy”, has been a subject of extensive discussion.

#### *Meaning of “Public Policy” of India*

Prior to 2015, courts were interpreting the term “public policy” widely, paving the way to a tendency to review an arbitral award on merits. This anomaly arose as the Supreme Court accorded an expansive construction to the term “public policy” appearing in Section 34 of the Arbitration Act in its decision in *Saw Pipes*.<sup>60</sup> Although the decision in *Saw Pipes* was in the context of a domestic award, it had the unfortunate effect of being extended to apply equally to foreign awards, given that both Sections 34 and 48 of the Arbitration Act use the same expression – “public policy”.<sup>61</sup>

This necessitated an amendment to the Arbitration Act in the year 2015,<sup>62</sup> through which two explanations were inserted in Sections 48(2) and 57(1) of the Arbitration Act that clarified the meaning

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<sup>56</sup> Section 49 (in the case of a New York Convention award) and Section 58 (in the case of a Geneva Convention award) of the Arbitration Act.

<sup>57</sup> *Shriram EPC Limited v. Rioglass Solar SA* (2018) 18 SCC 313 [Para 26].

<sup>58</sup> The grounds for challenge are provided in Section 48 (in the case of a New York Convention award) and Section 57 (in the case of a Geneva Convention award) of the Arbitration Act.

<sup>59</sup> *Vijay Karia and Others v. Prysmian Cavi E Sistemi SRL and Others* (2020) 11 SCC 1 [Para 58].

<sup>60</sup> *ONGC v. Saw Pipes Ltd.* (2003) 5 SCC 705.

<sup>61</sup> Report No. 246 of the Law Commission of India on “Amendment to the Arbitration and Conciliation Act, 1996”, dated 5 August 2014 [Paras 34-37].

<sup>62</sup> The Arbitration and Conciliation (Amendment) Act, 2015, dated 31 December 2015.

of “public policy”. Explanation 1 states that an award is in conflict with the public policy of India only if:

- (i) the making of the award is induced or affected by fraud or corruption or is in violation of Section 75 or 81 of the Arbitration Act; or
- (ii) it is in contravention of the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2 makes clear that the test as to whether there is a contravention of the fundamental policy of Indian law shall not entail a review of the merits of the dispute.

After the 2015 amendment, courts have consistently followed the principle of minimal judicial intervention while deciding petitions for enforcement of foreign awards.<sup>63</sup>

The shift towards a more pro-enforcement stance by Indian courts is evident in a recent decision of a three-judge bench of the Supreme Court in *Vijay Karia*, where the court reiterated that “awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48”<sup>64</sup> and that “the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counter-claims of the parties, enforcement must follow.”<sup>65</sup>

At the same time, if the grounds mentioned in Section 48 (in the case of a New York Convention award) or Section 57 (in the case of a Geneva Convention award) of the Arbitration Act are made out, courts do not hesitate to set aside such an award. In a recent decision of the Delhi High Court in *Campos Brothers Farms*,<sup>66</sup> the court set aside a foreign award as it was found that the arbitrator had ignored the submissions of one of the parties in totality. It was held that the award could not be enforced as it violated the principles of natural justice and contravened public policy.

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<sup>63</sup> *Cruz City I Mauritius Holdings v. Unitech Limited* (2017) 239 DLT 649 [Paras 86-100 and 109]; *GEA EGI Contracting Ltd v. Bharat Heavy Electricals Limited* (2016) 233 DLT 661 [Paras 26-29]; *Xstrata Coal Marketing v. Dalmia Bharat (Cement) Ltd.* (2017) 236 DLT 524 [Paras 42 and 52]; *Daiichi Sankyo Company Limited v. Malvinder Mohan Singh* (2018) 247 DLT 405 [Paras 55-61].

<sup>64</sup> *Vijay Karia (supra)* [Para 81].

<sup>65</sup> *Vijay Karia (supra)* [Para 83].

<sup>66</sup> *Campos Brothers Farms v. Matru Bhumi Supply Chain Pvt. Ltd* (2019) 261 DLT 201 [Para 56].

Generally, the approach is to enforce foreign awards subject to certain well-defined and narrow exceptions. Courts are not permitted to have a “second look” at the award on merits.<sup>67</sup> Nevertheless, courts have been prompt in refusing enforcement where the grounds for challenging an award under the Arbitration Act are clearly attracted.

### **Streamlining the Procedure for Execution**

As mentioned above, once the court is satisfied that an award is enforceable, it is deemed to be a decree of that court. It is then enforced as a decree of the civil court. Separate proceedings for the enforcement of the award and execution are not required under the Arbitration Act.<sup>68</sup> The concerned court would then enforce the award following the procedure laid down in Order XXI of the CPC.<sup>69</sup>

Order XXI of the CPC provides a detailed procedure for the execution of a decree. It lays down various modes of execution, such as attachment/sale of property, arrest, appointment of receiver, etc. Order XXI of the CPC is, thus, a complete code for the process of execution of a decree.

There is, however, an immediate need to streamline the procedure prescribed under Order XXI of the CPC to make the process of execution simpler and quicker. At present, the procedure for execution under the CPC has many loopholes, which makes the process extremely cumbersome. Executing courts have been given wide discretionary powers, for instance, under Order XXI Rule 17 of the CPC, to reject the execution application in case of any defect in the application.

Further, the executing court has also been given the power (under Order XXI Rule 26 of the CPC) to stay the execution of a decree to enable the judgment-debtor to apply for an order of stay before an appellate court. All these provisions make the process of execution of an award complicated and time-consuming. As a result, a successful litigant must wait for an inordinately long time for the enforcement of the award. The amendments made to the Arbitration Act for enhancing the ease of enforcing an arbitral award will fail in their purpose unless corresponding changes are made in the procedure for execution under the CPC.

### **Conclusion**

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<sup>67</sup> *Shri Lal Mahal Limited v. Progetto Grano SPA* (2014) 2 SCC 433 [Para 45].

<sup>68</sup> *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* (2001) 6 SCC 356 [Para 31].

<sup>69</sup> As per Section 10 of the Commercial Courts Act, 2015, the concerned court is the High Court.



Over the last few years, the legislature has systematically amended the law of enforceability of foreign awards to limit the scope of judicial review. Indian courts too have increasingly adopted a pro-enforcement approach. The Arbitration Act provides an efficient and swift method for recognition and enforcement of a foreign award. However, for India to achieve its dream of becoming a global arbitration hub, it is necessary to further streamline and simplify the process of enforcement laid down in the CPC.