



SPIRIT OF FOREIGN ARBITRAL AWARDS IN INDIA: RECOGNITION AND ENFORCIABILITY*

Introduction

The genesis of arbitration in India can be traced from a bygone age. However, arbitration has started to gain popularity and approval as a feasible method of dispute resolutions only in the recent past few decades. The mid and the closing years of the twentieth century witnessed arbitration gaining worldwide affirmation and popularity as a means of resolving commercial and investment disputes.¹ Emergence of new economic and business trends calls for adoption of effective, efficacious and speedier alternative for resolving disputes and arbitration serves the purpose of satisfactory dispute settlement mechanism. Numerous treaties, conventions and judicial decisions have been brought in place that attempts to recognize and enforce policies related to arbitral awards globally.

In order to enjoy the benefits of the arbitral award, the law pertaining to recognition and enforcement of arbitral award between the countries, where the award is proffered and where it is to be imposed, must be in harmony.² Success of arbitration stands on the pillars of its recognition and enforcement. Thus, the notion of arbitration is rendered futile where there is no possibility for the winning party to enforce the arbitral award in its desired country. Also, the credibility of an adjudicator relies on its efficiency and efficacy to be able to enforce its award.³ Therefore, the courts should also actively try to establish a stringent award enforcement regime. Recognition and

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¹Kevin T. Jacobs & Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and Americanization* in *International Arbitration and the Need for More Rigorous Legal and Procedural Defenses*, Texas International Law Journal, Vol. 43:359, page 360 (2008), available at <http://www.tilj.org/content/journal/43/num3/Jacobs-Paulson359.pdf> (accessed on April 21, 2015)

²Hamid G. Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award*, *Kluwer Law International*, page 3 (2002) available at https://books.google.co.in/books?id=PxVkCRNpKqIC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (accessed on April 21, 2015)

³Sumeet Kachwaha, *Enforcement of arbitration awards in India*, *Asian International Arbitration Journal*, Volume 4(2008), Issue 1, Page 1, available at <https://www.kluwerlawonline.com/abstract.php?area=Journals&id=AIAJ2008002> (accessed on April 21, 2015)

enforcement of arbitral awards along with jurisdiction and choice of law are the three stages which are same in the legal framework of resolution of international commercial disputes.⁴

Significance of Award Enforcement Mechanism In Arbitration

International arbitration enjoys preference over other dispute resolving mechanisms like Mediation, Conciliation, Judicial Process etc. because it brings along with it, the much demanded, finality and solemnity. This keeps the awards away from the scrutiny and judicial review of the Court and so, the international arbitral award enjoys the finality of the decision as compared to other decisions which are subject to interference from different country's legal system.

The biggest advantage of international arbitral awards is its enforceability in most countries of the world. It is quite difficult to enforce a judgment of the court as compared to a foreign arbitral award. It can be adopted at any point of time, even when a case is pending before any Court of law and either disputants could terminate at any stage of the arbitration proceeding. It can be used with or without a lawyer and is cost effective and produces quicker remedies of the disputes.

Opting for arbitration in settlement of disputes also reduces the work load of the already exhausted Indian Judicial system. Courts may also lack the required expertise to settle the conflicts. This helps the court to keep their focus on other cases. It reserves the freedom of the parties to withdraw and choose for litigation, at any stage of the arbitration proceeding. Resorting to arbitration can induce faith among both the parties as it gives them a chance to choose a decision maker who has expertise to understand the nature of the dispute. Both parties can mutually agree upon who shall serve as their arbitrator.

Arbitration is preferred over other dispute resolving mechanisms because of its flexibility, speed and confidentiality. It keeps the dispute a private matter and promotes creative, realistic and reliable business solutions. The ability to select a neutral forum makes it an advantageous option. A tribunal that is conditioned and proactive in resolution of disputes can contribute remarkably to managing the arbitration in the most cost and time effective manner. Also, this pivotal award given by such tribunals is based on uniform rules and procedures of the institution which gives it an edge over other dispute resolving mechanisms.

Similarly, there has emerged an international consensus to adopt Arbitration to settle investment related disputes. Growth in foreign investment, a scathing element of the world's economy, has stimulated the growth of investment arbitration simultaneously. Many developing companies lack the capital, technology and other resources needed to modernize their infrastructure and develop

⁴Jonathan Hill and Adeline Chong, *International Commercial Disputes*, Hart Publishing Ltd., Fourth Edition, Para 1.1.3

their industries and so, overseas investment become indispensable. Since enormous capital and money is invested in the host country, foreign investors want assurances that their investments will not be expropriated by changes in the host country's regulations. They also need a way to reconcile disputes which is not contingent on the courts of the host country to ensure that they receive fair and equal treatment and the scope of arbitrariness is minimized. Uniformity and equality in procedures and treatments of the awards is the reason why it is hailed by everyone round the globe.

Legal Basis for Recognition and Enforcement of Arbitral Awards

Foreign arbitral awards can invariably be upheld and enforced on the basis of various statutes, treaties and judicial precedents. There are provisions in Indian Arbitration laws for the recognition and enforcement of foreign arbitral awards given in countries which are signatories to either the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) or 1927 Convention on the Execution of Foreign Arbitral Awards (Geneva Convention).

In January 1996, a new Arbitration Act was passed which repealed all the three, the then prevailing, provisions of the 1937 Act, the 1961 Act and the 1940 Act. Part I of the Act has provisions in relation to the enforcement of arbitral awards produced in India and part II of the Act has provisions in relation to enforcement of foreign awards. Part II of the Act deals with the enforcement of only those foreign arbitral awards to which the New York Convention or the Geneva Convention applies.⁵ This means that Indian Courts shall enforce only those foreign awards under the New York Convention and the Geneva Convention which have been issued in a state that has been notified in the Official Gazette of India as a country to which these Conventions applies.

An International arbitral award enjoys the status of a decree of a court under the Arbitration & Conciliation Act, 1996 and is enforceable under Code of Civil Procedure.⁶ Part II of the Arbitration & Conciliation Act, 1996 dealing with the New York Convention and Geneva Convention provides that nothing shall prejudice the rights which any person would have had of enforcing in India of any awards or of availing himself in India of any award if this provision had not been enacted.⁷

⁵The Arbitration & Conciliation Act 1996 ('the 1996 Act').

⁶The Arbitration & Conciliation Act 1996, Sec 36

⁷ Dr. S.K. Dixit, Arbitration & Conciliation, Pg 43, available at

<https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&cad=rja&uact=8&ved=0CD4QFjAF&url=http%3A%2F%2Fwww.icsi.edu%2FWebModules%2FProgrammes%2FPCS%2F7PCS%2FBG%2520PCS-4->

In *Bhatia International v. Bulk trading*⁸, Supreme Court held that a foreign arbitral award shall be considered only if it is made in a convention country, making this a pre requisite for its enforcement in India. A separate action will have to be filed on the basis of the award if it is not under the Geneva Convention or the New York Convention. In the 2012 judgment of *BALCO v. Kaiser Aluminium Technical services Inc.*⁹, Supreme Court stated the limited power in the hands of court in intervening in the enforcement of a foreign arbitral award.

The law Ministry has proposed its recommendations to amend the laws in relation to the foreign arbitral award enforcement. It focuses on the problem arising due to equal treatment given to all the three different types of awards – Purely domestic award, domestic awards in an international commercial arbitration and a foreign award.¹⁰ This change is contemplated and it heralds a great step forward in approach of the Indian Courts to the Arbitration mechanism. The proposed recommendations for arbitral system must strike on the aim of having the arbitral system acceptable from the core of our hearts which will ultimately save our time, money and safeguard us from the harassment involved in our present judicial system. It must seek to realign the arbitration mechanism in India with the International arbitration framework.

Challenges for Recognition and Enforcement of Foreign Arbitral Award

With the change in social, legal and economic environment various challenges have been created for institutions of arbitration insisting greater swiftness and flexibility as well as neutrality and definiteness in the resolution of conflicts. Several difficulties are experienced in seeking enforcement of an arbitral award in the desired country.

Firstly, the Indian Judiciary has traditionally undertaken to come in as an extraneous factor in all aspects of International Arbitration when a petition is lodged to prevent the enforcement of the foreign arbitral award by a losing party. This interventionist and mediation approach of the Indian Judiciary, which expands the scope of judicial review, has contributed to the difficulties in enforcement to date.

Secondly, denial of recognition and enforcement on the grounds of 'public policy' has added to the challenges. Under the New York Convention the enforcement of foreign arbitral awards may be denied, if it violates the public policy of the place in which it is sought to be relied upon.

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⁸AIR 2002 SC 1432.

⁹ (2012) 9 SCC 552

¹⁰ Amendments to the Arbitration and Conciliation Act 1996, Law Commission of India, (Aug 2014), Report No. 246, available at <http://www.lawcommissionofindia.nic.in/>

Incompatibility with the national policy shall become the ground for ceasing the action of enforcement of the foreign award as per the aforementioned Article of the New York Convention.¹¹ Indian Courts have interpreted the term 'public policy' liberally, to the impairment of the enforcing parties because this term is not explicitly defined in the New York Convention. Refusal of enforcement on this ground had become a challenge until Supreme Court revised its approach in the recent judgment of *ShrilalMahal Ltd. V. ProgettoGrano Spa*¹², where it held that the term 'public policy' shall not be interpreted in broader sense in terms of foreign Awards. It also limited the court's interference while enforcing a foreign award.

This amorphous exception of public policy is usually evoked to hinder the winning party from enjoying the benefits of their victory. Leaving the interpretation of such terms in the hands of the court gives rise to the indefinite and nebulous concepts. Also, under the Geneva Convention Act, 1927, a foreign award may be set aside on the ground that enforcement and recognition of the awards is contrary to the public policy or to the principles of the law of the country in which it is invoked.¹³

Thirdly, the legacy of the leading cases as per which the Indian Courts have similar powers in respect to the International arbitration as they have in respect to the domestic arbitration, has withheld the enforcement procedures of foreign arbitration awards. The application of narrower interpretation of 'public policy' as envisaged in the judgments of *ShrilalMahal Ltd. v. ProgettoGrano Spa*¹⁴, *Renusagar Power Co. Limited v. General Electric Company*¹⁵, *BALCO v. Kaiser Aluminium Technical services Inc.*¹⁶ struck down the decisions made by the Courts in the Judgments of *Bhatia International v. Bulk Trading*¹⁷, *Venture Global Engineering v. Satyam Computer Services Ltd.*¹⁸ and *Phulchand Exports Ltd. v. OOO Patriot*¹⁹.

Fourthly, examination at two levels has intensified the problem of enforcement. Every award can be subjected to scrutiny at two stages: the set aside stage²⁰ and the enforcement stage²¹. It is because of this critical examination a losing party can undermine awards on several fronts. Not only can the winning party's petition to enforce be prevented (as under Part II of the Arbitration & Conciliation Act, 1996) but also the losing party could lodge a petition to set aside its

¹¹ Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958, Article V(2)(b)

¹² (2014) 2 SCC 433

¹³ Geneva Convention Act, 1927, Article 1(e)

¹⁴ Supra, n7

¹⁵ AIR 1994 SC 860

¹⁶ Supra, n5

¹⁷ 2002 (4) SCC 105

¹⁸ (2008) 4 SCC 190

¹⁹ (2011) 10 SCC 300

²⁰ Arbitration & Conciliation Act, 1996, Section 34

²¹ Arbitration & Conciliation Act, 1996, Section 48

enforcement (as under Part I of the Arbitration & Conciliation Act, 1996). If the set aside proceedings are not initiated within 3 months, the award becomes final and binding. Also, the provision of interim orders under Section 9 of the Arbitration & Conciliation Act, 1996 has contributed in hindering the process of enforcement of Foreign Arbitral Awards in India.

Lastly, lack of uniformity in the procedures and treatments of foreign arbitral awards has become an acute problem for the parties resorting to this mechanism. Lack of common legislative standards for recognition and enforcement of foreign arbitral awards stands as the biggest bottleneck that hinders an effective arbitration process in India.

Conclusion

Arbitration has faced practicality issues ever since its inception. In spite of this, there is an international consensus to choose arbitration, as a standalone mechanism, to reach a settlement that is conducive for the maintenance of further development of the business relationship. However, an ideal arbitral framework must contemplate least possible court interference in giving effect to an arbitral award. The streamlining of economic laws needs to be backed by a flawless dispute resolution system. Provisions to ensure fairness, uniformity and due process must be established to aid the enforceability of foreign awards.

Heavy pressure on, the already overburdened, Judiciary can be resolved only through this great mechanism of arbitration. There is a pressing need to have user friendly rules to guide the arbitration procedure. We need to understand that for enforcement of a foreign arbitral award there is no need to have separate proceedings, one for deciding the enforceability of the award and the other for execution of the award. Also, Arbitration tribunals are to be constituted so that quicker and satisfactory reliefs can be availed through short roots. Little and rampant Judicial system, seen and observed, can only then be overpowered by this arbitration methodology. There is a dire need for tightening the grounds to challenge an International arbitral award in India laying down strict provisions and precedence to ensure that foreign awards are made binding and out of the scrutiny of the Court's recourse and interpretations. Recognizing and enforcing foreign arbitral awards uniformly is the demand of the hour.

Notwithstanding the interventionist and expanded judicial review approach of the Indian Judiciary, India qualifies as an arbitration friendly country.²² In regard to international commercial arbitration, it is moving forward in leaps and bounds by following the UNICTRAL model. But we need to introspect to gain the momentum. The approach towards international arbitral awards has to be cautious and pragmatic.

²² Supra, note 3

The old age 'panch parmeshwar' theory of our traditional Indian society, which is based on the theory of 'precedence is justice', should be our guiding spirit so far as the arbitral system is concerned. Our deep rooted system based on our dispute resolution system should form the backbone of our arbitral mechanism. Only then, the concept of our present judicial system will have another lease of life by the oxygen generated from our newly aligned arbitral system.

