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With this thought, we hereby present to you

**LEX BONA FIDE: LAW JOURNAL**

## **Foreign Arbitral Awards and their Enforcement**

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### **Introduction**

In the matter of international trade, arbitration is preferred as a medium of solving disputes because enforcing an arbitral award in a foreign state is less complicated than enforcing a court decision from a foreign state. To facilitate the enforcement of arbitral awards, a lot of bilateral and multilateral conventions and treaties have been established. They lay down rules for enforcement of foreign awards. Enforcement of arbitral awards is also easier because of their contractual nature. This paper will discuss foreign arbitral awards and the Indian Law for the same.

The previous Indian Law on arbitration did not make any distinction between domestic and foreign awards.<sup>1</sup> There was also no definition given to the term ‘foreign award’, and hence, an assumption can be made that foreign awards were subject to challenge and retrial. Legal procedures which applied to domestic awards also applied to foreign awards, and there were no separate procedures. Under the previous Indian Law, settling international arbitration disputes was handled by *The Arbitration (Protocol and Convention) Act, 1937*<sup>2</sup> and *The Foreign Awards (recognition and Enforcement) Act, 1961*<sup>3</sup>. These two aforesaid acts were repealed and declared void via the enactment of the *Arbitration Act, 1996*. The relevant provisions from these repealed acts were added to the new act of 1996.<sup>4</sup>

The Supreme Court in *ThyssenSthlunion GMBH v. Steel Authority of India*<sup>5</sup> held that practically there is no difference between the Arbitration Act, 1996 and Foreign awards Act 1961 regarding enforcement of the foreign awards. Part II of the present Arbitration Act contains both the provisions of NYC (1958)<sup>6</sup> and GC (1927)<sup>7</sup>. Chapter 1 of Part 2 deals with arbitral agreements and awards of a foreign nature, and Chapter 2 deals with the enforcement of the same.

Section 44 of the present Arbitration Act lays down the definition of a foreign award. Under

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<sup>1</sup>Shodhganga, Chapter 6: Enforcement of Foreign Arbitral Awards in India, 230.

<sup>2</sup> It was enacted as a result of Geneva Protocol (1923) & Geneva Convention, 1927 under the auspices of League of Nations.

<sup>3</sup> It was enacted as a result of the NYC (1958), under the auspices of UNO.

<sup>4</sup> Supra note 1 at 231

<sup>5</sup> AIR 1999 SC 3923

<sup>6</sup>Convention on the Recognition and Enforcement of Foreign Arbitral Awards

<sup>7</sup>Convention on the Execution of Foreign Arbitral Awards

this section, a foreign award is an arbitral award made on disputes occurred between persons out of legal relationships.<sup>8</sup> The dispute needs to be considered commercial under the law in India. Foreign award basically means an arbitral award made out of a foreign arbitration, and not a domestic one. The essential elements of a foreign arbitration were laid down by the Calcutta HC in *Serajuddin v. Michael Golodetz*<sup>9</sup>. The court laid down that arbitration should have been done in foreign lands, foreign arbitrators should be involved, and it should be done by application of foreign laws. If an arbitral award is made in a foreign land, but with the application of Indian Laws, such an award will be treated as a domestic award and not a foreign one.<sup>10</sup>

Indian Law encourages the application of foreign laws in arbitration. The parties who engage in arbitration have the choice to use the law of any land to settle their disputes. They have the freedom to subject their issues to any foreign law, including bilateral treaties and international conventions.<sup>11</sup> Sections 44 and 49 of the Arbitration Act are the most important provisions of the Indian Law relating to the enforcement of foreign arbitral awards in our country. According to Section 49, the enforcement of foreign arbitral awards is the same as the enforcement of foreign judicial sentences. This shows that the Indian Law does not notice any distinction between foreign arbitral awards and foreign court judgements. This attitude of the Indian Law is not favourable to international arbitration and restricts the application of some types of foreign arbitral awards.

According to Section 44<sup>12</sup>, in order to enforce a foreign order it has to be established that the country whose law has been used for the arbitration allows enforcement of arbitral awards made in India. This is a rule of reciprocity. Refusal by a Country to enforce Indian arbitral awards leads to denial of arbitral awards made under the law of that specific Country in India. The main problem with this provision is that it is extremely vague and does not mention on whom does the burden of proof to establish reciprocity falls.<sup>13</sup> The section also states that there should be reciprocity in the amount of restrictions and flexibility in the enforcement of the arbitral order. Section 49 places unusual burden on the judge because this section expects the judge to take into consideration exactly the same conditions for enforcing a foreign award in India that are applied by the courts at the seat of arbitration when they enforce awards made in India.<sup>14</sup> It is impractical for the judge to know the rules of enforcement of a foreign arbitral award in another Country.

International treaties and conventions about arbitration remove this burden of reciprocity from

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<sup>8</sup> Section 44, Arbitration Act, 1996

<sup>9</sup> AIR 1960 Cal.49

<sup>10</sup> N.T.P.C. v. Singer Co AIR 1993 SC 998

<sup>11</sup> Article 7 of the Arbitration Act, 1996.

<sup>12</sup> Arbitration Act, 1996

<sup>13</sup> Supra note 1 at 238

<sup>14</sup> Supra note 1 at 240

the Judicial authorities of a Country, because the conventions and treaties are reciprocal by nature.<sup>15</sup> It would have been better if the Indian law would have separated enforcement of foreign arbitral awards and court decisions. By establishing this distinction, the present law could have been more explicit and free of any misinterpretation.

The Arbitration Act, 1996 also provides for certain instances in which the court has the power to refuse the enforcement of foreign arbitral awards. Section 48 of the Arbitration Act, 1996 lays down the criterion for declaring a foreign arbitral award as unenforceable. The High Court in *Glencore International AG v. Dalmia Cement (Bharat) Limited*<sup>16</sup> held that in order to qualify as a ground to resist enforcement, the matter should either violate due process of the law or principles of natural justice. The enforcement of a foreign award in India is a two-stage process which is initiated by filing an execution petition. Initially, a court would determine whether the award adhered to the requirements of the Act. Once an award is found to be enforceable it may be enforced like a decree of that court.<sup>17</sup>

Section 49 states that a foreign arbitral award is executable by its own force. This establishes smooth and speedy execution of foreign orders which are unobjectionable and recognized. When a court decides that a foreign award is enforceable, the court deems it as a decree of that respective court. The Supreme Court in *Koch Navigation Inc. v. M/s. H.P.C.L.*<sup>18</sup> held that a foreign arbitral award has to be executed as it is, and there is no scope of amendment to the award. In the case of *Fuerst Day Lawson v. Jindal Export*<sup>19</sup> the Apex Court made the observation that Sections 46 to 49 make it abundantly clear that separate proceedings are not necessary for the enforcement of foreign awards. Any person who may be interested in getting a foreign award enforced can apply to a Court in writing, which has jurisdiction over the matter. The Court has the power to declare the arbitral award a decree once it is satisfied that the award is foreign and enforceable under the law.

The Supreme Court has also stated that a foreign arbitral award does not need to be stamped.<sup>20</sup> Foreign arbitral awards do not require registration and can be enforced as a decree. The issue of stamp duty cannot stand in the way of enforcement of foreign awards.<sup>21</sup>

In conclusion, the previous Indian law on arbitration had no rules or regulations on enforcement of arbitral awards rendered outside the Country. Although over time, there have been a lot of legal developments in the Indian legislature which promote and support foreign arbitration and enforcement of their awards. This pro foreign arbitration attitude has helped India to catch up

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<sup>15</sup> *Habib Mohd. Sharif al Mulla*. "Conventions of Enforcement of Foreign Judgments in the Arab World", *Arab Law Quarterly*, vol. 14, issue 1 (1999); 34-35

<sup>16</sup> 2017(4) ArbLR228(Delhi)

<sup>17</sup> *Enforcement of Arbitral Awards and Decrees in India*, Nishith Desai Associates, 2020, pp. 6

<sup>18</sup> AIR 1989 SC 2198

<sup>19</sup> AIR 2001 SC 2293

<sup>20</sup> *M/S. Shri Ram EPC Limited v Rioglass Solar SA (2018) SCC 147*

<sup>21</sup> *Naval Gent Maritime Ltd v Shivnath Rai Harnarain (I) Ltd*. 174 (2009) DLT 391

with the advanced legal systems of the world.<sup>22</sup> The Arbitration Act, 1996 has helped immensely as it explicitly allows the enforcement of foreign arbitral awards. Although, non-compliance with rules of morality can lead to the award not being enforced under Indian Law.

In one of its most recent judgements, the SC has instructed the other courts against interfering with enforcement of foreign arbitral awards.<sup>23</sup> Through the establishment of this precedence, the judicial climate in India has adopted a ‘minimal interference’ approach towards the issue of foreign arbitral awards and their enforcement.<sup>24</sup>

The primary problem with Indian Law in this regard is that it treats foreign arbitral wards in the same manner as foreign court judgements and decisions. Therefore, it can be argued that the legal system of arbitration in India has significantly moved forward to create an environment which is supportive of foreign arbitration and its awards. Nevertheless, there is a lot of room for improvement.



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<sup>22</sup> *Supra note 1, at 261*

<sup>23</sup> *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors Civil Appeal No. 1544 of 2020, decided on 13 February 2020*

<sup>24</sup> *Vasanth Rajasekharan, Enforcement of Foreign Arbitral Awards, Mondaq: Connecting knowledge and people (June 27, 2020, 10:04 AM), [https://www.mondaq.com/india/trials-appeals-compensation/897470/enforcement-of-foreign-arbitral-awards-supreme-court-promotes-a-minimal-interference-approach#\\_ftnref5](https://www.mondaq.com/india/trials-appeals-compensation/897470/enforcement-of-foreign-arbitral-awards-supreme-court-promotes-a-minimal-interference-approach#_ftnref5)*