ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDIA – CURRENT ISSUES AND CHALLENGES

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ABSTRACT

This research paper is concerned with the enforcement of Foreign Arbitral Awards under the relevant regimes in India, both local and International. The easy enforceability of arbitration awards is considered one of the main factors in the success of International Commercial Arbitration. This paper not only attempts a comprehensive analysis of requirement and procedures for recognition and enforcement of foreign awards in India but also evaluate whether Indian laws and practice comply with best International practice standards especially embodied in the New York Convention 1958 on enforcement of foreign arbitral awards. This research work comprises five Parts. The first part examines the legal framework and provides a brief history of rules governing arbitration and enforcement of foreign arbitral awards. Chapter two looks at general principles governing the enforcement of foreign arbitral awards. Part three covers jurisdiction in the enforcement of arbitration awards in India. Part four examines procedural steps required by each state for enforcement of an award, looking particularly at the import of relevant international conventions on other issues. Part five deals with the limitations in the enforcement of foreign arbitral awards. The concluding chapter deals with a summary of all the problems and suggests a common way forward for the legal system of the state in dealing with these issues. There needs to be a lot to be done in the area of arbitration concerning foreign awards. The Act itself needs a review and the precedent set up by the courts are somewhat perplexing. The enforcement of foreign awards requires cooperation at both national and international levels. There needs to strike a balance between the New York Convention and the Arbitration & Conciliation Act of 1996.

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***Keywords*:** Arbitration, Foreign Award, Recognition & Enforcement of Foreign Arbitral Awards, Indian Arbitration Law, New York Convention 1958.

INTRODUCTION

The people of this nation have experience with alternative dispute resolution. It has existed for all of recorded history. According to legal history, man has been experimenting with ways to make it simple, affordable, and convenient to acquire justice throughout history. The traditional method of settling conflicts significantly aided in the resolution of small and family-related conflicts as well as conflicts involving groups of people.[i] The Lok Adalat, or court-based conflict resolution system, was introduced in India in 1982. It then took the shape of the Arbitration Act, 1940, which later evolved into the dynamic globalised system known as the Arbitration & Conciliation Act, 1996. Under Indian law, domestic arbitration awards may be implemented with relative ease. The problem occurs when the judgment is made in a nation other than the one where enforcement is sought. Awards made by foreign nationals or others based on foreign legal procedures could not be accepted by a state.[ii] The domestic court that operates under national laws that provide provisions for the execution of domestic awards has absolute jurisdiction to do so. The legal system of one nation does not automatically have jurisdiction over disputes settled in another nation. Therefore, compared to domestic arbitral rulings, the recognition and execution of an award in international commercial arbitration are treated differently. To maintain the scope and purpose of the arbitration, this report ends with a few remarks on the trend of enforcement in India. With the correct strategy, India will soon rank among the top South-East Asian arbitral jurisdictions. This is clear from the earnest efforts made by the Indian government and the shift in how national courts handle arbitration cases. International arbitration in India is about to enter a new era. The presentation begins by going through the concept and broad history of international arbitral decisions. Second, it discusses the function of national courts in conjunction with the responsible authorities handling the execution of foreign awards. Thirdly, it emphasises the steps that must be taken to enforce foreign awards. Fourthly, I tried to outline any restrictions or obstacles to the implementation of the rewards. Finally, present the conclusion along with any recommendations for improving the procedure.

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The enforcement of foreign arbitral awards requires both national and international cooperation. The New York Convention governs the international sphere and the Arbitration & Conciliation Act, 1996 the domestic sphere. The enforcement procedure still lacks certain safeguards which are needed to make the procedure more efficient.

Brief History

It may be helpful to give a quick overview of the situation before the implementation of the legislation relating to the enforcement of foreign arbitral judgments in India before analysing the issues on the enforcement of foreign arbitral awards in India under its current regulatory enactments. This chapter attempts to provide insight into the issue of international arbitral awards' enforcement in light of its historical context. A foreign award may be universally recognised in terms of its content, but various legal systems have varied opinions on the legal implications of such awards due to their differing policies. Early on in the common law's evolution, law courts had a negative opinion of commercial arbitration. *"Extra-judicial initiatives to resolve disputes through arbitration aimed to eliminate the authority of the court,"* the King's Bench ruled in *kill v. Hollister.* This worry prompted the courts to rule that an agreement to arbitrate future conflicts was reversible at any time before the delivery of an arbitral verdict. In common law nations, British law has shifted away from the strict *Kill v. Hollister*[iii] ruling and toward a position that supports commercial arbitration. Even if the arbitration process has essentially altered, there are still some contradictions. There have been multilateral strategies to deal with these contradictions. With the establishment of the 1927 Geneva Convention on Execution of Foreign Arbitral Awards and the 1923 Geneva Protocol on Arbitration Clause, the first strategy was established. The award must result from a legally binding arbitration agreement, it must have been rendered by a tribunal that was duly established and in compliance with local laws, and it must go against the public policy of the nation where enforcement is sought. The UN Convention on Recognition & Enforcement of Foreign Arbitral Awards was adopted as a result of a rise in international commercial contracts. The main drawback of the Geneva Conventions was that they prevented international awards from becoming final in the country in which they were given.[iv] The New York Convention, which was adopted in 1958, and the Foreign Award Recognition & Enforcement Act, which put the New York Convention into action, were both successful in solving this issue. The United Nations Commission on International Trade Law (UNCITRAL) adopted the most

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recent model, the UNCITRAL Model Law on International Commercial Arbitration, on June 21, 1985, and encouraged *"all States to give the Model Law on International Commercial Arbitration due consideration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice."*[v] There was no legislation governing the application of the execution of international arbitral decisions in India before the adoption of the Arbitration (Protocol & Convention) Act, 1937. India actively acceded to the 1927 Convention on the Execution of Foreign Arbitral Awards as well as the Geneva Protocol on Arbitration clause after 1937. Under the system developed under the New York Convention, the International Awards Act, 1961, provided the recognition and execution of foreign arbitral awards in India.[vi]

Definition of Foreign Arbitral Awards

The foreign award is vaguely defined by the 1937 Act as well as by the 1961 Act. The term is used in connection with the arbitration in foreign lands by foreign arbitration to which foreign law is applicable and in which a foreign national is involved. Sec 2 of the 1937 Act states that in this Act *"foreign award"* means an award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July 1924.[vii] The term *"foreign award"* came up for discussion between Punjab and Haryana High Court in the *Lachman das Sat Lal v. Parmeshri Das* dispute that arose between parties regarding the quality and quantity of goods sent to purchasers. An arbitrator was appointed by the respective firm but the appellants failed to appoint anyone. The sole arbitrator made an award in favour of the respondent. It was this award that which respondent sought to enforce under provisions of the Indian Arbitration Act of 1940. Appellants contended that an award in question was a foreign award and hence Indian Arbitration Act 1940 had no application.[viii]

Recognition and Enforcement

Recognition is used mainly as a defensive tactic to get an arbitral decision. If the same parties to a convention seek another arbitration, the "recognition" ensures protection to an arbitral ruling. Any other claim qua arbitration between the parties in which the problems resulting therefrom have previously been resolved may be offset by the opposing party by seeking acknowledgment of an arbitral ruling. The concept of moving forward while attempting to have

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the award recognised may be put on hold if new concerns that have emerged that were not covered in the previous round(s) of arbitration are taken into consideration.

On the other hand, "enforcement" focuses more on the aggressive side. A party requesting the enforcement of an award does so with the intention of employing proper legal remedies to not only enforce the award but also to have it recognised. One may contend that "enforcement" and "recognition" are contemporaneous concepts that work together.

The Supreme Court ruled in *Brace Transport Corpn. of Monrovia v. Orient Middle East Lines Ltd.*[ix] that: *" 13……. … An award may be recognised, without being enforced; but if it is enforced then it is necessarily recognised. Recognition alone may be asked for as a shield against re-agitation of issues with which the award deals. Where a court is asked to enforce an award, it must recognise not only the legal effect of the award but must use legal sanctions to ensure that it is carried out."*
Let us attempt to comprehend what "foreign award" means now before moving on. Section 44 of the Arbitration Act of 1996 provides a definition of the phrase "foreign award"[x]. "Foreign award" is defined as "an arbitral award on differences between people arising out of legal connections, whether contractual or not, regarded to be commercial under the law applicable in India, rendered on or after the eleventh day of October, 1960." —

- in accordance with a written arbitration agreement to which the First Schedule's Convention shall apply, and
- if the Central Government determines that reciprocal arrangements have been made in one of these areas, it may notify the public by publication in the Official Gazette.

An "arbitral award" was described as "an award rendered by an arbitrator appointed for each case, as well as those made by permanent arbitral tribunals to which parties have submitted" in the New York Convention of 1958.

The phrase "foreign arbitration" would also cover arbitrations if one of the parties is from a nation that has not joined the Geneva Convention, the High Court of Calcutta said in *Serajuddin & Co. v. Michael Golodetz*[xi].

The Court went on to examine the decisions where the terms "foreign arbitration" and "foreign award" were used and concluded that they were used in connection with the following:

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1. arbitrations in foreign lands;
2. foreign arbitrators;
3. application of foreign law; and
4. foreign nationals.

The Court observed that the countries that have ratified the Geneva Conventions have included certain class of such arbitrations and awards within the definitions under the Arbitration (Protocol and Convention) provisions, however, the definitions were not exhaustive. In this case where one party was Indian and the other US citizens, the Court was of the view that even though the arbitration did not fall within the ambit of the Indian Arbitration (Protocol and Convention) Act, 1937 and American laws were applicable, it satisfied all the characteristics of foreign arbitration as aforementioned.

The evolution of "enforcement" and "recognition" of foreign awards as per the provisions of two archaic Acts, namely the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention) Act, 1937, has been very skillfully handled by the Delhi High Court in *GAIL v. Spie Capage SA*.[xii]

GENERAL PRINCIPLES GOVERNING THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Under the Arbitration and Conciliation (Amendment) Act of 2015, There are two avenues available for the enforcement of foreign awards in India, viz., the New York Convention and the Geneva Convention, as the case may be.

Enforcement under the New York Convention

Sections 44 to 52 of the Arbitration and Conciliation (Amendment) Act, 2015 deals with foreign awards passed under the New York Convention. The New York Convention defines "foreign award" as an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October 1960 -

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a. In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

b. In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.[xiii]

From the abovementioned conditions, it is clear that there are two prerequisites for the enforcement of foreign awards under the New York Convention. These are:

a. The country must be a signatory to the New York Convention.

b. The award shall be made in the territory of another contracting state which is a reciprocating territory and notified as such by the Central Government.

Section 47 provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court

(a) original award or a duly authenticated copy thereof;

(b) original arbitration agreement or a duly certified copy thereof; and

(c) any evidence required to establish that the award is a foreign award. As per the new Act, the application for enforcement of a foreign award will now only lie to High Court.

Once an application for enforcement of a foreign award is made, the other party has the opportunity to file an objection against enforcement on the grounds recognized under Section 48 of the Act.

These grounds include: -

a. the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

b. the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

c. the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

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d. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

e. the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

f. the subject matter of the difference is not capable of settlement by arbitration under the law of India; or

g. the enforcement of the award would be contrary to the public policy of India.

The Amendment Act has restricted the ambit of violation of public policy for international commercial arbitration to only include those awards that are:

(i) affected by fraud or corruption,

(ii) in contravention with the fundamental policy of Indian law, or

(iii) conflict with the notions of morality or justice.

It is further provided that if an application for the setting aside or suspension of the award has been made to a competent authority, the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Section 49 provides that where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

Enforcement under the Geneva Convention

Sections 53-60 of the Arbitration and Conciliation (Amendment) Act, 2015 contain provisions relating to foreign awards passed under the Geneva Convention.

As per the Geneva Convention, "foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July 1924,-

a. in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and

b. between persons of whom one is subject to the jurisdiction of someone of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third

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Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

c. in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter, an award shall not be deemed to be final if any

d. proceedings for the purpose of contesting the validity of the award are pending in any country in which it was made.[xiv]

Section 56 provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court

(a) original award or a duly authenticated copy thereof;

(b) evidence proving that the award has become final and

(c) evidence to prove that the award has been made in pursuance of a submission to arbitration that is valid under the law applicable thereto and that the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure. As per the new Act, the application for enforcement of a foreign award will now only lie to High Court.

The conditions for enforcement of foreign awards under the Geneva Convention are provided under Section 57 of the Arbitration and Conciliation Act, 1996. These are as follows:

a. the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

b. the subject matter of the award is capable of settlement by arbitration under the law of India;

c. the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

d. the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

e. the enforcement of the award is not contrary to the public policy or the law of India. The Amendment Act has restricted the ambit of violation of public policy for international commercial arbitration to only include those awards that are: -

(i) affected by fraud or corruption,

(ii) in contravention with the fundamental policy of Indian law, or

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(iii) conflict with the notions of morality or justice.

However, the said section lays down that even if the aforesaid conditions are fulfilled, enforcement of the award shall be refused if the Court is satisfied that:-

a. the award has been annulled in the country in which it was made;

b. the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under legal incapacity, he was not properly represented;

c. the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration: Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

Furthermore, if the party against whom the award has been made proves that under the law governing the arbitration procedure there is any other ground, entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Section 58 provides that where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

Competent Authority dealing with Foreign Arbitral Awards

The arbitral tribunal itself has no power to enforce its award apart from making an order giving a party authority to enforce the award. Thus, if the losing party fails to comply voluntarily with the award, the winning party will seek to enforce it in any country where the assets of the losing party are located. The competent authority dealing with this differs from country to country. The main competent enforcement authorities are either judicial or public offices.[xv] Most countries issue enforcement orders to give jurisdiction to the court to enforce foreign awards but there is ambiguity regarding which particular court is entrusted with such jurisdiction. For example, in France and Belgium, the competent court to enforce foreign awards is a court that has jurisdiction to enforce national awards. In India, sec 47 of the Act in Part II dealing with enforcement of certain foreign awards defined the term court as having jurisdiction over the

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subject matter of the award.[xvi] This has a clear reference to a court within whose jurisdiction the asset or the person is located against whom enforcement of the International arbitral award is sought. When the subject matter of the award is monetary, the enforcement application is filed in the court within whose jurisdiction the bank account of the respondent is located. The explanation subject- matter of the award under sec 47 is different from the subject matter under sec 2(e) Part I of the Act.[xvii] To enforce and execute an award the party has to initiate proceeding as envisaged under sec 47.[xviii] In the case, on a critical appraisal of the judgment of the Supreme Court in *Badat Co., Bombay v. East, India Trading Co*.[xix] (i) that the cause of action for the plaintiff's suit on the original side of the Bombay High Court, on the basis that it rested on the judgment of the New York Supreme Court is outside the jurisdiction of Bombay High; (ii) that the arbitral awards lacking the finality as per the law of New York till they culminate in a judgment cannot furnish a valid cause of action for the suit before the Bombay High Court. The first ground contradicts the "doctrine of obligation." The doctrine lays down that despite the rule of non-merger of the original cause of action in the judgment even when a suit is based upon the judgment which furnishes a new cause of action, the question of lack of jurisdiction for the Bombay High Court to entertain the suit can never arise if the said doctrine which finds incorporation in section 13 of the Civil Procedure Code here in India thus making it res judicata.[xx] The rule relating to the jurisdictional competence of the court in the international arena, the Supreme Court of India all the same failed to appreciate that the procedural rule of the relation between jurisdiction and cause of action has no relevance to actions brought for the enforcement of a foreign judgment. The second ground on which the court based its decision, relegating foreign awards to an inferior position as compared with foreign judgments. In fact, from the point of view of finality or conclusiveness, there is little difference between a foreign arbitral award and a foreign judgment.[xxi] The court held there is a valid cause of action for the enforcement of the foreign award.

The Supreme Court laid down the first instance where a foreign award has been accepted in an Indian Court. The judgment itself raises various questions concerning foreign judgment and foreign awards. The cause of action and what will be the jurisdiction of the court about foreign awards. It is clear under sec 47 that one has to approach the Supreme court or High court for enforcement of foreign arbitral awards. Role of National Courts As Dr. F A Mann suggested *"every arbitration is necessarily subject to the law of a given State. No private person has the*

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right or power to act on any other level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law". It has been suggested that the role of the court is akin to that of an executive partner to provide greater effectiveness to arbitral proceedings.[xxii] The national court plays a prominent role in international arbitration and has been recognised in many countries. This is generally because arbitration is regulated according to national laws and national courts. This is particularly true at the enforcement stage where the award must survive certain statutory conditions for it to be successfully enforced. Once an arbitral award has been rendered national courts may refuse to enforce based on the ground of Article V of the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958.[xxiii] These conditions have been incorporated in the national legislation of most countries signing the New York Convention and adopting the UNCITRAL model law. Since arbitration is a private process the reason behind surpassing power is to safeguard the basic state of fairness and impartiality. The supervisory powers of the court are necessary to provide the arbitral process with the procedure of checks and balances to ensure a fair and impartial trial.

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

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of public policy is the most controversial. *Renusagar v General Electric*[xxv] has always been the starting point for whether one considers the topic of Indian court intervention on grounds of public policy. This decision was based on private international law and was in line with international practice commonly accepted in most developed arbitral jurisdictions such as France and US. It is confirmed that the position is only in exceptional circumstances should national courts interfere with arbitral awards on grounds of public policy.

Indian Supreme Court took a different approach in *Oil & Natural Gas Corp. v Saw pipes*,[xxvi] The case of saw pipes arose out of a domestic dispute concerning payment of liquidated damages under a supply contract. The matter was referred to arbitration and an award was rendered by a tribunal which holds that ONGC was not entitled to any liquidated damages since it has failed to establish any loss as a result of late supply by saw pipes. ONGC applied to set aside arbitral awards before Indian courts on the ground of public policy. The case of saw pipes has been criticised for its wide interpretation of public policy defence. by many distinguished commentators. It has been condemned for its wide interpretation of public policy defence. The Indian Arbitration Act does not include error of law as setting aside arbitral awards and it has been widely accepted in India that an arbitrator's decision cannot be received on such grounds. By referring that public policy grounds include error of law by arbitral tribunal the case went beyond Indian tribunal action. The error of law is considered within the ambit of public policy and created a system to review the arbitrator's decision which is in contravention of arbitration law.

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

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

Emergency Execution of Foreign Awards

The enforcement of foreign awards takes time as it is required in the same manner as any suit the emergency arbitration grants interim relief only for a specified period. It exercises a similar function as that of an ad hoc tribunal which has been constituted for a limited time. The New York Convention is leading a soft law on the enforcement of foreign arbitral awards. However, the New York Convention does not recognise an award passed by an emergency arbitration because such an order has not attained finality. Although a no of arbitrations jurisdictions have recognised the importance of emergency arbitration awards under their municipal laws. In the USA a no of judicial rulings has to be recognised as emergency arbitral awards and allowed enforcement of such awards. In England, the High court does not have the power to grant relief in cases where parties have sufficient means to obtain interim relief from emergency arbitration under the London Court of International Rules. In India, sec 9 of the Arbitration & Conciliation Act, 1996 provides that parties may apply for interim relief to the concerned court at any time before enforcement of arbitral awards passed by in emergency provisions. Under Part II of the Arbitration Act which deals with the enforcement of foreign arbitral awards only final awards can be enforced before the court of law in India and interim awards passed by an emergency arbitration proceeding are not to be recognised. In 2014, Law Commission recognised this lacuna in its 246th report[xxix] and recommended that the definition of the arbitral tribunal under sec 2(1)(d) Arbitration Act should broaden to include an emergency arbitrator to ensure that arbitration institutional rules which provide for an emergency arbitrator are statutorily recognised in India. The issue of emergency arbitration has been considered, by *Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors.*[xxx] In the said matter, the Delhi High Court was dealing with an application under Section

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9 of the Arbitration Act seeking interim reliefs on the lines of an award passed by the emergency arbitrator appointed by SIAC. However, it further held that it is open to a party to approach the court under Section 9 of the Arbitration Act to seek interim reliefs and that the court may grant interim reliefs to the party without considering the order passed by the emergency arbitrator. Enforcing an award passed by an emergency arbitrator lacks legal backing under Indian laws. The advantage of moving before an emergency arbitrator as opposed to a court are numerous. In various cases, parties mutually agreed to submit their neutral jurisdiction so both parties are comfortable with the judicial seat of the tribunal. Further, the timeframe for obtaining interim relief is uncertain whereas an emergency arbitrator is required to pass an award within a stipulated period.

Partial Enforcement of Foreign Arbitral Awards

Foreign arbitral awards may include parts that are acceptable to enforcement and part which cannot be enforced as it is not under the law of the state where enforcement is sought. In this case, the question is whether it is possible to separate the parts which may not be enforced from those that are acceptable so that recognition and enforcement of the latter can be granted. In the context of New York Article V (1) (c) shows that partial enforcement is contemplated only when decisions partly exceed the arbitrator's authority. The other half provides that if a decision submitted on matters to arbitration can be separated from that not submitted, that part of the award which contains the decision on matters submitted may be recognised and enforced.[xxxi] It provides for the grant of enforcement of part within the arbitrator's authority where it can be effectively separated from the rest. In the Italian Court of Appeal in General Organization of Commerce and Industrialization of Cereals of the *Arab Republic of Syria v S.p.a. SIMER* (Società delle Industrie Meccaniche di Rovereto)[xxxii] found that while the arbitration agreement only granted the arbitrators authority to deal with nontechnical matters, the award also covered technical matters. Thus, the court granted enforcement of the award only to the extent that it dealt with non-technical matters. Is the discretion of the court sufficiently broad to grant partial enforcement under the New York Convention in other circumstances? It is to be pointed out that partial enforcement supports the achievement of all International conventions in this area which favours the enforcement of Foreign arbitral awards. According to pondered & Besson *"even if partial recognition and enforcement cannot be not expressly provided for in other cases, it must be admitted that they are possible under*

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some condition". Moreover, recommending 1(h) of the final International Law Association Report on International Commercial Arbitration concluded that if any part of an award that violates international policy can be separated from any part which does not that part which does not violate international public policy may be recognised.[xxxiii] However, Convention contains no reference to partial enforcement under Article V (1)(c), enforcing court can exercise its discretion to grant partial enforcement.

JURISDICTION IN THE ENFORCEMENT OF ARBITRATION AWARDS IN INDIA

Courts

The high court with original jurisdiction to decide the questions forming the subject matter of a foreign arbitral award will have jurisdiction over an application for enforcement in terms of section 47 read with section 49 of the Arbitration Act.

In the case of a domestic award, the principal civil court of original jurisdiction in a district, and the high court in cases where the high court exercises ordinary original civil jurisdiction, would have jurisdiction to hear an application for enforcement of the award under section 36 read with section 2(1)(e)(i) of the Arbitration Act.

In accordance with section 10 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015, all applications or appeals arising out of an international commercial arbitration are to be heard and disposed of by the commercial division of the high court (where a commercial division has been constituted in that high court).

In the case of arbitration other than an international commercial arbitration, if the principal court of original jurisdiction is a district court, all applications or appeals arising out of the arbitration are to be heard and disposed of by the commercial court, where constituted. Further, if the high court has original pecuniary jurisdiction to entertain disputes over a particular pecuniary threshold, all applications or appeals arising out of that arbitration are to be heard

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and disposed of by the commercial division (where a commercial division has been constituted in that high court).

Note that the commercial division of a high court and the commercial court in a district court consists of judges who have experience in dealing with commercial disputes.

Requirements for the courts to have jurisdiction

An award holder must file its application for the enforcement of an arbitral award (whether foreign or domestic) before the competent court in whose jurisdiction the assets of the award debtor are located (*Executive Engineer v. Atlanta Limited*, 2014, 11 SCC 619; *Tata International Ltd v. Trisuns Chemical Industry Ltd*, 2001, SCC Online Bom 905; *Wireless Developers Inc v. India Games Limited*, 2012, SCC Online Bom 115). If the assets of the judgment debtor are located in the territorial jurisdiction of more than one court, the award holder can file execution petitions simultaneously in all competent courts (*Bulk Trading SA v. Dalmia Cement (Bharat) Limited* 2005 SCC Online Del 1389; *Cholamandalam Investment and Finance Co Ltd v. CEC Ltd and Anr*, 1995, SCC Online Del 240).

As a matter of practice, the applicant typically files a list of assets held by the judgment debtor with the enforcement petition (or states the reasons why it believes the assets of the judgment debtor are located within the territorial jurisdiction of the court where the execution proceedings are filed). If the award holder is unable to identify the assets of the judgment debtor, the award holder may make an application to the court requesting a disclosure of the assets held by the award debtor under provisions analogous to Order XXI, Rule 41 of the Code of Civil Procedure 1908 (CPC).

An application will be admissible if it meets the basic requirements set out under section 47 of the Arbitration Act, namely, the party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court (i) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it 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. Additionally, if the award or agreement to be produced is in a foreign language, the party seeking to enforce the award shall

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produce a translation into English duly certified as correct by a diplomatic or consular agent of the country to which that party belongs.

PROCEDURAL STEPS REQUIRED BY EACH STATE FOR ENFORCEMENT OF AN AWARD

Procedure for Enforcement of Foreign Arbitral Awards

There must be an acquaintance with rules of procedure for enforcement of foreign arbitral awards. The winning party to succeed should follow provisions governing rules of procedure. This chapter will examine the most significant question relating to the rules of procedure. First, it will examine the question of which provision governs the rule of procedure, and whether they are governed by national law. Secondly, there will be an examination of modes of procedure that have been adopted thereto ought to be followed by the winning party to enforce a foreign arbitral award. Thirdly, the procedure to be followed by an applicant for enforcement of the foreign arbitral award. Finally seeks to establish where existing provisions for regulating rules of procedure are adequate and capable of ensuring enforcement of all categories of foreign arbitral awards by conventions that apply in India. Section 2(6) of the CPC defines *"foreign judgment"* as *"the judgment of a foreign Court,"* which refers to a Court situated outside India and not established or continued by the authority of the Central Government. The enforcement of the foreign judgment in India depends on reciprocating and non-reciprocating countries. A party seeking enforcement of a decree of a court in a reciprocating country is required to file execution proceedings in India while in case of a decree from a non-reciprocating country, a fresh suit has to be filed before the relevant court in India. In the case of *Union of India v. Hardy Exploration and Production (India) Inc*[xxxiv] held that in cases where the arbitration agreement specifies the *"venue"* for holding the arbitration sittings by the arbitrators, but does not specify the *"seat",* the question then arises, 'on what basis and by which principle', the "seat" should be determined because the 'seat' 'has a material bearing for determining the applicability of laws of a particular country for deciding the post-award arbitration proceedings'. The Court was of the view that the matter needs to be referred to a larger bench, given the conflicting decisions and laws laid down by the Supreme Court *'in several decisions*

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by the Benches of variable strength'. The Supreme Court in the recent judgment of *BGS SGS SOMA JV v. NHPC Ltd*[xxxv] overruled the earlier decision and held that unless it is specified in the arbitration the venue of the arbitration is considered to be the seat of the arbitration.

The Principle of lex fori

This issue is addressed by the conventions that with the enforcement of foreign arbitral awards in India actual enforcement procedure is governed by the lex fori.[xxxvi] The New York Convention indicates that the rules of procedure for recognition and enforcement are governed by the national law of the place where the enforcement is sought. Article III of the Convention provides that *"Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."*[xxxvii] Moreover, according to van den Berg, the law of procedure of the lex fori can be applied to the aspects incidental to enforcement that are not governed by the New York Convention, e.g. attachment, the discovery of evidence, set-off, the effect of bankruptcy, time limits and for requesting enforcement and questions of estoppel. The principle of attribution of the rules related to lex fori has been adopted from various conventions that apply in India. An award rendered by the Washington Convention has the effect of res judicata in all member States as if it were a final judgment of the court of the state. However, the Convention assigns the rules of procedure to the national law of the place where an award is enforced, stating that *"the execution of an award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought."*[xxxviii]

Procedural Rules for Enforcing Foreign Arbitral Awards Generally national rules of procedure governing the enforcement of foreign arbitral awards fall into one of the following categories:

(1) specific provisions governing rules of procedure;

(2) one rule of procedure is used for all foreign awards;

(3) employment of the same rules of procedure as pertains to the enforcement of foreign judgment;

(4) employment of the same rules of procedure as pertains to the enforcement of domestic awards.

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In this section, there is an examination of detailed rules of procedure to be followed. The ultimate goal of parties concerned with International Commercial Arbitration is that when the losing party fails to carry out the award, the winning party will take steps to enforce its performance of it without delay. The losing party may challenge the award with the hope that it will be set aside or at least varied in some way to benefit it. A challenge is kind of a positive attack on the validity of an international award. However, it is suitable to introduce the subject by discussing the question of the performance of foreign arbitral awards from a wider viewpoint to place the challenge also in its proper context. The majority of awards are performed voluntarily but sometimes it is necessary to ascertain how an award can be enforced in law. A state may not be willing to give credit to awards rendered by the foreign arbitral tribunal or those based on some foreign legal procedure. The ultimate sanction for non-performance of an award is execution by court proceedings varies from country to country in respect of the enforcement of foreign arbitral awards.[xxxix] A foreign award could be enforced under multilateral conventions viz; *Geneva Convention 1927 and New York Convention 1958* which were effect by enacting *Arbitration (Protocol & Enforcement) Act, 1937 and Foreign Awards (Recognition & Enforcement) Act, 1961*. Enforcement in cases where parties to either of the convention were enforceable in India on the same ground and in the same circumstances as in which they were enforceable under general law on the ground of justice, equity and good conscience.

LIMITATIONS IN THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Conditions Required for Enforcement of Foreign Arbitral Awards

1. Sec 48(1) provides that a foreign award may not be enforced in India if it is proved by the party against whom it is sought to be enforced that;

(a) parties to the agreement have some incapacity to perform under any law to which they were subjected and in absence of any mention of such law of the country where the award was made i.e., place of arbitration;

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(b) The agreement was not valid under the law to which the parties have subjected it and the absence of any mention of such law or the law of the country where the award was made.

(c) Fair trial was not conducted by the tribunal passing the award.

2. Award passed was either partly or wholly beyond scope of an arbitration agreement, in any case, the part of the award exceeding the scope of arbitration may be separated from the rest of the award.

3. Composition of the arbitral award, authority or procedure of its appointment was not as per the principle of the arbitration agreement or there is the absence of any mention of same in the agreement or it was not as per the law place of arbitration.

4. Award has not yet been made binding on parties or has been set aside or suspended by the competent authority of the country which is either the place of the seat of arbitration court may call upon such party making an application under sec 48(1) provide evidence to prove the existence of any or all of grounds for refusal of enforcement of the award.

5. As per sec 48(2) of the Act, the foreign award may not be enforced in India if it is found by the court in India that (a) Settlement of award as per Indian Arbitration Law (b) Enforcement of award is contrary to the public policy of India. This defence should be narrowly construed. An award is said to conflict with the public policy of India if it has been affected by fraud or corruption or it was in violation of the Act or contravention of the fundamental policy of Indian law. Sec 48 only provides grounds for refusal of enforcement of foreign award as mentioned above but it does not permit an examination of the error by exercising its appellate inquiry. If an application for setting aside or suspension of the award has been made to the competent authority, the court may if it considers it is proper adjourn the decision on enforcement of the award and may also on the application of the party claiming enforcement order the other party to give suitable security.

Time Period of Enforcement of Foreign Arbitral Awards

Sec 47-49 of the International Arbitration & Conciliation Act, 1996 which forms part of the chapter on New York awards are relevant in this regard. Sec 47 states that evidence of which party is applying for enforcement is required to produce before the court. Sec 48 lays the ground

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for refusal of enforcement of award debtor. Sec 49 provides where the court is satisfied that foreign award is enforceable under this regime.[xl] In 2019, the Bombay High Court in *Imax Corporation v E-City Entertainment* took[xli] a contrary view after considering *Thyssen Stahlunion GMBH v Steel Authority of India* and *Fuerst Day Lawson v Jindal Exports*[xlii] and held that Article 136 (12 years) applied to an enforcement petition. In *Thyssen*, the Indian Supreme Court compared the provisions of the repealed *Foreign Awards Act, 1961* with those of its replacement and observed that under the Foreign Awards Act a decree follows the award. In *Fuerst,* the issue was whether two separate applications are required for enforcement and execution and the Supreme Court held that awards are already stamped as decrees and can be enforced and executed in the same proceeding. The Bombay High Court in *Imax*, therefore, concluded that to advance the object of the Act the word *"stamped"* should be understood as *"regarded"* and a foreign award should be regarded as a decree. Though the Supreme Court has not dealt specifically with the question, it recently, in *Bank of Baroda v Kotak Mahindra Bank*[xliii] held that the limitation period for execution of a foreign decree under *Section 44A of the Civil Procedure Code 1908*[xliv] is governed by the limitation law of the reciprocating country where the decree was issued. It was observed that Article 136 of the Limitation Act, being restricted to decrees of Indian courts, is not applicable. This judgment does not apply to foreign arbitral awards for three reasons. Firstly, the CPC is aware of different legal fields in which the arbitration functions and explains that a foreign decree does not include an arbitration award, even if such an award is enforceable as a decree. Secondly, the Supreme Court applied the reciprocity principle of the countries which is unavailable for application in case of arbitral awards. Finally, a foreign award is regarded as already stamped as a decree but not a 'foreign' decree.[xlv] Indian courts continue to grasp determining the limitation period applicable to petitions for enforcement of the foreign award. The statute prescribes clear time bars to such applications the question concerning the time period depends on whether a foreign arbitral award can be considered as a decree. The point of conflict is sec 49 of the Act, state awards can become decrees only if the court is satisfied that it is enforceable. It is accepted that enforcement consists of stages: (1) deciding the enforceability of foreign award; (2) steps for execution if the award is enforceable. The satisfaction under sec 49 is arrived at after clearing the first stage 12 years limitation may be applied. However, given the pro-enforcement policy of Article III of the New York Convention and the objective of the Act, speedy disposal of disputes, reduced supervisory jurisdiction of the court and prompt enforcement of awards

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including foreign awards, smooth enforcement should be enabled by the adoption of a purposive approach. The purpose of interpretation of sec47- 49 of the Act implies the application of Art. 136 of limitation Act to enforcement application. The interpretation of the Act should not defeat substantive and concluded arbitral proceedings between parties.

Court's intervention acts as a hurdle

One of the greatest advantages of International Commercial Arbitration is that it is cross-border enforceability. An award rendered in one country can be taken with relevant ease to another country and enforced. The principal source of this case of enforcement is the 1958 New York Convention on Recognition and enforcement Foreign Arbitration Award, which has 170 signatories.[xlvi] Though there are limitations concerning the enforcement of foreign arbitral awards, particularly in India. It has been witnessed that enforcement mechanism in this method of alternative dispute resolution is plagued by court intervention. The word 'intervention' does not appear precisely as it is considered arbitration to be a procedural mechanism based on the autonomy of parties and recognised as an alternative way of resolving disputes. Court's role therefore should be limited to assisting arbitral awards to achieve the purpose of the arbitration. While there are certain grounds for setting aside the award, these should be construed according to the law applicable under Article V of the New York Convention and UNCITRAL model law. The recognition and enforcement of foreign arbitral awards rest on the agreement between parties but also is a result of a policy that is turned into international practice. The only way in which the court interferes with the enforcement of the foreign award is if the award is against any statutory provision, patently illegal or violates public policy in India. In *Oil & Natural Gas Corporation Ltd. v. Saw Pipes (P) Ltd.*[xlvii] the court held that in our opinion, the principle of party autonomy should receive paramount consideration by the apex court, as excessive court intervention in the form of judicial review has retarded the dispute resolution. National laws relating to arbitration could significantly affect the character of the arbitral process. These requirements would entail some form of judicial review of the merits of the arbitral awards at the enforcement stage. In India, the court intervention is facilitated under Part I of the Arbitration and Conciliation Act, 1996 which applies to arbitration conducted in India and the awards thereunder; Part II provides for the enforcement of foreign awards and has further been subdivided into two distinct chapters. Chapter one deals with the Awards as regulated by the New York Convention, defined per Section 44 of the Act. Chapter two deals with Awards as

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regulated by the Geneva Convention, and section 53 of the Act covers it. The arbitration conducted in India and the enforceability of such awards falls in the category of Part I whereas the enforceability of foreign awards in India, based on the guidelines laid down in the New York Convention or the Geneva Convention is dealt with in Part II of the Act, 1996. Secondly, the challenges on which the Indian courts can rule are concerning the question of conflicting with public policy.

Public Policy Argument

In 1824, public policy was described as an unruly horse, wherein once you get astride, you'll never where it will carry you and it is never argued at all but when all points fail.[xlviii] It is governed by the fundamental principle of law and justice in instances such as bribery and corruption. In 2002, International Law Association Committee on International Commercial Arbitration conducted a conference on public policy and adopted a public resolution that public policy refers to the International Public Policy of the state and includes (i) fundamental principles, about justice or morality that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as *"lois de police"* or *"public policy rules"*; and (iii) the duty of the State to respect its obligations towards other States or international organisations.[xlix] One of the main objectives of the Arbitration & Conciliation Act, 1996 was to minimise the authoritative role of courts. In this regard, the Act contemplates only three situations where the judiciary may intervene in an arbitral process: matters regarding the appointment of arbitrators, deciding on whether the mandate of the arbitrator stands terminated owing to his incapacity and inability to perform his functions and invalidating and award when it contravenes provisions relating to enforcement as stated in the Act.[l] It is incapable of being dependent upon the laws of individual states and as a result of that, it varies from one state to another. The New York Convention does not particularly provide any guidance for national courts to interpret the public policy defence. The pro-enforcement bias of international parlance is in itself a public policy. Due to this, the national courts interpret public policy at their discretion and it is evident that in most developed arbitral jurisdictions public policy has been interpreted narrowly. The Supreme Court affirmed the pro-enforcement bias in the recent judgment of *Vijay Karia v. Prysmian Cavi E. sestemi*[li] the court held that the New York Convention is governed by a Pro-enforcement bias that can be applied to national courts. Indian courts have shown a great

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propensity towards interfering with International Arbitration. Judicial intervention at the award enforcement stage on grounds of public policy is the most controversial. *Renusagar v General Electric*[lii], has always been the starting point for whether one considers the topic of Indian court intervention on grounds of public policy. This decision was based on private international law and was in line with international practice commonly accepted in most developed arbitral jurisdictions such as France and US. It is confirmed that the position is only in exceptional circumstances should national courts interfere with arbitral awards on grounds of public policy. The legislation and international recognition principles of judicial intervention can be inferred that courts have no power to get into the merit of any arbitral dispute. This principle was put to rest by Supreme Court in the saw pipes case, where an award was challenged on the e ground that the arbitral tribunal had incorrectly applied the law of the land in rejecting the claim for liquidated damages.[liii]Two errors of great magnitude have been committed in this case. First, while reviewing the merits of this case, the court failed to consider external factors like the effect of labour strikes in the entire European continent something which was neither under control nor can be predicted by the saw pipes case. This particular aspect has been completely overlooked by courts and its impact on the decision. Second, the decision of two judges' bench in *saw pipes* bypassed the ruling of three judges' bench of the Supreme Court in *Renusagar Power v General Electric car*.[liv] This shows both judicial indiscipline and violation of binding precedent of a larger bench, while the bench in the *Renu Sagar* case held that the term *'public policy of India'* was to be interpreted in a narrow sense, the division bench went ahead unmindful of prior precedent the and expanded same to such extent that arbitration awards could now be reviewed in their matters.[lv] In *Mc Dermott case*,[lvi] the Supreme Court admitted that the decision laid down in saw pipes was subject to considerable adverse comments and went on to observe that only a larger bench can consider its correctness. It is one of the grounds mentioned in the New York Convention based on which party can challenge the enforcement of foreign arbitral awards. From the beginning of the 21st century, parties have been warned against relying on public policy: *"it has been very unruly horse and when you get astride it you never know where it will carry you. It may lead you from sound law public policy is one of the most important weapons in hands of national courts which allows it to refuse enforcement of an arbitral award which is otherwise valid."*[lvii] Consequential Drawbacks in Enforcement of Foreign Arbitral Awards The main cause of all delays in enforcement is the increasing ambit of the court's power to review awards. Excessive judicial interference resulting in the

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admission of large no. of cases that should never be entertained in the first place is yet another evil that hampers the settlement of commercial disputes in turn retarding the growth and development of an economy. Indian courts have in various instances misinterpreted the Act to suit their circumstances and as a result, it became impossible to achieve the desired result. The various errors on part of the courts to pass decisions under the convention is not only disappointing but also discouraging for parties opting for arbitration as means of dispute settlement in India. The criticism can also be the time period which is not accurately provided and as a result causing the inordinate delay. By not setting a time limit for enforcement of awards one finds that inordinate delays in arbitration proceedings are no different from that of innumerable pending court cases, thus defeating the very provisions of the Act. The reason why arbitration was picked over litigation as an ultimate legal procedure to be followed, the reason why it held such an appeal for the masses was its cost-effectiveness of additional litigation as to a humungous amount primarily because it was excruciatingly time-consuming. The purpose of arbitration is to provide an alternative to litigation with a cheaper and less time-consuming process. The arbitration does not give promised returns but only becomes quite expensive. Thus, issues of speed and cost efficiency are the hallmarks of procedure and are often identified as the core reason why arbitration very clearly surpasses litigation as a suitable choice for dispute resolution, especially concerning commercial disputes. It must be remembered that these shortcomings are capable of hindering the economy. One way to mitigate the risk of court intervention is to provide for an appointing authority. The Act provides a single effective framework for the recognition and enforcement in India and there is a need for a review of the Act to meet the new challenges. The Act was put through various 'Proposed Amendments' suggesting changes to Part I & II, but the amendments put forward does not perceive as a way to curtail the scope of judicial interference.

CONCLUSION & SUGGESTIONS

Simplifying the process of enforcing foreign arbitration awards is considered to be one of the main factors in the success of International Commercial Arbitration. If an award had no effective enforcement mechanism, the value of International Commercial Arbitration would be significantly diminished. If an award could not be enforced, the whole system of arbitration

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would collapse and arbitration awards would become mere words written on paper. This study concerns with enforcement of foreign arbitral awards in India. The key convention was seen to be New York Convention not merely because of the significant number of states acceding to it but because of certain significant provisions requiring minimal conditions to be fulfilled by the party seeking enforcement of the convention, removing the need for double exequatur. The need for the award to be declared enforced in their country of origin creates powers under the presumption in favour of the validity of arbitral awards and places the burden of proving invalidity on the party resisting enforcement allowing under article VII a winning party the option of relying on local law or treaty provision which is more favourable towards enforcement of foreign arbitral awards than New York Convention itself. Thus, it can be said that India's ratification of The New York Convention would be evidenced that their legal system is well disposed to recognition and enforcement. The report aimed to comprehensively analyse provisions about the recognition and enforcement of foreign arbitral awards under relevant regimes in India. Firstly, it discussed the historical aspects. Secondly, it examines basic terminological problems Thirdly, the elements of jurisdiction i.e., determining competent authority dealing with enforcement, the role of the authority, how its decision might be challenged and time limits relating to enforcement. Fourthly, the procedural steps demanded by each state for enforcement of the award were identified. This study has explored the main controversies and complexities in the application of different regimes regarding the enforcement of foreign arbitral awards which can undermine the relevant regime's goal of facilitating the role of foreign arbitral awards in India. as discussed in chapter three it is unclear which arbitration awards can qualify as awards for recognition and enforcement under the relevant regime. The New York convention fails to define precisely which arbitration awards are within the scope of the application. Moreover, national laws contain different views relating to the question of determining where an arbitral award can be considered foreign. The laws indicate that the mode for enforcing awards is normally by exequatur, on the other hand, the application must be filed by writ. The combination of these does not comply with civil and criminal procedures.

New separate provisions governing the enforcement of foreign arbitral awards in India should be inducted. It has been seen that in cases where no treaty or convention is applicable that provisions dealing with the enforcement of foreign arbitral awards are the same as that

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governing enforcement of foreign judgments. It has been observed that these provisions contain a list of grounds for refusal, meaning that these grounds are deemed as conditions and therefore the national courts in India are never entitled to grant enforcement of foreign arbitral awards under national provisions less than under other regimes. The words used by new provisions should leave room for courts in India to exercise their residual discretion to grant enforcement when a ground for refusing is established. This can be achieved by using the word may rather than shall in the context of provisions dealing with grounds for resisting enforcement of foreign arbitral awards. It should be ensured that there are no substantially more onerous conditions or higher fees charges on recognition and enforcement of foreign arbitral awards than are imposed on domestic arbitral awards. This can be achieved by removing distinctions in procedural rules applicable to domestic and foreign arbitral awards in India. this will also ensure that the state honours its obligations under international convention, particularly Article III of the New York convention. A short time limit of three years for applications to enforce foreign arbitral awards should be observed to ensure that enforcement is not used improperly. The law should give an idea to govern the validity of a submission to arbitration. It should not be left with controversy to be decided by the country where it is sought to be enforced in view with intention of the parties, express or implied in submission to arbitration. A requirement should be introduced that minimal evidence should have to be tendered by parties applying for foreign arbitral awards. A provision should be created making a distinction between domestic and international public policy in the context of foreign arbitral awards. Public policy is potentially unlimited in scope a distinction between domestic and international public policy can encourage enforcing courts in India to adopt a narrower definition of public policy as grounds for refusing foreign arbitral awards.

ENDNOTES

[i] United States Agency for International Development, 1998, 'Alternative Dispute Resolution Practitioners' Guide', Center for Democracy and Governance, USAID, Washington, D.C., https://gsdrc.org/document-library/alternative-dispute-resolution-practitioners-guide/ accessed on 13 March 2021.
[ii] Kumar summit, Arbitral Award It's Challenge & Enforcement (Legal service India) accessed on 13 March 2021 http://www.legalservicesindia.com/article/433/Arbitral-Award-Its-Challenge-&-Enforcement.html.
[iii] Kill v Hollister (1746) 1 Wills. 129.

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[iv] Jain, Sankalp, Enforcement of Foreign Arbitral Awards: International Conventions and Legal Regime in India (October 11, 2015) SSRN: https://ssrn.com/abstract=2778548 or http://dx.doi.org/10.2139/ssrn.2778548.
[v] Gamaliel G. Bongco 'The Enforcement of Foreign Arbitral Agreements and Awards in the Philippines', (1996) 21 Dispute Resolution Journal.
[vi] K. Venkatramaih, 'Enforcement of Foreign Arbitral Awards in India', Law of International Trade Transaction.
[vii] Section 2 The Arbitration (Convention & Protocol) Act, 1937.
[viii] Lachman das Sat Lal v. Parmeshri Das AIR 1958 P H 258.
[ix] 1995 Supp (2) SCC 280, 287.
[x] Section 44, Arbitration & Conciliation Act, 1996 – "foreign award means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after 11th day of October, 1960—

- in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
- in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette."

[xi] 1959 SCC OnLine Cal 196.
[xii] 1993 SCC OnLine Del 561.
[xiii] Section 44 of the Arbitration and Conciliation(Amendment) Act, 2015.
[xiv] Section 53 of the Arbitration and Conciliation(Amendment) Act, 2015.
[xv] David, R., Arbitration in International Trade, (Kluwer Law Taxation Publishers, Deventer, 1985), pp. 368-369
[xvi] Before 21/11/1999 the Commercial Court was the competent Court. This was repealed by Article 2 of Royal Decree No.90/99 of the Promulgation of Judiciary Authority Law, and Articles 36 and 41 of Civil and Commercial Procedure Law issued in 2003.
[xvii] 2(1)(e). "Court" means – in the case of arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in the exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subjectmatter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes; in the case of international commercial arbitration, the High Court in the exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.
[xviii] Sec 47. Evidence Explanation.—In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in the exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.
[xix] Badat Co., Bombay v. East, India Trading Co 1964 AIR 538.
[xx] V. C. Govindaraj, 'Foreign Arbitral Awards and Foreign Judgments Based upon Such Awards (Based on Badat & Co., Bombay v. East India Trading Co.)' 1964 13 The International and Comparative Law Quarterly pp. 1465-1468.
[xxi] Ibid
[xxii] F.A. Mann, 'Lex Facit Arbitrum' in P. Sanders (ed.), International Arbitration: Liber Amicorum for Martin Domke (1967) 157 at 159.
[xxiii] Article V Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought.
[xxiv] Vijay Karia v. Prysmian Cavi E. sestemi 2020 SCC OnLine SC 177.
[xxv] Renusagar v General Electric (1994) AIR SC 860.
[xxvi] Oil & Natural Gas Corp. v Saw pipes (2003) 5 SCC 705.
[xxvii] O Ozumba, 'Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?', available at www.dundee.ac.uk visited on 15 March 2021.
[xxviii] Patel Engineering Limited v. North Eastern Electric Power Corporation Limited (2014) 9 SCC 263.
[xxix] Law commission, Amendments to the Arbitration and Conciliation Act 1996 (law Com. No.246 2014).
[xxx] Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors (2016) 234 DLT 34.

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[xxxi] Domenico Di Pietro, Enforcement of Arbitration Agreements and International Arbitral Awards The New York Convention in Practice (Cameron May 2008).
[xxxii] General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria v S.p.a. SIMER (Società delle Industrie Meccaniche di Rovereto) (1983) VIII YBCA 386 28.
[xxxiii] Poudret & S. Besson, Comparative Law of International Arbitration, (London, Sweet & Maxwell 2007) p. 296 N. 347.
[xxxiv] Union of India v. Hardy Exploration and Production (India) Inc (2018) 7 SCC 374.
[xxxv] BGS SGS SOMA JV v. NHPC Ltd (2019 SCC Online SC 1585).
[xxxvi] Sulamérica Cia Nacional De Seguros S.A.v. Enesa Engenharia S.A. [2013] 1 WLR 102.
[xxxvii] Article III: Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.
[xxxviii] Jonathan Light & Caroline Swartz-Zern, 'International Arbitration: Spain's claim for sovereign immunity rejected?'(Allens Linkaters 8 February 2021) https://www.allens.com.au/insights-news/insights/2021/02/fca examines-sovereign-immunity-in-Spain-v-infrastructure-services-Luxembourg/ (visited on 16 March 2021).
[xxxix] Ulian D. M. Lew, 'Final Report on Intellectual Property Disputes and Arbitration' (ICC 1997) https://library.icc wbo.org/content/dr/COMMISSION_REPORTS/CR_0013.htm (visited on 16 March 2021).
[xl] Sec 47. Evidence of foreign arbitral awards of Arbitration & Conciliation Act, 1996, Sec 48. Conditions for enforcement of foreign awards of Arbitration & Conciliation Act, 1996, Sec 49. Enforcement of foreign awards. — Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.
[xli] Imax Corporation v E-City Entertainment Civil Appeal No. 3885 OF 2017.
[xlii] Fuerst Day Lawson v Jindal Exports EA Nos. 790-91 & 789 of 2012.
[xliii] Bank of Baroda v Kotak Mahindra Bank 2020 267 SC.
[xliv] Section 44A (1) of the CPC states that where a certified copy of a decree of any superior court of a reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.
[xlv] Jay karnawat, 'Stamping of Foreign Arbitration Awards in India – Analysis of Supreme Court's ruling in M/S. Shri Ram EPC Limited Vs Rioglass Solar SA' (ipleaders, November 23, 2018) https://blog.ipleaders.in/stamping of-foreign-awards/ accessed on 15 March 2021.
[xlvi] Some academic writers support the idea of a uniform system of international procedural rules of enforcement for foreign awards and consider the lack of uniformity of the rules of procedure one of the biggest drawbacks of the New York Convention. See, Martinez, R., op. cit. p.496.
[xlvii] Oil & Natural Gas Corporation Ltd. v. Saw Pipes (P) Ltd (2003) 5 SCC 705.
[xlviii] S Sattar, 'National Courts and International Arbitration: A Double-Edged Sword?', (2010) 27(1) Journal of International Arbitration.
[xlix] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted on 10 June 1958), 330 UNTS Art. V(2)(b).
[l] Mohit Agarwal, Arbitration in India (SCRIBD Mar 21, 2017) https://www.scribd.com/document/3425632 03/Arbitration-in-India accessed on (17 March 2021).
[li] Vijay Karia v. Prysmian Cavi E. sestemi 2020 SCC OnLine SC 177.
[lii] Renusagar v General Electric (1994) AIR SC 860.
[liii] Supra note 47.
[liv] Renusagar Power v General Electric car 1994 AIR 860.
[lv] Uditakanwar, ONGC v Saw Pipes (Legal Service India) http://legalservicesindia.com/article/584/ONGC-v-Saw-Pipes.html accessed on (17 March 2021).
[lvi]Mcdermott International Inc vs Burn Standard Co. Ltd. & Ors (2006) Insc 316.
[lvii] Albert Jan van den Berg , 'The New York Arbitration Convention of 1958' (1981) T.M.C. Asser Institute at 256.

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