THE QUAGMIRE OF ENFORCING FOREIGN ARBITRAL AWARDS IN INDIA: HAVE THE CHALLENGES EASED OR DEEPENED IN THE NEW LEGAL REGIME ESTABLISHED BY THE INDIAN ARBITRATION & CONCILIATION (AMENDMENT) ACT, 2015?

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The arbitration law in India has undergone a sea change with the coming into force of the Arbitration and Conciliation (Amendment) Act, 2015 ("2015 Act")[1], which has brought about an overhaul of the existing Arbitration and Conciliation Act, 1996 ("1996 Act")[2]. The amendments contained in the 2015 Act are in line with the Indian Government's aim to project India as arbitration-friendly with the ultimate goal of making India an arbitration hub like its neighbour, Singapore. This paper examines the amendments made by the 2015 Act in relation to international commercial arbitrations, in particular those relating to the recognition and enforcement of foreign arbitral awards. An analysis of the legal provisions and a perusal of recent judgments of Indian Courts[3] indicates a pro-arbitration approach, where international best-practices in considering challenges to enforcement of foreign arbitral awards have been given due consideration.

I. General overview of the Amendments qua International Commercial Arbitrations:

One of the primary purposes of the 2015 Act is to create a legal environment which encourages international arbitrations in India. The changes introduced by the 2015 Act are in accordance with the existing international legislations and conventions that dominate the international arbitration sector, such as the UNCITRAL Model law on International Commercial Arbitration,

[1] Available at: http://www.indiacode.nic.in/acts-in-pdf/2016/201603.pdf
[2] Available at: http://lawmin.nic.in/ld/PACT/1996/The%20Arbitration%20and%20Conciliation%20Act,%201996.pdf
[3] See *Cruz City 1 Mauritius Holdings v. Unitech Limited*, (2017 SCC OnLine Del 7810: (2017) 239 DLT 649) Glencore International AG vs. Dalmia Cement (Bharat) Limited (2017 SCC OnLine Del 8932).

1985[4]. Another important reason for introducing the 2015 Act was the pronouncement of judgment by the Supreme Court of India in the case of *ONGC Ltd. v. Western Geco International Ltd.*[5] and in the case of *Associate Builders v. Delhi Development Authority*[6]. In both these cases, the Court provided a wide interpretation to the term "public policy", which finds mention under Section 34 of the 1996 Act, and held that the "Wednesbury principle of reasonableness"[7] is also applicable while determining whether an arbitral award falls foul of the "fundamental public policy of Indian law"[8]. The frequent intervention of the Indian Courts which was for a long time a hot button issue has been adequately dealt with under the 2015 Act.

II. Amendments qua enforcement of foreign arbitral awards in India:

a. *Sections 47*[9] and *56*[10] relates to requirements of producing "evidence" of the foreign arbitral award whereby the party applying for the enforcement of a foreign award, at the time of making the application, is required to produce certain documents before the Court such as the original award or its copy, duly authenticated in the manner required by the law of the country in which it was made. The 2015 Act inserted an Explanation[11] to both these Sections 47 and 56 which granted original jurisdiction to the concerned High Courts contrary to the earlier provisions where the principal court included civil courts.

b. *Sections 48*[12] and *57*[13] mention the conditions for enforcement of foreign awards. Sections 48 and 57 provides for various circumstances / grounds on which the enforcement of a

[4] See *Supplementary to the Law Commission Report No. 246th on Amendments to Arbitration and Conciliation Act, 1996*, available at: http://lawcommissionofindia.nic.in/reports/Supplementary_to_Report_No._246.pdf
[5] (2014) 9 SCC 263.
[6] 2014 (4) ARBLR 307(SC).
[7] See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 KB 223.
[8] Supplementary to the Law Commission Report No. 246th on Amendments to Arbitration and Conciliation Act, 1996.
[9] Section 47 of the Indian Arbitration Act, 1996.
[10] Ibid.
[11] Explanation.—In this section and in the sections following in this Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.'
[12] Section 48 of the Indian Arbitration Act, 1996 provides for Conditions for enforcement of foreign awards.
[13] Ibid.

foreign award can be refused by the Court, such as the award being in contravention to the public policy of India. A foreign award can be enforced in India only when the competent Court before whom the enforcement application is filed is satisfied that it is enforceable. The consequence of the satisfaction, according to Sections 49[14] and 58[15], is that the award is deemed to be a decree of that Court and there is no need for the Court to render a judgment in terms of the foreign award. Thus, the Court's satisfaction is sufficient for enforcement. It is relevant to note that the grounds for refusal of enforcement under Section 48 are similar to those stated in the New York Convention. The 2015 Act inserted Explanations 1 & 2[16] to both these Sections 48 & 57. Explanation 1 clarifies what constitutes violation of public policy of India and Explanation 2 expressly states that when dealing with contravention of fundamental policy, the same does not permit the Court to review the foreign award on the merits of the dispute.

III. Impact of the 2015 Act's amendments on the enforcement of foreign arbitral awards in India:

a. Original Jurisdiction lies with High Courts

The 2015 Act by granting original jurisdiction to the High Courts with respect to matters relating to foreign awards has provided a solution to the problem of Local-Protectionism which may have existed in India. Earlier, recognition and enforcement of foreign awards lay with the district courts, i.e. local competent courts. To prevent any problems of local protectionism, many countries have preventive regulations in place, for example, supervision power is granted to the High Court in the United Kingdom and similarly, the supervision and examination power over foreign arbitral awards is authorized to the Supreme Court in Indonesia and even in

[14] Ibid.
[15] Ibid.
[16] Explanation 1, Ibid.—"*For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, — (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.*" Explanation 2.—"*For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.*"

Australia. Therefore, by making High Courts the principal court of action to deal with foreign arbitral awards, the 2015 Act seeks to achieve efficiency and efficacy in their disposal.

b. Restricting the grounds for challenging a foreign award:

Sections 48 and 57 of the 1996 Act have been accorded renewed clarity with respect to their implementation on account of the new Explanations inserted by the 2015 Act that explain the grounds upon which the court can determine an award as illegal and therefore unenforceable. The said amendments are aimed at restricting the scope of the grounds on which a foreign award can be challenged.

It may be noted that prior to *Venture Global Engineering v. Satyam Computer Services Ltd. and Another.*[17], challenging a foreign arbitration award on the ground of public policy was not available as a specific ground under the 1996 Act. The ground for challenge raised by the petitioner in *Venture Global* (Supra) was that the relief granted in the foreign award violated certain Indian corporate and foreign investment statutes, specifically the Foreign Exchange Management Act, 1999, and therefore the award was contrary to the public policy of India. The Supreme Court of India upheld that challenge on the ground that the foreign award was in conflict with the public policy of India pursuant to Part I of the Arbitration Act, 1996. It was after *Venture Global* (Supra) that a foreign award passed in contravention to the public policy of India became one of the grounds for refusal of its enforcement in India.

However, the term "public policy of India" had not been defined prior to the 2015 Act, which introduced two Explanations to Section 48(2) and Section 57(1) of the 1996 Act thereby attempting to remove the ambiguity by specifically allotting a meaning to "public policy of India". The explanations narrowed the scope of the term's interpretation as the same had been broadly interpreted in various judgments[18] leaving a wide window to challenge foreign awards on that ground.

[17] (2008) 4 SCC 190.
[18] See *ONGC v. Saw Pipes*, (2003) 5 SCC 705; *Phulchand Exports Limited v. O.O.O. Patriot*, (2011) 10 SCC 300.

The aforementioned Explanation 1 clarifies that an award conflicts with the public policy of India only in the circumstances provided in the said explanation such as the award was made upon inducement or affected by *"fraud or corruption or was in violation of section 75 or section 81"* or that the award was in "*contravention with the fundamental policy of Indian law"* or that the award was in *"conflict with the most basic notions of morality or justice*". In furtherance to the same, Explanation 2 expressly demarcates the clear cut role of the Court that when determining whether there has been a contravention of public policy, the Court will not review the case on the merits of the dispute.

The Supreme Court of India in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[19], while overruling the judgment in the Phulchand case[20], established a difference between the scope of objections to the enforceability of a foreign award under Section 48 of the 1996 Act, and the challenges to set aside an award under Section 34 of the 1996 Act. The Court held that the issue under Section 34 is whether the award should be set aside or not, whereas the issue under Section 48 is only with respect to enforcement. The Court observed that the expression "public policy of India" under Section 34 requires an interpretation prior to the award becoming final and executable, whereas for enforcement, the challenge is posed after an award becomes final. The Court categorically held that Section 48 does not require nor permits a review of merits at the enforcement stage and therefore the meaning of the expression "public policy" under Section 48 is limited to the fundamental policy of India, interests of India, justice and morality.

IV. Recent judgments passed by Courts in India with respect to enforcement of foreign awards under the regime of the 2015 Act:

a. *Cruz City 1 Mauritius Holdings v. Unitech Limited*[21]

The Delhi High court vide its judgment of April, 2017, rejected the arguments raised against enforcement of the foreign arbitral award passed by the London Court of International Arbitration for an amount of US $300 million. While deciding the enforceability of the said foreign arbitral award in India, the Delhi High Court laid down notable legal principles in the

[19] (2014) 2 SCC 433
[20] See Supra Note 26
[21] See Supra Note 3.

context of enforcement of foreign arbitral awards and structuring of foreign investments in India, which are stated below:

i. *Violation of FEMA is not violation of the "public policy of India"* - The Court observed that the expression "fundamental public policy of India" refers to the principles and the legislative policy on which Indian laws are founded. Further, the Court held that the expression "fundamental policy of Indian law" must be interpreted to mean only the "fundamental legislative policy" not as "*a provision of any enactment*", and a violation of "any particular provision or a statute" would not satisfy the "narrow width" of the public policy defence.

ii. *Non-approval of Reserve Bank of India for remitting funds abroad under the award is not a ground for denial of enforcement of award* – The Court held that it would favour a course where public policy considerations could be addressed without refusing enforcement and therefore the requirement of a prior Reserve Bank of India approval before remittance of funds abroad is an insufficient ground to refuse the enforcement of a foreign award.

iii. *Estoppel on raising defences in enforcement proceedings which ought to have been raised before arbitral tribunal* - The Court held that an enforcement proceeding was not the appropriate forum for raising such arguments that should have been raised before the arbitral tribunal as the same would result in an abuse of the process.

iv. *Discretion lies with the Courts in India to order enforcement even when certain grounds under Section 48 of the Act are met* - The Court observed that under Section 48 a Court may refuse the enforcement of a foreign award but may also enforce an award "even if one or more of the grounds" in Section 48 are established as "the width of the discretion is narrow and limited, but if sufficient grounds are established, the Court is not precluded from rejecting the request for declining the enforcement of a foreign award".

v. *Applicability of the doctrine of res judicata in enforcement proceedings* –The Court held that the principle of res judicata is applicable only where the issue is finally decided by a court of competent jurisdiction, therefore the findings or reasoning in a set-aside proceeding would not necessarily operate as res judicata before the enforcement court.

b. Sleepwell Industries Co. Ltd. and Ors v. LMJ International Ltd.[22]

In this case, the Calutta High Court held it is not open for a party which has consciously avoided participation in the arbitration proceeding to assert that the award is vitiated by fraud at the enforcement stage. The Court further held that if a party already had opportunities to challenge the enforceability of an award and the court has already ruled on the said subject, a party cannot be permitted to raise new challenges on the subject of enforceability and the court cannot be allowed to accept the said new challenges.

c. Raj Television Network Ltd. v. Thaicom Public Company Limited[23]

In this case, the Madras High Court held that the expression "public policy of India" for the purposes of Section 48(2)(b) of the 1996 Act must be given a narrow meaning and categorically stated that the application of the "public policy of India" doctrine for determining the enforcement of a foreign award is more limited than in respect of a domestic arbitral award. The Court further held that if the period of limitation under a foreign law has been agreed to between the parties, despite it being different from the Indian law, it does not ipso facto make a foreign award unenforceable on the ground of it being opposed to public policy in India.

d. NTT Docomo Inc. v. Tata Sons Limited[24]

In this case, the Delhi High Court, while upholding the foreign award passed by the arbitral tribunal in London under the LCIA Rules, directed that the same shall operate as a deemed decree. The Court held that there is no statutory requirement that where the enforcement of an arbitral award may result in remitting money to a non-Indian entity outside India, or to an account of a party outside India, the Reserve Bank of India has to necessarily be made a party or heard on the validity of the award. The Court held that the Reserve Bank of India, like any other entity, will be bound by an award after it is upheld by a Court.

In this case, the Court upheld the negotiated settlement agreement entered into between the parties as it was unable to find anything in the consent terms which could be said to be contrary to any provision of Indian law much less opposed to public policy or void or voidable under

[22] 2017 SCC OnLine Cal 12109
[23] MANU/TN/2117/2017
[24] 2017 SCC OnLine Del 8078 : (2017) 241 DLT 65.

the ICA. The Court also made observations in favour of international investments and for promoting international arbitration by stating that "*the issue of an Indian entity honouring its commitment under a contract with a foreign entity which was not entered into under any duress or coercion will have a bearing on its goodwill and reputation in the international arena. It will indubitably have an impact on the foreign direct investment inflows and the strategic relationship between the countries where the parties to a contract are located. These too are factors that have to be kept in view when examining whether the enforcement of the Award would be consistent with the public policy of India*."

e. Glencore International AG v. Dalmia Cement (Bharat) Limited[25]

In this case, the Delhi High Court upheld the award of US $4.3 million (approximately Rs 27.85 crore) given in favour of the petitioner by the London Court of International Arbitration Tribunal by rejecting the respondent's objection to enforceability as the respondent had full opportunity to present its case during arbitration.

The Court observed that the inability to present a case as contemplated under section 48(1)(b) of the 1996 Act (which is pari materia to Article V(I)(b) of the New York Convention) must be such so as to render the proceedings violative of the due process and principles of natural justice. The Court noted that in the event a party opposing the enforcement of a foreign award is able to present sufficient proof of such infirmity in the arbitral proceedings, the Court may then decline to enforce the foreign award. The court further clarified that there is a clear distinction that needs to be drawn between cases where a party is unable to present its case and where the arbitral tribunal does not accept the case sought to be set up by a party.

f. *RIO Glass Solar SA vs. Shriram EPC Limited and Ors.*[26]

In this case, the petitioner had filed for the enforcement of the arbitral award under Section 47 of the 1996 Act and the respondent objected to the same on the grounds that the arbitral tribunal rendered a wholly untenable, erroneous and unreasoned award and that the award was required to be stamped compulsorily under the provisions of the Indian Stamp Act, 1889 but was not which would make its recognition and enforcement contrary to the fundamental law and the

[25] 2017 SCC OnLine Del 8932
[26] MANU/TN/0458/2017

public policy of India. The Madras High Court held that the contentions raised by the petitioner "*are factual and these aspects cannot be gone into*" in an enforcement petition. The Court observed that the petition had been filed under Section 47 of the 1996 Act which only lays down procedural requirements that need to be complied with by a party for enforcement of the award.

The Court further pointed out that *"Section 48 of the 1996 Act does not given an opportunity to have a 'second look' at the foreign award in the award enforcement stage"*. The Court clarified that "*the scope of inquiry under Section 48 does not permit review of the foreign award on merits* and *procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy"*.

While rejecting the challenge, the Madras High Court made a significant point that in considering the enforceability of foreign awards, the Court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. The Court observed that it must determine the enforceability of an award by adjudicating whether the same is contrary to the fundamental policy of Indian law, the interests of India, justice or morality, and held that apart from the these factors, the Court cannot make a roving enquiry into the merits of the dispute.

With regard to the aspect of stamping of the award, the Court held that since foreign awards do not require registration and can be enforced as a decree, the issue of stamp duty cannot stand in the way of deciding whether the award is enforceable or not.

g. Integrated Sales Services Limited vs. Arun Dev and Ors.[27]

In this case, the Bombay High Court, upon perusal of the material on record and on the basis of the respective contentions of the parties, held that the appellant had produced the necessary material before the Court as required under Section 47 (1) of the 1996 Act and that the

[27] 2017 SCC Online Bom 1; (2017) 1 Mah LJ 681 (Bom)

respondents had failed to establish any ground under Section 48 of the 1996 Act which would enable the Court to refuse enforcement of the foreign award.

The Court observed that the provisions of Section 48(2) of the 1996 Act have been amended by the 2015 Act and the judicial interpretation of the expression "fundamental policy of Indian law" laid down in various decisions has now become part of the statutory provision itself. The Court held that the explanations added by the 2015 Act being clarificatory in nature and for avoidance of doubt, it is obvious that same would have to be treated as being in existence since the enactment of the principal provision itself.

The Court further observed that under Section 47(1) of the 1996 Act, the party applying for enforcement of a foreign award is required to produce before the Court such evidence as would be necessary to prove that the award was a foreign award. The provisions of Section 48 (1) of the 1996 Act on the other hand contemplate refusal to enforce a foreign award only if the party against whom it is invoked furnishes to the Court proof that requirements of sub-clauses (a) to (e) therein are satisfied. Thus, while the party applying for enforcement of a foreign award is required to give evidence as would be necessary to prove that the award was a foreign award, the party resisting its enforcement is required to give proof to the Court that the grounds stipulated have been duly made out. The Court noted that the distinction between a party to an agreement and a party against whom the award is invoked is relevant inasmuch as while the provisions of Section 48(1)(a) are relatable to signatories to the arbitration agreement, the object of Section 48(1)(b) is to take within its ambit parties against whom the award is sought to be invoked which may include non-signatories to the arbitration agreement. In other words, a non-signatory to the agreement could also be a party against whom the award is sought to be invoked. Thus, enforcement of a foreign award against a party which is a non-signatory to the agreement but a party to the award is also statutorily recognized. The distinction though subtle in nature, the same appears to have been deliberately made to indicate the areas intended to be covered by the said provisions.

The Court held that requirement of furnishing proof for non-enforcement of an award stands at a higher footing than producing necessary evidence for enforcing a foreign award. Under Sub-

section (1) of Section 48 of the 1996 Act, enforcement of a foreign award may be refused only if such party furnishes proof in that regard.

V. Analysis of the relevancy of the aforesaid recent judgments:

The aforementioned judgments by the Indian Courts reflect a pro-arbitration approach and adoption of international best-practices in considering challenges to enforcement of foreign arbitral awards. The judgments have clearly restricted the scope of challenging the enforcement of foreign arbitral awards resulting in limiting the intervention of the Indian Courts. The recent decisions also exhibit that Indian Courts, while adjudicating foreign award enforcement matters, are conscious of the adverse impact that non-enforcement of foreign awards can have on the sanctity of international commercial transactions.

The judgments are an affirmation of the recent trend in India to support the enforcement of foreign arbitral awards and give a clear indication that Indian Courts will not entertain issues on merits raised by parties at the enforcement stage, which ought to have been a subject matter of the arbitration proceedings itself.

CONCLUSION

Throughout India, pro-enforcement positions are being taken and encouraged by the Courts after the coming into force of the 2015 Act. The refusal to enforce foreign arbitral awards is now rare, especially when the foreign awards have been passed by recognised institutions such as the London Court of Arbitration (LCIA) or the Singapore Court of International Arbitration (SCIA).

In addition, after the setting up of commercial courts under the Commercial Courts Act, 2015, all arbitration-related proceedings are specifically referred to courts having expertise and clear understanding in commercial matters, a step towards increasing efficiency and efficacy in the commercial arbitration sector.

The Indian Government is aiming to create an arbitration-friendly environment in India with the ultimate goal of making India an arbitration hub like Singapore. The setting up of the

Mumbai Centre for International Arbitration (MCIA) in collaboration with the Maharashtra State Government is another step in that direction.