

# IMPEDIMENTS AND RECOMMENDATIONS IN ENFORCEMENT OF ARBITRAL AWARDS

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*When will mankind be convinced and agree to settle their difficulties by arbitration?*

*-Benjamin Franklin*

## INTRODUCTION

Arbitration is an alternative dispute resolution mechanism, wherein a dispute is resolved by appointing a mutually decided person as an arbitrator who gives out a decision which binding on both the parties. It is a mechanism, where a dispute is resolved without going to the court. Black's Law dictionary has given the definition of arbitration as 'a method of dispute resolution involving one or more neutral third parties, who are agreed by the disputing parties and whose decision is binding'.<sup>1</sup> This binding decision given by the appointed arbitrator is known as an Arbitral Award. In India, the governing law regarding issues related to arbitration is The Arbitration and Conciliation Act, 1996 as amended by The Arbitration and Conciliation (Amendment) Act, 2015<sup>2</sup> which is governed by the United Nations Commission on International Trade Law (referred to as UNCITRAL) Model Law. UNCITRAL law is a model arbitration law followed by all the signatory countries of New York Convention and Geneva Convention. A jurisdiction's credibility as an arbitration friendly one rests primarily on the efficiency and efficacy of its award enforcement regime.<sup>3</sup> Only when an arbitral award is sufficiently enforced can it be possible for the claimant to recover the damages awarded.

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<sup>1</sup> Henry Campbell Black, *Black's Law Dictionary*, (West Publishing Co., 6<sup>th</sup> edn., 1998).

<sup>2</sup> The Arbitration and Conciliation Act, 1996 (26 of 1996).

<sup>3</sup> Sumeet Kachwaha, "ENFORCEMENT OF ARBITRATION AWARDS IN INDIA" 4 AIAJ(2008).

The enforcement of such awards establishes the rights and liabilities of the parties involved in a dispute. An award stands at the same footing as a decree of a court, whether it has passed into a decree or not and therefore it is binding upon the parties.<sup>4</sup> However, a lot of times to secure an award is not the last step as there arise a lot of impediments in the enforcement of such awards. The researcher in this paper would be focusing upon

## ENFORCEMENT OF THE AWARD

If the prevailing party in an arbitration dispute cannot secure voluntary compliance with an arbitral award, he must resort to judicial enforcement in the courts of the state where property or other assets of the losing party are located. Most nations have domestic arbitration laws which regulate the enforcement of arbitral awards. A party seeking enforcement of an award from an international arbitration must also comply with the procedural law of the country where enforcement is sought. National courts generally deal with awards in a bifurcated manner: awards are treated differently depending on whether they are considered domestic or foreign. The difference in treatment is often attributable to a nation's evaluation of the role of the arbitral process in its legal system.<sup>5</sup>

Enforcement is the procedure where the Court is asked to recognize the legality and effect of the Arbitral Award and ensure that it is complied with using the available legal sanctions. Recognition of an arbitral award, that is, the acceptance of their legal validity, and Enforcement go together. In *Brace Transport Corpn of Monrovia, Bermuda v Orient Middle East Lines Ltd*, Saudia Arabia, the Supreme Court said: An award may be recognized, without being enforced; but if it is enforced, then it is necessarily recognized. 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.<sup>6</sup>

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<sup>4</sup> *Satish Kumar v. Surendra Kumar*, AIR 1970 SC 833.

<sup>5</sup> Kenneth T. Ungar, "The Enforcement of Arbitral Awards under UNCITRAL's Model Law on International Commercial Arbitration" 25 Colum. J. Transnat().

<sup>6</sup> *Brace Transport Corpn of Monrovia, Bermuda v Orient Middle East Lines Ltd*, AIR 1994 SC 1715.

The legal sanctions that are used to enforce arbitral awards range from seizing or freezing the properties of the party failing or refusing to comply with the award to penalizing the same person and making him or her personally liable.

Thus, Enforcement is the process to compel the party to perform an arbitral award, against which it is made, by applying all available legal sanctions.<sup>7</sup>

## ENFORCEMENT OF DOMESTIC AWARDS

The enforcement of an arbitral award is subject to law of limitation as applicable to contracts and therefore a suit for specific performance of the award could be filed within the prescribed period as laid down in Article 54 of the Schedule of the Limitation Act, 1963. It follows that a party cannot get an award set aside after the expiry of the limitation period allowed in Section 34(3) of the Arbitration Act. This period before it expires is the intervening period. Generally, an award holder has to wait for 90 days after the receipt of the awards before he can apply for the enforcement of such award.

In *Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd*<sup>8</sup>, the appellant and respondent entered into a contract for sale of certain items. On dispute having been arisen, the appellant invoked arbitration clause and the arbitrator made a 'Nil' award. The Appellant thereupon invoked the second part of the arbitration agreement. The respondent, during the pendency of the proceedings, filed an application challenging initiation of second arbitration proceedings which was restrained by and interim injunction order of the High Court. In appeal against this order, the Supreme Court held that on expiry of the period for challenging the first award of the Arbitral Tribunal, it became a decree and therefore the same would be binding on the Arbitral Tribunal.

Thus by legal fiction, if an award remains unchallenged within 90 days of the date it was published, it can be enforced immediately thereafter as a decree which becomes enforceable after the expiry of 90 days period.<sup>9</sup>

<sup>7</sup> The Predicaments of Enforcing Arbitral Awards, available at: <http://www.legalserviceindia.com/article/1111-Arbitral-Awards.html> (last visited on December 19, 2017).

<sup>8</sup> *Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd*, (2006) 11 SCC 245.

<sup>9</sup> *Union of India v. Kamal Construction*, AIR 2011 Pat 398.

Prior to the recent Arbitration and Conciliation (Amendment) Act, 2015 (“Amendment Act”), an application for setting aside an award would tantamount to a stay on proceedings for execution of the award. However, by virtue of the Amendment Act, a party challenging an award would have to move a separate application in order to seek a stay on the execution of an award.<sup>10</sup>

## ENFORCEMENT OF FOREIGN AWARDS

‘Foreign award’ has been defined in Section 44 of the Arbitration act.<sup>11</sup> It means an award made on or after October, 1960 on differences arising between persons out of legal relationships, whether contractual or not, which are considered to be ‘commercial’ under the law in force in India.

An award to be treated as a foreign award, must fulfill the three basic conditions which are as follows:

- a. The legal relationship between the parties must be of a commercial nature;
- b. The Award must have been in pursuance of an agreement in writing; and
- c. The award must have been made in a country which is a signatory to New York or Geneva Convention.<sup>12</sup>

It must be stated that an award does not become a foreign award merely because it was made in the territory outside India, but it becomes so because it is made in the territory of a foreign state where arbitration agreement is not governed by the law of India. In other words, if an award is made on an arbitration agreement governed by the Indian Law, though rendered outside India, will not be treated as ‘foreign award’ by the Indian Courts.

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<sup>10</sup> Enforcement of Arbitral Awards and Decrees in India, *available at*: [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Papers/Enforcement\\_of\\_Arbitral\\_Award\\_s.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Enforcement_of_Arbitral_Award_s.pdf) (last visited on December 19, 2017).

<sup>11</sup> The Arbitration and Conciliation Act, 1996 (26 of 1996), s. 44.

<sup>12</sup> *Centro-Trade Minerals and Metals Inc. v Hindustan Copper Ltd.*, (2006) 11 SC 245.

A foreign award is recognized and enforceable in India as if it were an award on a matter referred to arbitration in India. Such an award will then be filed to a competent Court in India, which will pronounce judgment according to the award.

India is a signatory of the New York Convention and the Geneva Convention that is, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927. An award would be enforceable in India, if an arbitral award is made in a country which has been given the title of a Convention Country by India, and if a party receives an award from a signatory country of New York or the Geneva Convention.

The enforcement of a foreign award in India is a two-ways method which is started by documenting an execution appeal. At first, the Court will find out whether the award is according to the conditions given in the Arbitration Act. If it found to be enforceable, then it will be equal to a decree of a court. However, **this is the most crucial stage as the parties involved have to be careful about the various impediments in the enforcement of the awards such as petty objections by other parties or red tapism or the various underlying agreements to be filed before the court.**

## CONDITIONS OF ENFORCEMENT OF AWARDS

Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>13</sup> enumerates the circumstances under which recognition and enforcement of awards may be refused at the request of the party against whom it is invoked. It may also be refused if it is found that the subject matter of the dispute is not capable of settlement by arbitration under the law of that State. These grounds are:-

- The parties to the agreement were under some incapacity.
- The agreement in question is not in accordance with the law to which the parties have subjected it, or under the law of the country where the award was made (especially in case of foreign awards).

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<sup>13</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Article V.

- There is a failure to give proper notice of appointment of arbitrator or arbitral proceedings.
  - Award is ultra vires the agreement or submission to arbitration.
  - Award contains decisions on matters beyond the scope of submission to arbitration.
  - Composition of the arbitral authority or the arbitral procedure is ultra vires agreement.
  - Award is not in accordance with the law of the country where the arbitration took place.
  - The award (specifically a foreign 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.
  - Subject matter of the dispute is not capable of settlement by arbitration under Indian law.
  - Enforcement of the award would be contrary to the public policy of India<sup>14</sup>
- The Article is thus the cue for determining the law applicable to the arbitration agreement.<sup>15</sup>

### ***Required Documents***

A party applying for enforcement of an award issued in an arbitration seat outside India under the New York Convention or Geneva Convention must file an application to the court and produce the following documents:

- the original award or an authenticated copy;
- the original arbitration agreement or a duly certified copy;
- such evidence as may be necessary to prove that the award is a foreign award; and
- translations of these documents into English, if necessary.<sup>16</sup>

**A domestic award does not require separate enforcement application proceedings. On the other hand, a foreign award (ie, an award in arbitration seated outside India) is enforced**

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<sup>14</sup> RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS, *available at*: [http://www.iac12014congress.com/fileadmin/user\\_upload/k\\_iac12014congress/General\\_reports/Bermann\\_-\\_General\\_Report\\_Recognition\\_\\_Enforcement\\_of\\_Foreign\\_Awards\\_July\\_2\\_2014\\_\\_2\\_.pdf](http://www.iac12014congress.com/fileadmin/user_upload/k_iac12014congress/General_reports/Bermann_-_General_Report_Recognition__Enforcement_of_Foreign_Awards_July_2_2014__2_.pdf) (last visited on December 19, 2017).

<sup>15</sup> *GAIL v. SPIE CAPAG*, AIR 1994 Del 75.

<sup>16</sup> Enforcement of Foreign Awards in India, *available at*: <https://www.hg.org/article.asp?id=32348> (last visited on December 19, 2017).



through an enforcement process in any court within the territorial limits where the defendant resides or has its business or where its assets are located.<sup>17</sup> Hence, the impediments of Enforcement of Arbitral Awards are mainly in the area of Foreign Arbitral Awards.

## IMPEDIMENTS IN ENFORCEMENT OF FOREIGN AWARDS

### 1. Issues of Local-Protectionism

The acknowledgment and enforcement of foreign awards at times have once in a while been stood up to with the deterrents from "nearby protectionism". As said above, the work of recognizing and enforcing of foreign awards are approved to the competent courts. On a few events, the local courts could be affected by "force" from the authorities of the native governments, to mostly secure the local parties who might be the subjects of the foreign award. In a word, the acknowledgment and enforcement of foreign award might be deferred or frustrated by the effects of "local protectionism".

But, in a study of patterns in national institutions of different nations, a sort of wonder is deserving of note: with a specific end goal to reverse the negative impact of "local protectionism" forced on the recognizing and enforcing of a foreign award, and furthermore so as to all the more adequately keep the conceivable errors made by a few judges of nearby courts in legal examination and supervision over an outside arbitral award (most likely because of their lower proficient capability), some advanced involvement in the international arbitral establishments ought to be taken for reference. That is, the supervision energy to direct both procedural and substantive examination over local and foreign arbitral awards is approved no matter the higher status of courts, which would have judges of a higher gauge, in order to demonstrate judiciousness and to ensure both equity and proficiency. For instance, such supervision control is allowed to the High Court in the United Kingdom.

In *Minmetals Germany GmbH v Ferco Steel Ltd*, it was seen that, "in 'global business', a party who forms a contract to arbitrate in not domestic jurisdiction is bound by

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<sup>17</sup> Arbitration awards in India, available at: <https://www.lexology.com/library/detail.aspx?g=8c489b6a-7fc5-44ef-80f3-a56616272874> (last visited on December 19, 2017).

domestic law of arbitration as well as by the supervisory jurisdiction of the court at the seat of the arbitration".<sup>18</sup> Making an observation on this, JE Adams commented, "That imposes an obligation to invoke local supervisory jurisdiction— 'a cardinal policy consideration'. If such an application leaves the award undisturbed, that will also weigh heavily with the English courts, so as to sustain the finality of supervisory decisions on procedural matters"

## 2. Public Policy

The infringement of guidelines of public strategy is a ground for refusal of enforcing an award or a ground for putting aside the award. Indian law does not confine (or expand) this ground to infringement of International Public Policy even where the same is an International Commercial Arbitration. Where enforcing of a foreign award is looked for in any Court in India, the principles of public policy relevant are the "Public Policy of India". For *Renusagar's* situation (October 1993), while interpreting the parts of Sect. 7(1)(b)(ii) of the Foreign Awards Act (which repeated Art. V (2)(b) of the New York Convention), the Supreme Court of India held that keeping in mind the end goal to pull in the bar of open strategy the enforcement of the award must include something more than infringement of Indian law; the implementation of a foreign award would be declined on the ground that it is in opposition to public policy if such requirement was opposite "to the key approach of Indian law or equity or profound morality".

It was held that any infringement of the Foreign Exchange Regulation Act, which was instituted for the national monetary interest, would be in opposition to the general public policy of India. The enforcement of a foreign award couldn't be opposed as disregarding the Public Policy of India where an award, in any case, coordinated installment of interests, or instructed to give compensation or where the tribunal had granted a sum higher than ought to have been granted or where costs granted by the arbitral council were inordinate.<sup>19</sup> With regard to a party asking that the award is in opposition to public policy, the benchmark for this design is the law of the land. A clarification, like the one attached to S. 34, that looks to enhance the significance of public policy in this setting is likewise appended to this Section. The enforcing of a foreign award happens in India when the court before which it is recorded has declared

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<sup>18</sup> *Minmetals Germany GmbH v Ferco Steel Ltd.*, COMC 1 MAR 1999.

<sup>19</sup> *Renusagar Power Plant Ltd. v. General Electric Co.*, AIR 1994 SC 860.



that it is enforceable as per Chapter I. The result of this fulfillment, as indicated by S. 49, is that the honor should be considered to be a pronouncement of that court. This essentially infers there is no requirement for the court to render a judgment as far as the honor, and the court's declaration is adequate for enforcement of the award. How this declaration is to be communicated seems hazy and the method that it must embrace to flag it having been declared in such manner shows up so far inaccessible.

### **3. Twofold and Multiple Exequatur**

While going for enforcing of a foreign award, the likelihood of various courts touching base at various discoveries on inquiries of truth and diverse conclusions on question of law can't be eliminated. The outcome will be that an award dissolved in a convention country will have to go the world over, asking for enforcement in other convention nations. The courts of different nations may likewise have unique and conflicting assessments on the application and translation of the Model Law as relevant in India. This uniqueness and irregularity will frustrate the essential object of the New York Convention and the consistency of the arbitration law among all Convention Countries. In India, so far there is no immediate legal authority on the inquiry whether the upholding court ought to reinvestigate 'procedural imperfections' contained in provisions like (a) to (d) of s 48(1) which have just been explored by the courts of the seat of arbitration while confirming the award. Especially, the Indian Supreme Court so far has not given any decision on this inquiry. In the event that it decides that, with a view to dodge twofold or different authorities of the award, there is no requirement for reinvestigation, the statute won't allow so. Conversely, in the event that it decides that, in perspective of the required arrangements of the Act, reinvestigation is unavoidable, it will open up a great deal of degree for twofold and different exequaturs, bringing about varied on similar questions of facts and laws. This will ransack the commercial society in the convention countries of constant and amicable international commercial arbitration.

### **4. Partial Enforcement Decisions (esp. with respect to canceled awards)**

There have been a couple of cases and there are a lot of chances for biasness in enforcement of foreign awards, an award, for instance, rendered in State A requesting

State B to pay a specific amount to State C can be revoked in State A, however in any case implemented in State C. Such one-sided enforcement choices prompt more of bad decisions than partial awards. This is on the grounds that no preventive measures exist against partial enforcement decisions, though partial arbitration decisions may frequently be averted through constancy in the assignment of the arbitral seat.

#### Doubt towards Arbitration

What these issues or really, provisos will at last prompt is doubt towards International Commercial Arbitration by International Commercial Actors and States, and will accordingly nullify the very point of Arbitration in the field of worldwide exchange and trade. They would, if not countered by sufficient measures before they develop, bargain a genuine hit to the image and advancement of this global dispute settlement instrument. Just the correct judicial treatment with respect to these issues can help keep up the trust and image of this system.

## JUDICIAL INTERVENTION AND ROLE OF COURTS

The New Law defines it to be clear that despite anything contained in any existing law in force, in issues identifying with a wide range of arbitration in India, no legal expert should intercede aside from as gave in the Law itself (S. 5). This standard of constraining the legal intercession in the arbitral procedure isn't a simple replication of Article 5 of the Model Law that talks about the degree of judicial intervention. The New Law goes much further. At the point when Article 5 of the Model Law was drafted there was a discussion with regards to the import of the recommendation that the Law would remove the jurisdiction of a court in issues represented by it.

There was trepidation that such an expression could prompt a circumstance in which no court could intercede in any part of the arbitration process, unless there was particular arrangement for intervening in the enactment embraced by the state being referred to. In this manner the discourses on the Law as confirmed through the official records have made it to evident that Article 5 is a confinement on court intercession relating just to particular themes shrouded in the Model Law and not to the general forces of the courts.

In any case, the New Law, in India, by utilizing the articulation "despite any law for the present in compel", means to return to a circumstance that was thought about when the Model Law was being drafted, in which no court could intercede yet for an arrangement made in the Law itself. The impact of S. 5 in this way, is to guarantee that the New Law is a total code to the extent where issues identifying with arbitration are concerned and, appropriately, all Indian courts can follow up on an issue relating to arbitration led in India just on the lines endorsed in the New Law. The intervening of the Indian courts in the arbitral procedure is not any more reasonable unless there is a particular arrangement for this reason in the Law.

The position of legal interceding in India with respect to implementation of foreign awards has experienced a great deal of confrontation and dynamics. The present position that does not permit legal intercession unless a particular arrangement is available in such manner which brings back every one of the contentions for more legal intervening. The idea of public policy that was examined before likewise comes into center as it is just Indian courts that can settle on the public policy front and whether the foreign award is in consonance with it. The necessity of an arbitral agreement diminishes extraordinarily, the voice that Indian courts will have in implementing foreign arbitral awards. A conventional adjustment should be struck between intervening of domestic courts and conclusiveness of the award made outside India. Legitimate administrative arrangements, rather than just Supreme Court orders in such manner will give greater control and give a last position as to legal intervention concerning implementation of foreign awards.

## **RECOMMENDATIONS AND CONCLUSION**

Arbitration is a helpful method to solve commercial disputes as it is usually cheaper and faster. Parties can select the conditions and the governing law they want to be adjudged under according to themselves rather than being restricted by the governing law of the jurisdiction where it is taking place. Traditional Court proceedings are still being preferred by some parties because of the issue that even if arbitration is a more practical method, the decisions by the traditional courts are more enforceable.

While the enforcement of Arbitral Award has become more efficient in the recent years due to decisions like the *BALCO* Judgment, which made it clear that Indian courts have no jurisdiction

to examine the subject matter of the case when the seat of arbitration is outside India<sup>20</sup>, there still are cases where the Arbitral Award was not effectively enforced.

In *Oil & National Gas Corporation Ltd v Saw Pipes* the Indian Supreme Court specified that the public policy of India is affected where the award is against the fundamental policy of India or the interests of India, or where the award is unjust, immoral or patently illegal<sup>21</sup>, which as we can see is a really broad definition.

To mitigate these concerns, corporations should aim to engage in large-scale commercial transactions only with Convention signatory countries or with companies with substantial assets in signatory countries. Even in non-signatory countries, because of the increasing interdependence of national economies and growing trade, alternative strategies may be used to influence governments to encourage their courts to enforce international arbitration agreements. When large-scale international commercial disputes occur the stakes are usually quite high and the party seeking relief will want some assurance of justice. International treaties have increased the amount of certainty that parties can have when entering into these cross-border transactions, but because not all countries have signed onto the New York or the Geneva Convention, there is still some uncertainty inherent in these transactions.

Some steps which are imperative for ensuring that the enforcement of an arbitral award is successful are-

1. Making efficient examination of the other party's contentions to avert objections at a later stage.
2. Taking necessary steps by way of attachment/ notice/ arrest/ appointment of receiver or in another manner;
3. Always keeping in mind that principles of natural justice such as justice and equity apply to the proceedings.
4. Proper drafting of the arbitration agreement preferably with a member country of the New York Convention so that the Award can be enforced according to the procedure.

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<sup>20</sup>Enforcement of arbitral awards in India: overview, available at: [https://uk.practicallaw.thomsonreuters.com/1-619-3233?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/1-619-3233?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (last visited on December 19, 2017).

<sup>21</sup> *Oil & National Gas Corporation Ltd v Saw Pipes*, (2003) 5 SCC 705.

5. Lastly, the arbitration agreement should expressly exclude the application of Part I of the Act, which could prevent the award from being set aside on Indian public policy grounds.

