PROCEDURAL ASPECTS GOVERNING ENFORCEMENT OF FOREIGN ARBITRAL AWARD IN INDIA

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ABSTRACT

Recognition and enforcement are crucial elements of arbitration. Without the possibility for the winning party to enforce the arbitral award in its desired country, the whole arbitration process becomes pointless. This paper discusses the requirements for recognition and enforcement of international arbitration awards in India. The paper aims to provide a clarification to the Arbitration law in India focusing mainly on the issue of the requirements regarding the recognition and enforcement of international arbitration awards. In this paper, the Indian law is compared with New York convention, 1958.The methodology adopted in this paper was purely doctrinal in nature focusing mainly on the primary and secondary sources. On a final note, the paper concluded that the Act is less similar to the New York Convention when it comes to the requirements for recognition and enforcement of international arbitration awards. Hence, there is an urgent need for the country to adopt some form of reforms as far as the Act is concerned especially on the issue of reciprocity reservation' since it adds more complications to business transaction.

Keywords: Arbitration award, enforcement, international arbitration, recognition

INTRODUCTION

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") has been ratified by India on 13.7.1960. Article VII of the New York Convention provides that the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 ceases to have effect between the members of the New York Convention.

Prior to the enactment of the Arbitration and Conciliation Act, 1996 ("Act") the law annulment of domestic and enforcement of foreign awards were governed by the Indian Arbitration Act, 1940 ("1940 Act"), the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961 ("1961 Act"). The 1961 Act was enacted by the Indian Legislature to implement the New York Convention. The 1996 Act was enacted pursuant to the commitment of the Government of India to make an appropriate legislation amending and consolidating the law in terms of UNCITRAL Model Law and Rules[i].

SCHEME OF THE ACT

Chapter 1 in Part I of the Act apply to arbitrations with its place in India, as is evident from sub section (2) of Section 2 of the Act. Whereas Part I deals with the domestic arbitration, Part II deals with the enforcement of certain foreign awards[ii]. Part II of the 1996 Act makes an exception to the effect that unlike section 9(b) of the 1961 Act, it makes the position absolutely clear that the character of an award is determined by the place where it is made[iii].

Part II of the Act relates to enforcement of 'certain' foreign awards. Chapter 1 of this Part deals with New York Convention awards. Section 46 of the Act speaks as to when a foreign award is binding. Section 47 states as to what evidence the party applying for the enforcement of a foreign award should produce before the court. Section 48 states as to the conditions for enforcement of foreign awards. As per section 49, if the court is satisfied that a foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that court and the court has to proceed further to execute the foreign award.

Section 48 of the Act provides that enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof about the existence of any one or more grounds mentioned in clauses (a) to (e) of sub-section (1) of Section 48 of the Act[iv]. It can also be refused if the court finds any of the grounds mentioned in clauses (a) and (b) of sub-section (2) of section 48 of the Act.

DIFFERENCE BETWEEN DOMESTIC AND FOREIGN AWARD

The term "Domestic award" is used to distinguish it from "international award" and a "foreign award". A "foreign award" may be regarded as a domestic award in the country in which it is made. The Act is intended to give different treatments to awards made in India and those made outside India. Part I of the Act applies to "international arbitrations" which are seated in India and all "domestic arbitrations". In the case of a domestic award a 'challenge' to the award can be made under section 34 of the Act whereas no 'challenge' proceeding is contemplated for a foreign award. On the other hand, a foreign award is one which is made in an arbitration proceeding seated outside India. Normally, the term "foreign award" gains significance only for the purposes of enforcement in a country other than its country of origin.

Section 48 of the Act is akin to Article V of the New York Convention. An application for enforcement of a foreign award can be resisted by a party on limited grounds stipulated in section 48 of the Act. Thus, no 'challenge' proceedings or proceedings to annul the award can be brought against a foreign award in India under the Act notwithstanding the governing law of the contract is Indian law[v]. Foreign awards sought to be enforced in India cannot be challenged on merits in Indian courts. In an enforcement proceeding, the court may refuse to enforce the foreign award on satisfactory 'proof' of any of the grounds mentioned in section 48(1), by the party resisting the enforcement of the award. The said section sets out the defences open to a party resisting enforcement of a foreign award[vi].

DEFINITION OF 'FOREIGN AWARD'

The expression "arbitral award" has not been defined in Part I, but the expression "foreign award" has been defined in Section 44 of Part II, which reads as under:

"44. Definition.—In this Chapter, unless the context otherwise requires, '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 the 11th day of October, 1960 - (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."

Under Article I (3) of the Convention, a member State when signing, ratifying, or acceding to the Convention or even notifying extension under Article X is permitted to make two reservations. Firstly, a member State may declare that it will only recognize or enforce awards made in another member State on the basis of reciprocity. Secondly, it may also declare that it will apply the provisions of the Convention for recognition and enforcement only if the differences between the parties arise out of legal relationships, whether contractual or not, which are considered 'commercial' by the State making the declaration. A reciprocity reservation permits a member State to declare that it will recognize and enforce awards applying the Convention only if the awards are made in another member State. However, section 44(b) of the Act requires the Central Government of India to issue a notification in the Official Gazette recognizing a reciprocating territory. Therefore, an award made in a non-notified Convention country will not be considered as a 'foreign award' within the meaning of section 44 of the Act and shall not be recognized and enforceable under the Act.

MEANING OF THE TERM 'COMMERCIAL' – FIRST RESERVATION UNDER THE CONVENTION

The word 'commercial' should be given a broad and not a restricted meaning. It should be construed liberally[vii]. In R.M. Investment and Trading Co. (P) Ltd. case the terms of the agreement required the petitioner to play an active role in promoting the sale and to provide "commercial and managerial assistance and information" which may be helpful in the respondents' sales efforts. It was held that the relationship between the appellant and the respondents was of a commercial nature.

'RECIPROCATING' COUNTRIES - SECOND RESERVATION UNDER THE CONVENTION

The Act defines a "foreign award" as an award made in one of the Convention countries which has been notified by the Central Government of India in the Official Gazette. Although a country may have ratified the New York Convention but if it has not been notified by the Indian Central Government, an award made in that country will not be enforceable as a "foreign award" under the Act. The following countries have been notified by India as reciprocating territories: "Australia, Austria, Belgium, Botswana, Bulgaria, Canada, Central African Republic, Chile, Cuba, Czechoslovakia Socialist Republic, Denmark, Ecuador, The Arab Republic of Egypt, Finland, France, Germany, Ghana, Greece, Hungary, Italy, Republic of Ireland, Japan, Republic of Korea, Kuwait, Malagasy Republic, Malaysia, Mexico, Morocco, The Netherlands, Nigeria, Norway, People's Republic of China (including the Special Administrative Regions of Hong Kong and Macao), Philippines, Poland, Romania, San Marino, Singapore, Spain, Sweden, Switzerland, Syrian Arab Republic, United Republic of Tanzania, Thailand, Trinidad and Tobago, Tunisia, United Kingdom, United States of America and U.S.S.R.[viii]

The Ministry of Foreign Trade issued a notification dated 7th February 1972 a notification stating that "the Central Government being satisfied that reciprocal provisions have been made, hereby declares the Union of Soviet Socialist Republics to be a territory to which the Convention on the recognition and enforcement of foreign arbitral awards set forth in the schedule to that Act applies"[ix]. Therefore, prior to 1992 an award made in Ukraine was an award made in a reciprocating territory as notified and this position continues even after the

political separation of various Soviet Socialist Republics. Ukraine continues to be a signatory to the New York Convention and the notification of 7th February 1972, continues to operate in the territories then forming part of the USSR, including the territory of Ukraine[x].

DIFFERENCE BETWEEN THE EXPRESSION 'RECOGNITION' AND 'ENFORCEMENT'

The Act only uses the expression 'enforcement' and does not use the expression 'recognition'. The First Schedule to the Act uses both the expressions and so does the Convention. The two expressions 'recognition' and 'enforcement' are distinct and connote separate meanings. An award may be recognised without being enforced though when it is enforced, it is necessarily recognised by the Court, which orders its enforcement. 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 recognize not only the legal effect of the award but must use legal sanctions to ensure that it is carried out[xi]. The expression 'recognition' is a defensive process as it is used as a shield against an attempt to raise in a fresh proceeding same issues that have already been adjudicated upon and decided in an earlier arbitration proceeding. A party, who receives a favourable award is entitled to object to the subsequent arbitration with respect to the dispute which was the subject matter of the earlier arbitration[xii]. As opposed to the expression 'recognition', which is a defensive process, 'enforcement' is a weapon of offence as it involves recovery of the award amount if money is the subject matter.

FILING OF ENFORCEMENT APPLICATION

A party seeking enforcement of a foreign award need not initiate separate proceedings - one for deciding the enforceability of the award to make it a rule of the court or decree and the other to take up execution thereafter. A party holding a foreign award can apply for enforcement of it but the court before taking further effective steps for the execution of the award has to proceed in accordance with sections 47 to 49. In one proceeding there may be different stages. In the first stage the court may have to decide about the enforceability of the award having

regard to the requirement of the said provisions. Once the court decides that the foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There is no requirement of making the foreign award a rule of court/decree again[xiii].

RELEVANT COURT FOR FILING ENFORCEMENT APPLICATION

Section 47 of the Act, which is in Part II, whilst dealing with enforcement of certain foreign awards has defined the term "court" as a court having jurisdiction over the subject-matter of the award. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought1[xiv]. Where the subject matter of the award is money, the enforcement application can be filed in the court within whose jurisdiction the bank account of the respondent is located. Therefore, a party seeking to enforce a foreign award can file the application in any court in India as long as the money asset is located within the jurisdiction of the court in which he intends to file the application. If the applicant does not find money in the account maintained by the Respondent within the court's jurisdiction, he may file another application for enforcement of the award in the court within whose jurisdiction respondent's assets are located[xv]. The expression 'subject matter' of the award to the explanation under section 47 is different from the expression subject matter of the arbitration under section 2(e) of Part I of the Act[xvi]. If the subject matter of the award is not money, then the party seeking to enforce is seeking to ensure that the award is implemented by the respondent and enforcing party's rights and interest are given effect to. Therefore, a successful party in order to enforce and execute an award has to initiate legal proceeding as envisaged under section 47 of the Act.

The Supreme Court of India in Brace Transport Corporation case has approved the passage and quoted from the Law and Practice of International Commercial Arbitration by Redfern and Hunter (1986 edition) (at pages 337 and 338) which states:

"A party seeking to enforce an award in an international commercial arbitration may have a choice of country in which to do so; as it is sometimes expressed, the party may be able to go forum shopping. This depends upon the location of the assets of the losing party. Since the purpose of enforcement proceedings is to try to ensure compliance with an award by the legal

attachment or seizure of the defaulting party's assets. Legal proceedings of some kind are necessary to obtain title to the assets seized or their proceeds of sale. These legal proceedings must be taken in the State or States in which the property or other assets of the losing party are located."

The approval of the said passage in the Brace Transport case is based on the reasoning that the parties to an international arbitration would normally seat the arbitration in a neutral forum where neither of them would have any assets and therefore enforcement of the award in the neutral forum would be of no consequence. Thus, enforcement of the award must be in a country where the properties of the judgment debtor are located. The court, therefore, held that foreign awards must, be recognisable and enforceable internationally and the place of such enforcement would not be chosen by the parties but would depend upon the circumstances of each particular case.

EVIDENCE REQUIRED FOR ENFORCEMENT

A party applying for enforcement of a foreign award in India must at the time of filing of the application produce before the court the following evidence:

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
(b) the original agreement for arbitration or a duly certified thereof; and
(c) such evidence as may be necessary to prove that the award is a foreign award.

If the award or agreement to be produced under sub-section (1) of section 47 of the Act is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India. The burden of proving that the award sought to be enforced is a genuine 'foreign award' and based on a foreign agreement for arbitration, is on the party seeking to enforce it by moving an application for enforcement. The aforesaid documents shall form prima facie evidence to prove that the award is a genuine foreign award. The applicant, i.e., party applying for the enforcement of a foreign award is not required to produce any further evidence.[xvii]

APPEAL AGAINST ENFORCEMENT OF AWARD

There is no scope for an appeal against an order of the court for the enforcement of a foreign award. If the court is satisfied that the foreign award is enforceable, the award itself would be deemed to be a decree of the court[xviii]. The procedural formality for the court to pronounce judgment and a decree to follow on that basis is omitted. Further, the possibility of the decree being in excess of, or not in accordance with the award is also removed. It is for this reason that section 50(1)(b) of the Act provides for an appeal only against an order refusing to enforce a foreign award under section 48[xix]

Section 50(1)(b) of the Act provides for an appeal only against an order refusing to enforce a foreign award under section 48. No letters patent appeal will lie against an order which is not appealable under section 50 of the Act[xx]. The scheme of sections 49 and 50 of the Act is devised specially to exclude even the limited ground[xxi]. The Letters Patent is only indicative of the forum to which an appeal against an order of the Single Judge would lie. It does not confer an additional right to file an appeal.[xxii]

CHOICE OF LAWS

The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Such choice is exercised either expressly or by implication. The parties to a contract containing an arbitration clause or a separate arbitration agreement may have various aspects of the arbitral relationship governed by separate laws. These are as follows:

(1) The proper law of the contract, i.e., the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.
(2) The proper law of the arbitration agreement, i.e., the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.
(3) The curial law, i.e., the law governing the conduct of the individual reference.

The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.

The curial law governs the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract. The proper law of the reference governs the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.

In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e., the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So, in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate. The field of operation of each of the laws applicable is as mentioned below:

(1) The proper law of the underlying contract, i.e., the law governing the contract which creates the substantive rights and obligations of the parties out of which the dispute has arisen.
(2) The proper law of the arbitration agreement, i.e., the law governing rights and obligations of the parties arising from their agreement to arbitrate and, in particular, their obligation to submit their disputes to arbitration and to honour an award. This includes inter alia questions as to the validity of the arbitration agreement, the validity of the notice of arbitration, the constitution of the tribunal and the question whether an award is within the jurisdiction of the arbitrator.
(3) The proper law of the reference, i.e., the law governing the contract which regulates the individual reference to arbitration. This is an agreement subsidiary to but separate from the arbitration agreement itself, coming into effect by the giving of a notice of arbitration from which point a new set of mutual obligations in relation to the conduct of the reference arise upon lines canvassed in the Bremer Vulkan Schiffbau Und

Maschinenfabrik v. South India Shipping Corpn. (Lloyd's Law Rep at pg. 263) and developed by Mr. Justice Mustill (as he then was) in Black Clawson International Ltd. v. Papierwerke Waldhof Aschaffenburg A.G. That law governs the question of whether by reason of subsequent circumstance the parties have been discharged (whether by repudiation or frustration) from their obligation to continue with the reference of the individual dispute, while leaving intact the continuous agreement to refer future disputes pursuant to the arbitration agreement.

(4) The curial law, i.e., the law governing the arbitration proceedings themselves, the manner in which the reference is to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract.

In most arbitration, the applicable law will be the same in all four cases. Choice of (1) will usually be decisive as to (2), in the absence of an express contrary choice; (2) and (3) will very rarely differ. However, as to (4), it is not uncommon to encounter the incidence of a different curial law in cases where the parties have made an express choice for arbitration (frequently in London) in a jurisdiction divorced from the jurisdiction with which the contract in (1) has most real connection. As to (4), the curial law, in the absence of express agreement there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e., the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings[xxiii]. Proper law of the contract is the law which the parties have expressly or impliedly chosen. Where the contract is silent it will be the law which has the closest and most intimate connection with the contract. The expression 'proper law' refers to the substantive principles of the domestic law of the chosen system and not to its conflict of laws rules. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract[xxiv].

The proper law of arbitration (i.e., the substantive law governing arbitration) determines the validity, effect and interpretation of the arbitration agreement, the arbitration proceedings are conducted, in the absence of any agreement to the contrary, in accordance with the law of the country in which the arbitration is held. On the other hand, if the parties have specifically chosen the law governing the conduct and procedure of arbitration, the arbitration proceedings will be conducted in accordance with that law so long as it is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held. If no such choice has been made by the parties, expressly or by necessary implication, the procedural aspect of the conduct of arbitration (as distinguished from the substantive agreement to arbitrate) will be determined by the law of the place or seat of arbitration. Where, however, the parties have, stipulated that the arbitration between them will be conducted in accordance with the ICC Rules, those rules, being in many respects self-contained or self-regulating and constituting a contractual code of procedure, will govern the conduct of the arbitration, except insofar as they conflict with the mandatory requirements of the proper law of arbitration, or of the procedural law of the seat of arbitration.

If the parties have agreed that the proper law of the contract should be the law in force in India but have also provided that the seat of arbitration shall be in a foreign country, the laws of India would govern certain aspects such as the validity, interpretation and effect of all clauses including the arbitration clause in the contract as well as the scope of the arbitrators' jurisdiction. Therefore, the Indian law would govern the contract and the arbitration clause. As regards other issues relating to the conduct of the arbitration proceedings, it will be the law of the seat of the arbitration i.e., the foreign procedural law which will govern, and the competent courts of that country would have a certain measure of control on the proceedings.[xxv]

Where the parties have chosen all the three applicable laws to be Indian laws i.e. (i) the law governing the substantive contract; (ii) the law governing the agreement to arbitrate and the performance of that agreement (iii) the law governing the conduct of the arbitration, the intention of the parties would not be to create an exceptionally difficult situation, by fixing the seat of arbitration in another country. For example, curial law of England would become applicable only if there was clear designation of the seat of arbitration in London. If the parties have deliberately chosen London as a venue, it cannot be accepted as the seat of arbitration by the court[xxvi].

GROUNDS OF RESISTANCE TO ENFORCEMENT

A foreign award will not be enforced in India if it is proved by the party against whom it is sought to be enforced that the parties to the agreement were, under the law applicable to them, under some incapacity, or, the agreement was not valid under the law to which the parties have subjected it, or, in the absence of any indication thereon, under the law of the place of arbitration; or there was no due compliance with the rules of fair hearing; or "the award exceeded the scope of the submission to arbitration; or the composition of the arbitral authority or its procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the place of arbitration; or 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". The award will not be enforced by a court in India if it is satisfied that the subject-matter of the award is not capable of settlement by arbitration under Indian law or the enforcement of the award is contrary to the public policy.[xxvii]

It is for the party against whom a foreign award is sought to be enforced, to prove to the court dealing with the case that the composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country where the arbitration took place. If the respondent's reply to the application for enforcement contains ground(s) mentioned in sub-section (1) of section 48, the respondent would be called upon to furnish to the court proof of the existence of any one or more such grounds as mentioned in clauses (a) to (e) of sub-section (1) of section 48 of the Act. The word 'proof' would necessarily imply the establishment of the alleged fact by evidence. The evidence can be oral as well as documentary evidence produced by a party or depositions of witnesses in relation to matters of fact under inquiry. The proceedings under Part II of the Act will not be treated as a suit. However, a party requesting the court to refuse the enforcement of foreign award will be entitled to lead evidence in support of the grounds[xxviii].

"PUBLIC POLICY" GROUND

The term "Public policy" in Article V(2)(b) of the New York Convention does not mean international public policy. The said expression means the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced. Consequently, the expression "public policy" means the doctrine of public policy as applied by the courts in India. The defence of public policy should be construed narrowly. According to the narrow view, courts cannot create new heads of public policy whereas the broad view countenances judicial law making in such areas. The enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy, and something more than contravention of law is required[xxix]. The enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality[xxx]. Therefore, the averment that the enforcement will be contrary to public policy of other countries i.e., law of the country of the place of arbitration will not be taken into consideration. A distinction must be drawn while applying the said rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. The application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved[xxxi]. It is the fundamental principle of law that orders of courts must be complied with. Any action which involves disregard for court orders adversely affecting the administration of justice and destructive of the rule of law would be contrary to public policy[xxxii]. Unjust enrichment even if is contrary to public policy of India it must relate to the enforcement of award and not to the merits of the case in order to be a ground for refusal of enforcement of the foreign award[xxxiii].

CHALLENGE ON MERITS

The Indian courts may refuse to enforce the foreign award on satisfactory proof of any of the grounds mentioned in section 48(1), by the party resisting the enforcement of the award. The provisions set out in section 48(1) (i.e., Article V(e) of the New York Convention) are in the nature of defences available to the party resisting the enforcement application. The expression "set aside or suspended", in clause (e) of section 48(1) cannot be interpreted to mean that, by necessary implication, the foreign award sought to be enforced in India can also be challenged on merits in Indian courts. The provision does not confer jurisdiction on Indian courts to annul an award made outside the country. Thus, the Act does not confer jurisdiction on the Indian courts to annul an international commercial award made outside India. The power to annul an award is provided under section 34 in Part I of the Act. The applicability of that provision is limited to the awards made in India or domestic awards. The powers of the Indian courts to set aside an award relating to international commercial arbitration are confined to those seated in India[xxxiv]. Therefore, Indian courts do not have jurisdiction to entertain a challenge to a foreign award on its merits.

SCOPE OF ENQUIRY BEFORE THE INDIAN COURT IN ENFORCEMENT PROCEEDINGS

The award must be executed as it is and there is no scope for any addition to any award in executing a foreign award but the award to be executed must be properly construed and given effect to. If an application is filed for decree in terms of the award, the court in upholding the award ought to grant a decree in terms of the award and not subtract any portion thereof[xxxv]. Enforcement of foreign award would be refused under section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in section 34(2)(b)(ii) in Oil and Natural Gas Corporation Limited v. Saw Pipes Limited[xxxvi], is not applicable where objection is raised to the enforcement of the foreign award under section 48(2)(b)[xxxvii]. It was observed by the Supreme Court in Shri Lal Mahal case that an enforcing court does not exercise appellate jurisdiction over the foreign awards

and cannot be called upon to enquire as to whether foreign awards are contrary to the principles of English law. A plea that the foreign award is founded on inadmissible and ought to be refused will not be entertained by the Indian courts. Moreover, section 48 of the Act does not give an opportunity to have a 'second look' at the foreign award in the award-enforcement stage. The scope of inquiry under section 48 does not permit review of the foreign award on merits. 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 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.[xxxviii]

ENFORCEMENT OF FOREIGN AWARD AS A JUDGMENT

An award is not a decision which the court will recognize as a foreign judgment. An award can furnish a fresh cause of action, but it must have attained finality. If the law of the country in which it was made gives finality to a judgment based upon an award and not to the award itself, the award can furnish no cause of action for a suit in India[xxxix]. A foreign award just like a foreign judgment affords a fresh cause of action upon which a suit can be brought. In Bremer Oeltransport GMBH v. Drewry.[xl] it was held that a foreign award furnishes a new cause of action based on the agreements between the parties to perform the award. A plaintiff filing a suit based on a foreign award and seeking from the court a judgment in his favour for the amount stated in the award must prove:

(1) that there was a contract between the parties whereunder disputes between them could be referred to arbitration to a tribunal in a foreign country.
(2) that the award is in accordance with the terms of the agreement;
(3) that the award is valid according to the law governing arbitration proceedings obtaining in the country where the award was made;
(4) that it was final according to the law of that country; and
(5) that it was a subsisting award at the date of suit[xli]

An enforcement order and a judgment on an award serve the same purpose. They are two different procedures prescribed for enforcing an award. In the case of an enforcement order a party applies to a court for leave to enforce the award; and on the granting of such leave, the award can be enforced as if it were a decree of a court. In the alternative procedure, an action either in the shape of a suit or a petition will have to be filed on an award and a judgment obtained thereon. In that event the award, vis-a-vis the country in which it is made, merges in the judgment and thereafter the judgment only becomes enforceable. There is no merger in the context of its enforcement in another country. In both the cases the award in the country of its origin is complete and enforceable. If an award gets vitality by a mere enforcement order, it gets a higher sanctity by the court of its origin making a judgment on it. Both of them afford a guarantee of its vitality and enforceability in the country of its origin and therefore, a different country can safely act upon it[xlii] In Halsbury's Laws of England, Vol. 73rd Edn., at p. 141, the relevant principle is stated under the heading "Foreign Judgments" thus "Since the foreign judgment constitutes a simple contract debt only, there is no merger of the original cause of action, and it is therefore open to the plaintiff to sue either on the foreign judgment or on the original cause of action on which it is based, unless the foreign judgment has been satisfied."[xliii] In Dicey's "Conflict of Laws", 7th Edn., at p. 1059: "For historical and procedural reasons, a foreign judgment is treated in England as a contractual debt, and the fact that, in certain instances, it can be enforced by registration does not appear to alter the traditional view."

"If the foreign award is followed by judicial proceedings in the foreign country resulting in a judgment of the foreign court which is not merely a formal order giving leave to enforce the award, enforcement proceedings in England must be brought on the foreign judgment (or possibly on the original cause of action), but probably not on the award."

PROVING FOREIGN JUDICIAL RECORD

Section 78(6) of the Indian Evidence Act, 1872 lays down three conditions for admitting the judgment in evidence.

Section 78. The following public documents may be proved as follows: * * * (6) Public documents of any other class in a, foreign country, by the original, or by a copy certified by

the legal keeper, thereof with a certificate under the seal of a notary public, or of an Indian Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country."

Section 86 of the Evidence Act lays down that a court may presume the genuineness and accuracy of any document purporting to be a certified copy of any judicial record of any foreign country, if such a copy is duly certified in the manner and according to the Rules in use in the country for certification of copies of judicial records. To give rise to this presumption it is not necessary that the judgment of the foreign country should have already been admitted in evidence. Section 86 of the Evidence Act states as under : "The court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of India or of her Majesty's Dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Central Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records...." 'Binding' nature of foreign award an award is 'final' if under the laws of the country in which an award has been made, it is no longer open to challenge it on merits[xliv] In order to be enforceable in England, the foreign award need not first be pronounced enforceable in the country of its origin.[xlv] It is not material for the purpose of enforcement of a foreign award under the Act that the award in any country other than India is made enforceable by a judgment[xlvi]. For the purpose of enforcing a foreign award plaintiff must prove only (1) submission, (2) compliance with the submission in the conduct of arbitration and (3) the validity of the award according to the law of the country where it was made[xlvii]. If the award is not challenged in the country of origin and is allowed to stand and becomes final in the country of its origin, the award can be enforceable in India.[xlviii]

ENFORCEMENT OF AN AWARD IN INDIA PENDING CHALLENGE TO IT IN THE SEAT OF ARBITRATION

Article V(1)(e) provides that recognition and enforcement of the award will be refused if 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". An Indian court will enforce an award provided the award has become enforceable in accordance with the laws of the country in which the award was made.

A converse situation came before the Indian Supreme Court in O.N.G.C. v. Western Co. of North America[xlix], wherein the court observed that it would be difficult to uphold a contention "that a foreign award can be enforced on the mere making of it without it being open to challenge in either the country of its origin or the country where it was sought to be enforced". Further a possible scenario could be that the validity of the award is tested in the country where the award was made after the award has been enforced in the enforcing country. The court held that "till an award is transformed into a judgment and decree under section 17 of the Arbitration Act, it is altogether lifeless from the point of view of its enforceability. Life is infused into the award in the sense of it becoming enforceable only after it is made a rule of the court upon the judgment and decree in terms of the award being passed. The American Court would have therefore enforced an award which is a lifeless award in the country of its origin, and under the law of the country of its origin which law governs the award by choice and consent". The Supreme Court allowed ONGC's prayer for grant of a restraint order against Western Company from proceeding further with the enforcement action in the American court pending a decision on the setting aside proceedings before the Indian court.

REGISTRATION OF FOREIGN AWARD

A foreign judgment does not require registration. When a decree is passed by the court, it does not require registration in view of clause (vi) of sub-section (2) of section 17 of the Registration Act. A decree or order of a court affecting the rights mentioned in section 17(1)(b) and 17(1)(c) would not require registration. It would, however, require registration where the decree or order on the basis of compromise affects the immovable property other than that which is the subject-matter of the suit or proceeding. Even a decree passed by the foreign court execution of which is sought under section 44-A of the Code of Civil Procedure, 1908 would not require registration.[l]

PAYMENT OF INTEREST PENDING ENFORCEMENT

A deposit made pursuant to an order of court, does not stop the accrual of interest payable under the award. Depositing a sum in court to obtain stay of execution of the decree on terms that the decree-holder can draw it out on furnishing security, does not pass title to the money to the decree-holder. The payment is not in satisfaction of the decree[li]. The decree holder would therefore be entitled to claim interest payable under the award till realization.

PAYMENT IN FOREIGN CURRENCY

Where an award directs payment of a sum of money in a foreign currency and the court while pronouncing judgment provides for its rupee equivalent at the rate of exchange prevailing on the date of the award, the court will not be pronouncing judgment "according to the award". If the decree holder is seeking conversion of the foreign currency into Indian Rupees, the judgment, therefore, can only be said to be "according to the award" if it directs payment of the rupee equivalent at the rate of exchange prevailing on the date of pronouncing the judgment which date is the same as the date of the passing of the decree[lii]. The date of conversion should be the date of the decree as opposed to the date of the award.[liii] An award will be deemed to be a decree of the court for the purpose of conversion into Indian currency when the Supreme Court (in case appeal is filed) finally upholds the validity of the award. The award will become a decree on the date on which the Supreme Court declares the award to be binding. This is so because an appeal is a continuation of the trial court proceedings and unless the appeal is concluded, there is no finality of the proceedings.[liv]

DISSOLUTION PROCEEDINGS BASED ON A FOREIGN AWARD

A winding up petition on the basis of a foreign award will not be entertained unless the party seeking to enforce the foreign award gets an order from the court in its favour enforcing the award. Once the enforceability of the award is established by the court a winding up proceeding is maintainable.[lv] A winding up proceeding cannot be used for enforcement of the foreign award[lvi].

CONCLUSION AND RECOMMENDATIONS

From the foregoing discussions above, it is undeniable fact that the recognition and enforcement of arbitral awards is a central element for successful arbitration. Parties will not perceive arbitration as a viable alternative to state court proceedings if the resulting arbitral award will not be enforced with the same or at least equivalent effects as state court 's judgment. There is no doubt that a number of provisions of the Arbitration Act of India in light of the international arbitration awards enforcement. The requirements established in India concerning the matter relate to the nature of the international arbitral award.

The author recommends that India has to amend its Arbitration Act by specifically inserting the words binding awards for the sake of dealing with the issue of jurisdiction. Furthermore, the author also recommends that India has to add other documents that need to be attached together with the application for enforcement of international arbitral award such as a certified copy proving that the arbitral award is recognized by a competent court where the arbitration proceedings took place. With regards to the issue of reciprocity reservation ', it is suggested that India should revoke this principle as it adds complication to business transactions due to the fact that some countries are not listed in Indian gazette for the simple reason of it being against their public policy and India may reciprocate such an act. All in all, it is important to note that even though uniform recognition and enforcement of international arbitral awards is the main goal of the most worldwide applicable New York Convention of 1958, the interpretation of the provisions of this Convention is still up to national courts Hence, it is vital that considerable attention should also be focused on formalities when entering into an arbitration agreement, as well as during the course of arbitration.

ENDNOTES

[i] Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245 (269).
[ii] Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245 (270).
[iii] Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245 (270)
[iv] Sub-section (1) of Section 48
[v] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.
[vi] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 (625)
[vii] R.M. Investment and Trading Co. (P) Ltd. v. Boeing Co., (1999) 5 SCC 108.
[viii] By a notification under Section 2 issued by the Ministry of Foreign Trade dated 7.2.1972 USSR had been notified as a reciprocating territory. The notification of 7th of February 1972 covers awards made in the territories of the then existing USSR which included Ukraine as a part of it. Although various republics which formed a part of the territories of the USSR may have separated, the territories continue to be covered by the notification of

7.2.1972. Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.
[ix] Transocean Shipping Agency (P) Ltd. v. Black Sea Shipping, (1998) 2 SCC 281 (285).
[x] Transocean Shipping Agency (P) Ltd. v. Black Sea Shipping, (1998) 2 SCC 281 (284).
[xi] Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd., Saudi Arabia, AIR 1994 SC 1715.
[xii] Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd., Saudi Arabia, AIR 1994 SC 1715.
[xiii] Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2001) 6 SCC 356 (370).
[xiv] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 (606).
[xv] Wireless Developers Inc v. India Games Ltd., 2012 (2) ARBLR 397 (Bom).
[xvi] Tata International v. Trisuns Chemical, 2002 (2) Bom CR 88.
[xvii] Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain (India) Co., 2008 (4) ARBLR 497 (Delhi).
[xviii] Section 49 of the Act. Fuerst Day Lawson Limited v. Jindal Exports Limited, (2011) 8 SCC 333.
[xix] Fuerst Day Lawson Limited v. Jindal Exports Limited, (2011) 8 SCC 333.
[xx] Fuerst Day Lawson Limited v. Jindal Exports Limited, (2011) 8 SCC 333 (370).
[xxi] Fuerst Day Lawson Limited v. Jindal Exports Limited, (2011) 8 SCC 333 (363).
[xxii] Shivnath Rai Harnarain India Company v. Glencore Grain Rotterdam, AIR 2010 Delhi 31
[xxiii] Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (1998) 1 SCC 305 (309).
[xxiv] National Thermal Power Corpn. v. Singer Company, (1992) 3 SCC 551 (563).
[xxv] National Thermal Power Corpn. v. Singer Company, (1992) 3 SCC 551 (571).
[xxvi] Enercon (India) Ltd. v. Enercon GMBH, MANU/SC/0102/2014.
[xxvii] National Thermal Power Corpn. v. Singer Company, (1992) 3 SCC 551 (567).
[xxviii] Ittgrani Spa v. Shivnath Rai, MANU/DE/1130/2005.
[xxix] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644.
[xxx] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644.
[xxxi] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644 (678).
[xxxii] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644 (689).
[xxxiii] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644.
[xxxiv] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 (625).
[xxxv] Koch Navigation Inc. v. Hindustan Petroleum Corpn. Ltd., (1989) 4 SCC 259 (262).
[xxxvi] (2003) 5 SCC 705.
[xxxvii] Shri Lal Mahal Ltd. v. Progetto Grano Spa, 2013 (3) ARBLR 1 (SC).
[xxxviii] Shri Lal Mahal Ltd. v. Progetto Grano Spa, 2013 (3) ARBLR 1 (SC).
[xxxix] Badat and Co. v. East India Trading Co., (1964) 4 SCR 19.
[xl] [1933] 1 KB 753.
[xli] Badat and Co. v. East India Trading Co., (1964) 4 SCR 19.
[xlii]Badat and Co. v. East India Trading Co., (1964) 4 SCR 19.
[xliii] Badat and Co. v. East India Trading Co., (1964) 4 SCR 19.
[xliv] Badat and Co. v. East India Trading Co., (1964) 4 SCR 19.
[xlv] Union Nationale des Cooperatives Agricoles de Cereales v. Robert Catterall and Co. Ltd., [1959] 2 QB 44.
[xlvi] Escorts Ltd. v. Universal Tractor Holding LLC, (2013) 10 SCC 717.
[xlvii] Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd., (1927) 43 T.L.R. 541.
[xlviii] Naval Gent Maritime Limited v. Shivnath Rai Harnarain (I) Ltd., 174 (2009) DLT 391.
[xlix] (1987) 1 SCC 496 (509).
[l] Harendra H. Mehta v. Mukesh H. Mehta, (1999) 5 SCC 108 (137).
[li] P. Ramanathan Chettiar v. O. Ramanathan Chettiar, AIR 1968 SC 1047.
[lii] Forasol v. Oil and Natural Gas Commission, AIR 1984 SC 241.
[liii] Forasol v. Oil and Natural Gas Commission, AIR 1984 SC 241.
[liv] Sea Stream Navigation Ltd. v. LMJ International Ltd., MANU/WB/0043/2013.
[lv] Marina World Shipping Corporation Limited v. Jindal Exports (P) Limited, 2004(2) Company Law Journal 50 (Delhi).
[lvi] Vinayak Oil and Fats Private Ltd. v. Andre (Cayman Islands) Trading Co. Ltd., 2005 (2) ARBLR 551 (Cal).