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India's journey towards being a pro-enforcement regime for foreign arbitral awards

The rapid advancement in international commerce has resulted in generating considerable revenues for all parties involved, whether government or private entities. However, on the flip-side it has also given rise to considerable cross-border disputes. In general, the parties engaged in international commerce conduct their transactions across national borders and therefore tend to resort to alternative dispute resolution mechanisms to avoid being subjected to the jurisdiction of national courts. It is in this regard that international commercial arbitration is typically chosen as the method for resolving disputes between parties engaging in transactions pertaining to international commerce.

Recent judgments affirm the fact that Indian courts have shifted towards a pro-enforcement stance with a strict adherence to the principle of non-interference with arbitral awards. The Indian courts alongwith the Indian Legislature have taken proactive steps to ensure speedy execution of arbitral awards, hence augmenting India's credentials as an arbitration-friendly regime that includes minimal intervention by national courts and speedy resolution of arbitration proceedings. The passing of legislation namely, The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2016 (**"Commercial Courts Act"**) marks another attempt by Legislature to reduce judicial delays in commercial disputes. The Commercial Courts Act further mandates the setting up of Commercial Divisions in High Courts that have ordinary original civil jurisdiction while in all other districts over which High Courts do not have ordinary original civil jurisdiction, these Commercial Courts are to be established by the relevant State Governments. Appeals are to be heard by Commercial Appellate Divisions, which are to be set up in the High Courts. Apart from specialized courts, the most interesting aspects of the legislation are strict timelines with quick adjudication and limited scope of appeals. Thereby ensuring that delays on account of pendency before the courts is mitigated. The 246th Law Commission reviewed the prevailing law under the Arbitration & Conciliation Act, 1996 (**"Act"**) and recommended several important changes to bring the Indian law in line with international best practices. Most of these recommendations were incorporated by the Indian Legislature while enacting the Arbitration (Amendment) Act, 2015, resulting in an overhaul of the Act.

Thus, all round collaborative efforts are being made by the Legislature and the Judiciary towards securing the confidence of foreign investors/parties and making India an international arbitration hub. One of the most crucial aspects in this regard has been the adoption by the courts in both letter and spirit, the principles of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (**"New York Convention"**). The bedrock of the New York Convention is limited interference in the arbitral award by the courts enforcing the same. The New York Convention under Article V provides for limited and narrow grounds that are available to a party to raise objection before the courts enforcing the award. These limited grounds of objection are almost in the same terms as provided under Section 48 of the Act. However, the courts in India, did not always consider their scope of reviewing a foreign arbitral award to be as limited and narrow as provided in the plain reading of Section 48 of the Act. During the initial phase of the enactment of Act, the courts in India had a more sceptical outlook with respect to foreign awards and were more willing to go into its merits and interfere with its findings. Such scepticism of the

Indian courts led to the now infamous judgments of *Venture Global*[1] *and Phulchand Exports*[2] being the flag bearers for enforcement of foreign awards in India.

Indian courts adopting pro-enforcement stance in favour of foreign arbitral awards

Over the last half a decade, the Indian courts have been correcting its course to be more in conformity with the international norms relating to foreign arbitral awards. The first step towards sustaining its growing global credibility, India needed to deal with the elephant in the room post ***Bhatia's***[3] ruling wherein court interpreted Section 2 of the Act to mean that Part I of the same would be applied even to arbitrations seated outside India. The process to set in motion a pro-enforcement regime was initiated by a full court decision of the Supreme Court in the celebrated ***BALCO judgment***[4], by settling the law that Part I of the Act only applies to arbitrations seated within India. While, foreign arbitral awards are only subject to the jurisdiction of Indian courts when they are to be enforced in India under the limited jurisdiction provided in Part II of the Act. This decision has been the impetus that has led to an evident shift in the judicial mindset and brought forth a change in the current reputation of India being an enforcement friendly nation. As a welcome change, the Indian Legislature also played its role and brought about a swarm of amendments to the Act in the year 2015.

In ***NTT Docomo vs. Tata Sons***[5], the judgment passed by J. Muralidhar has proved the fact that India respects finality of international awards and is a foreign investment friendly country. In this case ,the objection raised by Reserve Bank of India (**"RBI"**) to resist enforcement of international arbitration award, on the ground that the mutual settlement between the companies permitting transfer of funds violated provisions of the Foreign Exchange Management Act, 1999 (**"FEMA"**) and a compromise under Order XXIII Rule 3 Civil Procedure Code, 1908 (**"CPC"**) cannot be taken on record by court when it was hit by Section 23 of Indian Contract Act, 1872 (**"ICA"**), was rejected by the Delhi High Court. The court held that the intervention by RBI is not permissible as per the provisions of Act since it is only the parties to the award who can challenge it.

In ***Cruz City I Mauritius Holdings vs. Unitech Limited***[6], the Delhi High Court while dismissing Unitech's arguments has held that the 'public policy' defense is to be construed narrowly, and foreign awards will only be held unenforceable if they contravene the basic rationale, values and principles which underpin Indian laws. A contravention of specific provisions of FEMA even if established, was held to be insufficient to invoke the defense of public policy against enforcement of a foreign arbitral award. It further held that an alleged contravention of a provision of Indian law is not synonymous with contravention of the fundamental policy of India. In coming to this conclusion, the court had extensively referred to an earlier Supreme Court case of **Renusagar Power Co. Ltd. vs. General Electric Co.**[7]

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1 Venture Global Engineering LLC vs. Satyam Computer Services Limited (2008) 4 SCC 190.
2 Phulchand Exports vs. OOO Patriot (2011) 10 SCC 300.
3 Bhatia International vs. Bulk Trading SA (2002) 4 SCC 105.
4 Bharat Aluminium Co vs. Kaiser Aluminium Technical Services (2012) 9 SCC 552.
5 2017 SCC OnLine Delhi 8078.
6 2017.
7 1994 Supp (1) SCC 644.

The shift towards adopting a more pro-enforcement regime by the Indian courts has culminated into the latest decision of the 3-judge bench of the Supreme Court of India in ***Vijay Karia & Ors. vs. Prysmian Cavi E Sistemi SRL & Ors.***[8]***.*** Herein, the Supreme Court has advised caution to the Indian courts against enthusiastically interfering with enforcement of foreign arbitral awards. Through this judgment the Supreme Court has re-affirmed the pro-enforcement regime by delineating the scope of 'due process' objections that are available to a party under Section 48 of the Act. The main elements of this landmark decision are elaborated hereinbelow:

1) Powers under Article 136 of Constitution of India and its limited invocation

Bearing in mind the limited jurisdiction under Article 136 of the Constitution of India, 1950 (**"Constitution"**), the Supreme Court observed that it must be very slow in interfering with cases regarding enforcement of foreign arbitral awards, as no provision for appeal is available against a judgment recognizing and enforcing a foreign award. This is because the policy of the legislature is that there ought to be only one bite at the cherry in a case where objections are made to the foreign award on the extremely narrow grounds contained in Section 48 of the Act and which have been rejected. Therefore, Interference may only be warranted in the interest of settling the law, if some new or unique point is raised, which has not been answered by the Supreme Court on any previous instance. So that the judgement arising out of such intervention may be used as a trailblazer to guide the future course of litigation in that regard.

The Supreme Court by imposing costs of INR 50,00,000/- (Indian Rupees Fifty Lakhs only) in the instant case, has also set a deterrent on parties from adopting a strategy of extinguishing all actions that may be construed to be available to it under law including invoking the special jurisdiction of the Supreme Court under Article 136 of the Constitution.

2) Framework concerning recognition and enforcement of foreign awards

It has been recognized that one of the primary objectives of the New York Convention is to ensure that a party which belongs to a signatory country, and which has gotten past a challenge procedure to an arbitral award in the country of its origin, must then be able to get such award recognized and enforced in other signatory countries as soon as possible.

Further under the New York Convention, the country in which, or under the arbitration law of which, an award is made is said to have primary jurisdiction over the arbitral award. All other signatory states are said to have secondary jurisdiction. Only a court in a country with primary jurisdiction over an arbitral award may annul that award. Courts in countries having secondary jurisdiction are required to limit themselves to deciding whether the award may be enforced in that country.

3) Discretion of the court to enforce foreign awards

Use of the word "may" in Section 48 indicates that a residual discretion remains with the Court to enforce a foreign award, despite grounds for its resistance having been made out. While discussing the ambit of this discretionary power, the Supreme has classified grounds for resisting enforcement of a foreign award under Section 48 into three groups:

[8] Civil Appeal No. 1544 of 2020, decided on 13 February 2020.

(a) grounds which affect the jurisdiction of the arbitration proceedings;

(b) grounds which affect party interest alone; and

(c) grounds which go to the public policy of India, as set out in Explanation 1 to Section 48(2).

There can be no question of discretion in matters where the ground to resist enforcement is one which questions the very jurisdiction of the tribunal, such as the validity of the arbitration agreement under the governing law of the contract; or where the subject matter of dispute is not capable of settlement by arbitration under the law of India. Specifically, when it comes to the "public policy of India" ground, there would be no discretion in enforcing an award which is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice.

However, where the grounds taken to resist enforcement can be said to be (1) linked to party interest alone; (2) capable of waiver or abandonment; or (3) such that no prejudice has been caused to the party on such ground being made out, a Court may well proceed to enforce a foreign award, even if such ground is made out. The width of this discretion is however restricted to the circumstances pointed out hereinabove, in which case a balancing act may be performed by the court enforcing a foreign award.

4) "Public policy" ground

A violation of the "fundamental policy" of Indian law, as previously held in **Renusagar**, must mean a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible to being compromised.

Contravention of a provision of law in itself is an insufficient basis to invoke the defence of public policy, when it comes to enforcement of a foreign award. Contravention of any provision of any enactment has been held as not being synonymous to contravention of "fundamental policy" of Indian law. The expression "fundamental policy" of Indian law refers to the principles and the legislative policy on which Indian statutes and laws are founded i.e., the basic and underlying rationale, values and principles which form the bedrock of Indian laws. Furthermore, if a foreign award fails to determine a material issue which goes to the root of the matter, or fails to deal with a claim or counter-claim in its entirety, the award may shock the conscience of the court and may be set aside on the ground of violation of the public policy of India, in that it would then offend a most "basic notion of justice" in this country.

It is in this context that it was held that alleged violations of provisions of Foreign Exchange Management Act, 2000 would not be sufficient to scuttle the enforcement of the foreign arbitral award.

Conclusion

Through the collaborative efforts of the Judiciary and the Legislature over the last half a decade, the pronouncements of its courts and enactment of enabling legislations, India has shaken off its poor reputation regarding the enforcement of foreign arbitral award. The recent decision of the Supreme Court in the *Vijay Karia* case is perhaps the most significant. Through this judgment clarity has been provided on the limited and narrow scope that is available to a party for raising objections to a foreign arbitral award under Section 48 of the Act. The Supreme Court has also come down heavily on the practice of litigating parties sanctioning multiple attempts to thwart the enforcement of foreign awards. In this regard to act as a deterrent for parties agitating successive actions to try and prevent the enforcement of the foreign award the Supreme Court has imposed heavy costs on the infringing parties. Finally, the Supreme Court by holding that courts have a discretion to enforce a foreign arbitral award even if certain grounds objecting to the same are made out, further strengthens India's shift to a pro-enforcement regime for foreign arbitral awards and capable of becoming an international arbitration hub in the near future.

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