



Enforcement of foreign awards in India: Simplification under the 1996 Act

In this article, using a case study approach, the author discusses the system for enforcing foreign arbitral awards in India under Part II of the Arbitration and Conciliation Act 1996. Recent Indian case law on interim measures of protection is also discussed, with particular reference to the right of a party to an arbitration being held outside India to seek interim measures from Indian courts.

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Introduction

In today's world of shrinking boundaries, free trade and international commerce have become global necessities. Increasing competitiveness often leads to conflicts between entrepreneurs, resulting in commercial disputes. Arbitration is chosen as a means of effective consensual and speedy dispute resolution. The growing strength and role of India and Indian industry in the Asian and global economy has seen the country's emergence as a force to be contended with. Increasing foreign direct investment and other forms of collaboration by foreign companies have also witnessed disputes between Indian and foreign parties. The objective of this article is to provide an overview, from the perspective of a foreign company, about enforcement of foreign arbitral awards in India and the challenges that go with it.

Case Study

Let us take an hypothetical case study for the purpose of this article. A Hong Kong company (HKC) executed an agreement for sale and supply of goods with an Indian company (IC) in New Delhi, India. HKC's place of business was Hong Kong and that of IC was New Delhi. The agreement provided for (a) reference to arbitration in case of a dispute, (b) the venue of the

arbitration proceedings to be Hong Kong, and (c) Indian law to be the applicable law of the contract. A dispute arose between the parties and the arbitration agreement was invoked. Pursuant to the arbitration proceedings, an award of HK \$10 million was made in favour of HKC, who sought to enforce the award in India.

Applicable Indian Procedural Law: Arbitration and Conciliation Act 1996

Object of the 1996 Act

In India, arbitration proceedings and the enforcement of foreign arbitral awards are governed by the Arbitration and Conciliation Act 1996 (No 26 of 1996) ('the Act' or 'the 1996 Act'). The Act is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The enactment of the Act was a reflection of the Indian legislature's objective of ensuring speedy disposal of cases as well as to encourage arbitral tribunals to get parties to settle disputes through the use of mediation and conciliation. This is demonstrated in Part III of the Act, which deals solely with conciliation. The erstwhile Arbitration Act 1940 did not provide for 'international commercial arbitration' which is a significant element of the 1996 Act. HKC must therefore comply with the provisions of the 1996 Act.

Application of Part I and Part II of the Act to the enforcement of foreign awards

The Act is divided into four Parts. This article is, however, concerned only with Parts I and II. Part I deals with domestic arbitration. Part II deals exclusively with the enforcement of certain foreign awards² in India, particularly Convention awards, ie awards made in countries that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('the New York Convention') and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 ('the Geneva Convention')³. The New York Convention lays down a detailed framework for the recognition and enforcement of arbitral awards.

The Act provides⁴ that Part I applies when the venue of arbitration proceedings is in India. By virtue of a recent Supreme Court judgment, however, there is ambiguity about which Part will apply to the enforcement of foreign awards, since the court seems to have applied the provisions of Part I also to such awards. In *Bhatia International v Bulk Trading SA*⁵ the Supreme Court held that -

"in cases of international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement express or implied, exclude all or any of its provisions". (Per S N Variava J)



Dispute Resolution in the Asia Region

In this case, interim relief was sought by the defendant in respect of arbitration proceedings being conducted in Paris. The appellant's counsel contended that Part I of the Act applied only to domestic arbitrations held in India. The object was to prevent the defendant from seeking any interim remedies under section 9 of the Act, which is a provision of Part I, in respect of an international arbitration. The Supreme Court, however, held that Part I would apply to foreign arbitrations unless mutually excluded by the parties. The rationale for this was that if Part I did not apply, then the parties to international commercial arbitrations held outside India would not be able to seek any kind of interim relief⁶ under Part I, as Part II only dealt with the enforcement of foreign awards. Moreover, it could not be the intention of the legislature to restrict Part I of the Act to domestic arbitrations or to international commercial arbitrations that take place in India. In view of the *Bhatia International* decision, the scope of applicability of Parts I and II of the Act has become somewhat contentious.

For the purposes of this article and the case study, however, it will be assumed that both Parts I and II of the Act will apply.

Application of the Case Study

Both India⁷ and Hong Kong⁸ are parties to the New York Convention. Any Convention award made outside India will be treated as a foreign award.

Procedural matters

HKC must follow the procedures envisaged in the Act for enforcement of the award, as Indian law applies to the enforcement of the award in India. The applicable procedural laws would be the Code of Civil Procedure 1908 (the Code⁹) and the Indian Evidence Act 1872. HKC must observe the following requirements before filing an application to enforce the award.

Limitation

The limitation period for filing an application to enforce an award is very critical. By virtue of section 43(D) of the Act, "The Limitation Act, 1963 shall apply

to arbitrations as it applies to proceedings in court." A foreign award is treated as a decree¹⁰. The limitation period for execution of a decree is twelve years¹¹.

Jurisdiction

The jurisdiction of the court, both pecuniary as well as territorial, has to be considered by HKC before filing the application. With regard to pecuniary jurisdiction, HKC must file the application in the High Court.¹² HKC can then move an application for enforcement to the court at the place where defendant, IC¹³, has its place of business, ie New Delhi. Hence, the High Court of Delhi will have territorial jurisdiction to entertain the application.

Application for Enforcement

Under section 47 of the Act, the application to be filed by HKC for enforcement of the award must be accompanied by the following documents¹⁴:

- (i) the original award or a copy thereof, duly authenticated in the manner required by the laws of Hong Kong;
- (ii) the original arbitration agreement or a duly certified copy thereof;
- (iii) such evidence as may be necessary to prove that the award is a foreign award;
- (iv) if the award has been made in the local language, an English translation of the award certified as correct by a diplomatic or consular agent of Hong Kong, must be supplied along with the award.

Potential Obstacles to Enforcement

Objections raised by the party against whom the award is made

After HKC has filed its application, a notice will be duly sent by the court to IC, which has the right to raise the following objections to enforcement of the award, duly substantiated with required proof, viz:

- (i) that the disputing parties were under some 'incapacity' or the arbitration agreement was not valid under the law of Hong Kong¹⁵; or
- (ii) that the notice of appointment of the arbitrator or of the arbitral proceedings was not properly served upon IC or IC

was otherwise unable to present its case¹⁶; or

- (iii) that the award contains matters exceeding the scope of the terms of the submission to arbitration¹⁶; or
- (iv) that the composition of the arbitral authority or the arbitral procedure was not in accordance with either the agreement between HKC and IC or with the laws of venue of the arbitration¹⁷, in this case Hong Kong; or
- (v) that the award is not binding on the parties, or has been set aside or suspended by the competent authority of Hong Kong¹⁸.

The court will then proceed to hear both HKC and IC in order to determine whether any of the foregoing objections is a bar to enforcement of the award.

Objections raised by the Court

In addition to the objections that may be raised by a party against whom enforcement is sought, the court may refuse enforcement of the award if it finds that:

- (i) the subject matter is not capable of settlement by arbitration under the laws of India¹⁹; or
- (ii) enforcement of award would be contrary to the public policy of India²⁰.

The onus of proof will lie on IC to challenge the enforceability of the award²¹. In a situation where IC does not raise any objections or challenges to the award, the court may proceed to enforce the award if satisfied that none of the objections enumerated above apply to it.

Merits of the Award: Open to Challenge

There are judicial precedents which establish that the courts will not go into the merits of the case. In *Western Shipbreaking Corp v Clare Haren Ltd*²² the Gujarat High Court held that Indian courts cannot call for the records of the arbitration and satisfy themselves about the genuineness and authenticity of the award, since that would obviate and vitiate a principal objective of the Act, namely, to minimise intervention by the enforcing court. The procedure provided under section 47 of the Act, however, ensures that the court must be



satisfied about the legality, validity and correctness of the award. The objections available to IC under section 48 of the Act can stall the enforcement proceedings somewhat. Thus, practically speaking, the court may have to re-examine the case to a limited extent. Once the court is of the opinion that the award is capable of being enforced, the award will be deemed to be a decree²³ of the court²⁴.

Execution

The next step is the execution of the award. Order 21, Rule 10 of the Code²⁵ deals with execution of decrees generally - it is not confined only to arbitral awards - and envisages that separate execution proceedings must be carried out following enforcement.

However, the Supreme Court in *Fuerst Day Lawson Ltd v Jindal Exports Ltd*²⁶ held that -

"... under the new Act the foreign award is already stamped as a decree. Thus, in our view, a party holding the 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.Once the Court decides that the foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no further question of making the foreign award as a rule of the court/decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take separate proceedings resulting in multiplicity of litigation."

Therefore, in reliance on this judicial precedent, HKC can apply for both enforcement and execution of the award before the same court and in the same proceedings.

In the event that the enforcement proceedings are adjourned by the court under section 48(1)(e) of the Act (award not yet binding, or set aside or suspended in the place where made)²⁷, HKC can also file an application²⁸ for an order that IC should furnish security for the due satisfaction of the amount awarded, ie HK\$ 10 million, pending disposal of the

enforcement application.

Timespan

In our experience, and on the assumption that the parties do not use any dilatory tactics, the timespan involved in arbitration proceedings, from the commencement of arbitration proceedings to enforcement of the award, would be approximately 3-4 years.

Conclusion

In recent years, arbitration has evolved into a preferred method of resolving contentious issues and disputes. The 1996 Act has provided an effective and efficient basis for dispute resolution between Indian and foreign companies by minimising the intervention of the courts in the arbitral process. Parties now have a better alternative when compared to the long drawn-out and convoluted process of litigation. Nonetheless, the role of the courts is not completely dispensed with, since they play a crucial role in the enforcement of arbitral awards. The judiciary must therefore maintain its proactive role in interpreting the Act so as to reduce further the opportunities to challenge enforcement of awards.

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1 Section 2(1)(f): "international commercial arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is - (i) an individual who is a national of, or habitually resident in, or any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country."

2 See section 44 for the definition of 'foreign award' in relation to the enforcement of Convention awards.

3 See section 53 for the definition of 'foreign award' in relation to the enforcement of Geneva Convention awards.

4 Section 2(2): "This Part shall apply where the place of arbitration is India."

5 AIR 2002 SC 1132.

6 Section 9 of the Act.

7 Editorial note: The New York Convention took effect in India on 11 October 1960.

8 Hong Kong adopted the New York Convention on 21 April 1977 by virtue of the United Kingdom's accession on Hong Kong's behalf.

9 AIR 2001 SC 2293.

10 Article 136 of the Schedule to the Limitation Act 1963.

11 Rule 5(2) of Delhi High Court Act 1966 states that cases exceeding the value of twenty lakhs or HK\$355,000 (approximately based on an exchange rate of 1 HK\$ = 5.65) will lie in the High Court.

12 Section 20 of the Code.

13 The applicant must include with the application the evidence specified by section 47.

14 Section 48(1)(a).

15 Section 48(1)(b).

16 Section 48(1)(c).

17 Section 48(1)(d).

18 Section 48(1)(e).

19 Section 48(2)(a).

20 Section 48(2)(b).

21 *International Investor KCSC (Kuwait) v Sanghi Polyesters Ltd* (2002) (Supp) Arb LR 417 (AP).

22 (1998) (Supp) Arb LR 53 (Guj).

23 See section 2(2) of the Code for the definition of 'decree'.

24 *Fuerst Day Lawson Ltd v Jindal Exports Ltd* (AIR 2001 SC 2293).

25 See text of Order 21, rule 10 for the procedural requirements for execution.

26 AIR 2001 SC 2293.

27 Section 48(3), also considered in *Fuerst Day Lawson Ltd v Jindal Exports Ltd* (AIR 2001 SC 2293).

28 Section 48(3).

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