ABSTRACT

Effective enforcement of an arbitration award is the prime indicator for the success of any arbitral process. In India, Part II of the Indian Arbitration and Conciliation Act of 1996 provide the law governing the enforcement of foreign awards in India. The Said Act is enacted by Government of India in the year 1996 to bring the Indian Arbitration Act in line with the UNICITRAL MODEL LAW on Arbitration. This E-book aims to briefly describe the final settled position of law relating to enforcement of foreign arbitration awards in India.
Topics

FOREIGN AWARDS IN INDIA................................................................. 2
VIEWS OF SUPREME COURT OF INDIA............................................... 3
EXECUTION PROCEDURE FOR FOREIGN AWARDS ............................ 4
PREQUISITES FOR THE ENFORCEMENT OF FOREIGN AWARD .......... 5
FOREIGN AWARDS THAT ARE ENFORCEABLE UNDER THE ACT ......... 6
EXECUTION OF FOREIGN AWARD .................................................... 7
SUPREME COURT DECISIONS ON ENFORCEMENT OF FOREIGN AWARDS ................. 8
As noted above, Part II of the Indian Arbitration and Conciliation Act, 1996 provides for the law relating to enforcement of foreign arbitration awards in India. Section 44 of the Part II defines foreign awards as awards made in the countries that are notified by the central government (in the official gazette) as the countries to which New York Convention on Recognition and Enforcement of Foreign arbitral awards apply. Hence, the Arbitration Act lays down the process for the enforcement of all those awards that are rendered in countries to which New York Convention applies. The Act and Part II is however silent on the enforcement of awards that are rendered in countries that are not notified under the gazette or those countries that are not party to New York Convention.

The countries that are notified by the central government as countries to which New York convention applies are Austria, Belgium, Botswana, Bulgaria, Central African Republic, Chile, Cuba, Czechoslovak Socialist Republic, Denmark, Ecuador, Arab Republic of Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, Italy, Japan, Kuwait, Republic of Korea, Malagasy Republic, Mexico, Morocco, Nigeria, The Netherlands, Norway, Philippines, Poland, Romania, San Marino, Spain, Sweden, Switzerland, Syrian, Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania, and United States of America, China, Macau and Hong Kong.

And therefore, all the awards that are made in countries that are not notified by the central government of India cannot be considered as foreign arbitral awards that are falling within the definition provided under the act. The Act defines foreign awards as awards that are made on differences between parties to a well-defined legal relationship that are considered to be commercial in nature under the Indian law. It may be noted that Part II of the arbitration act provides only for the process of enforcement of foreign arbitral awards and do not stipulate any process for the setting aside of the foreign award or for passing of any interim measure in respect of foreign award.
In a landmark case, Bhatia International v. Bulk Trading AIR 2002 SC 1432, the Supreme Court of India held that arbitration award that is not made in a convention country shall not be considered as foreign arbitral award and in cases where award is passed in a Non-Convention country then a separate action has to be filed on the basis of the award. Thus, the court held that all those awards that are not made in convention countries are not foreign awards and thus are required to be enforced by way of filing of another suit on the basis of the said arbitral award.

The Apex Court had in another decision of Transocean Shipping Agency Ltd. v. Black Sea Shipping and Ors 1998 (2) SCC 281 also settled the legal position in respect of all those foreign awards that are made in countries that are notified by the government but later disintegrate into separate political entities. The Court held in the favour of the enforcement of foreign award made in Ukraine that was part of erstwhile USSR and said that the creation of new entity from the notified country would not make any difference to the enforceability of award that was earlier part of a notified territory.
EXECUTION PROCEDURE FOR FOREIGN AWARDS

The objective of any arbitration proceeding is to settle disputes between parties (to a commercial legal relationship) outside the traditional court system amicably and quickly without causing any unreasonable delay. And it is on account of this objective that the enforcement and execution of an arbitral award holds prime significance in the arbitration proceedings as without timely and efficacious enforcement and execution of arbitral awards, the awards are only worth the paper on which they are drawn and hold no value.

In case of foreign awards, the successful party has to move an application to the court of competent jurisdiction for the enforcement of award and if the court is satisfied that the award is enforceable then, the foreign award can be proceeded to be executed just like a decree of the court by virtue of the objective laid down in the act itself which states that every final arbitral award shall be enforced in the same manner as decree of the court.

In case the foreign award which is made in the country not notified by the government or in a country that is not party to the New York Convention then the successful party in case it wishes to enforce the award in India have to file a suit for enforcement of foreign award in India and can rely on this foreign award as evidence to proceed with its claim by filing a separate Civil Suit as laid down in Bhatia International v. Bulk Trading AIR 2002 SC 1432.
PREQUISITES FOR THE ENFORCEMENT OF FOREIGN AWARD

Section 47 of the arbitration act provides that every application for the enforcement of foreign award under the act shall be accompanied by:

1. The original award or the copy of the award as authenticated as per the requirement of country in which it is made.
2. The original arbitration agreement or a copy of arbitration agreement.
3. And any evidence that is necessary to prove that the award that is rendered is foreign in nature.
4. In case the award is in local language of the country in which the award is made then an English translation of the award is to be accompanied with the application. The translation is to be verified by the consulate of the country in which it is made.
FOREIGN AWARDS THAT ARE ENFORCEABLE UNDER THE ACT

Sections 48 and 57 of the arbitration act states conditions for the enforcement of foreign arbitral awards in India. Section 57 of the arbitration act states that a foreign award shall become enforceable in India if:

1. The award has been made in pursuance of the submission to the arbitration which is valid under the law that is applicable and the award does not contain decisions on matters beyond the scope of submission.

2. The subject-matter of the award is capable of settlement by arbitration under the law of India.

3. The award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure.

4. The award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to, opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending. The award should not have been annulled in the country in which it is made.

5. The enforcement of the award is not contrary to the public policy or the law of India. The award is said to be in conflict with public policy of India if the making of the award was induced or affected by fraud or corruption.

6. The party against whom the award is sought to be enforced should be provided with the notice of arbitration proceedings in sufficient time to enable him to present the case and should be properly represented.

Section 48 of the arbitration act lays down negatively conditions for enforcement of foreign awards. It lays down the grounds for refusal of enforcement of foreign awards. The grounds are as follows:

1. The arbitration agreement was not valid under the law to which parties to the agreement were subjected to.

2. The parties to the arbitration agreement were under some legal incapacity in the country in which the award was made.

3. The party against whom the award is to be invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was unable to present the case.

4. The award deal with the differences not contemplated in the submission to arbitration or contains decision on matters beyond the scope of submission to arbitration.

5. The composition of the arbitral tribunal or arbitral process was not in accordance with the agreement between parties or failing of the agreement, was not in accordance to the law of the country in which the award was made.
6. The award had not become yet binding on the parties or suspended in the country in which it is made.

7. The subject-matter of the difference is not capable of settlement by way of arbitration under the law of India.

8. The enforcement of foreign award was against the public policy of India. The award is said to be in conflict with the public policy in India if the making of award is induced by fraud or corruption.

Hence, a foreign arbitral award is enforceable only if is made in pursuance of a legally valid arbitration agreement between parties that are not under some legal incapacity in the country in which the said award is made and the subject matter of arbitration is capable of settlement by way of arbitration under the Indian law. The Foreign award is further enforceable only if constitution of arbitral tribunal and notice of arbitration proceedings are served on all parties to dispute to present their respective cases and award was not made on matters beyond the scope of arbitration. The making of the foreign arbitral award should not be in conflict with the public policy of India.

EXECUTION OF FOREIGN AWARD

As noted above, every final arbitral award shall be executed in the same manner as a decree of the court as elucidated in the objectives of the Act. The same holds true for foreign awards too. In Fuerst Day Lawson V. Jindal Exports AIR 2001 SC 2293, the Supreme court of India stated that once it is determined that a foreign arbitral award is enforceable then it can straightaway it should be executed like a decree of the court and there is no requirement of making foreign award a rule of court. The Court stated that the objectives and purpose shall be served in same proceeding and there is no need to have multiple litigations one for enforcement and other for execution. Hence, a single application shall hold good for enforcement as well for execution of foreign award.
Foreign awards under the Indian law can be enforced in the manner provided under the act. As stated above, the act only lays down the process for the enforcement of foreign awards and is silent on the issue of setting aside of foreign award or passing of interim measures in a dispute pertaining to foreign award.

It should be noted here that it is well settled principal of law that procedural law follows the seat of arbitration in arbitration and hence an award can be disputed or challenged only in the jurisdiction where seat of arbitration is situated. However, the Supreme Court of India in some of the its decisions (Bhatia V. Bulk Trading AIR 2002 SC 1432, Venture Global Engineering v. Satyam Computer services 2008 (1) SCALE 214 ) prior to its decision in BALCO v. Kaiser Aluminium (2012) 9 SCC 649 had held that Indian courts under Part I of the act have the jurisdiction to pass interim measures against the enforcement of foreign awards and can also pass orders setting aside foreign awards thereby stalling the enforcement of foreign arbitral awards in India.

Part I of the Act lays down general conditions for arbitration and provides for law for the conduct of arbitration proceedings with seat of arbitration as India and also provides for law in regard to enforcement of these awards made under arbitration proceedings conducted in India.

This preposition of law laid down by the court in aforesaid decisions (Bhatia and Satyam) is an incorrect preposition of law and overlooks the basic principles of law on seat of arbitration as noted above. The Supreme Court of India have recently in BALCO v. KAI SER (2012) 9 SCC 649 set aside the ratios held in the above mentioned cases and held that only Part II is applicable to foreign awards and these awards cannot be set aside under the Indian law and laid down the above mentioned correct principle of law that foreign awards can be set aside or challenged only in jurisdiction where seat of arbitration is situated and the Part II of act only provides for enforcement of foreign awards and there is no overlapping between Parts I and II of the act. However, the court has held that this decision of BALCO v. KAISER shall be only applicable prospectively from the date of the judgment i.e. 6th September, 2012 making the foreign awards made in pursuance of agreements executed prior this cut-off date as subject to jurisdiction of Indian courts and thereby lending a mechanism to parties for stalling enforcement of foreign arbitral awards In India. As of now only future apex courts decisions shall bring on more clarity in regard to this position.

Another issue that came before the apex court in regard to
enforcement of foreign awards was with respect to the ground of public policy for refusing the enforcement of foreign arbitral award. The Supreme Court of India in Sri Lal Mahal Limited v. Progetto Grano Spa in Civil Appeal No. 50857 of 2012 held that enforcement of foreign awards cannot be challenged on the ground of patent illegality or on the ground that the foreign award was passed in ignorance or contrary to the contractual terms of agreement. The court overruled its earlier decision in Phulechand Exports Limited v. Patriot (2011) 10 SCC 300 and stated that public policy under section 48 has to construed narrowly in contradistinction to the meaning provided under section 34 of the Part I as the award under made thereunder under section 34 is not yet final and can be liable to be set aside under the provisions of Part I whereas the award under Section 48 is a final award that has attained finality and only requires enforcement. The Court stated further that the courts cannot act appellate jurisdiction over award. The Court finally categorically held that the enforcement of a foreign arbitral award can be refused on the ground of public policy only in case where the award is contrary to the fundamental policy of law or is contrary to interest of India or justice or morality.

This sums up the process for the enforcement of foreign arbitral awards in India. In conclusion, it can be said that the Indian law and courts have favoured in favour of enforcement of Foreign arbitral awards in India rather than denying the same.