ENFORCEMENT OF FOREIGN ARBITRATION AWARDS IN INDIA after 2015

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India has been always a pro-arbitration country and it ratified ***New York Convention***[2] on 13.7.1960. After the said ratification to implement the New York Convention, ***The Foreign Awards (Recognition and Enforcement), Act 1961*** was enacted by India. Hence, the above said 1961 Act confined itself to the challenge to an arbitral award only on the limited grounds permitted under the New York Convention.

The UNICTRAL Model law on International commercial arbitration[3] was drafted and adopted by United Nations Commission on International Trade Law (UNICITRAL) on 21st June 1985. To bring Indian arbitration law in line with the said model law, in the year 1996 India enacted the present legislation which governs the arbitration field in India, *Arbitration and Conciliation Act, 1996*. Since the above said 1996 is the complete law occupying the field of arbitration, it deals with domestic arbitration in India as well as the enforcement of *International Arbitration awards* in India. Even though the above said 1996 Act was a complete legislation enacted in the lines of *UNICITRAL* Model Law, over a period of time due to various judicial interpretations made by the Supreme Court of India with regard to the term "public Policy" in various cases including SAW pipes case[4], venture Global case[5] and Phulchand Exports[6] the scope for judicial interventions and the possibility of courts in India refusing to enforce an international arbitral awards got enhanced. The Same Supreme Court of India in Renusagar case[7], while interpreting the term "Public Policy" in section 7(1)(b)(ii) of 1961 Act[8] held that the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law (2) the interests of

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[2] The United Nations Convention on the recognition and enforcement of foreign arbitral awards (New York, 10th June 1958)

[3] The United Nations Commission on International Trade law (UNICITRAL) on International Commercial arbitration, General Assembly Resolution No.40/72 adopted on 11th December 1985("the Model law")

[4] Oil and Natural Gas Corporation Limited Vs Saw Pipes Limited reported in (2003) 5 SCC 705

[5] Venture Global Engineering Vs Sathyam Computer Services (2010) 8 SCC 660

[6] Phulchand Exports Limited Vs Patriot (reported in (2011) 10 SCC 705)

[7] Renu Sagar Power Co Limited Vs General Electrical Co 1994 Supp (1) SCC 644

[8] Foreign Awards (Recognition and Enforcement Act,1961

India (3) justice or morality. In Shri Lal mahal[9] the Supreme Court of India reconfirmed the law laid down in the earlier Renusagar case, with regard to public policy while dealing with S.48(2)(b) of the 1996 Act. In Mc Dermott International case[10], the Supreme Court of India read down the interpretation given in the SAW pipes case and confirmed the narrow interpretation of the term "Public policy".

In an endeavour to further reduce the scope of intervention by courts under the term public policy, the Law Commission of India, a statutory body created by the Constitution of India, prepared a report explaining the requirements and necessity to amend the above said 1996 Act, suggested an amendment to S. 48(2) by inserting two explanations. The Government of India promulgated an ordinance[11], exercising its rights under the Constitution of India, since parliament was not in session at that point of time. The amended 1996 Act has come into force with effect from 23rd October 2016. For all the arbitrations initiated after the above said date will have the applicability of the amended act. Even though the amendment has come in to force only prospectively, it has drastically reduced the chances of refusal by courts in India, with regard to an international arbitration award. The above said explanations inserted into S.48(2) of the 1996 Act is reproduced below:

> *[Explanation 1: For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -*
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> *(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or*
> *(ii) it is in contravention with the fundamental policy of India law; or*
> *(iii) It is in conflict with the most basic notions of morality or justice.*
>
> *Explanation 2: For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]*

Hence After the new 2015 explanations, the scope for court intervention in the enforcement of a foreign award under the excuse of "Public Policy" is considerably reduced.

Foreign arbitral awards under Indian law: To become eligible to get enforced the International arbitral award should fall under the category of Foreign award. The said 1996 Act, classifies all the awards arising out of an Indian seat, whether it is domestic arbitration or an international arbitration, as a domestic award. The part I of the above said 1996 Act applies to all the arbitrations

[9] Shri Lal mahal Ltd Vs Progetto Grano Spa

[10] McDermott International Inc Vs Burn Standard Co Ltd., Reported in 2006(11) SCC 181

[11] Arbitration and Conciliation (amendment) Ordinance,2015 (Ord 9 of 2015) dated 23.10.2015

seated in India. The enforcement of an international arbitration award arising out of a foreign seat, is a foreign award and covered by the part II of the above said Act, reads as under:

"S.44. *In the Chapter, unless the context otherwise requires," foreign award" means an arbitral award on difference 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 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."

Hence it is important to note that all foreign seated awards are not foreign awards as per Section 44. The seat of arbitration requires to be a New York Convention seat and also must have been a territory recognised by Government of India on the basis of reciprocity. This is because the New York Convention permits a member state to declare that it will recognise and enforce arbitral awards applying New York Convention only if the awards are made in country which recognises its awards under the principle of reciprocity. Hence, Section 44(b) of the Act requires the Government of India to issue a notification in the Official Gazette recognising a reciprocating country. Hence it is evident that an international arbitration award made in a non-notified Convention country will not be considered as a foreign award for the purpose of enforcement under the Act. The countries which have been notified so far by the Government of India include:

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, Hong Kong, Hungary, Italy, Japan, Kuwait, Republic of Korea, Malagasy Republic, Mauritius, Mexico, Morocco, Nigeria, The Netherlands, Norway, Philippines, Poland, Republic of China, 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.

It is also important to note that Supreme Court of India while dealing with Transocean shipping Agency case[12] held that the creation of a new political entity would not make any difference to the enforceability of the foreign award rendered in a territory (Ukraine) which was initially a part of the notified Convention country.

Enforcement Procedure of a foreign award: A foreign award is required to go through a procedure of enforcement in which there are two stages, one is to check whether the award is enforceable as

[12] Transocean Shipping Agency Vs Black sea Shipping & others 1998(2) SCC281

per Section 48 and the next is enforcement under Section 49. The said Sections are reproduced below:

Section 48:

"*Condition for enforcement of foreign awards*

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that part furnishes to the court proof that, -

(a) the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was unable to present his case; or

(c) the award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

PROVIDED that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) 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.

(2) Enforcement of an arbitral award may also be refused if the court finds that, -

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

To enforce a foreign award, the party applying for the enforcement of a foreign award shall at the time of making an application, produce before the court (a) Original award duly authenticated in the manner required by law of the country in which it was made (b) the original agreement for

arbitration or a duly certified copy and (c) such evidence as may be necessary to prove that the award is a foreign award. In addition to that in case if the award is not in English it should be officially translated and produced before the court. Now as per the *2015 amendment*[13] all the above said execution proceedings of a foreign award shall take place in the High Court having jurisdiction. That means the High Court having the jurisdiction over the place where the properties of the losing party are situated. There is no prescribed limitation under the 1996 Act, to enforce a foreign arbitral award but some courts in India have held, three years from the date of getting the right to enforce a foreign award. More over there is no appeal provided under the 1996 Act, to appeal against an order of enforcement of a foreign award. Hence the enforcement of a Foreign award in India has become much easier than earlier.

[13] Substituted by Arbitration and Conciliation Amendment Ordinance, 2015