

## **Supreme Court of India upholds the Limited scope of interference at the time of enforcement of a Foreign award and imposes cost of 30,000 USD**

India is a Model law country and the procedural law of India, Arbitration and Conciliation Act, 1996 (Herein after “The Act”) is enacted in the lines of the UNCITRAL Model Law<sup>1</sup>. In India, it is the settled law that a party can challenge the award on merits only in the seat of Arbitration and not at the time of enforcement in India. As per the Act, S.48 provides the grounds on which the enforcement of an international arbitration award passed in a Foreign seat can be resisted by a party in India. The said S.48 is just the reproduction of Article V of New York convention<sup>2</sup> and Article 36 of the UNCITRAL Model Law For the convenience S.48 of the Act<sup>3</sup> is reproduced below:

**48. Conditions 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 party 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*

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<sup>1</sup> UNCITRAL Model Law on International Commercial Arbitration

<sup>2</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

<sup>3</sup> Arbitration and Conciliation Act, 1996



- (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 otherwise unable to present his case; or*
- (c) *the award deals with a difference not contemplated by or not falling 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.*

<sup>1</sup>*[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, -*

- (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 Indian law; or*

*(iii) it is in conflict with the most basic notions of morality or justice.]*

*<sup>1</sup>[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.]*

*(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.*

From the above it can be understood that Procedural law of India is fully aligned with the Model Law and New York Convention. India is a signatory to New York Convention with reservation to recognize the member Nations on reciprocity basis and all the popular seats of arbitration are already recognized. The Supreme Court also held consistently that all the courts should take a narrow view while doing the interpretation of the grounds stated in S.48 of the Act than interpreting similar grounds raised at the time of enforcement of domestic awards passed in India<sup>4</sup>. Upholding the above said view, by a recent Judgment in LMJ International case<sup>5</sup> dated 20.02.2019 dismissed the Special Leave Petition filed by the Petitioner challenging the order passed by the High Court of Calcutta and imposed an unusual cost of USD 30,000 for delaying the enforcement proceedings without any acceptable ground and demanding the enforcing court to re-look into the arbitration award on merits.

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<sup>4</sup> Shri Lal Mahal Limited Vs Progetto Grano SPA (2014) 2 SCC 433, Renusagar Power Company Ltd Vs General Electric Co 1994 Supp(1) SCC 644, Oil and Natural Gas Corporation Ltd Vs Saw Pipes Limited (2003) 5 SCC 705

<sup>5</sup> LMJ International Ltd Vs Sleep Well Industries Co Ltd., (2019)SCC Online SC242

The Petitioner was to supply Non Basmati parboiled rice, Thailand origin to the Respondent as per the terms specified in the contracts between the parties. The Contract in “other terms” envisage that on terms and conditions not contradiction with the stipulated terms of the contract shall be governed by GAFTA 48 and disputes shall be resolved by Arbitration as per GAFTA 125 in London. Hence, after the disputes arose between the parties, the Respondent initiated arbitration proceedings by nominating its nominee to the Arbitral Tribunal. The petitioner failed to appoint its nominee and hence under GAFTA Arbitration Rules 125, GAFTA appointed the arbitrator and both the arbitrators jointly appointed the Chairman of the tribunal. The Petitioner did not participate in the arbitration proceedings despite receipt of notices from the tribunal and hence finally an ex-parte arbitration award was passed based on the pleadings and documents filed by the respondent.

Finally, on 19.11.2013, the Respondent filed two execution cases under Part-II of the Arbitration and Conciliation Act,1996, before the High Court of Calcutta for enforcement of the foreign arbitral awards. The Petitioner herein did not file any formal objection to the enforcement proceedings and the counsel of the petitioner made only oral submissions. But still the single Judge of High Court of Calcutta noted the following grounds that were raised objecting enforcement of the award, in the order:

1. There is no specific prayer in the application for recognition and enforcement seeking declaration that the foreign award is enforceable.
2. In the Civil Suit/appeal pending between the parties and the enforcement of arbitration award is premature since the Appeal is pending.
3. The arbitration Clause mandates an attempt to settle the matter amicably for initiating arbitration and the Respondent did not make any effort for amicable settlement and hence award requires to be set aside.
4. As per NAFTA arbitration Rules, the parties should try and appoint a sole arbitrator and incase of failure to find a sole arbitrator jointly, they can go for a three-member arbitration tribunal. But in the present case, the

Respondent did not make any effort to appoint a sole arbitrator and hence award should be set aside.

5. The nominee arbitrator of the Respondent was appointed De Hors of NAFTA Rules and hence awards require to be set aside.

The Single Judge of the High Court dismissed the above said objection on the finding that the legislative intent underlying the Act was to circumscribe the supervisory role of the Court in arbitration proceedings and that it predicated limited interference. Further, it went ahead and recorded that the petitioner tried desperately to resist the enforceability of an enforceable award rather than making any real challenge thrown towards the maintainability of the said petition. The Petitioner challenged the order of Calcutta High Court recognizing the said award, by way of Special Leave petitions in the Supreme Court of India and were dismissed on 27<sup>th</sup> February 2015.

The Petitioner again filed an objection to the execution petition and the High Court rejected the same. Again, the petitioner filed a review petition in the execution case. The petitioner listed various grounds on Merits and contended that the award is violative of Public Policy of India and hence not enforceable in Law. The High court rejected the above said review and passed an order for enforcement.

Challenging the above said order of the High Court rejecting the review petition, the petitioner filed Special Leave Petitions in the Supreme Court of India. After dealing with the factual matrix in the light of the settled law Supreme Court of India dismissed the said special leave petitions and imposed an unusual cost of INR 20,00,000 (USD 30,000).

**Author's note:** The Above said Judgment of Supreme Court of India by Justice Mr Khanwilkar and Justice Mr Ajay Rastogi clearly reaffirms the commitment of India to the globally recognized international Arbitration system. The above said facts of the case also demonstrate that some of the lawyers and Law firms are



not having the required understanding of the International Arbitration system but without any hesitation they under take all cases and put the parties into deep trouble. Because of the above unfortunate situation, even though laws in India are well settled enforcement proceedings takes longer time. But, if the Law firm entrusted with the work of enforcement by a foreign party, has sufficient experience in enforcement of Foreign awards, it can develop certain other strategies including applications under Section.9 of the Act & applications under Insolvency and Bankruptcy Code etc., to expedite the enforcement & recovery.

