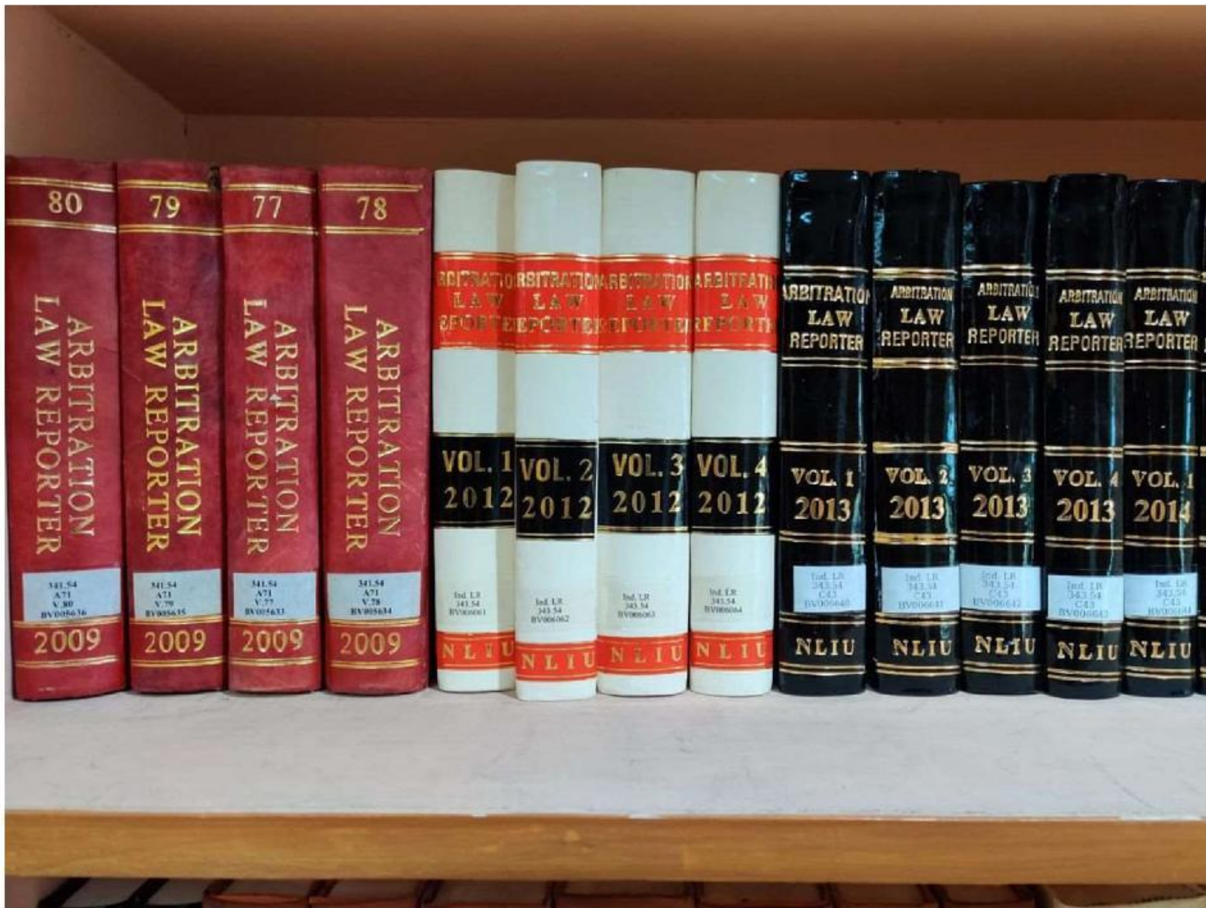

India's journey towards being a pro-enforcement regime for foreign arbitral awards

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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.

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. Indian courts and the Indian Legislature have taken proactive steps to ensure speedy execution of arbitral awards, hence augmenting India's credentials as an arbitration-friendly regime.

The 246th Law Commission reviewed the prevailing law under the *Arbitration & Conciliation Act, 1996,* 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 the 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* and *Phulchand Exports* 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 international norms relating to foreign arbitral awards. India needed to first deal with the elephant in the room post *Bhatia's* ruling, wherein the Supreme 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,* by settling the law that Part I of the Act only applies to arbitrations seated within India. It was also held that 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.

In *NTT Docomo v. Tata Sons,* the judgment passed by Justice **S 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 the Reserve Bank of India (RBI) to resist enforcement of an 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 the *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.

In *Cruz City I Mauritius Holdings v. Unitech Limited*, the Delhi High Court while dismissing Unitech's arguments 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. 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. v. General Electric Co.*

The shift towards adopting a more pro-enforcement regime by the Indian courts has culminated in the latest decision of the 3-judge Bench of the Supreme Court of India in *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors.*. 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, 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. 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.

   By imposing costs of Rs. 50 lakh in the instant case, the Court 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.

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 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 Court has classified grounds for resisting enforcement of a foreign award under Section 48 into three groups:

(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).*

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 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, India has shaken off its poor reputation regarding the enforcement of foreign arbitral awards. 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.

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.

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