
ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE LIGHT OF THE FOREIGN EXCHANGE MANAGEMENT ACT (FEMA) 1999: A CRITICAL ANALYSIS

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ABSTRACT

The enforcement of foreign arbitral awards in India is governed primarily by the Arbitration and Conciliation Act, 1996, which recognizes awards made in countries that are signatories to the New York or Geneva Conventions, subject to compliance with India's public policy. However, the successful execution of these awards is often complicated by India's foreign exchange regulations, primarily under the Foreign Exchange Management Act (FEMA), which govern cross-border remittances and the inflow or outflow of foreign currency. Judicial interventions further add to the complexity, as courts may interpret or override provisions of arbitration or foreign exchange law, leading to uncertainty in enforcement outcomes. These overlapping legal frameworks create challenges for parties seeking to enforce foreign awards, potentially affecting investor confidence and India's reputation as an arbitration-friendly jurisdiction. This study critically examines the interplay between arbitration laws, FEMA, and judicial practices, highlighting the need for clarity, harmonization, and reform to ensure efficient enforcement of foreign arbitral awards and to facilitate international trade and investment in India.

Keywords: Foreign Arbitral Awards, FEMA, Arbitration and Conciliation Act, Judicial Intervention.

INTRODUCTION

1.1 Introduction

The provisions of the Arbitration and Conciliation Act, of 1996 govern the enforcement of foreign awards in India. The foreign arbitral awards are recognized and enforceable in India under the Act but it is subject to certain conditions. The conditions are such that the award that is made in a country that country should be a signatory to the New York Convention or the Geneva Convention and the award shouldn't be contrary to the public policy of India¹. Further, the enforcement of foreign arbitral awards in India can also be affected by the country's foreign exchange laws. These laws impact the enforcement of foreign arbitral awards in the country.² The inflow and outflow of the foreign currency is regulated by these laws and they may impose restrictions on the remittance of funds outside India.³ For example, if the foreign arbitral award involves the payment of a sum of money to a party located outside India in foreign currency, then the parties need to comply with India's foreign exchange law to ensure that the payment can be made and received legally.⁴ In such cases, parties may need to obtain necessary permissions from the Reserve Bank of India or comply with other reporting requirements to complete the remittance of funds.⁵

The foreign exchange laws of India have a considerable influence on international arbitration which involve cross-border transactions. There have been various judicial decisions where the FERA, (which is now replaced by FEMA) and FEMA have been used to prevent the enforcement of foreign arbitral awards as being in violation of the public policy of India or against the interest of India.⁶ The foreign exchange law FEMA creates challenges in the enforcement of the foreign arbitral awards and impact foreign investments in India. It becomes crucial for parties that are seeking to enforce foreign arbitral awards in India to understand the

¹ Section 48 of The Arbitration and Conciliation Act 1996.

² Shikha Tandon, et al., "Enforcement of a Foreign Arbitral Award: Calcutta High Court Contextualises Fundamental Policy of Indian Law", [https://corporate.cyrilamarchandblogs.com/2022/03/enforcement-of-a-foreign-arbitral-award-calcutta-high-court-contextualises-fundamental-policy-of-indian-law/#:~:text=However%2C%20the%20Respondent%20took%20the,1956%20\(%E2%80%9CSCRA%E2%80%9D\),](https://corporate.cyrilamarchandblogs.com/2022/03/enforcement-of-a-foreign-arbitral-award-calcutta-high-court-contextualises-fundamental-policy-of-indian-law/#:~:text=However%2C%20the%20Respondent%20took%20the,1956%20(%E2%80%9CSCRA%E2%80%9D),) (visited on February 1, 2024).

³ Rajkumar S Adukia, "Fathoming FEMA {Overview of Provisions of Foreign Exchange Management Act, 1999 (FEMA) and Rules and Regulations there under}", https://icmai.in/upload/PPT_Chapters_RCs/Nagpur-23012016-Session-IV.pdf, (visited on February 1, 2024).

⁴ Bharat Vasani and Varun Kannan, "Legislative gap between the Arbitration Act and FEMA: Should Parliament step in?", <https://corporate.cyrilamarchandblogs.com/2022/11/legislative-gap-between-the-arbitration-act-and-fema-should-parliament-step-in-part-ii/>, (visited on February 1, 2024).

⁵ Ibid.

⁶ Ibid.

intricacies of these laws. Thus, it becomes paramount in this context to analyse the interrelation between India's foreign exchange regulation and the enforcement of foreign arbitral awards so as to guarantee compliance and the successful execution of the awards.

1.2 Statement of Problem:

The enforcement of foreign arbitral awards in India faces the problem of legal complexities due to the intersection of the arbitration laws and the foreign exchange law that is FEMA and due to the intervention of the judiciary in the enforcement process. This creates doubts for the businesses involved in international commercial agreements and further raises questions about the harmony between these regulatory frameworks and India as a place for an arbitration-friendly environment. This lack of clarity as to the scope and applicability of the foreign exchange law (FEMA) on the arbitration awards and intervention by the judiciary results in creating challenges for the parties that are seeking enforcement of the foreign arbitral award and may impact India's reputation as a jurisdiction that is arbitration-friendly.

1.3 Research Objectives:

- To study the conceptual and legislative framework concerning Foreign Arbitral Awards and the Foreign Exchange Management Act (FEMA).
- To analyse the influence of Foreign Exchange Management Act interpretations by the Indian Judiciary on the enforcement of foreign arbitral awards.
- To analyse the issues and challenges in the enforcement of foreign arbitral awards in India in the light of Foreign Exchange Management Act.
- To give suggestions for better enforcement of foreign arbitral awards in India.

1.4 Research Hypothesis:

The enforcement of foreign arbitral awards in India faces challenges due to the irregularities between the Arbitration and Conciliation Act and FEMA, and intervention of the Judiciary in the enforcement of the same.

1.5 Research Questions:

- What is the conceptual and legislative framework concerning Foreign Arbitral Awards and the Foreign Exchange Management Act (FEMA)?
- How does the Judiciary's interpretation of Foreign Exchange Management Act influence the enforcement of foreign arbitral awards in India?
- What are the issues and challenges in the enforcement of foreign arbitral awards in India in the light of Foreign Exchange Management Act?
- What could be the possible roadmap for better enforcement of foreign arbitral awards in India?

1.6 Review of literature

1. Bharat Vasani and Varun Kannan, "Legislative gap between the Arbitration Act and FEMA: Should Parliament step in?"⁷, the authors have looked into the relationship of two important laws that are the Arbitration Act and the Foreign Exchange Management Act (FEMA). Various cases have been discussed by the author to understand how these laws interact. The Dropti Devi case highlighted the similarities in the goals of the old FER and the current FEMA. And also analysed the cases which involved companies like Vijay Karis and NTT Docomo. The cases explore issues such as the role of the RBI and can the foreign awards be enforced if they go against the FEMA. In the end, the authors suggest the need to align these laws to avoid conflicts and to ensure a smooth legal process, mainly in the cases of international arbitration.

2. Charan Rawat and Bindu Ronald "When International Arbitration Collides With National Law A critique of the foundation laid by the Delhi High Court in the case of NTT DoCoMo Inc. vs. Tata Sons Limited"⁸, the authors have analysed and have critiqued the decisions taken by courts in the cases of DoCoMo Inc vs Tata Sons Limited and Vijay Karia & Others vs Prysiman Cavi E Sistemi SLR & Others. These cases comprise an interrelation of clarification

⁷ Bharat Vasani and Varun Kannan, "Legislative gap between the Arbitration Act and FEMA: Should Parliament step in?", <https://corporate.cyrilamarchandblogs.com/2022/11/legislative-gap-between-the-arbitration-act-and-fema-should-parliament-step-in-part-ii/>, (visited on February 1, 2024).

⁸ Charan Rawat and Bindu Ronald, 'When International Arbitration Collides With National Law A critique of the foundation laid by the Delhi High Court in the case of NTT DoCoMo Inc. vs. Tata Sons Limited', JOURNAL OF POSITIVE SCHOOL PSYCHOLOGY, Vol. 6, 2022, pp. 3180–3201.

of contract, violation of Foreign Exchange Management Act, 1999 (FEMA) and the role of the Reserve Bank of India (RBI). The authors have highlighted the incorrect precedent established by these cases regarding guaranteed returns in India and the potential for parties to engage in contracts with the aim of avoiding legal provisions. Consequently, these cases emphasize the necessity of resolving the discrepancies between India's foreign direct investment policy, particularly regarding foreign investments and the withdrawal of foreign investors from Indian companies.

3. Ashish Kabra Bhavana Sunder Lars Markert, "Arbitration and Exchange Control Laws of India"⁹, the authors have primarily focused on the impact of exchange control law on the contractual obligations and the positive trend seen in the enforcement of foreign arbitral awards in India. Lots of judgments given by the Indian court have shown a positive trend toward enforcement of foreign arbitral awards in India. The article has analysed the nature of foreign exchange laws and their impacts on the contractual obligations in India. There is a prioritization of enforcement of arbitral awards over strict adherence to exchange control laws in the judgments given which demonstrates a pro-arbitration policy prevailing in India.

4. Vishal Ranaware, "Public Policy A Hurdle Under the Indian Arbitration Law: Critical Analysis",¹⁰ a critical analysis has been done by the author concerning the role of public policy in Indian arbitration law and its impact on international commercial arbitration. The author has discussed the role of public policy, as how it is used to limit the scope of enforcement of foreign awards or judgments and many a times the domestic courts have used it to strike down the foreign arbitral awards. The absence of consistency in the claim of public policy among the different states, which makes it difficult to determine which awards will be allowed and which will violate the principle. The author has also analysed the steps that have been taken by the Indian judiciary to define and limit the scope of this doctrine of public policy which includes the amendment of the Arbitration and Conciliation Act in 2015 to clarify the term 'public policy'. The public policy works as a limitation on the party autonomy in the arbitral proceedings even though there has been minimum intervention of judiciary in the international

⁹ Ashish Kabra Bhavana Sunder Lars Markert, "Arbitration and Exchange Control Laws of India", INTERNATIONAL ARBITRATION LAW REVIEW, 2021, pp 63-74, https://www.nishithdesai.com/Content/document/pdf/ResearchArticles/Arbitration_and_Exchange_Control_Laws_of_India.pdf, (visited on February 1, 2024).

¹⁰ Vishal Ranaware, "Public Policy A Hurdle Under The Indian Arbitration Law: Critical Analysis", INTERNATIONAL JOURNAL OF LAW AND SOCIAL SCIENCES, Vol. 4, 2018, pp 1-9.

cases.

5. Aayushi Arora, in “Judicial Intervention As A Barrier To Foreign Arbitral Awards In India”,¹¹ the author has discussed that public policy which is an exception has been used by the judiciary to intervene in the enforcement of arbitral awards and has become a significant barrier in the enforcement of foreign arbitral awards in India. The Supreme Court has become a barrier to the enforcement of foreign arbitral awards in India. The court’s changing views on public policy exceptions have led to inconsistency and unpredictability in the enforcement of foreign arbitral awards in India. The author emphasizes the lack of clarity and the changing interpretations of the exception of public policy in the arbitration laws and this leads to uncertainty.

6. Komal and Neha Pallav, “Enforcement of foreign arbitral awards in India: Issues and Challenges”,¹² the authors have discussed the case of *Venture Global Engineering v Satyam Computer Services Limited* and analysed that the court’s decision has led to confusion, mistrust, and uproar amongst the foreign companies. This has highlighted the need for clarity and trust in the arbitration process. Even though India has well-established laws and procedures for enforcing foreign awards but there is still a need to bring more clarity and business-friendly reforms so that foreign investment can be brought and also reduce the burden of the judiciary. Adequate steps need to be taken by the Indian Legislature to preserve the sanctity of ADR and to avoid needless intervention by the judiciary in the arbitration proceedings. The authors have suggested that certain provisions should be added so that there can be quick disposal of applications to set aside awards or refuse enforcement within one year from the date of notice. To maintain the integrity of the Indian legal system it is essential that speedier remedies are provided to the foreign investor and the parties involved and also to remove the unnecessary delays in proceedings. The primary focus of the author is on the need for clarity and trust in the enforcement of foreign arbitral awards in India.

7. In the article *Enforcement of Foreign Arbitral Awards In India -Current Issues And Challenges*,¹³ by Mahantesh G S, the author has discussed the current issues and challenges in

¹¹ Aayushi Arora, “*Judicial Intervention As A Barrier To Foreign Arbitral Awards In India*”, INDIAN JOURNAL OF LAW AND LEGAL RESEARCH, Vol. 4, 2022, pp 1-5.

¹² Komal And Neha Pallav, “*Enforcement of foreign arbitral awards in India: Issues and Challenges*”, INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES, Vol. 3, 2020, pp. 2331 – 2346.

¹³ Mahantesh G S, “*Enforcement of Foreign Arbitral Awards in India: Current Issues And Challenges*”, JOURNAL OF ALTERNATE DISPUTE RESOLUTION, Vol. 2, 2023, pp. 11-33.

relation to the enforcement of foreign arbitral awards in India. The author highlights the significance of national courts in upholding foreign awards and stresses the importance of establishing a transparent legal framework for their enforcement. It is analyzed that the Arbitration and Conciliation (Amendment) Act of 2015 has aligned India's laws with international standards and the Geneva Convention. However, there remains a necessity for enhancements in the enforcement process, such as the establishment of specialized courts and the implementation of a more efficient procedure for enforcing foreign arbitral awards in India.

1.7 Rationale of the Study

The rationale for the study is in the importance of the enforcement of foreign arbitral awards in easing international trade and investment in India. In present-day, India is attracting foreign investment and engaging in cross-border commercial transactions in this scenario the enforcement of foreign arbitral awards becomes paramount for maintaining the investor's confidence and nurturing a favourable business environment. However, the present laws in India present challenges and uncertainties regarding the enforcement of foreign arbitral awards, mainly due to the inconsistencies in between the arbitration and foreign exchange laws and judicial intervention. By analyzing these issues and challenges it contributes to providing more coherent and arbitration-friendly solutions which will help in increasing legal certainty, and efficiency in the enforcement of foreign arbitral awards.

1.8 Research Methodology

The methodology adopted by the researcher in this study is essentially doctrinal, explanatory, and analytical, and has made use of qualitative data based on the analysis of both primary and secondary sources to understand the enforcement of foreign arbitral awards in India. The primary sources are the legislation, case laws, and judgments. The secondary sources include books, newspaper editorials, official websites, articles, and research papers published in various journals on the issue of foreign arbitral awards in the light of India's foreign exchange law.

1.9 Scope and Limitation

The scope of the research includes an in-depth analysis of the enforcement of foreign arbitral awards in the light of the Indian foreign exchange law FEMA. It analyses the judicial decisions

given by Indian Courts on the enforcement of foreign arbitral awards involving FEMA. and also analyses the issues and challenges that surround the enforcement of foreign arbitral awards in India.

There are certain limitations to the study. The research is limited to the Indian jurisdiction only, concerning the enforcement of foreign arbitral awards in India. Further, the research is confined to the legal aspects of the issue and does not delve into the political factors that influence arbitration practices, and the research is also limited by accessibility issues.

FOREIGN ARBITRAL AWARDS AND FEMA IN INDIA

2.1 Introduction

Foreign arbitral awards play a crucial role in facilitating international trade and commerce by providing a mechanism for resolving disputes arising from cross-border transactions. In India, the recognition and enforcement of foreign arbitral awards are governed by various international conventions and domestic legislation. One of key defences taken by parties to stop the enforcement of foreign arbitral awards is the violation of public policy due to non-compliance with the foreign exchange law. This chapter explores the conceptual and legal framework surrounding foreign arbitral awards in India and its foreign exchange law.

2.2 Evolution of International Arbitration

International arbitration has become vital due to evolving commercial transactions, with disputes common in international trade. The complexity of modern business relationships necessitates effective dispute resolution. Globalization led to the creation of the Geneva Convention of 1927 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, (New York Convention), administering the recognition and enforcement of foreign arbitral awards. The UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Model Law of 1985 imposed obligations on arbitration clauses and procedural rules. The Arbitration and Conciliation Act, 1996, consolidated domestic and international arbitration, focusing on implementing foreign awards through the 2015 Amendment Act. The New York and Geneva Conventions serve as major avenues for enforcing foreign awards in India.¹⁴

¹⁴ Daniel Centner and Megan Ford “A Brief Primer on the History of Arbitration”, <https://www.americanbar.org/content/dam/aba-cms-dotorg/products/inv/book/399836364/chap1->

2.3 Foreign Arbitral Awards

Foreign awards pertain to arbitration awards issued pursuant to an arbitration agreement in a foreign country that has reciprocal arrangements with India. These arbitrations might occur in a jurisdiction outside India, adhering to the legal frameworks of that particular nation. The decision holds binding authority, contingent upon the fundamental principles of justice, morality, and the legal system of the country where enforcement is pursued. The parties must agree on the rules governing the arbitration proceedings, including the applicable law and language. In the *Bhatia International Vs Bulk Trading S.A*¹⁵, it was clarified that foreign awards arise from arbitration in a convention country, while awards from non-convention countries are neither foreign nor domestic under the Act.¹⁶

While domestic arbitration awards are relatively easy to enforce under Indian law, challenges arise when enforcing awards from foreign jurisdictions. Unlike domestic awards, foreign awards may not be automatically accepted by a state's legal system. India, as a signatory to the Geneva Convention and the New York Convention, has provisions for enforcing foreign arbitral awards. If the award is from a country that ratified these conventions and is recognized by India as a convention country, it's enforceable in India. The enforcement of foreign awards in India follows the principle of minimal judicial intervention, promoting a pro-arbitration and pro-foreign investment climate.¹⁷

2.4 Legal framework for Enforcement of Foreign Arbitral Awards

2.4.1 New York Convention

India, as a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is bound by its provisions concerning the enforcement of foreign arbitral awards. Article 1 of the Convention specifies that it applies to arbitral awards rendered outside the jurisdiction where enforcement is sought, particularly in disputes between parties. Article 2 mandates recognition of written arbitration agreements, while Article 3 requires

5190560.pdf#:~:text=However%2C%20beginning%20sometime%20in%20the%20early%2020th,circumscribing%20judicial%20review%20of%20arbi%2D%20trators%20awards, (visited on February 20, 2024).

¹⁵ *Bhatia International Vs Bulk Trading S.A* (2002) 4 SCC 105.

¹⁶ Nandhini Ravi, "Implementation of Foreign Arbitral Awards In India- Issues And Concerns", INTERNATIONAL JOURNAL OF LAW AND LEGAL JURISPRUDENCE STUDIES, Vol. 5, No. 2, 2016, pp 138.

¹⁷ Mahantesh G S, "Enforcement of Foreign Arbitral Awards in India: Current Issues and Challenges", JOURNAL OF ALTERNATE DISPUTE RESOLUTION, Vol. 2, No.1, 2023, pp.32.

binding recognition and enforcement. Article 4 outlines the documentation needed for recognition and enforcement, including translations if necessary. Article 5 lists grounds for refusal, such as incapacity, lack of notice, procedural issues, non-binding status, annulment, non-arbitrability, or public policy violations. These articles collectively form the basis for consistent and fair recognition and enforcement of foreign arbitral awards.¹⁸

2.4.2 Geneva Convention

Article 1 sets the criteria for recognizing and enforcing arbitral awards, requiring compliance with a valid arbitration agreement, settlement capability under local law, and finality in the award's country of origin. Article 2 sets out grounds for refusing enforcement, including annulment of the award, lack of notice, or decisions beyond the scope of arbitration. It also provides options for postponing enforcement. Article 3 permits challenging the award's validity under specified grounds, allowing the court to refuse or adjourn recognition based on the arbitration procedure's governing law.¹⁹

2.4.3 Arbitration and Conciliation Act 1996

The primary legislation governing arbitration in India is the Arbitration and Conciliation Act, 1996. Part II of the Act deals specifically with the recognition and enforcement of foreign arbitral awards. It incorporates the provisions of the UNCITRAL Model Law on International Commercial Arbitration. The term foreign award is defined as an arbitral decision made after October 11, 1960, resolving disputes between parties arising from legal relationships, whether contractual or not. The Act differentiates an arbitral award where the law governing arbitration as is Part 1 as a domestic award and an award which meets the requirements of sec.44 as foreign award. According to this definition, a foreign award will include – an award arising out of an arbitration agreement dealing with differences between people arising from legal relationships, whether contractual or not, considered commercial under the law in force in India, must be made in pursuance of an arbitration agreement in writing and be made in one of the

¹⁸ “United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)”, <https://www.newyorkconvention.org/english>, (visited on March 3, 2024)

¹⁹ Geneva Convention 1927, https://www.trans-lex.org/511400/_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/#:~:text=In%20the%20territories%20of%20any,Clauses%2C%20opened%20at%20Geneva%20on, (visited on March 3, 2024)

reciprocating territories.²⁰ A petition for execution, where the national court would determine whether the international award is fulfilling the requirements of the Act. Once the award is found enforceable, it is executed through a decree.²¹ Section 36 of the Act says that an Arbitral Award is equal to a Decree of the Civil Court and contemplates it to be executed straightaway and realize the amount. This decision must be made pursuant to a written arbitration agreement covered by the Convention specified in the First Schedule and in territories declared by the Central Government, ensuring reciprocity²². The Courts, in cases where parties have an arbitration agreement as described in Section 44, are obligated to refer the matter to arbitration upon request unless the agreement is deemed null, void, or impracticable.²³

Once a foreign award is recognized as enforceable under the Act, it is binding on the parties involved and may be used as a defence or set-off in legal proceedings in India.²⁴ To enforce a foreign award, the party seeking enforcement must provide the original award, the arbitration agreement, and any necessary evidence proving the award's foreign status.²⁵

Section 48 of the Act largely mirrors Article V of the New York Convention. Section 48 of the Act, lays down the conditions necessary for the enforcement of foreign arbitral awards in India. For a foreign award to be enforceable it must meet several criteria: Firstly, it must be based on a valid arbitration agreement according to the relevant law.²⁶ Secondly, the subject matter of the award must be capable of settlement by arbitration under Indian law²⁷. Thirdly, the award must be made by the arbitral tribunal as provided in the arbitration agreement or in conformity with the agreed-upon arbitration procedure and relevant laws.²⁸ Additionally, the award must have attained finality in the country where it was made, meaning it is not open to further opposition or appeal.²⁹ Lastly, enforcement of the award must not be contrary to public policy or the law of India.³⁰

²⁰ Anirban Chakraborty, *LAW AND PRACTICE OF ALTERNATE DISPUTE RESOLUTION IN INDIA A DETAILED ANALYSIS*, 1st ed., 2016, Lexis, Nexis, pp.192.

²¹ Vyapak Desai and Shweta Sahu, "*Enforcement of Arbitral Awards and Decrees in India*", https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Enforcement_of_Arbitral_Awards.pdf, (visited on March 3, 2024).

²² Section 44 of Arbitration and Conciliation Act 1996.

²³ Section 45 of Arbitration and Conciliation Act 1996.

²⁴ Section 46 of Arbitration and Conciliation Act 1996.

²⁵ Section 47 of Arbitration and Conciliation Act 1996.

²⁶ Section 48(1)(a) of Arbitration and Conciliation Act 1996.

²⁷ Section 48(1)(b) of Arbitration and Conciliation Act 1996.

²⁸ Section 48(1)(c) of Arbitration and Conciliation Act 1996.

²⁹ Section 48(1)(d) of Arbitration and Conciliation Act 1996.

³⁰ Section 48(1)(e) of Arbitration and Conciliation Act 1996.

By amending the Arbitration and Conciliation Act, the anomaly regarding the enforcement of international awards was remedied in 2015. The amendment added to the existing Section 48(2) of the Act two new explanations, which sought to restrict the discretion available to the courts when interpreting the terms ‘public policy’ and ‘fundamental policy of Indian law’. Section 48(2) provides:-

“(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.”

Section 57 of the Arbitration and Conciliation Act, 1996, sets forth requisites for enforcing foreign arbitral awards in India. The section lays out conditions for recognizing foreign awards that are, validity of the arbitration agreement, arbitrable subjects under Indian law, compliance with arbitration laws, finality in the award’s country, and conformity with Indian public policy.³¹ Enforcement can be refused if the award is annulled, the respondent not being properly notified, or award exceeds arbitration scope, however, if it doesn’t cover all disputes, enforcement may be postponed or guaranteed.³² Respondent’s valid grounds to challenge validity can lead to enforcement refusal or adjournment for annulment.³³ Once conditions are met, the court treats the award as a decree for enforcement ensuring a structured process for international arbitration parties.³⁴

2.5 Foreign Exchange Law in India

The foreign exchange in India was earlier governed by the Foreign Exchange Regulation Act (FERA) and this has been replaced by the Foreign Exchange Management Act (FEMA). The interrelation of FEMA with arbitration can be seen in the next paragraphs.

2.5.1 From FERA to FEMA

The regulatory contrast between the Foreign Exchange Regulation Act (FERA) and the Foreign

³¹ Section 57(1) of Arbitration and Conciliation Act 1996.

³² Section 57(2) of Arbitration and Conciliation Act 1996.

³³ Section 57(3) of Arbitration and Conciliation Act 1996.

³⁴ Section 58 of Arbitration and Conciliation Act 1996.

Exchange Management Act (FEMA) is stark. FERA, prevalent until 1999, upheld a stringent regulatory regime, emphasizing control and restriction over foreign exchange transactions. This restrictive environment potentially posed challenges for enforcing foreign arbitral awards, subjecting such endeavours to the stringent provisions of FERA. Conversely, FEMA, enacted in 1999, introduced a more liberalized and market-oriented approach. It streamlined the process by providing explicit provisions for the repatriation of funds awarded through foreign arbitral awards and the conversion of foreign currency. This shift facilitated a smoother enforcement mechanism, with FEMA's flexible framework promoting compliance while enabling greater transparency. Additionally, while both legislations entail penalties for contravention, FEMA's enforcement measures are comparatively less severe, administered by authorities such as the Directorate of Enforcement.³⁵

2.5.2 Foreign Exchange Management Act 1999

The Foreign Exchange Management Act (FEMA) is a crucial piece of legislation enacted in India in 1999. The objective of FEMA is to support international trade and transactions while ensuring the structured growth of India's foreign exchange market. It grants the RBI authority to create regulations and guidelines for foreign exchange transactions. The Act establishes a robust framework for regulating cross-border transactions, managing foreign exchange reserves, and fostering financial stability in India. The Act prohibits dealing in or transferring foreign exchange or securities without authorization, along with regulating financial transactions involving assets outside India³⁶. Indian residents are prohibited from acquiring, holding, or transferring foreign exchange, securities, or immovable property outside India without authorization³⁷. It permits to sell or draw foreign exchange for current account transactions³⁸, and capital account transactions, with government-imposed restrictions in the public interest. Additionally, it empowers the Reserve Bank to regulate the establishment of branches or offices in India by non-residents and defines "debt instruments", granting authority to the Central Government, in consultation with the Reserve Bank, to determine them.³⁹

³⁵ Supra n. 2, p.1.

³⁶ Section 3 of Foreign Exchange Management Act (FEMA) 1999.

³⁷ Section 4 of Foreign Exchange Management Act (FEMA) 1999.

³⁸ Section 5 of Foreign Exchange Management Act (FEMA) 1999.

³⁹ Section 6 of Foreign Exchange Management Act (FEMA) 1999.

2.5.3 FEMA and Arbitration

FEMA intersects with the realm of arbitration, particularly concerning the recognition and enforcement of foreign arbitral awards in India. One of the critical aspects relates to the repatriation of funds awarded through foreign arbitral awards. When a party receives a foreign arbitral award involving monetary compensation, FEMA regulations come into play regarding the transfer of those funds from India to a foreign jurisdiction. Parties seeking to enforce foreign arbitral awards in India must navigate FEMA regulations to ensure proper repatriation of awarded funds, including obtaining necessary approvals and adhering to prescribed documentation requirements. Failure to comply with FEMA regulations in repatriating funds awarded through foreign arbitral awards can lead to legal complications and delays in the enforcement process. Therefore, understanding the interplay between FEMA regulations and arbitration is essential for parties involved in international arbitration proceedings with a connection to India.⁴⁰

2.6 Put Option and Arbitration

Put options are a popular exit option for investors. When a shareholder exercises a put option, they receive payment equivalent to the value or price of the shares. If the investee company fails to fulfil its obligations, provided the put option is validly exercised, the affected party, or shareholder, has the right to seek redress and ensure the enforcement of the clause. But their history has been uncertain, particularly under the FDI Policy of India where no investor is guaranteed an exit at an assured return. So how do investors then make sure that they can make a safe exit. The answer lies in International Arbitration.⁴¹

The utilization of the put option clause needs to adhere to the regulatory protocols and legal framework of the country where the investee operates. While put options are widely used in global business practices, they encounter various regulatory challenges in India, particularly under securities and foreign exchange control laws. Nevertheless, there has been a gradual

⁴⁰ Bharat Vasani and Varun Kannan, “Legislative gap between the Arbitration Act and FEMA: Should Parliament step in? – Part I”, <https://corporate.cyrilamarchandblogs.com/2022/11/legislative-gap-between-the-arbitration-act-and-fema-should-parliament-step-in-part-i/>, (visited on March 3, 2024).

⁴¹ Harshit Kumar, “Legality Of Put Options In India And Their Enforcement Through Arbitral Awards”, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4675304#:~:text=Put%20options%20are%20a%20popular,may%20lie%20in%20International%20Arbitration,SSRN, March 2023, (visited on March 3, 2024).

evolution in the enforceability of foreign awards endorsing put options, driven by amendments in regulatory statutes and evolving judicial interpretations.⁴²

2.7 Conclusion.

Thus, the enforcement of foreign arbitral awards has been provided under the Arbitration Act which takes inspiration from the Geneva and New York Conventions. Even though detailed processes and requirements have been provided under the Act for the enforcement of foreign arbitral awards but it faces issues in its enforcement in India, and one of the areas that creates hurdles in its enforcement is the FEMA. The judicial pronouncements given by the Indian courts don't give a concrete view regarding this issue. The following chapter analyses the judicial trend in the enforcement of foreign arbitral awards in the light of FEMA and its implication for foreign investors in India.

FOREIGN ARBITRAL AWARDS AND THE INDIAN JUDICIARY

3.1 Introduction

Until recently, there was uncertainty regarding the enforceability of put options and foreign awards supporting investors' use of put options, with the defense of public policy often cited as a reason for refusing enforcement of foreign arbitral decisions under Indian law. Put options in public companies were deemed void under the Securities Contract Regulation Act, 1956 (SCRA), as they were seen as speculative due to their dependence on future occurrences. Similarly, in the Foreign Exchange Management Act, 1999 (FEMA), put options guaranteeing predetermined returns were considered to contravene regulations prohibiting assured returns on investments. Foreign investors often faced resistance from shareholders due to legal and regulatory uncertainty surrounding put options. However, recent Supreme Court of India and High Court decisions have substantially answered these challenges, allowing foreign awards upholding put options to be enforced.

3.2 Public Policy

There is no precise and fixed definition of the definition of the concept of public policy. One

⁴² "Enforcement of Foreign Award granting a put option subject to challenges under FEMA", <https://amlegals.com/enforcement-of-foreign-award-granting-a-put-option-subject-to-challenges-under-fema/#>, (visited on March 5, 2024).

would imagine that the spirit of an idea or a concept that has been around for centuries may be easier to state. But that is not so. It is to be seen and understood in practice from the way it is applied by judges in individual cases, for judges have a critical role in determining public policy. The idea of public policy in arbitration has developed from the principles of private international law.

In, *Renusagra Power Plant Co. Ltd. v. Genral Electric Co.*⁴³, it was held that any involvement in the merit of the arbitral tribunal's decision would fall outside the scope of Section 48 of the 1996 Act. It further held that "*the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.*" Despite the ruling being issued under the previous arbitration regime and the former Foreign Awards (Recognition and Enforcement) Act, 1961 ("Foreign Awards Act"), it has remained valid over time, even after the amendments introduced to the 1996 Act in 2015.

In *HRD Corporation*⁴⁴, it was determined that both Sections 34 and 48 have reverted to the legal stance outlined in the *Renusagar* case, where public policy now encompasses only two of the three elements mentioned: fundamental policy of Indian law and justice or morality. The aspect concerning the interest of India is no longer applicable. The concept of fundamental policy of Indian law is now interpreted in accordance with the *Renusagar* case. Justice or morality now refers solely to the fundamental principles of justice and morality that would deeply trouble the conscience of the court, as elucidated in the *Associate Builders v Delhi Development Authority*.⁴⁵

In the case of *Union of India v. Vedanta Ltd* ⁴⁶, the court emphasized that the reasons for rejecting the enforcement of foreign awards outlined in Section 48 are comprehensive. This is apparent from the wording of the provision itself, which states that enforcement can only be declined if the applicant presents evidence of any of the conditions listed in that provision.⁴⁷

⁴³ *Renusagar Power Plant Co. Ltd. v. General Electric Co.* AIR 1994 SC 860.

⁴⁴ *HRD Corporation v. Gail (India) Ltd* AIR 2018 SC (SUPP) 636

⁴⁵ *Associate Builders v Delhi Development Authority* 2014 SCC OnLine SC 937.

⁴⁶ *Union of India v. Vedanta Ltd* 2020 SCC Online SC 749.

⁴⁷ Bharat Vasani and Varun Kannan, "*Legislative gap between the Arbitration Act and FEMA: Should Parliament step in? – Part I*", <https://corporate.cyrilamarchandblogs.com/2022/11/legislative-gap-between-the-arbitration-act-and-fema-should-parliament-step-in-part-i/>, (visited on March 4, 2024).

Over the years, the Indian arbitration landscape has seen significant evolution. In 2012, the Supreme Court's decision in *Bharat Aluminium Co v. Kaiser Technical Services*⁴⁸ it was clarified that Part I of the Arbitration and Conciliation Act (A&C Act) doesn't extend to arbitrations conducted outside India, which means that Indian courts cannot consider challenges to foreign arbitral awards under domestic arbitration laws. In 2013, another significant judgment narrowed down the scope of the public policy exception for enforcing foreign arbitral awards as opposed to domestic ones. The amendments made to the A&C Act in 2015 further refined the adjustments. Notably, the definition of public policy was expanded to encompass violations of fundamental Indian legal principles or basic moral and just notions. Before these amendments, courts could set aside awards for patent illegality, including serious breaches of national law, but this ground was limited to challenges against awards from domestic arbitrations seated in India following the amendments.

3.3 Judicial Decisions

In *Cruz City I Mauritius Holdings v. Unitech Limited*⁴⁹ the Delhi High Court upheld the enforcement of a foreign award, despite potential violations of FEMA. It emphasized that the discretion to reject enforcement is confined to circumstances outlined in Section 48, allowing for a balanced approach in enforcing foreign awards. The Court highlighted that the grounds for resisting enforcement based on public policy are exceedingly narrow, stating that breaching FEMA provisions doesn't justify declining enforcement. The Court referenced various Indian and foreign rulings to support the view that the scope of the public policy defence against enforcing foreign awards is extremely limited. Additionally, it clarified that remitting foreign exchange to a foreign party following award enforcement would still necessitate obtaining any required permission from the RBI under FEMA. Furthermore, the Court dismissed the notion that exercising the put option clause guaranteed a return, emphasizing that Cruz City had no assurance of a predetermined exit at a fixed return. The court also emphasized that there had been a fundamental shift between the exchange control policy adopted under FERA and the present policy administered under FEMA.⁵⁰

⁴⁸ *Bharat Aluminium Co v Kaiser Technical Services* (2012) 9 SCC 552.

⁴⁹ *Cruz City I Mauritius Holdings v. Unitech Limited* 239 DLT 649.

⁵⁰ Ahan Gadkari, "Enforcement of Foreign Awards in India: Special Emphasis on FEMA Awards", <https://www.jsbf-report.com/post/enforcement-of-foreign-awards-in-india-special-emphasis-on-fema-awards>, (visited on March 3, 2024)

In the case of *Shri Lal Mahal Ltd. v. Progetto Grano Spa*⁵¹, a three-Judge Bench of the Supreme Court ruled that examining a foreign arbitral award based on its merits is illogical as it goes against the provisions of the Convention. It emphasized that the term public policy of India in Section 48 of the Act should be interpreted narrowly, while a broader interpretation could be applied under Section 34 of the Act.

In the *Vitol SA v Bhatia International Ltd*⁵² case, a London-seated arbitration involved the enforcement of an arbitral award. Vitol and Bhatia had an agreement for coal supply, but due to market collapse, Bhatia couldn't accept three instalments. Negotiations failed, and Vitol sought damages. Bhatia resisted enforcement in India, citing public policy under FEMA. The Bombay High Court rejected Bhatia's argument, stating that no violation of FEMA occurred. The court enforced the foreign arbitral award.⁵³

In the case of *NTT Docomo Inc. v. Tata Sons Limited*,⁵⁴ the Reserve Bank of India (RBI) challenged the enforcement of a foreign award for damages in India, arguing that it facilitated the purchase of shares by an Indian company from a foreign entity, which contravened FEMA regulations. However, the Delhi High Court dismissed the RBI's challenge, asserting that there's no provision allowing the RBI to intervene in a petition for the enforcement of an arbitral award to which it's not a party. The court concurred with the tribunal's determination that the award solely pertained to damage, hence RBI authorization wasn't required for enforcement. Furthermore, the Court allowed the enforcement of the award as it pertained to compensation for damages rather than enforcing the put option obligation, thereby ensuring compliance with FEMA provisions.

In *Vijay karia v. Prysmian Cavi E sistemi SRL and Others* ⁵⁵ the Supreme Court upheld the Delhi High Court's previous rulings to permit the enforcement of a foreign award involving the transfer of securities from an Indian resident to a non-resident at a price lower than the fair market value. The challenge stemmed from foreign exchange regulations mandating transfers to occur at fair market value, not below. It was argued that the award contradicted FEMA and India's public policy. However, the Court determined that FEMA breaches can be rectified by

⁵¹ *Shri Lal Mahal Ltd. v. Progetto Grano Spa* (2014) 2 SCC 433.

⁵² *Vitol SA v Bhatia International Ltd* (2015) 1 Bom. C.R. 100.

⁵³ Tina Abraha, "Indian Judiciary's progressive approach to foreign arbitral awards enforcing put options", <https://www.lexology.com/library/detail.aspx?g=b1f15397-1c67-487c-8600-405a4ebd9f6a>, (visited on March 3, 2024).

⁵⁴ *NTT Docomo Inc. v. Tata Sons Limited* (2017) (4) ARBLR 127.

⁵⁵ *Vijay Karia v. Prysmian Cavi E Sistemi SRL & Others* (2020 SCC SC 177).

obtaining retroactive approval from the RBI, rendering the awards neither illegal nor void. Additionally, the Court emphasized that a FEMA violation does not equate to a breach of Indian law. The Court further held that:

“the important point to be considered is that the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counter-claims of the parties, enforcement must follow”.

In *Banyan Tree Growth Capital LLC v. Axiom Cordages Ltd* ⁵⁶, the Bombay High Court examined objections to enforcing a foreign award on the ground that it is allegedly conflicting with India’s public policy. It dismissed objections related to FEMA violations, reiterating that public policy concerns are confined to three categories: fundamental Indian legal principles or national interest, justice, and morality. The Court asserted that put options facilitating foreign investors exit don’t breach FEMA provisions, as they aim to regulate foreign exchange transactions.⁵⁷ Violations like FEMA breaches, which are remediable and don’t intend to nullify the underlying contract, don’t align with the core tenets of Indian law and thus don’t meet the criteria outlined in Section 48(2) of the Arbitration Act.⁵⁸ Citing a similar structure approved by the Supreme Court in *IDBI Trusteeship Services Ltd v. Hubtown Ltd.* ⁵⁹, the Court found no infringement of FEMA. It noted that unlike its precursor, FEMA doesn’t aim to invalidate transactions but only regulates foreign exchange remittances. Therefore, FEMA provisions can’t render a put option deed unenforceable, and violating FEMA isn’t grounds for rejecting foreign award enforcement on public policy grounds. The Bombay High Court heavily relied on decisions in *Vijay Karia* and *Cruz City* to reach this conclusion. ⁶⁰

*EIG (Mauritius) Limited v. McNally Bharat Engineering Company Limited*⁶¹, in November 2021, the Calcutta High Court upheld a foreign award in favour of EIG (Mauritius) Limited,

⁵⁶ *Banyan Tree Growth Capital LLC v. Axiom Cordages Ltd* Commercial Arbitration Petition No. 476 of 2019.

⁵⁷ Manavendra Mishra, Rajeswari Mukherjee, “Foreign arbitral award allows exit based on put option? “No worries” says Bombay High Court”, <https://www.lexology.com/library/detail.aspx?g=b078198d-aa11-4db3-8f13-5bdcdee6cba5>, (visited on March 4, 2024).

⁵⁸ Manavendra Mishra, Rajeswari Mukherjee, “Foreign arbitral award allows exit based on put option? “No worries” says Bombay High Court”, <https://www.lexology.com/library/detail.aspx?g=b078198d-aa11-4db3-8f13-5bdcdee6cba5>, (visited on March 4, 2024).

⁵⁹ *IDBI Trusteeship Services Ltd v. Hubtown Ltd.* 2018 SCC OnLine SC 2795

⁶⁰ “Enforcement of Foreign Awards granting a Put Option despite objections under the FEMA”, <https://www.snrlaw.in/enforcement-of-foreign-awards-granting-a-put-option-despite-objections-under-the-fema/>, (visited on March 4, 2024).

⁶¹ *EIG (Mauritius) Limited Vs. McNally Bharat Engineering Company Limited*, (2022) ibclaw.in 153 SC.

granting damages for breach of a put option by MBECL, the resident shareholder. The court dismissed MBECL's challenge based on violations of the Securities Contract Regulation Act (SCRA) and the Foreign Exchange Management Act (FEMA), stating that mere contravention of law does not constitute a breach of the fundamental policy of Indian law. The court affirmed the Arbitral Tribunal's interpretation that the put option did not violate SCRA and FEMA restrictions would not apply if MBECL arranged for a non-resident third party to purchase the shares. The decision reinforces a pro-enforcement approach towards foreign awards and provides clarity on exit mechanisms structured to provide assured returns.

But in the case of *National Agriculture Cooperative Marketing Federation of India v. Alimenta S.A.*⁶², the Court refused to enforce a foreign arbitral award related to groundnut exports in the 1980s. Throughout the proceedings, the Court conducted a detailed examination of the award's merits, resembling an appellate review, and independently determined the contractual obligations of the parties involved. Such actions diverged from the stipulations in Section 48 of the 1996 Act. Regarding the argument concerning public policy, the Court cited numerous legal precedents and concluded that allowing NAFED to supply goods without government permission and exporting commodities from previous years in the following year contradicted India's fundamental public policy, particularly concerning export-related regulations requiring government authorization. This conclusion was based on the premise that governmental authorization for NAFED's supply activities constitutes a fundamental aspect of India's public policy. Redfern and Hunter were quoted by the court "*Even if blatant, a mistake of fact or law, if made by the arbitral tribunal, is not a ground for refusal of enforcement of the tribunal's award.*" Despite the recent approval of this principle in the case of *Vijay Karia v. Prysmian*⁶³, the Honourable Court did not apply it in the present scenario. Despite the existence of established principles regarding the enforcement of Foreign Arbitral Awards, the Supreme Court has taken a significant departure from its previous stance, especially when it considered the context of an older case, which happened when India was operating as a closed economy.⁶⁴

The Supreme Court's decision is criticized for its application of Section 32 of the Indian Contract Act, 1872 without considering the governing law of the agreement, which explicitly

⁶² *National Agriculture Cooperative Marketing Federation of India v. Alimenta*, 2020 SCC OnLine SC 381.

⁶³ *Supra* n 55, p.19.

⁶⁴ Kirit S. Javali, "Enforcing foreign awards in India is a challenging task", <https://thedailyguardian.com/enforcing-foreign-awards-in-india-is-a-challenging-task/>, (visited on March 4, 2024).

provided for English law as the governing law. The Court's reasoning that the awards violated fundamental policy of Indian law is also questionable, as it did not analyze whether the particular export policy of the Government of India for a particular time period could be considered as 'fundamental policy of Indian law'.⁶⁵ The decision appears to be a review of the awards on merits, contrary to past precedent on how the term 'fundamental policy of Indian law' should be construed. This comes at a time when Indian courts are consistently following a pro-enforcement bias in foreign arbitral awards, as seen in decisions relating to foreign exchange regulations. Finally, the judgment also shows that a fundamental problem in enforcement of foreign awards remains unaddressed viz. the time taken before Indian Courts for enforcement of awards. The enforcement petition was filed in 1993 and it took almost 27 years for the final decision of the Supreme Court to come in April 2020. While Indian Courts are working towards better timelines, the Supreme Court's latest judgment shows that much remains to be done.⁶⁶

3.4 Analysis

In numerous cases, Indian courts have adhered to the principle of "minimal interference" when assessing the enforceability of foreign arbitral awards under Section 48 of the Act. The recent case of *Government of India v Vedanta Ltd*⁶⁷ sheds light on the Indian judiciary's stance towards enforcing foreign awards with minimal interference. The court emphasized that only the seat of arbitration has the authority to set aside a foreign award, even if conditions under section 48 of the Act are met. This echoes the Supreme Court's earlier rulings in *Renusagar* case and *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*⁶⁸, where it was clarified that the New York Convention doesn't allow refusal of recognition based on the law of the country where enforcement is sought. But despite these judgments, it can be seen from the above case analysis that the Indian courts are very much involved in the enforcement of foreign arbitral awards. Due to the availability of grounds to challenge the enforcement of the awards, the parties try to use these grounds to stop the enforcement of the same. Furthermore, there is uncertainty about whether the courts will

⁶⁵ "Enforcement of foreign arbitral awards – *NAFED v. Alimenta SA*", <https://www.azbpartners.com/bank/enforcement-of-foreign-arbitral-awards-nafed-v-alimenta-sa/>, (visited on March 3, 2024).

⁶⁶ *Supra* n. 64, p 21.

⁶⁷ *Government of India v Vedanta Ltd* 2020 SCC Online SC 749.

⁶⁸ *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India* Civil Appeal No. 4779 of 2019.

enforce the award or refuse it. The recent ruling in the NAFED case has sparked concerns about whether India is truly a conducive environment for arbitration. This decision casts doubts on India's arbitration-friendly reputation and may deter potential investments in the country, posing challenges for attracting foreign investments. Foreign investors may avoid investing in India if these situations persist. Lastly, there is an issue that the judiciary for the sake of being pro-enforcement is enforcing foreign arbitral awards that disregard the national laws of India.

3.5 Conclusion

Despite the completion of the arbitral process, the enforcement of awards in India faces challenges, particularly in the context of minimizing court intervention to ensure the effectiveness of arbitration as an alternative dispute resolution mechanism. Ultimately, a strong commitment to upholding arbitral awards and reducing court intervention will be essential for the continued success of arbitration in the country.

ISSUES AND CHALLENGES IN THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE LIGHT OF FEMA.

4.1 Introduction

The analysis of the judicial pronouncements given by the Indian Courts shows that the judiciary is going towards pro-enforcement of foreign arbitral awards. However, certain issues and challenges exist in the enforcement process that can be seen from the analysis done, which impacts the foreign investors and the arbitration process in India. The chapter analyses the issues and challenges in detail and concludes with a way forward to address these concerns.

4.2 Issues and Challenges

The following points show the issues and challenges in the enforcement of foreign arbitral award in the light of FEMA: -

4.2.1. Legislative Gap: There exists a legislative gap between the regulations outlined in the Foreign Exchange Management Act (FEMA) and the Arbitration and Conciliation Act of 1996. This issue becomes apparent when arbitration awards involve transactions or remittances that might breach FEMA regulations, yet they are enforced without scrutiny or objection from the Reserve Bank of India (RBI). Such a gap allows for the enforcement of arbitral awards that

may potentially violate FEMA regulations, thereby undermining FEMA's purpose and authority in regulating foreign exchange transactions. This involves the transfer of foreign exchange or securities that do not comply with FEMA regulations. If this legislative gap is not addressed and resolved, the provisions of FEMA are at a risk of becoming redundant, as parties to agreements could engage in transactions that do not align with FEMA's regulatory framework and still obtain arbitration awards.⁶⁹ The lack of clarity or harmonization between these laws poses challenges in ensuring compliance with FEMA while enforcing foreign arbitral awards in India. This lack of coordination between the Arbitration and Conciliation Act and FEMA regulations ultimately creates confusion and ambiguity for parties involved in foreign exchange transactions. The government must address this discrepancy and provide clarity on how these laws should be applied in order to uphold the integrity of both the Arbitration and Conciliation Act and FEMA regulations.⁷⁰

4.2.2. Enforcement of Put Options through Arbitration: In the Docomo case, the court ruled that RBI approval would not be necessary as the award aimed at compensating for damages rather than directly enforcing the put option.⁷¹ This reinterpretation of the transaction has enabled parties to bypass mandatory provision of FEMA, potentially allowing them to structure exit options in a manner that avoids scrutiny by RBI. Similarly, in cases like Cruz City, courts have concluded that although a violation of FEMA would not invalidate the award, subsequent consent from RBI would be essential for any foreign exchange transfer.⁷² The uncertainty arising from whether RBI permission will be granted adds another layer of complexity after significant time and resources have been invested in arbitration. Moreover, it's important to note that not only does this situation affect the foreign party involved but also exposes the Indian party to potential penal consequences upon enforcement of an arbitral award. An intriguing observation made in Vijay Karia was that post facto condonation by RBI is possible since breaches under FEMA can be rectified, however, while compounding offenses are provided for under FEMA, they do not amount to pardon. The existing regulatory framework

⁶⁹ Bharat Vasani and Varun Kannan, "Legislative gap between the Arbitration Act and FEMA: Should Parliament step in? – Part II", <https://corporate.cyrilamarchandblogs.com/2022/11/legislative-gap-between-the-arbitration-act-and-fema-should-parliament-step-in-part-ii/#:~:text=This%20legislative%20gap%20or%20conflict,Regulatory%20Regime%20and%20obtain%20an> (visited on March 1, 2024).

⁷⁰ Supra n. 69, p24.

⁷¹ Ashish Kabra, et al., Arbitration and Exchange Control Laws of India, https://nishithdesai.com/Content/document/pdf/ResearchArticles/Arbitration_and_Exchange_Control_Laws_of_India.pdf, (visited on March 5, 2024).

⁷² *Ibid.*

related to put options under FEMA exhibits inadequacies and a lack of specificity. As a result, parties often resort to using foreign arbitral awards to increase their financial burden and exposing Indian entities to regulatory risks when seeking recourse through adjudication processes. To enhance investor confidence and fulfill India's goal of becoming more liberalized economically speaking, these addressed shortcomings need resolution.⁷³

4.2.3. Weaking Oversight of RBI: There exist complexities arising from the interplay between the Reserve Bank of India's (RBI) regulatory powers and the enforceability of arbitration awards potentially based on violations of laws like the Foreign Exchange Management Act (FEMA). One key issue is the enforcement of awards directing transactions that contravene FEMA regulations, such as selling shares at a discounted price below market value requirements. In such cases, the RBI's authority to deny approval for these transactions can render court decisions to enforce these awards ineffective, leading to uncertainties and undermining regulatory oversight. Moreover, foreign investors strategically frame their claims as damages for breach of contract, rather than seeking enforcement of specific financial arrangements, may further complicate regulatory oversight.⁷⁴ The Indian courts have clarified that contravention of FEMA provisions isn't a valid ground for resisting foreign award enforcement. That being said, the courts have specified that the execution of directions from the award would be contingent upon RBI permissions, as required by FEMA. Therefore, these rulings should not be considered as a loophole in terms of transactions governed by FEMA regulations. The RBI maintains its authority to regulate the transfer of funds following the enforcement of a foreign award. This approach could potentially impact India's foreign exchange reserves and financial stability. Consequently, these challenges highlight the complexities faced by the RBI in balancing the enforcement of arbitration awards with the need to uphold regulatory requirements and ensure financial stability.⁷⁵ Recent cases have weakened the supervisory powers of the Reserve Bank of India (RBI) in implementing FEMA. Specifically, in the Tata Sons – DoCoMo case, where the decision was influenced by diplomatic

⁷³ Siddhaant Verma, Arbitrating Put Options: Resolving the Legislative Gaps, [https://www.cbfinludelhilhi.in/post/arbitrating-put-options-resolving-the-legislative-gaps#:~:text=Such%20conundrums%20are%20most%20conspicuous,and%20the%20rules%20framed%20the%20reunder,\(visited on March 5, 2024\)](https://www.cbfinludelhilhi.in/post/arbitrating-put-options-resolving-the-legislative-gaps#:~:text=Such%20conundrums%20are%20most%20conspicuous,and%20the%20rules%20framed%20the%20reunder,(visited%20on%20March%205,%202024).).

⁷⁴ Abhijnan Jha and Urvashi Misra, "Enforcement of Foreign Arbitral Awards and Challenges based on India's foreign exchange laws", <https://www.azbpartners.com/bank/enforcement-of-foreign-arbitral-awards-and-challenges-based-on-indias-foreign-exchange-laws/>, (visited on March 10, 2024).

⁷⁵ Charan Rawat and Bindu Ronald, 'When International Arbitration Collides With National Law A critique of the foundation laid by the Delhi High Court in the case of NTT DoCoMo Inc. vs. Tata Sons Limited', JOURNAL OF POSITIVE SCHOOL PSYCHOLOGY, Vol. 6, 2022, pp.3200.

concerns between India and Japan, indicating that diplomatic imperatives can sway regulatory decisions.⁷⁶ As discussed previously, the Courts, when assessing challenges to the enforcement of awards awarding damages to foreign investors, have expressed that the issue of FEMA's applicability may not even arise. In such scenarios, the RBI might not possess the authority to intervene even after the enforcement of the foreign award.

4.2.4. Uncertainty in Enforcement of Foreign Arbitral Award: The proactive stance taken by Indian Courts in upholding foreign awards despite objections from Indian parties based on foreign exchange laws marks a significant stride in positioning India as good destination for foreign investors. Indian Courts have embraced a restricted interpretation of public policy in line with the pro-enforcement spirit of the Convention. Indian courts' stance aligns with Article 51⁷⁷ of India's Constitution. But, the Supreme Court's recent decision in the NAFED case has raised concerns about continued judicial interference affecting the enforcement of foreign judgments in India. In this case, the Court seemed to assess the judgment on its merits rather than solely considering breaches of India's public policy under section 48 of the 1996 Act. This departure from established practice suggests a potential outlier ruling, but its long-term implications remain uncertain.

4.2.5. Judicial Intervention: It is a well-known fact that Indian Courts play a significant role in resolving disputes, yet, their intervention in the enforcement of the Foreign Arbitral Award creates impediments for the parties to the Arbitration.⁷⁸ Parties refer to arbitration to stay out of the litigation process and judicial involvement. But in the case of enforcement of foreign arbitral award, the judiciary gets involved due to the grounds given under the Arbitration and Conciliation Act 1996, for refusing the enforcement of foreign arbitral awards. Parties for the sake of avoiding their obligations in the enforcement of foreign arbitral awards file suits to resist the enforcement of the awards, which acts as a major hurdle in the enforcement of the awards.⁷⁹ The 1996 Arbitration Act addresses the exemption of foreign arbitral awards based on public policy. Sections 48(2)(b) and 57(1)(e) deal with New York Convention and Geneva Convention Awards respectively. The Act's public policy defence for enforcing foreign arbitral

⁷⁶ *Ibid.*

⁷⁷ Article 51 of the Constitution of India, Promotion of international peace and security.

⁷⁸ Ayush Yadav, "Minimal Interference of Courts in Enforcement of Foreign Arbitral Awards", <https://amlegals.com/minimal-interference-of-courts-in-enforcement-of-foreign-arbitral-awards/>, (visited on March 10, 2024).

⁷⁹ Vikash Kumar Singh, "Arbitration In India: Recent Developments And Key Challenges", International JOURNAL OF CREATIVE RESEARCH THOUGHTS, Vol.11, No.7, July 2023, pp.90.

awards in India remains controversial. It grants national courts the power to intervene in arbitration, citing public policy concerns. Since there's no universal agreement as to what its contents should entail, it's crucial to balance it with principles like minimal judicial intervention and party autonomy.⁸⁰ However, this doesn't authorize courts to review the merits of foreign awards. Set aside here refers to cases involving fraud or corruption in the award-making process. Yet, because the Act lacks clarity and guidance, courts have broad discretion in interpreting public policy exemptions. This ambiguity has empowered courts to intervene extensively in enforcing foreign arbitral awards, influenced by prevailing socio-cultural norms.⁸¹

Furthermore, the use of international arbitration clauses in contracts involving Indian parties allows these agreements to bypass scrutiny under legal laws, potentially avoiding nullification for violating FEMA. Arbitration awards influenced by such clauses can effectively supersede Indian laws, undermining national legal authority, especially concerning FEMA violations. Recent cases like Tata Sons – DoCoMo indicate a weakening of the RBI's oversight under FEMA, with diplomatic concerns influencing regulatory decisions. These cases establish a precedent where arbitral awards can override national laws, even in cases of clear illegality. This raises concerns about the Arbitration Act's provisions regarding challenges based on public policy, suggesting potential discrimination against those strictly adhering to national laws. This shows that the judiciary for the sake of enforcing foreign arbitral awards is ready to overlook FEMA violations and shows that national laws can be brazenly violated if the international arbitration clause is involved as seen in the case of Vijay Karia and Docomo case.⁸²

4.2.6. Costly Process: Arbitration is portrayed as a costly process due to several factors. Firstly, there's uncertainty associated with enforcing a contractual right through arbitration, which may not have been necessary if regulatory hurdles were not present. Secondly, arbitration itself incurs significant expenses, as evidenced by the expenses in the Docomo case, including arbitration costs and legal fees. These costs can be prohibitive, particularly for smaller entities, and can restrict the use of put options to larger corporations with more resources. Despite the often-cited advantages of arbitration, such as speed, confidentiality, and lower costs, the reality

⁸⁰ *Ibid.*

⁸¹ Pallavi Mahajan, "The Unruly Horse of Public Policy Exemption in the Enforcement of Foreign Arbitral Awards in India", 2019, pp 7-11, <https://ssrn.com/abstract=3449565>, (visited on March 3, 2024).

⁸² *Supra* n.74, p.26.

in large commercial arbitrations like the Docomo case is different. Pre-arbitration negotiation and preparation, as well as post-award enforcement actions, can significantly increase both the time and costs involved. This can deter foreign investment and restrict the use of put options to corporations capable of bearing such expenses.⁸³ Though the 1996 Act was enacted to achieve quick and cost-effective dispute resolution but a close examination of the enactment reveals that arbitration as an institution is still evolving, and has not yet become effective to fulfill the ever-changing needs of the commercial world economy.⁸⁴

4.3 Way Forward

Thus, the enforcement process for foreign arbitral awards in India is not free from uncertainty even after the Indian courts pro-enforcement approach. The legislative gaps, costs for the parties, and the role of RBI all of these issues are hindering the enforcement process and impact India's image as an arbitration-friendly place. To address these concerns, the legislature needs to take some concrete steps to fill the gap, the role of RBI needs to be clarified, the parties must be made aware of the costs involved, and further they should be encouraged to adopt other methods of dispute resolution before going into arbitration. Lastly, the Indian judiciary needs to adopt its pro-enforcement stance strongly and have minimal interference in the arbitration process, only then these issues can be resolved.

CONCLUSION AND SUGGESTIONS

5.1 Conclusion

In conclusion, the study provided a critical analysis of the enforcement of foreign arbitral awards in India within the framework of the Foreign Exchange Management Act (FEMA). By examining the legal principles, procedures, and challenges associated with the recognition and enforcement of foreign awards, as well as the broader context of India's foreign exchange laws, several key insights have emerged. Firstly, it has become evident that the enforcement of foreign arbitral awards in India is a complex process that requires a thorough understanding of both domestic and international laws. Additionally, the challenges posed by conflicting legal

⁸³ M.P. Ram Mohan, et al., "Doctrinal Conflict In Foreign Investment Regulation In India: *Ntt Docomo Vs. Tata Sons And The Case For "Downside Protection"*", U. PA. J. INT'L L., Vol 43, 2022, pp 777-778.

⁸⁴ Supra n.75, p.26.

frameworks and the need for timely and efficient enforcement mechanisms have highlighted the importance of reforming India's arbitration laws in cross-border disputes.

The analysis highlights the importance of foreign arbitral awards in facilitating international trade and commerce, providing a mechanism for resolving disputes arising from cross-border transactions. The enforcement of foreign arbitral awards in India not only promotes international arbitration but also boosts investor confidence in the country's legal system. By upholding these awards, India demonstrates its commitment to honouring international agreements and fostering a business-friendly environment. Ultimately, the successful enforcement of foreign arbitral awards contributes to India's economic growth and integration into the global economy. But with the analysis of the judicial pronouncements and the issues and challenges on the enforcement of foreign arbitral awards, it can be seen that a lot needs to be done. The legislative gap between the two Acts creates a lot of confusion regarding the enforcement of the foreign arbitral awards. It hampers not only the enforcement process but also impacts the authority of RBI, also the judicial decisions show that national laws can be disregarded for the enforcement of these awards, but in that too there is no certainty that the awards will be enforced in all the cases, further, all this shows non-adherence to the principle of minimal interference by the Judiciary. Thus, the hypothesis stands proved that the enforcement of foreign arbitral awards in India faces challenges due to the irregularities between the Arbitration and Conciliation Act and FEMA, and the intervention of the Judiciary in the enforcement of the same.

Suggestions: -

The following suggestions can be helpful in the better enforcement of foreign arbitral awards in India in the light of FEMA.

- To make amendments to reconcile differences between the Arbitration Act and FEMA, both being key statutes under the Union List of India's constitution. Parliament faces two options: amend Section 48 of the Arbitration Act to require notice to the RBI for international arbitration awards involving remittances to non-residents or transfers of securities between non- and residents. The notice would prompt the RBI to assess compliance with FEMA regulations regarding foreign exchange payments/transfers and NDI Rules pricing guidelines for securities transfers. Or, Parliament can reintroduce

Section 47 of FERA into FEMA, subjecting any non-resident remittances under court-decreed arbitration awards to final RBI approval.

- To recognize the importance of put options in strengthening investor confidence and suggest that a blanket prohibition under FEMA is counterproductive. Instead, there should be a nuanced approach that distinguishes between clauses providing downside protection and those facilitating exit at a price exceeding market value. This suggestion urges the RBI and the Central Government to reconsider their stance and align with the judicial trend favouring the enforcement of optionality clauses. By doing so, they can mitigate uncertainty for parties and streamline the process for exercising exit rights, ultimately fostering a more conducive environment for investment.
- To enhance the capacity of the RBI to review and assess the implications of foreign arbitral awards on financial stability can help mitigate risks and ensure regulatory compliance. Furthermore, this increased capacity can also improve the efficiency and effectiveness of the RBI in responding to any potential challenges posed by foreign arbitral awards. By staying informed and proactive in monitoring these awards, the RBI can better protect the financial system from any destabilizing effects.
- To adopt a strong stance of pro-enforcement of arbitral awards and minimal judicial intervention by the Indian Judiciary to foster investor confidence in the Arbitration process of India and make India arbitration-friendly. This approach will not only expedite the resolution of disputes but also attract foreign investors who are looking for a quick and efficient mechanism for resolving their disputes in India. By promoting a pro-arbitration environment, India can position itself as a preferred destination for international business transactions and investments. This will ultimately contribute to the growth of the Indian economy and strengthen its position in the global market.
- To promote alternative dispute resolution mechanisms, such as mediation or expedited arbitration, which can be more cost-effective and efficient for resolving disputes. Additionally, enhancing transparency and predictability in arbitration proceedings, particularly regarding costs and fees, can help parties better assess the potential financial implications of arbitration and make informed decisions.

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