INDIA AND THE NEW YORK CONVENTION: A LONG WAY TRAVELLED, A LONGER WAY TO GO

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ABSTRACT

India, a signatory to the New York Convention (NYC) since 1960, governs international arbitration under the Arbitration and Conciliation Act, 1996. Judicial interpretations have shaped its application—Bhatia International initially extended Part I to foreign arbitrations, but BALCO adopted a seat-centric approach, restricting enforcement to Part II. Courts have also clarified the scope of "commercial" disputes and narrowed "public policy" as a ground for refusing enforcement, aligning Indian law with global standards. Recent reforms, including the Permanent Court of Arbitration's office in Delhi and pro-arbitration rulings like Cox & Kings, mark India's shift toward minimal judicial intervention and reinforce its position as an emerging arbitration hub in the global south. This article will focus solely on the arbitration aspect in India under The Act.

India has been a member of The New York Convention Treaty (hereinafter referred to as NYC) since July, 1960. The governing statute for arbitration in India is the Arbitration and Conciliation Act of 1996. (hereinafter referred to as "The Act"). The Act is largely adopted from the UNCITRAL Model law and was intended to comprehensively cover domestic and international commercial arbitrations, as well as conciliation. The Act envisages the making of an arbitral procedure which is fair, just and aims to effectively cope up with the ever-growing trends of globalisation. It aims to put forth an effective dispute redressal mechanism to ensure speedy settlement of disputes and uninterrupted, seamless international trade and commerce.

India ratified the NYC with 2 caveats. Firstly, that the Government declares that they will apply the Convention to the recognition and enforcement of the awards made only in the states that is a party to the Convention, and subsequently, Part II of The Act will apply to the differences arising out of legal relationships, whether contractual or not, considered as commercial law in India. Initially, prior to the enactment of The Act, the foreign arbitration agreements as well as the awards were regulated by 2 separate acts: The Arbitration (Protocol and Convention) Act, 1937 and The Foreign Awards (Recognition and Enforcement) Act, 1961.

The Act defines International Commercial Arbitration as an arbitration, disputes arising out of legal relationships, regardless of whether contractual or not, and wherein at least one of the parties who is -

an individual who is a national of, or a habitual resident of any other country than India, or

a body corporate, which is incorporated in any country than India, or

a company or an association or body of individuals whose central management and control is exercised in any country than that of India, or a government body of another foreign state.

Thus, from the above provision, it is evident that NYC will be applicable to an arbitration agreement if it has some foreign element involving international trade or commerce. The focus is not on the subject matter of the dispute, but on the nationality of the parties.[1]

As mentioned above, India only enforces certain binding awards, that is from 48 NYC notified territories, even though there are more contracting states to the NYC. Moreover, India has

[1] NV Paranjape, *Law relating to the Arbitration and Conciliation Act of 1996*

agreed to enforce awards arising out of relationships which are commercial in nature, but The Act has not defined the scope of the term "commercial" anywhere.

This naturally led to considerable confusion, but in a landmark case[2], the Supreme Court referred to the UNCITRAL Model Law and asserted that the term "commercial" should be construed broadly and must regard to the activities that fall under international trade today.

Two of the most important decisions that were taken by the Supreme Court were in the cases of Bhatia International v. Bulk Trading Co[3]., and the BALCO[4] case. These decisions changed the image of international commercial arbitrations and foreign arbitral awards in India.

In the former case, the issue before the Court was regarding the interpretation of statute regarding international commercial arbitrations. It held that Part I of the Act would equally apply to international commercial arbitrations held outside India, unless parties exclude otherwise, and that a strict interpretation of the provision would lead to absurd consequences. To ensure that India is in consonance with the leading arbitral institutions of the world, the Courts should achieve the purpose of the Legislation as it ensures that parties do not evade performance of their obligations under the award. But this case was overruled by the latter one. In the BALCO Case, the pertinent issue was whether Part I of the act applied to arbitrations seated outside India. Herein, the Court took a seat-centric approach and held that Foreign Arbitrations are only subject to the jurisdiction of Indian Courts when they are enforced under Part II of The Act. The procedure for the recognition as well as enforcement of foreign awards is governed by the sections 44 and 49 of The Act. The procedure to enforce such an award includes the following 3 steps:

a) The party who is seeking the enforcement should make an application under section 47 of The Act to the Court that has the proper jurisdiction.

b) The party against whom the enforcement is sought, or the judgement debtor, may challenge the said enforcement on certain grounds.

c) The award must fulfil the pre – requisites[5] laid down in The Act for it to be enforced

[2] R.M. Inv. & Trading Co. v. Boeing Co., A.I.R. 1994 S.C. 1136 (India).
[3] Bhatia Int'l v. Bulk Trading S.A., (2002) 4 S.C.C. 105 (India).
[4] Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc., (2010) 1 S.C.C. 72 (India).
[5] The Arbitration and Conciliatio n Act, No. 26 of 1996, § 47 (India).

just how a decree is passed under the Code of Civil Procedure.

Article V 1(e) of NYC provides that an award would be binding on parties when,

i. It has been made by a regular proceeding,

ii. It complies with the formalities required for an arbitral award. It becomes final when an application for setting it aside is refused. A "binding" award is enforceable, but it is not "final" as long as it vulnerable or open to "other means of recourse".

Section 46 of The Act provides that any enforceable foreign award shall be treated as binding for all purposes between the concerned parties. The foreign award cannot be challenged on its merits, except for some circumstances stated in section 48 of The Act. Thus, an arbitral award under the Indian law is not final and binding unless and until the period for making an application to set aside the award has expired.

In the case of Fuerst Day Lawson LTD. v Jindal Exports Ltd[6], the Supreme Court of India explained that "Looking to the provisions contained in sections 46 to 49 in relation to enforcement of a foreign award, a party holding a foreign award can apply for the enforcement of it but the court before taking it further steps for its enforcement and execution of the award, has to proceed in accordance with sections 47-49 of the act. in the first stage, the court may have to decide about the enforceability of the award having regard to requirement of the provisions. Once it is decided that it is enforceable, the court can take further steps to execute the award, as a decree of a court. therefore, for enforcement of a foreign award, there is no need to take separate proceedings, one for deciding the enforceability of the award and make it a rule of the court or decree, and the other to take up the execution thereafter."

On the grounds for setting aside of a foreign award, there have been quite a few landmark decisions by the Courts of India. Especially, the ground of "public policy" has been a very disputable issue considering the enforcement of foreign arbitral awards.

Recently in 2017[7], Supreme Court revisited the grounds of challenging foreign arbitral awards under the NYC, focusing mainly on the ground of public policy. In Renu Sagar Power Electric

[6] Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., A.I.R. 2001 S.C. 2293 (India).
[7] Venture Global Eng'g v. Satyam Computer Servs. Ltd., (2010) 8 S.C.C. 660 (India).

Co. v Gen Electric Co.[8], the Supreme Court explained what the expression "public policy" exactly construes, and stated that, it must be understood as a doctrine under Private International Law.

Additionally, in the case of Penn Racquet Sports Vs. Mayor International Ltd[9], Delhi High Court reiterated the above and held that *"...the recognition and enforcement of a foreign award cannot be denied merely because the award is in contravention of the law of India. The Award should be contrary to the fundamental policy of Indian law, for Courts in India to deny recognition and enforcement of foreign awards. The other grounds recognized by the Supreme Court of India to refuse recognition and enforcement of a foreign award are, that the award is contrary to the interests of India, or justice or morality. Merely because a monetary award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality."*

The latest trends in arbitration have proven India's ever-growing involvement in international arbitration. According to SIAC's survey, India has been their top number 1 party in the list of foreign users. [10] There have been arbitration friendly developments, like the Supreme court and High Courts have now begun to advocate for minimal, or less interference in the issuance of awards. This was not the case earlier, as there used to be a very unpredictable interference.

The Ministry of Law and Justice has set up an expert committee to delve deeper and suggest reforms regarding the foreign arbitration ecosystem in India. The committee consists if government representatives, legal practitioners, and private arbitrators.

Some of the committee's terms of reference are:

a. The committee is required to assess the operation of the current arbitration ecosystem in India. The act's strengths, weaknesses, and challenges will be examined in consonance with the NYC.

b. The committee has also been tasked to consider the feasibility of enacting separate statutory regimes for domestic and international arbitration, as well as the enforcement

[8] Renusagar Power Co. v. Gen. Elec. Co., A.I.R. 1994 S.C. 860 (India).
[9]Penn Racquet Sports v Mayor International Ltd. (2011) 122 D.R.J 117 (India).
[10] Singapore Int'l Arbitration Ctr., *Where the World Arbitrates: SIAC Annual Report 2022* (2022), available at https://siac.org.sg/annual-report-2022

of Foreign Awards under Part II.

Recently, the CJI, Hon'ble DY Chandrachud gave a speech on "International Arbitration and Rule of Law", highlighting India's progress in International Arbitration.

One of the major expansions in this aspect is the establishment of a registered office of the Permanent Court of Arbitration in Delhi, the capital of India, right opposite to the supreme court building. This growth will be extremely instrumental in recognising India as an arbitration friendly jurisdiction and would allow parties, especially south Asian parties to take wholesome advantage of this development. PCA and The Ministry of External Affairs, in collaboration have formulated a program which aims at training and capacity building young lawyers to become arbitrators and prepare the upcoming generation to be equipped with the skills needed for international arbitration.

CJI also recognised the need for India to take lead in international arbitration, and foster a culture of a well-established international arbitration center, by providing a level-playing field for dispute resolution beyond the domestic courts, and also recognised the importance of establishing a robust institutional framework, "India has the capability to champion the growth of arbitration in the global south by promoting a fair, efficient and reliable means of resolving commercial disputes"

Additionally, some key judgements in the recent year have made big strides in embracing the new role of India as a hub for international arbitration. To highlight one, a seven-judge constitution bench of the Supreme Court in the case of Cox v Kings settled a major question about the enforceability of the arbitration clause in an unstamped agreement. The necessity for a validly stamped agreement was laid down and declared that this issue, even though not fatal, should be dealt with promptly by the arbitral tribunal.

To sum up, India has faced its challenges regarding the recognition and enforcement of the foreign awards under NYC. But, quite a few landmark decisions over the past years have paved the way for India to become an arbitration hub.