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# CHALLENGES IN ENFORCING FOREIGN ARBITRATION AWARD IN INDIA

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## INTRODUCTION:

Effective enforcement of foreign arbitration award in India is a prime difficulty that have been found in recent days. The developments in the transforming the arbitration method to deal with the domestic problems to adopt the procedures in the foreign arbitration in India is taking a significant importance these days. The pronouncements of the courts in India in situations where, the result was very effective in the establishment of institutional arbitration in India. The development of institutional arbitration led to rise in approaches to solve the problem in the international commercial transactions. There are many factors which are affecting the global transaction and that are looked from the lens of arbitration as the main tool to solve the problems. One of the main reasons is that evolution in international investments, trades and transactions. The approach towards looking into a transaction by different countries are different. Through, there is rise of bilateral agreements for conducting the business as well as in solving the conflict arises out of business. It has not resulted to that extent because conflicts got high dimensional in numbers and increase in the depth of the problem, and the effect of the problem. The problem used to remain even after the arbitration award has been delivered. This is solved through arbitration based on agreement between the parties.

But when the arbitration award has been delivered, the procedure after that to make its enforcement is very difficult. Because, it can be questioned in the court of law where the person lost the award wants it to be decided by the court. In India, it is very common that the award was questioned on the basis of public policy. This article also includes how Indian courts deal with the enforcement of arbitration award which is determined by the different way of the foreign arbitration. But the whole process will be depending up on the circumstances of the award that have been passed. It is

finally, how the courts look into matter on both sides to defend a foreign award and the safeguards for anti-injunction.

**Keywords:** International Arbitration, development, foreign award, challenges in enforcement.

## **DEVELOPMENT OF INTERNATIONAL ARBITRATION: -**

In the international scenario, Jay Treaty of 1794 is recognized as the first arbitration procedure which was intended to solve the outstanding issues between the America and Great Brittan in the War of Independence. But, due to the drastic growth after the impact of globalization and industrialization, the boundary of business became very vast. Due to this, there arose many conflicts which are also resulted in two world wars. Arbitration got boosted after the second world war where many treaties agreements have been signed by the member nations. It was strongly opined that, if each and every matter referred to court, it will lead to increase in business cost, which also lead to loss also. Hence, there is need to adopt a new method to solve the problem at the same time it should bind the parties as powerful as the court. This led to new way of solving dispute, where parties to have some power to decide the way and the procedures, that is arbitration.

The favorable trend towards arbitration has been reflected also in legislative enactments, international treaties, and other measures by which arbitration has gradually acquired a more solid legal standing.<sup>1</sup> On that great stand, further amendments have been made as per the problems arose due to the irregularities in the legal provision at international level. It might be UNCITRAL Model Law or any other treaties based on it. The institutional arbitration system also boosted the arbitration mechanism around the globe. It also delt with the creation of the arbitration centers to decide the distribution of cases to the institutions, which the arbitration process became simplified process. It was made compulsory in some treaties and agreements that parties should move to the arbitration first, without that they cannot enter into court for seeking claims.

As Indian investment policies have been changing in increase phase towards foreign investments, there are many problems that have been accrued due to clash in the agreements and policies where

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<sup>1</sup> Paolo Contini, International commercial arbitration and enforcement of foreign arbitration awards, Oxford University Press, 1959, p.3.

the fast and simple remedy to solve them is arbitration. “The emergence of countries such as India, China, and Brazil as drivers of global growth is critically connected to the evolution of the contested investment arbitration regime. These nations may show complete socialization as they integrate into the regime, but they may also use their newfound status to pursue alternative regulatory paths.”<sup>2</sup> This made Indian scenario of international arbitration to grow in rapid way.

### **ENFORCEMENT OF FOREIGN ARBITRATION AWARD: -**

Arbitration is tool to decide the conflict raised by the parties in both domestic matters as well as international matters. Section 44 of the Arbitration and Conciliation Act, 1996 a foreign award is defined as, “an arbitral award on differences that are related to the matters which are deemed commercial under the Indian law.”<sup>3</sup> There must be two elements present in a foreign arbitration award they are, firstly, it should resolve the inconsistency or the deviation in a relationship where it found commercial matter under Indian law. Secondly, there should be involvement of another country in the matter to be decided or in the decision to be made by them. In the case, **Serajuddin And Company V. Michel Golodetz and Others**<sup>4</sup>, the Calcutta High Court defined the essentials of the arbitration award as follows: a) the arbitration proceedings should be held in foreign country, b) foreign arbitrator should conduct the process of arbitration, c) arbitral proceedings should involve the foreign law or the institutional rules and regulations (in case of it is institutional arbitration), d) the parties involved in matter should be a foreigner. These factors are also mentioned in the New York and Geneva Conventions. It is necessary that, India should follow the universal rules recognized by the international bodies as the member nation of the United Nation Organization.

### **Procedures in Enforcement: -**

There is difference between a domestic arbitration award and to the foreign arbitration award. Foreign award is the result of the different laws, minds, perceptions and the culture one has adopted as per the situation that have been found in their country. It is not proper to just adopt the arbitration

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<sup>2</sup> Mihaela Papa and Aditya Sarkar, Rising India in Investment Arbitration: Shifts in the Legal Field and Regime Participation, p.4

<sup>4</sup> Serajuddin And Company V. Michel Golodetz and Others.

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

award decided by the foreign parties. If any default found in process of arbitration or the award to be adopted is against law of the domestic country should be get a chance to question the award on the grounds of legality in that country. It should be properly assessed before enforcement and allowed to enforce it. But, in each and every case it is not be necessary to just avoid the bearing the award, it will be questioned in the court of law. There are procedures, which describes the initiation of foreign award in India. After receiving the arbitration award from the foreign country, India maintains some procedure of checks and balances. It is derived from the New York Convention that the award that have been passed by the member nation who signed to that convention only can be applied. Hence, the next question that arises is that weather there is any formula or the procedure to adopt the foreign award which is answered under Arbitration and Conciliation regime of India.

1. Section 47 of the Arbitration and Conciliation Act 1996<sup>4</sup> says that the parties should apply for the enforcement of that award received by the foreign country under this section with the High Court of its jurisdiction. It is also mentioned that there are some documents that have to be submitted to the court with the application, they are a) original copy or certified copy of the award obtained from foreign country, b) the arbitration agreement which have been signed during entering into contract or the separate arbitration agreement, c) evidence that supporting the award that is a foreign award, d) the award should be in English, if in any case it is found in other language should be translated to English and the party should provide the certified copy of the translated copy.
2. Under section 48 of the Arbitration and Conciliation Act 1996<sup>5</sup> says that power of the court to cancel the foreign award which is applied under the above section. But when the award is to be canceled, it is the duty of the court to check the following grounds which are mentioned in this section:
  - a) If the party against whom the order is made is competent to enter into contract under Indian law or the contract that have been entered into by the parties is invalid under the

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<sup>4</sup> Arbitration and Conciliation Act 1996.

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law.

- b) The party against whom the award has been passed if did not receive any proper notice with regards to appointment of the arbitrator or starting of the arbitration proceedings.
  - c) If the award granted contains the contention that is beyond the arbitration ambit.
  - d) The award which contains the matter or the claim which do not fall under the jurisdiction of the arbitration but that is out of the scope of the arbitration that have been described as per the agreement.
  - e) If the arbitrary proceedings or the appointment of the arbitrators were not according to the agreement that have been signed by the parties.
  - f) If the award cannot be applicable as per the law of the country that where the arbitration award has to be implemented.
3. Under section 49 of the Arbitration and Conciliation Act 1996,<sup>6</sup> which says that the award which has been processed through the above section can be enforced or it can be rejected on the grounds mentioned under section 48 of the Act.

These are the procedures, powers and function of the court in applying the arbitration award passed by the foreign arbitration. From the procedure it is clear that the Indian courts have the power to pass an order enforcing the implementation of the award. It has the authority to reject also, which is the main challenge that has been found in enforcement of arbitration award. Judicial intervention is to correct the award, but at the same time it is used as the tool to stop the enforcement which is major obstacle that is discussed below.

### **CHALLENGES IN ENFORCEMENT OF FOREIGN ARBITRATION AWARD:**

Even after the presence of the New York Convention of 1958 which is mainly signed by 145 signatory countries. The countries who were signed will be binding them in all the procedures of

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<sup>6</sup> Arbitration and Conciliation Act 1996.

the arbitration and at the end it also governs the enforceability of the award that has been given by the foreign countries. The only thing which is found as obstacle is when the arbitration is not according to the legal scope of the domestic will be questioned in the court of the law of that country. Likewise, it was also questioned before the courts in India. In international commercial arbitration, that the parties have the autonomy to decide the rules of the procedure. But at the same time, they are bound by the rules of the domestic countries in the enforcement part, the main reason is to create checks and balances so that the award is not contravening the law of the domestic countries.

The statistical data also says that there are many grounds that have been provided to make the restriction on enforceability. The enforcement statistics for arbitral awards in the High Court and Supreme Court for the period of 1996 to 2003 reveal that 29.41 percent of challenges on the ground of 'jurisdiction'; 17.64 percent on the ground of 'public policy'; 17.64 percent on 'technical grounds petition to be made under Section 48 and not Section 34.<sup>7</sup> It also sometimes, the court has intervened in the process of enforcement which made the process that has been disbelieved by the people. Excessive judicial interference resulting in the admission of a large number of cases that should never be entertained in the first place is yet another evil that hampers the settlement of commercial disputes in terms of retarding the growth and development of the economy.<sup>9</sup> But it is the duty of the court that has to maintain the public policy and to determine the legality of the award passed by the foreign arbitrators while the same is binding on the parties, who are citizens of that country.

The award has been questioned under public policy, where public policy includes the fundamental principles of law and principles of justice, the followings of the society, and instances that directly or indirectly rule against the local laws of that country. First, under the Federal Arbitration Act an award may be vacated for violating public policy although no such reference is made in section 10 of the Act.<sup>8</sup> This says that the American judiciary also provides the exemption under the public policy scheme. Under the 1979 Act, the English courts, specifically, the High Court, no longer

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<sup>7</sup> Sumeet Kachwaha, Enforcement of Arbitration Awards in India, 4 ASIAN INT. ARB. J. 81, 5 (2008).. <sup>9</sup> Divya Suwasini & Shreya Bose, Arbitration in India not for the Faint-hearted: Enforcing foreign arbitral award, p.9.

<sup>8</sup> Daniel M. Kolkey, Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations, The International Lawyer, vol.22 p.4

have the jurisdiction to set aside or remit an award on the basis of "errors of fact or law on the face of the award."<sup>9</sup> Which shows that every country has its own way of applying the arbitral award passed by the foreign countries. This is because to make the applicability of the award without any contravention to the domestic rules or laws of that land.

In the same way, any award that have been passed in violation of any law of that land will be considered as award that violated the public policy of that state. In the case **Fuerst Day Lawson Ltd v. Jindal Exports Ltd**<sup>10</sup> the court held that, it is the court that have to look into the matter of the enforceability of that foreign award and its criteria. Then the court should initiate the procedure to the enforceability of that award.

In the case **Renu Sagar Power Company Ltd. v. General**<sup>11 12</sup> the supreme court added that the contents that are to be considered as the prohibition, if the arbitration award does not contains the following: -

1. Fundamental policy of India.
2. Interest of India.
3. Justice and morality.

Where these were considered in provision of amended act of the arbitration by the law commission of India.

In another case, **White Industries Australia Ltd v. Coal India Ltd**<sup>14</sup>, the court is of the opinion that, the arbitration award can be questioned under the section 34 of the act even though it is passed as per the rules of the International Chamber of Commerce. The main thing which is considered by the court in this case is that the agreement that contains that any award by the foreign arbitration could be questioned in India except the arbitration act 1940. Hence, this mainly acted as the ratio

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<sup>9</sup> Daniel M. Kolkey, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, *The International Lawyer*, vol.22 p.6.

<sup>10</sup> *Fuerst Day Lawson Ltd v. Jindal Exports Ltd*,

<sup>11</sup> *Renu Sagar Power Company Ltd. v. General, General Electric Company*, (1994), Supp. 1 SCC 644.

<sup>12</sup> vol. 4 SCC 105.

decident to decide this case. In another case, which is considered to be very much important in Indian scenario of defining the process of foreign arbitration award is that **Venture Global Engineering v. Satyam Computer Services**<sup>13</sup> where the court held that, all the provision and legal regime of part one of the arbitration act will apply on the parties who apply for the enforcement of the award. The award may include foreign award or it may be domestic award. Furter, it also says that if any arbitration award has been decided in India or it may be outside India can be questioned under the grounds mentioned under section 34 of Arbitration and Conciliation Act 1996.<sup>14</sup> But it is left to party autonomy that, if any arbitration conducting outside India can be set aside any of provision with the written consent in the arbitration agreement. Then only any provisional compulsion will not be there to the arbitration award. But this same cannot be considered in domestic arbitration where they can get an exemption to the provision of part 1.

There is a need for a pro arbitration regime that to be taken into consideration to make it possible and fast changes that effects the enforcement of arbitration award. But, from the starting days in India, we are upholding many doctrines and principles to minimize the judicial intervention and also with respect to party autonomy. But in India, there is an option to the parties to apply for judicial intervention in all stages of the arbitration. It will starts with the appointment of arbitrators to check weather the arbitration award is according to the domestic law without any intervention.

In the Law commission report (246<sup>th</sup>) 2014 it was suggested that the application for setting aside the award only applicable if it is strongly against “Fundamental policy of Indian Laws.” On the other hand the courts should be trained not to entertain the application of setting aside the foreign award. The supreme court in **Renusagar Power Company Limited**<sup>15</sup> case where the factual matrix states that Renusagar Power Company Ltd has signed an agreement with General Electric Company which is incorporated in New York. The agreement is to supply electronic equipment and power which also include services to construct a thermal power plant. The contract was contained a specific timeline to supply the materials in 15 months and to construct the power plant within 30 months. The agreement also contained the arbitration clause to solve the matters that have been raised through the transactions mentioned in the agreement. The Renusagar company

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<sup>13</sup> Venture Global Engineering v. Satyam Computer Services, 2008 (1) scale 214.

<sup>14</sup> Arbitration act 1996.

<sup>15</sup> Renusagar Power Co. Ltd v. General Electric Co, 1994 SCC Supl. (1) 644.



contended that the matter will not come under the arbitration jurisdiction so it cannot be enforced as the award was been disposed against the Renusagr in the arbitration process. Hence, the same award was been questioned under public policy ground to stop the enforcement of that award. But, the Supreme Court gave a strong opinion on the application of public policy during the contravention of the Indian law and its fundamental structure.

In another case, **Daiichi Sankyo Company Limited v. Malvinder Mohan Singh and Ors**<sup>16</sup> where it was happened that, the award that have been passed to sell the shares of the company Ranbaxy Laboratories Limited to the award creditor by the award debtor. But, here the award debtor is minor who owned the shares by misrepresentation. By knowing the same issue the order has been passed by the Singapore Arbitration Institution. The same was challenged in the court where the award debtor has argued on the ground that the award cannot be enforced in India the reason being 1) The quantity of the fine that have been ordered to pay, 2) The tribunal's limitation on the decision 3) The thing mainly to consider is that respondents who were minors which is contrary to the law.

The court observed that, the quantum of punishment would have various factors considered by the tribunal for which court will not look into it. But the court sticked to the final objection which says that the order is passed against the minor which is not valid under the Indian law. So the court concluded that the award is not enforceable to that extent.

But when some other grounds were questioned in the judiciary where the judiciary strongly said that, if any contravention which made on the basic structure then only it can be discussed. On the other hand, if it is not so the court will intervein the enforceability of award so that the parties themselves have agreement to conduct arbitration proceedings which was binding them and should bind them.

When the judiciary finds that mere filing to judiciary to set a side arbitration award just because that they want to waste the time and that too without a proper proof cannot be entertained. This was pronounced in **Emmanuel Cashew Industries V. CHI Commodities handlers Inc.**<sup>19</sup>

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<sup>16</sup> Daiichi Sankyo Company Limited v. Malvinder Mohan Singh and Ors 2018. <sup>19</sup> Emmanuel Cashew Industries V. CHI Commodities handlers Inc.

**CONCLUSION:**

Even though after the parties have agreed to resolve the matter through arbitration process, at the end when they got chance to question the award where they feel it is not correct or not according to their wish. This create the confusion between the society to weather arbitration has a value in solving the problem and that will bind the people. The only thing that makes them to believe in arbitration is that proper procedures to be introduced to avoid unnecessary complications that rises in enforcement of award which is given by the foreign arbitration tribunal. On the other hand, it is very necessary to make the proper implementation of the foreign award according to law of that particular country where it is to be executed. But as mentioned in this paper, it can be questioned under the public policy of that country if contrary. The suggestion is that the arbitration tribunal, if tried to know about that law of the land where the award is to adopted by the parties. The tribunal if passes the order as non-contrary to the domestic principles, would be better way of dealing the challenges that will rise in the process of enforcement of arbitration award. Where it found difficult to know about the laws of various country, there can be established some authority to govern the foreign award enforcement procedure by making the applicable changes that have to be done to award or to assist the tribunal on the basis of the domestic laws of that country. This process should make the judiciary free from checking the award's legality in that country. Hence, the whole arbitration procedure can be done in a smooth way, which also increase the belief of the people on the process of arbitration.