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FOREWORD

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CHALLENGES IN ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDIA

BY SRISHTI SAHU¹

ABSTRACT

The litigious spirit is more often found with ignorance than with knowledge of law. ~ Cicero.

The proliferation of international commercial disputes, usually involving several parties, is an inevitable by-product of the global economy. Litigation ceases to be an option in a country like India where delivering speedy justice is but a far-flung dream due to excessive delays and backlogs that are characteristic of the Indian Judiciary. Arbitration, an outcome of discontentment with the traditional rigid and adversarial court system, has emerged as a favourite choice of dispute resolution mechanism especially in case of cross border disputes. The dramatic growth of international commercial arbitration in recent years in the Asia-Pacific region has been extraordinary. This reflects the rapid growth of international trade and commerce in this region as well as an increased willingness of commercial parties to resort to international arbitration as a dispute resolution mechanism. Arbitration as a method of Alternative Dispute Resolution (hereinafter ADR) is not free from loopholes. Of late, this method of ADR has been a subject of criticism chiefly on account of complexity in enforcement of arbitral awards. The Paper discusses the scope of International Commercial Arbitration and meaning of Foreign Awards under the Arbitration Law in India . The Paper further discusses the various challenges and complexities in the enforcement of Foreign Arbitral Awards. The paper further gives suggestions to facilitate successful enforceability of foreign awards in India with the least amount of judicial intervention. The paper finally underscores the need to remove the hurdles in enforcing foreign awards in India by adopting suitable reforms both on statutory and judicial avenues and suggests some means by which these problems could be curtailed or minimised.

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BACKGROUND OF ARBITRATION LAW IN INDIA

A Primer Arbitration is a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a court of law that would have jurisdiction but for the agreement between the parties to exclude it. The decision of the arbitral tribunal is called an award.² Until 1996, the law governing arbitration in India was contained in mainly of three statutes: the Arbitration (Protocol and Convention) Act 1937, the Indian Arbitration Act 1940, and the Foreign Awards (Recognition and Enforcement) Act 1961. In order to modernize the outdated 1940 Act, the government enacted the Arbitration and Conciliation Act, 1996 (hereinafter the Act). The Act is a comprehensive piece of legislation designed on the lines of the UNCITRAL Model Law on International Commercial Arbitration³. It repealed all the three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act).⁴ Its key rationale was to encourage arbitration as a cost effective and quick mechanism for the settlement of commercial disputes.⁵ The 1940 Act covered only domestic arbitration and while it was perceived to be a good piece of legislation in its actual operation and implementation by all concerned, it proved to be ineffective and was widely felt to have become redundant.⁶ The present Act is unique in two respects. First, it applies both to international and domestic arbitrations unlike the UNCITRAL Model Law, which was designed to apply only to international commercial arbitrations.⁷ Secondly, it goes beyond the UNCITRAL Model Law in the area of minimizing judicial intervention.⁸

UNDERSTANDING FOREIGN AWARDS

A foreign award has been defined in Section 44 of the present Arbitration Act, 1996. It gives an understanding about the term of foreign awards as also the term Commercial in context of foreign award. Under this Section, the term ‘Foreign Award’ means an arbitral award made on or after the 11th day of October, 1960 on differences between persons arising out of lawful

² II HALSBURY’S LAWS OF ENGLAND 1201 (5th ed. 2008) (emphasis supplied).

³ Hereinafter UNCITRAL Model Law.

⁴ § 85, Arbitration and Conciliation Act, 1996 [hereinafter The 1996 Act].

⁵ Ashok Bhan, *Dispute Prevention and Dispute Resolution* (2005), available at <http://www.ficci.com/icanet/icanet/activity/annual-report.pdf> (last visited on 30 Jan 2016).

⁶ Statement of Objects and Reasons, The 1996 Act.

⁷ See UNCITRAL Model Law, art. 1.

⁸ S K Dholakia, *Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003*, 39 ICA’S ARB. QUAT. 3 (2005).

relationships, whether based on a Contract or otherwise, considered as commercial under the law in force in India. The first Act as to foreign awards was the Foreign Awards (Recognition & Enforcement) Act, 1961 and because the Arbitration Act, 1996 takes over the provisions of the Act, 1961, the Section provides that is necessary that foreign award was made on or after the 11th day of October, 1960.

To interpret the term ‘Foreign Award’, the Supreme Court in *N.T.P.C. v. Singer Co.*,⁹ observed that where in London an interim award was made which arose out of an arbitration agreement governed by the laws of India. It was held that such an arbitral award cannot be treated as a foreign award and it is purely a ‘Domestic Award’ because it was governed by the Indian laws both in respect of agreement and arbitration.

In 1994, just a year had passed since the Supreme Court ruling in aforesaid case, the Delhi High Court in *Gas Authority of India Ltd. v. Spie Capage S.A.*,¹⁰ examined in depth the historical developments which led to the New York Convention 1958 and Geneva Convention 1927 and their result implementation under the two enactments i.e., The Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961 which now repealed by the Arbitration Act, 1996.

POSITION OF ENFORCEMENT OF ARBITRAL AWARDS PRIOR TO 1996

The international commercial activities were in existence to the present era as well. Of course, its volume and participating units were limited. The advent of industrial revolution technical and mechanical utilization and information technology explosion have made the world very small in its reach and transactions have grown enormously between the different nations. To settle these international commercial disputes speedy and satisfactorily, as per international norms, in India there were two separate Acts, namely: a) The Arbitration (Protocol & Convention) Act, 1937: It was enacted as a result of Geneva Protocol (1923) & Geneva Convention, 1927 (the GC, 1927) under the auspices of League of Nations. b) The Foreign Awards (Recognition & Enforcement) Act, 1961: It was enacted as a result of the NYC (1958), under the auspices of United Nations Organization. The Part II of the present Arbitration Act, 1996 contains in Chapter I the primary provisions of the New York Convention 1958 which deals and covers both arbitral agreement and awards, having foreign texture and in Chapter II, likewise, the provisions of the Geneva Convention, 1927 are contained. Thus part II of the

⁹ *N.T.P.C. v. Singer Co.*, AIR 1993 SC 998.

¹⁰ *Gas Authority of India Ltd. v. Spie Capage S.A.*, AIR 1994 Del 75.

present Arbitration Act, 1996, regulates the awards made under the New York Convention 1958 in Chapter I or the Geneva Convention 1927 in Chapter II for its enforcement.

SCOPE OF INTERNATIONAL COMMERCIAL ARBITRATION

The meaning and scope of the term International Commercial Arbitration assumes great importance in the context of the discussion on enforcement of foreign arbitral awards. This section analyses the term in light of contemporary judicial interpretation. “International commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether based on contract or otherwise, considered as commercial under the law which is in force in India and where at least one of the parties is— an individual who is a national of, or habitually resident in, any country other than India; or a body corporate which is incorporated in any country other than India; or a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or the Government of a foreign country.¹¹

In the case of *R. M. Investment Trading Co. Pvt. Ltd. v. Boeing Co*¹² the term “commercial relationship” came under consideration. The Supreme Court of India observed: While construing the expression ‘commercial’ in Section 2 of the Act it has to be borne in mind that the Act is calculated and designed to sub serve the cause of facilitating international trade and promotion thereof by providing speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should accept, consistent with its factual and grammatical sense, a liberal construction. The Court further emphasized upon the activity that forms the structure of commercial relationships by noting that trade and commerce is not mere traffic in goods, but with modern dimensions coming into play, transportation, banking, insurance, stock exchange, postal and telegraphic services, energy supply and communication of information, etc., all form a part of commercial behaviour and transactions.

GROUND FOR NON- ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The Arbitration Act, 1996 provides for certain grounds for refusing enforcement of foreign arbitral awards. In this respect, Indian Law generally follows the NYC (1958). Nevertheless, there are some significant differences that are discussed in the following Sections. The main difference is that while, under the Convention these grounds may, but not must, result in non-

¹¹ § 2(1) (f), The 1996 Act.

¹² *R. M. Investment Trading Co. Pvt. Ltd. v. Boeing Co.*, AIR 1994 SC 11 36, at ¶ 12.

enforcement of a foreign award, under Indian law, they shall have such a legal impact. In other words, if there exists such a ground, the Convention provides judges with the discretion to or not to enforce the award, but Indian Law clearly prohibits them from enforcing such an arbitral award.

The Section 48 of the Arbitration Act, 1996 had an occasion to elaborate and lay down proof grounds for setting aside of award which are available in foreign awards. Briefly stated, these grounds are; -

- a) If the arbitral agreement is not valid.
- b) Due process of law has been violated.
- c) Arbitrator has exceeded his authority.
- d) Irregularity in the composition of Arbitral Tribunal or arbitral proceedings.
- e) Award being set aside or suspended in the country in which, or under the law which, that award was made.
- f) Non- arbitrability of dispute.
- g) Award being contrary to public policy.

‘COURT INTERVENTION’: A HURDLE IN ENFORCEMENT OF ARBITRAL AWARDS

It is noted that one of the greatest advantages of international commercial arbitration is its cross-border enforceability. In other words, an award rendered in one country can be taken, with relative ease, to another country and be enforced. The principal source of this ease of enforcement is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which as on date has 145 signatory states, following the accession of Fiji to the treaty. The New York Convention provides for the recognition of all foreign arbitral awards provided they meet certain basic minimum standards (such as the award being in writing, and not contrary to public policy).¹³ This Convention provides for the validity of the arbitration agreement, recognition of their jurisdictional impact, and presumptive enforceability of arbitration law. Furthermore, it emphasizes the importance of integrity of national legal order by allowing the courts of a requested state to deny enforcement of an award on the basis of ‘in-arbitrability’ defense and public policy exception. The content of both the grounds is to be defined under the respective national laws.¹⁴ However, it has been witnessed that the

¹³ Mark Beeley, *Arbitration in the Dubai International Financial Centre: A Promising Law, But will it Travel Well?* 12 INT. ARB. L. R. 1 (2009).

¹⁴ Generally A VAN DEN BERG, THE NEW YORK CONVENTION OF 1958 (1982).

enforcement mechanism in this method of alternate dispute resolution is plagued by what is known as ‘court intervention’.

In India, first, such court intervention is facilitated under Part I of the Arbitration and Conciliation Act, 1996 which applies to arbitration conducted in India and the awards thereunder; whereas Part II provides for enforcement of foreign awards and has further been sub-divided into two distinct chapters. Chapter one deals with the Awards as regulated by the New York Convention; defined as per Section 44 of the Act.¹⁵ Chapter two deals with Awards as regulated by the Geneva Convention; section 53 of the Act covers it.¹⁶ The arbitration conducted in India and the enforceability of such awards (whether domestic or international) fall in the category of the Part I whereas the enforceability of foreign awards in India, based on the guidelines laid down in the New York Convention or the Geneva Convention is dealt with in Part II of the Act, 1996. Secondly, the challenges posed on the grounds that the award in question is in conflict with ‘public policy’, as will be demonstrated in later parts of this note, is increasingly becoming an avenue for judicial intervention in arbitral process. 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’.¹⁷ Thus, the present status of enforcement of foreign arbitral awards may be safely attributed to excessive court intervention.

¹⁵ § 44 of the Act provides that: “....unless the context otherwise requires, “foreign award” means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—(a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and (b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which they said Convention applies...”

¹⁶ § 53 of the Act states that: “... “foreign award” means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,—(a) In pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and (b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and (c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which they said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made...”

¹⁷ Sumeet Kachwaha, Enforcement of Arbitration Awards in India, 4 ASIAN INT. ARB. J. 81, 5 (2008).

It is submitted that the distinction between the jurisdiction for enforceability of foreign awards and the jurisdiction for challenging a Foreign Award is a blurred line. With respect to enforcement of foreign awards, Article 3 of the New York Convention states that Foreign Awards are “binding as per the rules and the procedure of the territory where the award is relied upon.” Article 5, on the other hand, lays down the grounds under which the Recognition & Enforcement of an award may be challenged or refused. The Indian Act has identified the role of the Foreign Territory in the finality of the Challenging Jurisdiction in Section 48 clause 1 sub clause (e) of Part II of the Act - if the Judgment Debtor as per the Award shows that the Award is not final, the court of the enforcing jurisdiction may refuse the enforcement of the Award.

THE ‘PUBLIC POLICY’ CONUNDRUM

It is submitted that ‘Public Policy’ as a ground of challenge under Section 34 of the Act also poses hurdles for the enforcement of foreign arbitral awards in India. In 1824, public policy was described as an ‘unruly horse’ where in once you get astride it you’ll never know where it will carry you and that it is never argued at all, but when all other points fair ¹⁸ Public policy includes fundamental principles of law and justice, instances such as bribery and corruption. The phrase ‘the award is in conflict with the public policy of the state’ should not be interpreted as excluding circumstances or events relating to the manner in which it was arrived at.¹⁹ In 2002, the International Law Association’s Committee on International Commercial Arbitration ²⁰ conducted a conference on public policy and adopted the resolution that public policy refers to international public policy of the state and includes:

- (i) fundamental principles, pertaining to justice or morality that the State wishes to protect even when it is not directly concerned;
- (ii) rules designed to serve the indispensable political, social or economic interests of the State, these being known as “Lois de police” or “public policy rules”; and

¹⁸ Richardson v. Mulish, 1824 All E R 258 (per BURROUGH J.).

¹⁹ REPORT OF THE UNCITRAL COMMISSION, *commenting on public policy as understood in the New York Convention and Model Law*, UN Doc. A/40/17, at ¶¶ 297, 303, referred to in Interim Report, Part III, under “UNCITRAL Model Law”.

²⁰ International Law Association, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, REPORT OF THE COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION, adopted at New Delhi in 2002.

- (iii) the duty of the State to respect its duties towards other States or international organisations. One of the main objectives of the Arbitration and Conciliation Act of India, 1996, was the minimization of the supervisory role of the Courts.²¹

In this regard, the Act contemplates only three situations where the judiciary may intervene in an arbitral process: matters regarding the appointment of arbitrators²², deciding on whether the mandate of the arbitrator stands terminated owing to his incapacity and inability to perform his functions²³ and invalidating an award when it contravenes the provisions relating to its enforcement as stated in the Act.²⁴

CONSEQUENTIAL DRAWBACKS IN ENFORCEMENT OF FOREIGN AWARDS

The root cause of all the delays in enforcement/challenging the awards has been the ever-widening powers of the court to review the awards, be it domestic or international. Excessive judicial interference resulting in admission of large number of cases which should never be entertained in the first place is yet another evil that hampers the settlement of commercial disputes in turn retarding the growth and development of the economy. Indian courts have so grossly misinterpreted the Act to suit their whims and fancies that it is impossible to achieve results conducive to healthy business with Indian companies. The innumerable errors on the part of the courts to pass decisions in accordance with the Conventions is not only frustrating but also setting a negative trend, possibly discouraging parties from opting for arbitration as a means of dispute settlement in India.

CONCLUSION

The business and operating conditions in the present globalised economy underscore the advantage of arbitration as a process of dispute resolution, over litigation, especially in cross-border disputes. The 1996 Act was enacted to achieve quick and cost-effective dispute resolution. An examination of the working of this system in India reveals that arbitration as an institution is still evolving, and has not yet become effective to fulfill the ever changing needs of the world economy incidental to commercial growth. In theory, arbitration; whether international or national, has become the duplication of a Court process that even provides for

²¹GuerillaParikh v. Mahadeodas Maiya, AIR 1959 SC 781.

²² § 11, The 1996 Act.

²³ § 12, The 1996 Act.

²⁴ . § 34 and 36, The 1996 Act. See also Sumeet Kachwaha, The Indian Arbitration Law: Towards a New Jurisprudence, 10 INT. A.L.R. 13 (2003).

appeals. Further, the rulings in the Saw Pipes and Venture Global cases clearly make it unfruitful for any investor or individual seeking to arbitrate in India. Mr. Javed Gaya ²⁵ has stated that the Supreme Court's judgment in Saw Pipes would encourage further litigation by the aggrieved party, and in doing so diminish the benefits of arbitration as a mode of dispute resolution. The harsh reality is that courts are totally inept at dealing with the task of meeting the basic expectations of the litigating community. Mr. Kachwaha ²⁶ opines that these very courts cannot be leaned upon to salvage the perceived inadequacies of the arbitral system through their greater intervention. Rather, the courts must take the law forward based on trust and confidence in the arbitral system. In our opinion, these discrepancies highlight that 'law in action' and 'law in books' are not one and the same. Legal Realism is not that which exists only in Statutes and Acts but in the Judges' interpretations thus resulting in the politics of law. Thus, it has been suggested that a global commercial arbitration system would promote international trade and commerce by reducing the risk that potential commercial disputes would be determined by counter-parties' home courts²⁷ Notwithstanding the open questions that plague the model organization suggested, one must remember that rational men and women do not intend the inconvenience of having the possible disputes arising from their transactions potentially litigated before three (or more) very different echelons i.e. the arbitral body, the courts at the seat of arbitration and the courts at the place of enforcement. The above highlighted issues concerning the enforcement of foreign arbitral awards in India reinforces the premise that arbitration in India is not for the fainthearted. Therefore, it is imperative to remove the difficulties and lacunae in the Act coupled with efforts to establish an international organization so that arbitration as a method of ADR becomes a favoured and popular choice of international commercial dispute resolution. These steps will also go a long way in fulfilling the objectives of the Arbitration law in India.

²⁵ Javed Gaya, *Judicial Ambush of Arbitration in India*, 120 L. QUAT. R. 571 (2004).

²⁶ Sumeet Kachwaha, *The Indian Arbitration Law: Towards a New Jurisprudence*, 10 INT. A. L. R. 17 (2007).

²⁷ Holtzmann, *A Task for the 21st Century: Creating A New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, INTERNATIONALIZATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE, 111 (1995).

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