

Enforcement of Foreign Awards in India

Introduction

The ever-growing and rapid development of trade and commerce has witnessed a consistent and uninterrupted increase in cross-border transactions. As a result of this surge in cross border trade and transactions there has also been a correlative and corresponding rise in cross borders disputes. This growth in international cross-border disputes required the creation of an efficient and effective method for their resolution.

It was found that there was a broad consensus amongst industry leaders and jurist scholars that the answer to the conundrum posed by the increase in the number of disputes lay in international commercial arbitrations. The acceptance of international commercial arbitration was further strengthened as parties involved in cross-border disputes were usually unwilling to have matters resolved by the court systems of another disputing party.

However the setting up of a dispute resolution mechanism and passing of an award is only half the battle, the true success of international commercial arbitration as a method for dispute resolution can only be adjudged by the effective execution of the award in the territory where the subject matter of the dispute is located. If awards cannot be executed to put an end to ongoing disputes by securing the interests or assets of successful parties, the practical effect would be the failure of international commercial arbitration as a method for cross border disputes. Thus, enforcement of an award is as important a part of any international commercial arbitration as the arbitral proceedings themselves.

Enforcement of an Award in India

India is a signatory to the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 ("**Geneva Convention**") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**New York Convention**"). Broadly speaking if an award is received by a party from a country which is signatory to either of the abovementioned conventions and has been notified as a convention country by India, then in such case an award would be enforceable in India subject to it withstanding the tests laid down for enforcement in the Indian Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

Section 48 of the Arbitration Act lays down the circumstances under which a Court to which an application for execution of an award has been made, *may* refuse the enforcement of the award. It is also pertinent to state that the grounds mentioned in section 48 are exhaustive in nature.

The abovementioned circumstances to oppose execution of an award under Section 48 are as under:

- The parties to the agreement were under some incapacity and/or the agreement in question is not in accordance with the law to which the parties have subjected it, or under the law of the country where the award was made.
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
- Composition of the Arbitral Authority or Procedure was not in conformity with the agreement of the parties or the law of the land where the arbitration took place.
- Award is not binding on the parties or has been set aside by a competent authority where the award was made.
- The subject-matter of the difference is not capable of settlement by arbitration under the law of India
- The enforcement of the award would be contrary to the public policy of India

The language of section 48 of the Arbitration Act makes it clear that the enforcement of a foreign award “may” be refused instead of the words “shall” be refused. The use of this language clearly evidences the intention of the legislature to provide the Court with a power to overrule and disregard the defence put up by the contesting party even if they are successful in establishing the existence of one of the conditions laid down in section 48 of the Arbitration Act.

It is also necessary to clarify that the powers of the Court to refuse enforcement of an award under section 48 of the Arbitration Act, are not one of an appellate court, it is a universally accepted principle that the Court before which the enforcement is sought should not delve into the merits of the award or into questions of any mistake of facts or in law committed by the Arbitrator/ Arbitral Tribunal.

Once the Court before which the enforcement proceedings are filed is satisfied that a foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that domestic Court.

Appropriate Court for Enforcement: -

As per the clauses of the Arbitration Act a ‘court’ would mean the principal Civil Court having original jurisdiction to decide the question forming the subject matter of the arbitration if the same was the subject matter of a suit.

In light of the above it is apparent that an award holder can initiate execution proceedings before any court in India within whose jurisdiction the assets/ interests that are the subject matter of the dispute are located. To further reduce ensure the expeditious enforcement of foreign awards the legislature has formed various commercial courts under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 (“**Commercial Courts Act**”), that in most cases have the jurisdiction to hear such matters.

Conclusion:

The rapid growth and development witnessed in India since the opening up of the economy post the 1991 reforms has made India as a regional powerhouse and on the path to become a global commercial superpower. This growth in the commercial sector however have burdened and, in some cases, crippled the judiciary with a heavy backlog of cases and matters often taking decades to be resolved. It has long been a sore point with international investors that any disputes which arise in or require enforcement of awards against assets and interests located in India usually take a large amount of time and the same was not conducive to the establishment and growth of trade and commerce. However, changes have been made to make India a more investor friendly jurisdiction.

The pro-arbitration approach of the courts are evident from the recent spate of judgements propounding the limited role to be played by courts in the enforcement of foreign awards. The passing of the 2015 and 2019 amendments to the Arbitration Act along with the establishment of the commercial courts as mentioned earlier have been lauded as developments that have aligned India with the prevailing jurisprudence and best practices in the field of Arbitration globally.