

Unit-v

Enforcement and recognition of foreign awards

Arbitration is understood as a method of alternate dispute resolution across the world and recognized as the most effective method of solving commercial disputes, especially those of an international dimension. Arbitration in India is governed in accordance with the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). Part II of the Act deals with the foreign awards and applies to the parties, member to the New York Convention. The enforceability of a foreign award in the countries where the parties to an arbitration agreement do not have any presence has been in discussions and are a subject matter of multiple interpretations. **Section 44** of the Act defines "**foreign award**" as *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. The Section further provides that the above mentioned provisions should be in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and 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 the said Convention applies*

Recognition of foreign award

Such right in a third country can be enforced after the execution of the Arbitral Award in that particular country. Section 46 of the Act provides the criterion as to when such foreign award would be binding on the parties. According to the said Section, any foreign award which would be enforceable shall be treated as binding for all the purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or any other purpose in any legal proceedings in India. Therefore, an Award may be recognized without being enforced, but if it is enforced, then it is necessarily recognized.

Evidence

Section 47 of the Act provides the requirement as to the evidence, which are required for enforcement of the Arbitral Award. Section 47 of the Act reads as under:

1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court -

a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

b) the original agreement for arbitration or a duly certified thereof; and

c) Such evidence as may be necessary to prove that the award is a foreign award.

2) If the award or agreement to be produced under subsection (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation- In this Section and all the following Sections of this Chapter, " Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject- matter of the award if the same had been the subject- matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

According to Section 47 of the Act, any person applying for enforcing an Award in India shall produce before such court, the original award or a copy thereof (duly authenticated), Original Agreement for arbitration or a certified copy thereof, such evidence as may be required to prove that the award is a foreign award.

Further, the explanation to Section 47 of the Act, provides that the application is to be filed in the court where the subject matter of the award lies. The subject matter of an award can be of any nature which could be the part of the evidence as provided under Section 47 or any other relief which may arise during the course of Arbitration proceedings. For example, if the subject of an international arbitration is a licensing agreement between the parties, and the award provides certain other reliefs which are related to the intellectual property of either of the parties in some other country in which neither of the party has any actionable assets or claims lying, it may be necessary to enforce the foreign arbitral award in that third country. It can be said that, per se, the right/relief provided by a foreign arbitral award to a judgment debtor cannot be exploited in a third country until such foreign award is enforced in that particular country. Once such foreign award is enforced in such country, it would be the decree of such court and the rights conferred by such decree can be enforced.

The idea of enforcing the award in a country where there is no place of business of any of the parties, has been discussed and examined by various courts in the light of the extent of scope and jurisdiction of such courts .

Tata International Ltd. vs. Trisuns Chemical Industry Ltd. Bombay High Court has held that, in an arbitration the Court would consider the subject matter of the arbitration; in the enforcement of the award the Court would consider the subject matter of the award as the determining factors. This stands to reason and logic. The subject matter of the arbitration may be a certain contract, a certain property., etc. The territorial jurisdiction of the Court would be where the contract was entered into or where the some or all the properties of the respondent would be. Once the arbitration is concluded and has to be enforced, it is the subject matter of the award which would have to be seen. That would be whether the award is a money award (analogous to a money decree in litigation) or a declaration or other relief with regard to a contract or a property. The award would have to be filed for its enforcement in a Court which would be able to enforce that award. It would be futile to file it where a cause of action may have arisen, if the respondent would have no properties in that jurisdiction. Similarly, it would be of little use to file it where the respondent resided or carried on business. It would have to be filed where the respondent would have properties, movable or immovable, which could be attached and sold in execution of the award.

The decision of the Bombay High Court was followed in the matter of *Wireless Developers Inc Vs. India games Limited*^{(2012(3)MhLj449)}

geneva convention 1927 and New York convention of 1958 have come into force for recognition and enforcement of foreign awards

India has enacted no.of legislations to implement geneva convention 1927 and New York convention of 1958

1. arbitration protocol and convention act 1937 for enforcement of foreign awards to which geneva convention 1927 applied
2. foreign awards(recognition and enforcement) Act 1961, had been enacted pursuant to New York convention of 1958

india made two reservations while ratifying the convention that it would apply this convention only if its made in territory of another contracting state.

Second reservation was that India would apply convention only to differences arising out of legal relationships which are considered commercial under Indian law.

R.M. Investments & Trading Co. ... vs Boeing Co AIR 1136, 1994 SCC (4) 541

Held Consultancy services for promotion of sales of aircraft manufactured by foreign company are commercial services

Koch Navigation Inc. v. Hindustan Petroleum Corpn. Ltd.⁶ (SCC at p. 262; SCR at p. 75).] held the expression "commercial" should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today.

Procedure for enforcement of an Arbitration Award Obtained from a Foreign Country Against a Party in India?

Under Section 44 of the Indian Arbitration and Conciliation Act, 1996, a foreign arbitration a foreign award by definition means an award passed in such territory as the Central Government by notification may declare to be a territory to which the New York Convention applies.

Hence, even if a country is a signatory to the New York Convention, it does not ipso facto mean that an award passed in such country would be enforceable in India. There has to be further notification by the Central Government declaring that country to be a territory to which the New York Convention applies.

About 40 countries have been notified so far by the Indian government. The United States of America, United Kingdom, France, Germany, Japan and Singapore are among the countries notified by India.

Australia and Hong Kong are among the countries which have not yet been notified.

India is a party to the the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. It became a party to the 1958 Convention on 10th June, 1958 and ratified it on 13th July, 1961.

India is also a party to the Geneva Protocol on Arbitration Clauses of 1923, and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927.

Section 48 of the Indian Arbitration and Conciliation Act, 1996 lays down the conditions for enforcing a foreign arbitration award in India.

Grounds for refusal of enforcement are provided for under Section 48 are similar to the New York Convention.

If the court is satisfied that the foreign award is enforceable, the same shall be deemed to be a decree of the court. The Supreme Court has held that no separate application need be filed for execution of the award. A single application for enforcement of award would undergo a two-stage process. In the first stage, the enforceability of the award, having regard to the requirements of the Act (New York Convention grounds) would be determined. Once the court decides that the foreign award is enforceable, it shall proceed to take further steps for execution of the same.

Also read

New York Convention

Geneva convention 1927