Enforcing Foreign Diktat: Puncturing the Stereotype

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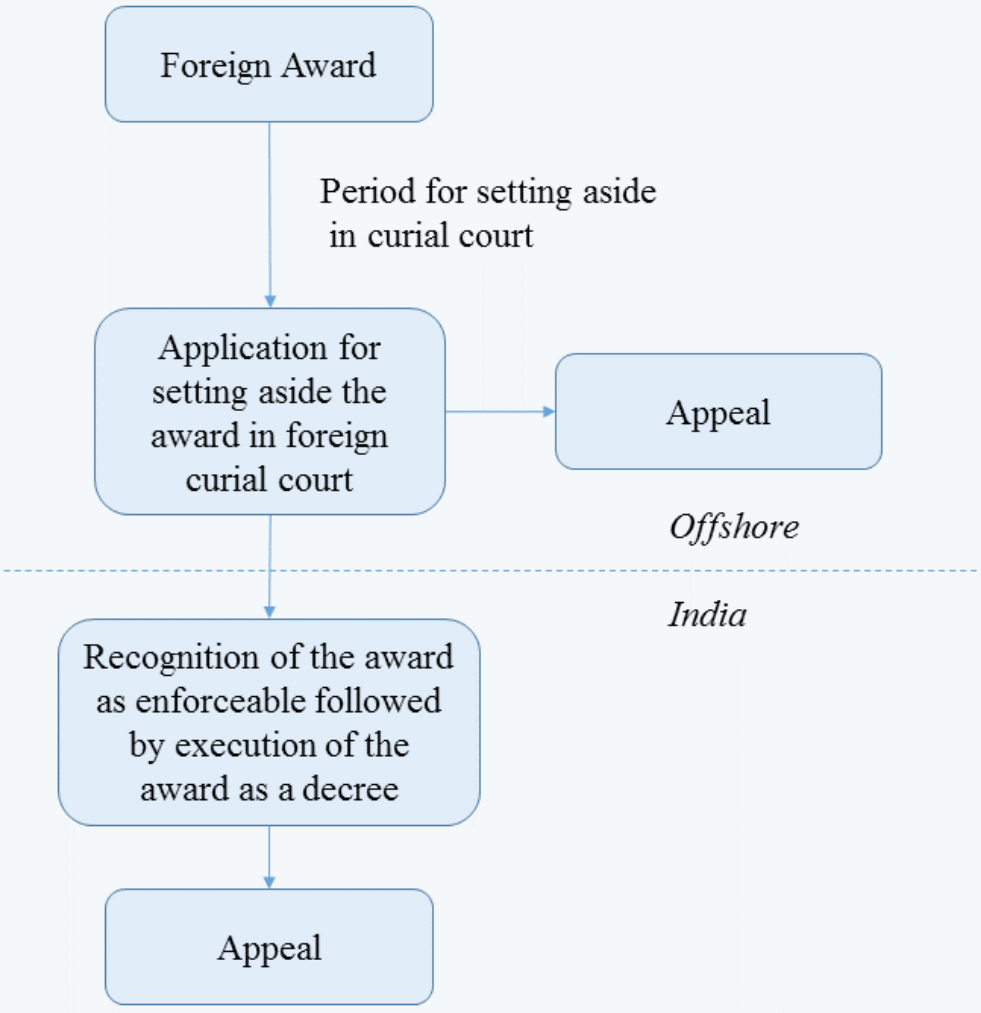
India has long been regarded as an unappealing centre for arbitration, be it as the seat of arbitration or as the place for final enforcement of the arbitral award. The Indian judiciary is often said to be over-interfering in matters of arbitration and enforcement. In the last decade, Shylock would have had a hard time enforcing his rights to his money and claiming a pound of Antonio's flesh. The Indian courts would not have shied away from reopening and rehashing proceedings which had already happened before the Duke of Venice, a twist in the tale that would have made Shakespeare rewrite the famous climax and made Portia's wit of little consequence. While this reputation may have been well-deserved in the past decade, the ground reality has since seen a galactic shift. India's legislature and judiciary have together taken upon themselves to ensure this course correction.

In this article, we bust the myth of India's recalcitrance in respect of the enforcement of foreign awards.

The various steps in enforcement of a foreign award are illustrated below:



A. The ever-shrinking scope of resisting enforcement of foreign awards in India

The legislature and judiciary have restricted the grounds for refusing the enforcement of a foreign award to only established grounds under Section 48 of the Arbitration and Conciliation Act 1996 (**Act**) and, in keeping with the views of arbitrally-progressive jurisdictions, have held that executing courts cannot review the award on merits.

Some (the authors included) would even argue that under the present regime, it is easier to enforce a foreign award in India than a domestic award.

i. Foreign-seated awards – no longer open to challenge in India

The myriad of challenges to enforcement of foreign awards in India had become a nightmare for parties seeking enforcement in India. The uncertainty associated with enforcement of foreign awards reached its peak in *Bhatia International*[1], which held that Indian courts had jurisdiction in international commercial arbitrations, regardless of the seat of the arbitration. The resulting jurisprudence saw Indian courts not only refusing enforcement, but even setting aside foreign awards.

The time was ripe for the proverbial hero to emerge and save foreign-seated arbitrations from the unwelcomed interventions by Indian Courts. In September 2012, a five-judge bench of the Honourable Supreme Court of India delivered its much celebrated decision in *BALCO*[2] which ousted the jurisdiction of Indian courts in a foreign-seated arbitration. Post *BALCO*, foreign awards cannot be challenged in India.[3]

ii. "Patent illegality" no longer a ground for resisting enforcement of foreign awards

The introduction of the test of "patent illegality" to the already infamous ground of "public policy" as interpreted in *ONGC v. Saw Pipes*[4], meant that enforcement of a foreign award in India could be challenged on the basis that the foreign award was contrary to the substantive law of India or in contravention of contractual terms. However, such determinations ought to be in the sole remit of the arbitrator.

After almost a decade, the scope of challenge was restricted in *Shri Lal Mahal Ltd. v. Progetto Grano SPA*[5] (***Shri Lal Mahal Ltd***), wherein "public policy" under Section 48(2)(b) of the Act was narrowly interpreted and recourse for challenging enforcement of foreign awards, under the ground of "patent illegality", was abolished.

The pro-arbitration shift in the judicial mindset could also be gleaned from the fact that in the Supreme Court judgment in *Shri Lal Mahal Ltd.,* the Honourable Justice R.M. Lodha overruled his earlier ruling in *Phulchand Exports Limited v. O.OO. Patriot*[6], where he had decided that a party could resist enforcement of a foreign award on grounds of "patent illegality").

As the statute reads today, even domestic awards would not be vitiated on grounds of being patently illegal in India-seated international commercial arbitrations.[7]

[1] *Bhatia International v. Bulk Trading S.A.* (2002) 4 SCC 105
[2] *BALCO v. Kaiser Aluminium* (2012) 9 SCC 552
[3] However, this judgment could only be applied prospectively to arbitral agreements executed after 6 September 2012 (i.e. the date of the judgment in *BALCO*).
[4] (2003) 5 SCC 705
[5] (2014) 2 SCC 433
[6] (2011) 10 SCC 300
[7] Arbitration and Conciliation Act 1996, section 23(2A)

iii. A foreign award need not be stamped under the Indian Stamp Act

A domestic award may be refused enforcement, if it had not been adequately stamped in accordance with the laws of India. However, resisting enforcement of a foreign award on the ground that it was not stamped, has been rejected as a frivolous ground for delaying and obstructing enforcement of foreign awards (following the case of *Naval Gent Maritime Ltd. v. Shivnath Rai Harnarain (I) Ltd*[8]).

iv. Intention to arbitrate was paramount

In a recent appeal, the Supreme Court upheld the finding of the Bombay High Court that in a foreign-seated arbitration (and resultant award), an arbitration agreement that was not signed would not be a ground for refusing enforcement of the award.[9] In construing arbitration agreements, the court preferred to give primacy to the intention and conduct of parties, over the mandate of the parties' signatures required in the agreement.

v. Burden of proof on the resisting party

Similarly, in a recent ruling[10], the Bombay High Court placed a "*higher burden on [the] party resisting enforcement of giving necessary proof which stands on higher pedestal than evidence*". In contrast, the party seeking enforcement of a foreign award was only expected to produce necessary evidence.

vi. No third party or the Government could object to enforcement of a foreign award

With the Supreme Court taking the lead in a consistent pro-enforcement approach of foreign awards, the High Courts have also been keeping up with the pace, with the High Court of Delhi being the harbinger in this respect. In *NTT Docomo Inc. v. TATA Sons Ltd*[11], the Delhi High Court allowed enforcement of a London Court of International Arbitration (**LCIA**) award, after rejecting the Reserve Bank of India's (**RBI**) objections that the underlying terms of settlement (wherein the Indian entity, Tata Sons, was required to pay $1.17 billion to NTT Docomo, a Japanese company) would be against the public policy of India. The Delhi High Court held that since RBI was not a party to the award, it could not maintain any challenge to the enforcement of the award.

vii. Reciprocating countries for enforcement of foreign awards outnumbered the ones for foreign judgments

48 countries have been notified by the Central Government of India as "reciprocating countries" under the New York Convention, while only 12 nations have been recognised as reciprocating countries under Section 44A of the Code of Civil Procedure for the execution of foreign court judgments. In respect of court judgments emanating from the remaining countries, the parties seeking execution would have to file a suit in India and place in evidence the underlying foreign judgment.

B. The legislative intent: Arbitration and Conciliation (Amendment) Act 2015

Consistent with the pro-enforcement approach adopted by Indian courts, the recent legislative changes to the Act have, through the Arbitration and Conciliation (Amendment) Act 2015, clarified the extent to which a foreign award could be said to be in conflict with the public policy of India. Subsequent to these amendments, only the following cases amount to violation of "public policy" under Section 48 of the Act:

i. the making of the award was induced or affected by fraud or corruption, or was in violation of section 75 or section 81 of the Act; or

ii. the award was in contravention with the fundamental policy of Indian law; or

[8] (2009) 163 DLT 391 (Del)
[9] *Govind Rubber v Louis Dreyfus Commodities Asia P. Ltd.* (2015) 13 SCC 477
[10] *Integrated Sales Services Ltd., Hong Kong v. Arun Dev s/o Govindvishnu Uppadhyaya & Ors.* (2017) 1 AIR Bom R 715
[11] 2017 SCC OnLine Del 8078

iii. the award was in conflict with the most basic notions of morality or justice.

The tests for these grounds have been summed up by the Supreme Court in *Associate Builders*.[12] It has been further clarified that "*the test as to whether there [was] a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.*" Such amendments were strong measures in response to the perception that India was liberal in its treatment of challenges to enforcement of arbitral awards on grounds of "public policy".

Furthermore, subsequent to these amendments, even after the making of the arbitral award, a successful party entitled to seek enforcement of the award, could, pending enforcement of the foreign award, apply to the court under section 9 of the Act.[13]

C. Protectors of the realm: commercial courts in India

The Indian legal system continued to face criticism on the time taken in disposal of cases. Thus, with the objective to accelerate disposal of high value commercial disputes, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act, 2015 (**Commercial Courts Act**) was enacted.[14]

Under this regime, specialised commercial courts were set up for speedy and effective dispute resolution of all commercial disputes. The Commercial Courts Act also provided that proceedings emanating from arbitrations (both foreign and domestic) would also be heard and disposed of by the Commercial Courts if they involve commercial disputes.[15] The statute had further amended the application of the existing Code of Civil Procedure 1908 to apply to commercial disputes, provided for a mechanism for speedy resolution, and a much needed requirement of appointing only judges who have had experience in dealing with commercial disputes.[16]

"Change is the end result of all true learning"

The liberalisation of policies and clarified norms of doing business in India had made investments more lucrative and attractive. However, to sustain India's growing global credibility, India needed to deal with the elephant in the room.

In 1982, His Lordship Justice D. Desai, of the Supreme Court of India had, in relation to the then existing arbitral laws, observed that "*the way in which the proceedings under the Act [were] conducted and without exception challenged in Courts, has made Lawyers laugh and legal philosophers weep*".[17] India has since come a long way. In the face of the legislative and judicial changes, and the evident shift in the judicial mindset, India's current reputation of being an enforcement unfriendly jurisdiction is largely undeserving and a remnant of the past decade– the *Bhatia* Raj. India is no longer emerging as a pro-arbitration and pro-enforcement jurisdiction. It has already arrived. Sit-up and take notice!

[12] *Associate Builders v. Delhi Development Authority* 2014 (4) ARBLR 307 (SC). http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/supreme-court-clarifies-the-narrow-scope-of-public-policy-for-challenge-of-indian-award.html?no_cache=1&cHash=c2934ad845e18a28db84af76bf51c391

[13] See Arbitration and Conciliation Act 1996, Section 2(2).

[14] Also see, http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/introduction-of-commercial-courts-end-of-endless-litigation.html?no_cache=1&cHash=2747250a08f728e125b01c97278f334f.

[15] Commercial Courts Act, section 10

[16] Commercial Courts Act, sections 4, 5

[17] *Guru Nanak Foundation v Rattan Singh* (1982) SCR (1) 842