

# Enforcement of Arbitral Awards

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## Statement of Practice

May 2016



The growth of international commerce has necessitated the creation of efficient methods of resolution of disputes and enforcement of the consequent awards that determine the rights and obligations of the parties. In some situations securing an award may only be half the battle won; this is especially true in the Indian context.

We have come across situations where the opposite parties decide not to participate in the arbitral process or abandon them midway. The enforcement of these awards where the party is *in absentio* is sometimes more complicated than one where the opposite party participated in the proceedings. In some situations objections have been raised against costs that were awarded by the tribunal. Therefore, parties should be cautious even at the stage of enforcement.

The procedure for enforcement and execution of arbitral awards in India is primarily governed by the Arbitration & Conciliation Act, 1996 (“**Act**”) as well as the Code of Civil Procedure, 1908.

Domestic and foreign award are enforced in the same manner as a decree of the Indian court. This is true even for consent settlement awards. However, there is a distinction in the process for enforcement of an award based on the seat of arbitration. While the enforcement and execution of an Indian seated arbitral award (between two India parties or Indian party and foreign party) would be governed by the provisions of Part I of the Act, enforcement of foreign seated awards would be governed by the provisions of Part II of the Act.<sup>1</sup>

A few steps that are crucial for ensuring successful enforcement of arbitral awards are:

- Making effective service on opposite party / judgment debtor is crucial to prevent objections at later stage;
- Taking necessary steps by way of attachment /notice / arrest / appointment of receiver or in another manner
- Remember that principles of natural justice apply to even execution proceedings.

## I. Enforcement of awards in India seated arbitrations

An award holder would have to wait for a period of 90 days after the receipt of the award prior to applying for enforcement and execution. During the intervening period<sup>2</sup>, the award may be challenged in accordance with Section 34 of the Act. After expiry of the aforesaid period, if a court finds the award to be enforceable, at the stage of execution, there can be no further challenges as to the validity of the arbitral award.

Prior to the recent Arbitration and Conciliation (Amendment) Act, 2015 (“**Amendment Act**”), an application for setting aside an award tantamounted to a stay on proceedings for execution of the award. However, by virtue of the Amendment Act a party challenging an award would have to move a separate application in order to seek a stay on the execution of an award.<sup>3</sup>

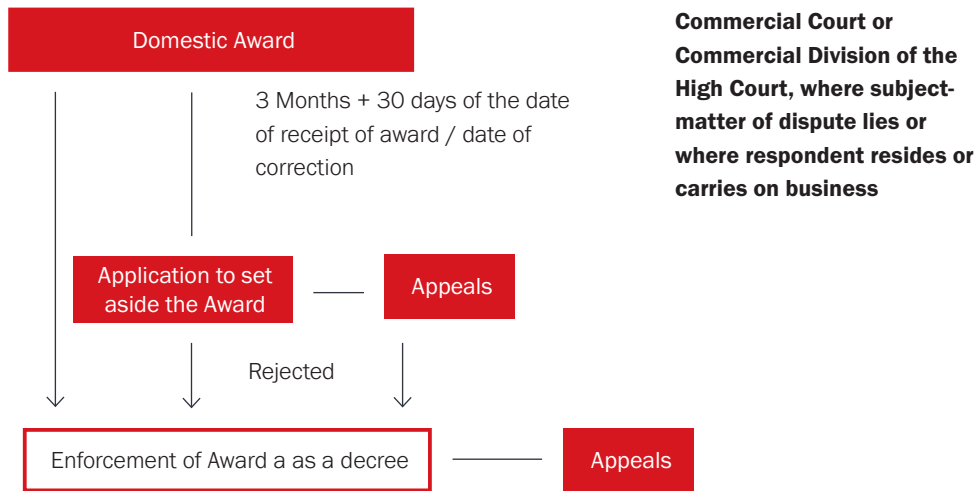
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1. Part II specifically deals with foreign awards which are in consonance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 or Convention on the Execution of Foreign Arbitral Awards, 1927.

2. A further period of 30 days may be granted by a court upon sufficient cause being shown for condonation of delay.

3. Please refer to our publication on the prospective applicability of the Amendment Act for an in-depth analysis of the challenges posed by the Amendment Act in relation to execution proceedings at [http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/prospective-applicability-of-arbitration-and-conciliation-amendment-act-2015.html?no\\_cache=1&cHash=6d32f4593c-c011ace451c59639f42aee](http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/prospective-applicability-of-arbitration-and-conciliation-amendment-act-2015.html?no_cache=1&cHash=6d32f4593c-c011ace451c59639f42aee)

## I a. Process for Challenge & enforcement



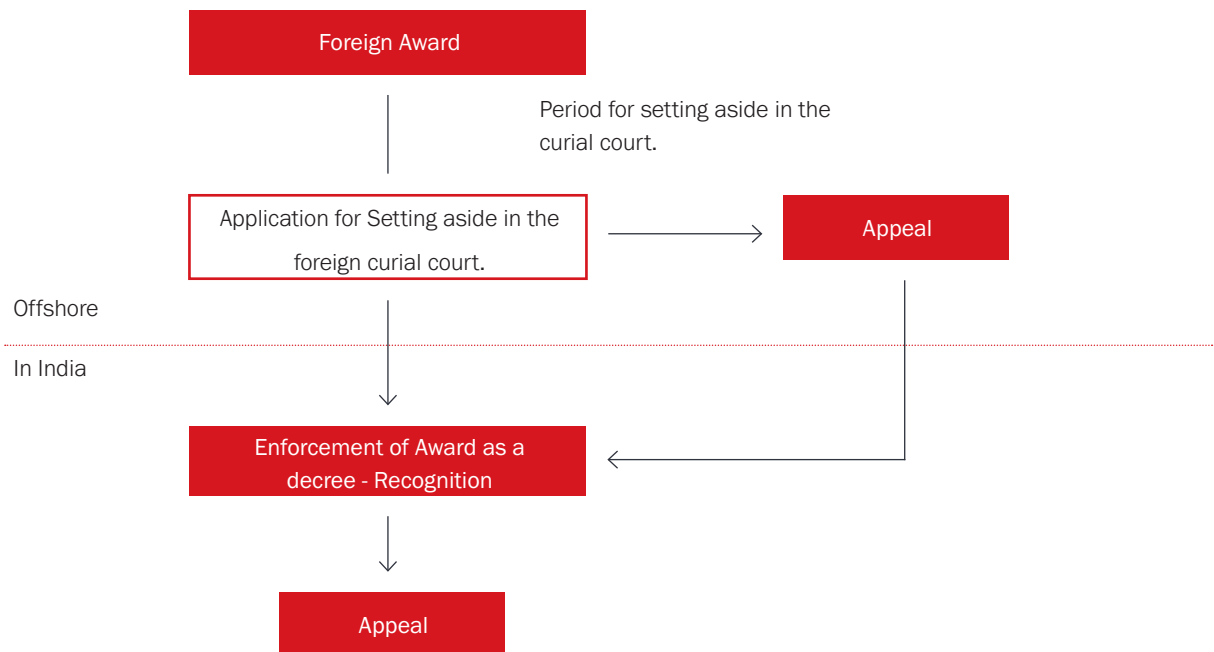
## II. Enforcement of Foreign awards

India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York, 1958) (“**New York Convention**”) as well the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (“**Geneva Convention**”). If a party receives a binding award from a country which is a signatory to the New York Convention or the Geneva Convention and the award is made in a territory which has been notified as a convention country by India, the award would then be enforceable in India. Out of the 196 countries in the world only 48 countries have been notified by the Central Government as reciprocating countries, with the most recent addition being Mauritius.<sup>4</sup>

The enforcement of a foreign award in India is a two-stage process which is initiated by filing an execution petition. Initially, a court would determine whether the award adhered to the requirements of the Act. Once an award is found to be enforceable it may be enforced like a decree of that court. However at this stage parties would have to be mindful of the various challenges that may arise such as frivolous objections taken by the opposite party, and requirements such as filing original/ authenticated copy of the award and the underlying agreement before the court.

4. Australia; Austria; Belgium; Botswana; Bulgaria; Central African Republic; Chile; China (including Hong Kong and Macau) Cuba; Czechoslovak Socialist Republic; Denmark; Ecuador; Federal Republic of Germany; Finland; France; German Democratic Republic; Ghana; Greece; Hungary; Italy; Japan; Kuwait; Mauritius; Malagasy Republic; Malaysia; Mexico; Morocco; Nigeria; Norway; Philippines; Poland; Republic of Korea; Romania; Russia; San Marino; Singapore; Spain; Sweden; Switzerland; Syrian Arab Republic; Thailand; The Arab Republic of Egypt; The Netherlands; Trinidad and Tobago; Tunisia; United Kingdom; United Republic of Tanzania and United States of America. India has entered into an agreement with the United Arab Emirates for Juridical and Judicial co-operation.

## II a. Process for Challenge & enforcement



## II b. Grounds of Challenge - Foreign Award

- When it is held unenforceable: Grounds of challenging enforcement
  - » Failure to give proper notice.
  - » Award is *ultra vires* the agreement or submission to arbitration.
  - » Award contains decisions on matters beyond the scope of submission to arbitration.
  - » Composition of the arbitral authority or the arbitral procedure is *ultra vires* agreement.
  - » Award is not in accordance with the law of the country where the arbitration took place.
  - » Award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.
  - » Subject matter of the dispute is not capable of settlement by arbitration under Indian law.
  - » Enforcement of the award would be contrary to the public policy of India.

## II c. How courts examine awards?

- The grounds of challenge enlisted are exhaustive and courts cannot expand the grounds for refusal of enforcement.
- Executing Court cannot re-examine the award apart from satisfying itself on a superficial basis about the award.
- Executing Court cannot examine the merits of the case.
- The exercise is not an “appeal” on merits against order of tribunal, but merely review.
- Accordingly - court has to first make enquiry as to enforceability of award and secondly hold that it is enforceable and thereafter enforce it.

## II d. Evidence for Enforcement of Foreign Award

- How is an award enforced:
  - » Original award or a duly authenticated copy in the manner required by the country where it is made.
  - » Original agreement or duly certified copy.
  - » Evidence necessary to prove the award is a foreign award.
- Where can it be enforced:
  - » Where the subject matter is money:- Commercial Division of any High Court in India where assets of the opposite party lie.
  - » Other subject matter:- Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit.

## Our Expertise

By way of strategy we seek measures of protection during the first hearing itself, in order to mitigate the risks caused by time dilatory tactics and frivolous challenges adopted by the opposite parties. These mostly include a stay order on alienation of the assets of the opposite parties. Where assets are not known, we routinely engage experts to trace and identify the assets since obtaining a restraint order against alienation of assets is possible only in a situation where such assets are identified. Obtaining the disclosure of assets and financial status of the opposite parties at the initial stages is another facet of our strategy, which reduces the risk of the opposite party alienating or disposing of its assets.

An illustrative order obtained in the initial hearings for enforcement of a domestic award, granting disclosure of assets and restraining the transfer/ alienation of assets is set out below:

\* **IN THE HIGH COURT OF** [REDACTED]  
 + [REDACTED]  
 [REDACTED] .... .Decree Holder  
 Through: Mr. Moazzam Khan and Mr. Alipak  
 Banerjee, Advcoates.  
 versus  
 [REDACTED] ..... .Judgement Debtors  
 Through: None.  
**CORAM:**  
**HON'BLE MR. JUSTICE** [REDACTED]  
**ORDER**  
 % [REDACTED]  
EX.APPL. [REDACTED]  
 Allowed subject to just exceptions.  
EX.P. [REDACTED]  
 1. Issue notice to the judgement debtors by all modes including registered speed post and/or approved courier on filing process fee within one week returnable on [REDACTED]. *Dasti* in addition. The affidavit of service, enclosing the tracking report of the postal authority and/or courier agency be filed by the decree holder at least one week before the next date of hearing.

2. The judgement debtors are directed to file affidavit of their assets in Form 16A, Appendix E, under Order XXI Rule 41(2) of the Code of Civil Procedure along with statements of all their bank accounts, balance sheets as well as income tax returns for the last three years within 30 days of the receipt of the notice.
3. Copy of this order be sent to the judgement debtors along with the notice.
4. The judgement debtors are restrained from transferring, alienating or creating any third party interest in respect of the movable and immovable assets mentioned in the Schedule of the properties. The schedule of the properties at page [REDACTED] be sent to the judgement debtors along with the notice.
5. The judgement debtors shall remain present in Court on the next date of hearing.
6. Copy of this order be given *dasti* to counsel for the decree holder under the signatures of the Court Master.

An illustrative order obtained in the initial hearings for enforcement of a foreign award, granting disclosure of assets and restraining the transfer/alienation of assets is set out below:

[REDACTED]  
**\* IN THE HIGH COURT OF [REDACTED]**  
O.M.P.(EFA)(COMM.) [REDACTED]  
[REDACTED] decree-holder  
Through Mr.Moazzam Khan, Adv. with  
Ms.Payal Chatterjee, Mr.Alipak  
Banerjee and Mr.Brijesh Kumar,  
Advs.  
versus  
[REDACTED] .... judgment-debtor  
Through [REDACTED]  
**CORAM:**  
[REDACTED]  
**ORDER**  
[REDACTED]



**I.A. No. [REDACTED] (exemption)**

Exemption allowed, subject to just exceptions.

The application is disposed of.

**O.M.P.(EFA)(COMM.) [REDACTED]**

Issue notice to the respondent through all modes including registered post and courier, on filing of process fee and Regd. A.D. Covers, returnable on [REDACTED].

In the meanwhile, upon service, the judgment debtor shall file the affidavit disclosing the movable and immovable properties owned by them.

[REDACTED]  
\* IN THE HIGH COURT OF [REDACTED]

O.M.P.(EFA)(COMM.) [REDACTED]

[REDACTED] Petitioner  
Through Mr.Moazzam Khan, Adv. with  
Ms.Payal Chatterjee and Mr.Brijesh  
Kumar, Advs.

versus

[REDACTED] Respondent

**ORDER**

**I.A.** [REDACTED]

Issue notice to the respondent through all modes including registered post and courier, on filing of process fee and Regd. A.D. Covers within a week, returnable on [REDACTED], the date already fixed.

Along with the application, the copy of the affidavit of [REDACTED] [REDACTED] has been filed, which was earlier filed by the respondent before the Supreme Court [REDACTED] [REDACTED] in which it is mentioned that all the fixed and current assets of the company are charged with the banks and financial institutions, the details of which are mentioned at [REDACTED].

Heard learned counsel appearing on behalf of the petitioner, till the next date, the respondent is directed not to dispose of the said properties.

The respondent shall also disclose the details of the bank accounts by filing of an affidavit.

[REDACTED]

## Our Experience

The following are a few of our ongoing execution proceedings before courts in India.

- Representing the world's second largest oilfield services company in enforcement of an award passed in a London seated arbitration conducted as per UNCITRAL Rules. This matter was handled entirely by NDA's internal Advocacy Unit out of New Delhi. Within one month of initiating the said proceedings, we secured favorable orders directing disclosure (of assets, bank accounts etc.,) and the opposite party was restrained by the Court from alienating any of its assets thus securing the award amounts.
- Representing a Singapore entity in enforcement of an international commercial arbitration award passed in India against an Indian listed entity. This matter was handled by NDA's internal Advocacy Unit out of New Delhi. Within one month of initiating the said proceedings, we secured favorable orders directing disclosure (of assets, bank accounts etc.,) and the opposite party was restrained by the Court from alienating any of its assets thus securing the award amounts.
- Representing an Indian fund in enforcement of a domestic award in an ad-hoc arbitration against an Indian public listed infrastructure company and its promoters. This matter was handled by NDA's internal Advocacy Unit out of New Delhi. On the first hearing of the matter, we secured favorable orders directing disclosure (of assets, bank accounts, tax returns etc.,) and the opposite party was restrained by the Court from alienating any of its assets thus securing the award amounts.
- Representing a Swiss multi-national commodity trading and mining company against an Indian public company in enforcement of a Singapore-seated SIAC award. In this matter, NDA, though the lead Advocate on Record, is working in conjunction with a member of one of the leading chambers in London Bar as well as a very eminent Singapore based Law Firm.
- Representing a Korean conglomerate in enforcement of an award passed in an Austria seated ICC arbitration against an Indian public listed company. The matter was handled at all stages by NDA's Internal Advocacy Unit out of New Delhi and comprised of several related and on-going litigations, each dependent on the success of the other – initiated by the opposite party aimed at scuttling the realization of the awarded amounts by our clients. The synchronized strategy adopted by us at all levels in India, Korea as well as other jurisdictions where the Award was sought to be enforced, enabled us to successfully stem the attempts made by Indian Award debtor seeking to restrain our client from pursuing enforcement of the Award in a foreign jurisdiction through an injunction order from an Indian Court. Our concerted efforts ultimately resulted in a settlement where the opposite party paid the entire awarded amount to our client.
- Representing successfully a United States of America based company involved in the gaming industry for enforcement of an AAA arbitral award passed in United States of America against a Mumbai based leading gaming entity.

The following research papers and much more are available on our Knowledge Site: [www.nishithdesai.com](http://www.nishithdesai.com)

	<b>Fund Structuring and Operations</b>		<b>E-Commerce in India</b>		<b>The Curious Case of the Indian Gaming Laws</b>
June 2015		July 2015		September 2015	
	<b>Corporate Social Responsibility &amp; Social Business Models in India</b>		<b>Joint-Ventures in India</b>		<b>Outbound Acquisitions by India-Inc</b>
March 2016		November 2014		September 2014	
	<b>Internet of Things</b>		<b>Doing Business in India</b>		<b>Private Equity and Private Debt Investments in India</b>
April 2016		April 2016		June 2015	

## NDA Insights

TITLE	TYPE	DATE
Thomas Cook – Sterling Holiday Buyout	M&A Lab	December 2014
Reliance tunes into Network18!	M&A Lab	December 2014
Sun Pharma –Ranbaxy, A Panacea for Ranbaxy’s ills?	M&A Lab	December 2014
Jet Etihad Jet Gets a Co-Pilot	M&A Lab	May 2014
Apollo’s Bumpy Ride in Pursuit of Cooper	M&A Lab	May 2014
Diageo-USL- ‘King of Good Times; Hands over Crown Jewel to Diageo	M&A Lab	May 2014
Copyright Amendment Bill 2012 receives Indian Parliament’s assent	IP Lab	September 2013
Public M&A’s in India: Takeover Code Dissected	M&A Lab	August 2013
File Foreign Application Prosecution History With Indian Patent Office	IP Lab	April 2013
Warburg - Future Capital - Deal Dissected	M&A Lab	January 2013
Real Financing - Onshore and Offshore Debt Funding Realty in India	Realty Check	May 2012
Pharma Patent Case Study	IP Lab	March 2012
Patni plays to iGate’s tunes	M&A Lab	January 2012
Vedanta Acquires Control Over Cairn India	M&A Lab	January 2012
Corporate Citizenry in the face of Corruption	Yes, Governance Matters!	September 2011
Funding Real Estate Projects - Exit Challenges	Realty Check	April 2011

## Research @ NDA

**Research is the DNA of NDA.** In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Research has offered us the way to create thought leadership in various areas of law and public policy. Through research, we discover new thinking, approaches, skills, reflections on jurisprudence, and ultimately deliver superior value to our clients.

Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our "*Hotlines*". These *Hotlines* provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our *NDA Insights* dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction.

We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with a much needed comparative base for rule making. Our *ThinkTank* discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

As we continue to grow through our research-based approach, we are now in the second phase of establishing a four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. The center will become the hub for research activities involving our own associates as well as legal and tax researchers from world over. It will also provide the platform to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear from you about any suggestions you may have on our research reports.

Please feel free to contact us at  
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