



## ENFORCING FOREIGN ARBITRAL AWARD IN INDIA

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### ABSTRACT

One important aspect of international dispute resolution is the implementation of foreign arbitral rulings in India. This is especially important in light of the fact that globalization is promoting cross-border business. The legal structure of India is designed to make it easy for foreign awards to be recognized. It is governed by the 1996 Arbitration and Conciliation Act and is in line with the New York and Geneva Conventions. However, enforcement remains subject to compliance with Section 44 and scrutiny under Section 48, where objections often arise on grounds of procedural irregularities, due process violations, or conflicts with Indian public policy.

Judicial precedents such as "*Bhatia International v. Bulk Trading SA*" and "*Renusagar Power Co. Ltd. v. General Electric Co.*" have significantly influenced India's arbitration landscape, navigating the fine line between party autonomy and domestic legal safeguards. The goal of the Act's 2015 revisions was to strengthen India's reputation as an arbitration-friendly environment while reducing the role of the courts. Problems with distinguishing between domestic and international awards, shifting understandings of public policy, and the extent to which jurisdictions apply continue, however.

As India deepens its dedication to global arbitration standards, its legal framework is constantly changing. It manages to reconcile international enforcement norms with national objectives, keeping India at the forefront of arbitration.

**Keywords:** Foreign Arbitral Award, Arbitration and Conciliation Act, 1996, International Dispute Resolution, New York Convention, Public Policy Exception, Judicial Intervention

### DEFINITIONS AND KEY CONCEPTS

"The Arbitration and Conciliation Act, 1996 governs the arbitration in India". Arbitration is a legally recognized method of conflict resolution in which the disputing parties submit their differences and disputes to a neutral third party for a final and legally binding decision. "Parties can also settle their disputes through a permanent arbitral institution like the Indian Council of Arbitration, Chamber of Commerce etc. The following are the basic concepts which are critical to understanding the process of arbitration".

### ARBITRATION

In accordance with the Arbitration and

Conciliation Act of 1996, an arbitral institution is defined as a permanent arbitral institution. This is an exact copy of the Model Law. As a result of this concept, arbitration does not have to be conducted by a permanent institution. No meaning is conveyed by it. A permanent body of arbitration or not, all arbitrations would be included in the term. Because of this, this definition was created to encompass both formal arbitration proceedings and more informal ones. This fact suggests that arbitration is an alternative to litigation as a means of resolving legal disputes.

Lord Justice Romilly MR defined the 'Arbitration' in the well-known case of '*Collins vs. Collins*' as "An Arbitration is a reference to the decision of



one or more persons, either with or without an umpire, of a particular matter in difference between the parties<sup>641</sup>. In *Amar Chand*<sup>642</sup> case, Supreme Court of India defined the arbitration as “judging of a dispute between parties or groups of people by someone not involved in the dispute and whose decision both parties agree to accept”.

David defines arbitration as, “Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons i.e., the arbitrator or arbitrators who derive their powers from a private agreement, not from the authorities of a state, and who are to proceed and decide the case on the basis of such an agreement.”<sup>643</sup>

Halsbury's Laws of England defines arbitration as, “the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities judicially determined and by application of law have binding effect by one or more persons (the arbitral tribunal) instead of by a court of law.”

“In '*Jivaji Raja Vs Khimji Poonja & Company*', High Court of Bombay defined arbitration as” “Arbitration is the reference of dispute or difference between two or more parties to a person chosen by the parties to a person chosen by the parties or appointed under statutory authority, for determination of the same.”

“When two or more parties agree to arbitrate conflicts, the parties are required to accept the arbitrator's judgement, which is based on law or, if so agreed, other considerations, after a fair hearing, and is legally enforceable. This means that arbitration is a private conflict settlement system, but it also gives arbitrators judicial authority”. “Four concepts which are core requirements for the arbitration are: an Arbitration Agreement, a Dispute, Reference for

Determination to a Third Party, and an Award. To arbitrate, the parties must agree to abide by the third party's decision. The arbitral process must be legal and binding. This means arbitration is a viable alternative to judicial litigation for resolving disputes or disagreements between parties.<sup>644</sup> The purpose of arbitration is to provide a summary, speedy, and cost-effective method of settling disputes, devoid of legal and procedural trappings”.

### ARBITRATION AGREEMENT

“An arbitration agreement is an agreement which requires the person who signed them to resolve any disputes by binding arbitration, rather than in court before a judge. The concept of an arbitration agreement is spelled out in two provisions of the Arbitration and Conciliation Act, 1996 and is more elaborative than 1940 Act. The definition of Arbitration Agreement under Section 7 is identical to Article II (1) of the New York Convention. New York Convention sets forth the requirement of valid agreement and is of a particular importance in the context of Article 7 of Model Law. The Model Law was seen as a means of clarifying and widening the range of means that constitutes an Arbitration Agreement' under the Convention”.

Section 7(1) of the Act and UNCITRAL Model Law defines an arbitration agreement as, “An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”.

“Between the parties the arbitration agreement must disclose their definite intention to refer their present or future dispute in respect of a definite legal relationship for arbitration with bilateral rights and binding obligations to make such reference and no particular form of arbitration clause and the parties have an intention to refer the dispute to the arbitration accord to terms of agreement”.

“The arbitration agreement must necessarily be

<sup>641</sup> Avatar Singh, *Law of Arbitration & Conciliation and Alternative Dispute resolution Systems*, Eastern Book Company, (9<sup>th</sup> Ed 2009), P 15.

<sup>642</sup> Amar Chand v. Ambika Jute Mills, AIR 1966 SC 1036.

<sup>643</sup> David, *Arbitration in International Trade*, 5.

<sup>644</sup> Jivaji Raja vs Khimji Poonja & Company AIR 1934 Bom 476.



in writing which may be in the form of a signed document, letters exchange, telegrams or any other means of communications or claim exchange and defense statements which is provided to record of the agreement”<sup>645</sup>. An arbitration agreement is also formed whenever a contract mentions a document that has an arbitration clause.<sup>646</sup> “However, it is necessary to apply the arbitration that there should be a mandatory requirement of the settlement of disputes by means of arbitration because the aim of the arbitration is to settle the disputes between the parties and to avoid further litigation. The essential elements of an arbitration agreement as explained by the Supreme Court in *‘Bihar State Mineral Development Corporation v. Encon Builders (P) Ltd’*<sup>647</sup> case, are the existence of a present possibility of a future difference; the intention of the parties to settle such difference by a private tribunal; the agreement in writing to be bound by the decision of the tribunal and that the parties *ad idem* i.e.- consensus between the parties. It was viewed in *BPCL v. Great Eastern Shipping Co. Ltd*, that the survival of the arbitration agreement and the terms thereof between the parties can be proved not only by their words but also by their conduct<sup>648</sup>.

However, the parties’ intention must be according to the conveying meaning. “In this, it exhibits that there had been a meeting of minds between the parties and they had actually reached an agreement upon all material terms, then only it can be said that a binding contract was capable of being spelled out from the contract or the correspondence”.

“The provisions of the Act make it amply clear that arbitration proceedings cannot be initiated in the absence of a dispute between the parties. In *Agri-Gold Exims Ltd v. Sri Laxmi Knits & Woven & others*<sup>649</sup>, the Supreme Court held that the

term dispute must give its general meaning and the Court was bound to refer parties to arbitration in terms of an arbitration agreement between the parties”.

### **INTERNATIONAL COMMERCIAL ARBITRATION**

“Section 2 (1) (f) of the Arbitration and Conciliation Act, 1996 defines international commercial arbitration according to Indian law, as an arbitration dealing to disputes arising out of legal connections (contractual or otherwise) that are considered commercial under Indian law and when at least one of the parties (individual/corporation/company) has business or resides overseas”. “This defines two elements i.e.- physical and conceptual. Physically, one of the parties to arbitration must be a foreign national, a group of individuals whose central management or control is in foreign hands, or the government of a foreign country, and conceptually, the arbitration must be based on a legal relationship between the parties, contractual or otherwise, and must be deemed commercial under Indian law, both of these requirements are met”.

On close scrutiny of the text, it is observed that the article has three components: (a) International (b) Commercial and (c) Arbitration. Therefore, an arbitration to be covered by the 1996 Act must be of a commercial in nature and the dispute must be arising out of a legal relationship and international in character. It also gives an impression that the international character shall have to be determinant by the nationality of the parties rather than the subject matter of arbitration. In other words, if a dispute is a commercial and international in character but is between Indian nationals, is not considered as International commercial arbitration within the meaning of this definition.

In *Gas Authority of India v. Spie Capag*<sup>650</sup>, the High Court of Delhi while considering the circumstances in which the nature of a commercial arbitration agreement has an

<sup>645</sup> O.P. Malhotra, *The Law and Practice of Arbitration and Conciliation*, Lexis Nexis Butterworths, (2<sup>nd</sup> Ed, 2006).

<sup>646</sup> Rukmanibai Gupta vs. Collector, Jabalpur, AIR 1981 SC 479; (1980) 4 SCC 556.

<sup>647</sup> Bihar State Mineral Development Corporation v. Encon Builders(p) Ltd AIR 2003 SC 3688; (2003) 7 SCC 418.

<sup>648</sup> BPCL vs. The Great Eastern Shipping Co Ltd, 2007 (12) SCALE 247.

<sup>649</sup> Agri-Gold Exims Ltd v. Woven 7 Others (2007) 3 SCC 686.

<sup>650</sup> Gas Authority of India Vs. Spie Capag AIR 1994 Del 75.





international in character held that (a) “if one of the parties has business located abroad; or (b) the agreement has to be performed abroad; or (c) the subject matter of the agreement is located abroad; or (d) one of the parties to the agreement is a foreign national. According to the above, three factors i.e. (a) the parties (b) the subject matter and (c) the place of arbitration determine the international character of the commercial arbitration”.

However, the Supreme Court in the *TDM Infrastructure (P) Ltd. V. U.E. Development India (P) Ltd*<sup>651</sup>, “while examining the case of a company incorporated in India but the central management and control being exercised in Malaysia, under subsection (iii) of Section 2 (1) (f) of the 1996 Act, opined that determination of nationality of the parties being crucial in the matter of appointment of arbitrator under the Act and in *COMED Chemicals Ltd. V. C.N Ramanand*”<sup>652</sup>, “it was held that a Company incorporated in India only have nationality of India for this purpose, but any disputes with person of Indian origin and settled in other Country and being a foreign national therefore, it shall be an international commercial arbitration”.

“The Law Commission of India<sup>653</sup> while reviewing the functioning of Arbitration and Conciliation Act, 1996” has received many representations and suggestions from the business community that the dropped the ‘commercial’ word applies to international arbitration either it is commercial or not, where the arbitration seat is placed in India. For starters, they found that based on their research of the case laws they had looked at there is a question of whether the arbitration has a ‘commercial’ nature or not, which leads to superfluous litigation. “There is no need to remove the word commercial from Section 2 (1) (f) of Part I, which states that international arbitrations are not of a

commercial character. A definition of domestic arbitration and international arbitration is proposed in Section 2 of the Act. The concept of “international commercial arbitration,” which was previously referenced in section 2(1)(f), is to be included in the next paragraph”.

### **ARBITRAL AWARD**

An Arbitral Award is an award which is granted by the arbitrators through their decision. It can be a financial award where one party has to pay money to the other party. It can also be a non-financial award, such as stopping a certain business practice or attach an employment inducement. Arbitral Award as per section 2 (1) (c) includes ‘an interim award’. It neither gives any meaning nor explains as to what an award is and what it contains and the concept of an interim award.

Despite the fact that the term ‘award’ has no universally accepted definition, it is nonetheless used. But in practice, the term “award” is reserved for rulings that definitively settle the substantive problems with which they are concerned. In other words, an award is an expression of an adjudication of a dispute between the parties and as long as the manifestation of the decision on the dispute raised is clear and unambiguous, it cannot be flawed merely because it does not subscribe to any particular format. Likewise, there is no ‘specific form’ of the award and ‘what substance is to be in the award’ is not prescribed in the Act except that the award shall state reasons. An award must give a decision and any form of words which expresses a decision is sufficient. According to Russell, “an award in order to be valid must be final, certain, consistent and possible and must decide submitted matters, and no more than matters submitted”.

The following that makes the substance of an award according to Section 31 of the Act-

1. The award should be in writing; oral awards are not recognized in law;
2. “The award can be signed by the

<sup>651</sup> *TDM Infrastructure (P) Ltd. v. U.G. Development India (P) Ltd* AIR 2008 SC 2928.

<sup>652</sup> *COMED Chemicals Ltd. v. C.N Ramanand* AIR 2009 SC 494.

<sup>653</sup> 176<sup>th</sup> Report Law Commission of India, *the Arbitration and Conciliation (Amendment) Bill, 2001*, (September 2001).



members of the arbitral tribunal”;

3. “If arbitral tribunal consists of more than one member, majority members are to sign the award. However, reasons for the omitted signature is to be mentioned”; an award should be signed by a majority of the members who are present throughout the proceedings and took part in all the deliberations;

4. “The members of the arbitral tribunal may sign at the foot of the award preferably at the same time and in the presence of other members”;

5. “The arbitral tribunal shall state the reasons based on which it has determined the award/ arrived at award”;

6. The arbitral tribunal shall mention the date and place of the award where it is made; and

7. After the award is made, a signed copy shall be delivered to each party.

An arbitral award may either be a ‘Final Award’ or an ‘Interim Award’. It may also be a ‘Domestic Award’<sup>654</sup> or a ‘Foreign Award’. According to Supreme Court, 1996 Act contemplates four types of awards i.e.- “interim award, additional award, settlement award or agreed award and final award”<sup>655</sup>. The Court compared additional or partial award with the interim. As a protective measure, an arbitral tribunal may make an interim order at the request of the party regarding dispute”. Such order will be effective only during the arbitral proceedings and a party may restrain from doing something which may be detrimental to the interest of the other party.

“This may be in the form of an interim injunction. But unlike an interim measure (order) an interim award shall be a part of the final award and it is binding on the parties and such an interim award can only be passed after a proper hearing. In the form of an interim

award the interim measures are accepted”. “In *McDermott International Inc v. Burn Standard Co Ltd*, the Supreme Court held that additional award is valid, being within the framework of the law”. “The main goal of such an order would be to prevent or minimize any disadvantage that may occur from the length of the arbitral procedures until the ultimate settlement and the execution of its conclusion, whichever comes first. Where the matters are so entwined with each other that the decision on one is dependent upon, or would affect, the other matters no interim award can be made on such a matter. Nor can an interim award be made which cannot be merged into the final award”. Supreme Court, in *SBP & Co v. Patel Engg & Co*<sup>656</sup>, held that interim orders of the arbitral tribunal are not challengeable before the court. Only the final award can be questioned. The situation should be such an interim order/award only could save the parties from grave consequences. A decision of the arbitrator on the preliminary issue of jurisdiction is not an interim award as it does not decide the claim or any part of the claim or an issue of liability<sup>657</sup>.

Section 30 codifies the law relating to ‘Settlement Award’. Such award has been described as a ‘Compromise Award’ ‘Agreed Award’ or ‘Settlement Award’. This provision is designed to encourage settlement, in the course of arbitral proceedings. “If during the arbitral proceedings, the parties come to a settlement of the dispute, on being informed of the settlement, the arbitral tribunal, if it has no objection, shall precede the settlement in the form of an arbitral award accord to the terms”<sup>658</sup>. “An award shall have the same effect as any award in the dispute, it is final and binding between the parties and is enforceable as if it was a decree of the court”.

“A final award’ as its name indicates, finally concludes all the issues in dispute between the

<sup>654</sup> O.P. Malhotra, *The Law and Practice of Arbitration and Conciliation*, Lexis Nexis Butterworths, (2<sup>nd</sup> Ed, 2006).

<sup>655</sup> Centro trade Minerals & Metals Inc v. Hindustan Copper Ltd, (2006) 11 SCC 245.

<sup>656</sup> *McDermott International Inc v. Burn Standard Co Ltd* (2006) 11 SCC 181.

<sup>657</sup> *SBP & Co v. Patel Engg & Co* AIR 2006 SC 450; (2005) 6 SCC 288.

<sup>658</sup> *Uttam Singh Dugal Vs. Hindusthan Steel Ltd*; AIR 1982 MP 206; *UOI Vs. East Coast Boat Builders & Engg. Ltd*; AIR 1999 Del.



parties. Such an award is final and binding as it determines all the issues referred to arbitration or determines all the issues which have remained outstanding following earlier awards dealing with only some of the issues". In this context, the word 'final' "means that as between the parties to the reference the award is conclusive as to the issues with which it deals, unless and until it is set aside by the court".

"The award stands in the same footing as a decree of the Court, whether it has passed into a decree or not and therefore it is binding upon the parties"<sup>659</sup>. "If the agreement prescribes a time limit within which an award is to be passed, the arbitrator is bound by it. An arbitrator is bound to pass the award within the time prescribed or within the extended period if any".

An award must be read as a whole. It should be construed liberally to give effect to the real intention of the arbitral tribunal<sup>660</sup>. The supreme court in *Santa Sila v. Dharendra Nath Sen*<sup>661</sup> observed that- "*The Court should approach the award with a desire to support it if that is reasonably possible rather than to destroy it. Unless otherwise required, the award need not formally express the decision of the arbitrator on each matter of difference. The silence of the award on a particular matter is a clear indication that the claim was not upheld*".

### **FOREIGN AWARD**

Both the 1937 Act and the 1996 Act included similar definitions of international arbitral awards. Further, Section 4(2) of the Act states that the dispute is commercial in character. "Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made and may accordingly be relied on by any of those persons by way of defense, set-off or otherwise in any legal proceeding in [India], and any references in this Act to enforcing a foreign award shall be construed as including

references to relying on an award". "Further, on fulfillment about the enforceability of the award, the Court shall order to be filed the award and proceed to pronounce the judgment according to the award".<sup>662</sup>

"However, the term foreign award has been defined in Section-44 of Part II of the Act. According to the Act, it must be an award made on the basis of an agreement in writing for arbitration administered under the New York Convention and not subject to Indian law; and, last, it must have been made in a foreign country".

"The High court of Calcutta in *Serajuddin v. Michael Golodetz*<sup>663</sup> stated that the essential elements of foreign arbitration results to a foreign arbitral award are":

1. Arbitration must be conducted in foreign lands
2. By the foreign arbitrators
3. By applying foreign laws
4. The party must be a foreign nationality.

"Although the arbitration was conducted and awarded in another country, the Foreign Awards (Recognition and Enforcement) Act, 1961 contained a specific provision to exclude its application to what may be regarded as a "domestic award" in the sense that the award is being made according to an arbitration agreement that is subject to Indian law".

"The Supreme Court while examining the language of Section 2 of the Foreign Awards (Recognition and Enforcement) Act, 1961 in *National Thermal Power Corporation v. The Singer Co* clarified" that- "*An award is foreign not merely because it is made in the territory of a foreign state, but because it is made in such a territory on an arbitration agreement not governed by India. An award on arbitration agreement administered by the law of India,*

<sup>659</sup> Satish Kumar v. Surendra Kumar AIR 1970 SC 833.

<sup>660</sup> Gobardhan Das v. Lakshmi Ram, AIR 1954 SC 689.

<sup>661</sup> Santa Sila v. Dharendra Nath Sen AIR 1963 SC 1677.

<sup>662</sup> Foreign awards and foreign judgments, Law teacher, available at <https://www.lawteacher.net/free-law-essays/foreign-awards-and-foreign-judgments.php?vref=1>, visited on 18-05-2021.

<sup>663</sup> Serajuddin v. Michael Golodetz AIR 1960 Calcutta 49.





though rendered outside India, is affected by the saving clause in section 9(b) of the Act of 1961 and is, therefore, not a 'foreign award'.

"In *Bhatia International v. Bulk Trading SA* case, International commercial arbitrations outside of India continue to be governed by the broad rules of Part I, according to the Supreme Court. Accordingly, the prize would be a domestic reward under S.2 (7). India's arbitration awards are governed by the contract's law, not the location of the arbitration. In *Bharti Televentures Ltd v DSS Enterprises P. Ltd*<sup>664</sup> case an award from an international commercial arbitration made outside India is a foreign award, regardless of the proper law, declared the Delhi High Court in its ruling". "According to the court, the only relevant condition under S.44 is the territorial nexus. Aside from that, domestic and international awards are governed by different legal regimes, and the Bhatia International case only addresses the applicability of Section 9 in circumstances where the arbitral proceedings take place outside of India, but the properties are located in India".

"Supreme Court in *Centro trade Minerals*<sup>665</sup> case overruling an award from an international commercial arbitration outside India is a foreign award, as territoriality was the only factor considered under Section 44," he explained. There are different sections in the 1996 Act for domestic and international awards, but as can be observed in several of the decisions of this Court, there are some clauses that overlap.. "Consequently, it may not be conceivable to hold that the 1996 Act envisions that an arbitration award can be a mix of domestic and foreign awards".

"An award from another nation is enforceable in a signatory country to the New York or Geneva Convention if the Central Government of India has notified that country. Whenever an Award is rendered enforceable, it is treated as an official court order and enforced as such A

foreign award cannot be set aside under the Act". However, it is impossible to overturn a foreign award." This fundamental variation in a foreign and a domestic award has been customized by the Supreme Court in the recent case of *Venture Global Engineering v. Satyam Computer Services Ltd* case and further confirmed in *Videocon Industries Limited v Union of India* case".

### **ENFORCEMENT OF DOMESTIC AND FOREIGN ARBITRAL AWARDS**

"India's Constitution, in Article 51, mandates that the state work to promote international peace and security, maintain good relations with other nations, respect international law, and use peaceful measures to resolve international disputes". "The state shall attempt to establish respect for international law and treaty commitments in organized people's relations with one country," reads Article 51 clauses (c) and (d). Article 39A of the Constitution of India provides that "State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall, in particular, provide free legal aid, by appropriate legislation or schemes or in any other way, to make certain for securing justice are not deprived to citizens by reason of economic or other disability". "Articles 14 and 22(1) also make it obligatory for the State to ensure equality before the law and a legal system which promotes justice on a basis of equal opportunity to all. By virtue of

Article 253"<sup>666</sup> "confers exclusive powers on the parliament to enact laws to implement the international agreement. The Indian Arbitration and Conciliation Act, 1996 was implemented by Indian president". Domestic arbitration is available under this Act if both parties are Indian nationals, while international commercial arbitration is available if at least one party is not.

<sup>664</sup> Bharti Televentures Ltd v. DSS Enterprises P. Ltd (2005) 2 Arb.L.R. 561.

<sup>665</sup> Centrotrade Minerals & Metals Inc v. Hindustan Copper Ltd, (2006) 11 SCC 245.

<sup>666</sup> Agneskv, *Difference between international and domestic arbitration in the light of various decided case laws...*,

available at [www.legalservicesindia.com/article/511/Domestic-&-International-Arbitration.html](http://www.legalservicesindia.com/article/511/Domestic-&-International-Arbitration.html)



"It was commonly known in ancient and mediaeval India that a disagreement might be settled by a person or persons of the parties' choosing or by private courts.<sup>667</sup> British rule is credited with developing India's arbitration legislation, which has evolved through time. Commencing with the Bengal Regulation of 1772, courts in several British Indian provinces were empowered, with the consent of the parties or at their request", to refer certain lawsuits to arbitration. Between 1772 and 1827, the following presidency towns had arbitration regulations enacted by the British government, thanks to powers granted to it by Parliament. "As soon as the Legislative Council for India was established in 1834, it passed the Code of Civil Procedure Act 1859, which codified civil court procedures except for those established by Royal Charters, namely the High Courts in Calcutta, Bombay, and Madras. After the 1859 act was repealed in 1877, a new version of the Code of Civil Procedure Act was enacted in 1882. (Act No 14 1882)<sup>668</sup>. To the same extent as before, Sections 506 to 526 of the new Act contain provisions relating to arbitration. The Indian Arbitration Act, 1899" (Act No. 9 of 1899) was adopted by the Legislative Council and was heavily influenced by the British Arbitration Act, 1889. 53 Vict C 49 and 52 There were a number of issues with its workings, which led to court opinion expressing its discontent and dissatisfaction with the arbitration statute as it stood. In *Dinkar Rai Lakshmiprasad v. Yeshwantrao Hariprasad*<sup>669</sup> The initial stage in the development of arbitration law in India was the 1937 Arbitration Act (Protocol and Convention), which was proposed by Justice Rangnekar, "based on the Geneva Protocol of 1923 and the Geneva Convention of 1927. As a signatory to the stipulations in the first schedule, India was included in the list. In India,

the law was passed as a result of the treaty and convention. Arbitration Act 1940 was the result of a judicial rebuke and commercial community demands. There were provisions for arbitration without court intervention, arbitration with court intervention in pending litigation, and arbitration with court participation in non-pending suits in this enactment, which subsequently went on to include further provisions common to all three types. Following World War II in 1945 and India's independence in 1947, trade and industry experienced a major boost and the commercial community became increasingly oriented towards arbitration as a means of resolving their conflicts, as opposed to judicial litigation". "The Act also failed to differentiate between a "agreement" to submit future disagreements and a "submission" made upon the emergence of a dispute.<sup>670</sup> "It was later decided that a combination of the Arbitration Act 1940 and the Foreign Awards Act 1969 would be more effective in resolving domestic as well as foreign economic issues. This Act has three (3) Parts they are as follows: Arbitration, Enforcement of certain Foreign Awards, Conciliation".<sup>671</sup>

"India's law on enforcement of arbitration judgements consisted of three separate statutes prior to the enactment in 1996 of the Arbitration and Conciliation Act. The 1940 Act addressed the enforcement of domestic awards. There were two statutes that dealt with the enforcement of foreign awards: the 1937 Act"<sup>672</sup> Acknowledgment and implementation of a 1961 Act and awards under the Geneva Convention The Foreign Awards Act of 1961 established these prizes. As a result of Article VII of the New York Convention on Enforcement of Foreign Awards, the Geneva Convention was effectively replaced by the 1961 Act, "while domestic awards were governed by the 1940

<sup>667</sup> K Ravi Kumar, 'Alternative Dispute Resolution in Construction Industry', International Council of Consultants (ICC) papers, [www.iccindia.org](http://www.iccindia.org), at p 2, retrieved on 30-4-2021.

<sup>668</sup> "In 1882, the Code of Civil Procedure was introduced and with passing of time it is felt that the Code needs some flexibility to breathe the air of speed and effectiveness. Finally, to meet these problems Code of Civil Procedure, 1908 was enacted".

<sup>669</sup> *Dinkar Rai Lakshmiprasad v. Yeshwantrao Hariprasad* AIR 1930 Bom. 98,105

<sup>670</sup> *M/s Tractor export, Moscow V. Tarapore and Co.* AIR 1971 SC 1 at 11

<sup>671</sup> Agneskv, "Differences between international and domestic arbitration in the light of various decided case laws...", available at <http://www.legalservicesindia.com/article/511/Domestic-&-International-Arbitration.html>, visited on 18-05-2021.

<sup>672</sup> The Arbitration (Protocol & Convention) Act 1937 (No 6 of 1937).





Act. There was a big difference in the way these two statutes were enforced. According to the Foreign Awards (Recognition and Enforcement) Act of 1961, an arbitral award could only be appealed on the narrow grounds allowed under the New York Convention of 1923. Under the 1940 Act, the scope of the challenge to domestic awards was substantially broader. Under this statute, an arbitrator may be subject to judicial review if he miscondacted himself or the proceedings, a term that was widely defined, and awards were impeded based on fundamental errors of law”.<sup>673</sup>

“It was not until 1996 that the Arbitration and Conciliation Act was passed that the legislation governing arbitration was codified. The Code of Civil Procedure”, 1908 was used to deal with the rising complexity of litigation and other issues that occurred in the application of civil nature litigations, as well as to solve some essential concerns. “Code of Civil Procedure, 1908 is a procedural legislation that governs civil procedures in India today. 158 sections make up the initial part of the code, whereas the First Schedule has 51 Orders and Rules. whereas the Orders and Rules establish procedures and methods that govern civil proceedings in India, the sections provide general principles of jurisdiction. In 2002, the Code of Civil Procedure underwent significant revisions. The CPC (Amendment) Act, 2016 has been adopted to change several provisions of the CPC. To the extent that they apply, these laws apply to commercial disputes of the indicated value”

The courts are obligated to promote the use of alternative dispute resolution methods by the parties to their cases as stated in the 1908 Code of Civil Procedure. For effective execution of Section 89, a set of recommendations has been established by the Court after it considered the many features of such provision. “The Supreme Court in *Afcons- Infrastructure Ltd. Vs. Cherian Varkey Construction Co. (P) Ltd.*<sup>674</sup>, has

discussed in detail about the provisions”.

“It is the ruling of an arbitral tribunal in a domestic or international arbitration. There is also an interim award in the arbitral award. A valid and enforceable preliminary/provisional award is one that is made by an arbitral tribunal that may resolve some concerns. The Arbitration and Conciliation Act 1996 governs arbitration and conciliation in India. Both the United Nations and

New York Conventions as well as the Geneva Convention have been adopted by India”<sup>675</sup> to international prizes, have been obtained and inserted in legislation. As a result of the 1996 Act, the Geneva Convention Awards are included into Section 53 and Section 57, which lays forth the grounds for enforcement.

“A recipient of a domestic award must wait 90 days after receiving it before applying for enforcement and execution under the 1996 Arbitration and Conciliation Act. During this time.<sup>676</sup>, According to Section 34 of the Act, the award may be contested”. There will be no other opportunities to contest the award’s legality after this time has passed and the court has ruled that it is enforceable. A court order must be made out of the award in order to enforce it against the party that has defaulted. Prior to the new law, a formal application was necessary, “along with notice to both parties and an opportunity for objections to be heard. As long as the losing party paid voluntarily, a decree was not required. As a court order, the award is enforceable under Section 34 of the Act”.

“According to the Arbitration and Conciliation Act of 1996, a party who has been wronged by an arbitral award can apply to the court with jurisdiction to have the award set aside. Instead of waiting for 30 days, the award holder can file for enforcement of the award using Civil

<sup>673</sup> The Convention on the Execution of Foreign Arbitral Awards, 1927) India became a signatory to this Convention on 23 October 1937.

<sup>674</sup> *Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. (P) Ltd.*, 2010 (7) TMI 844 - Supreme Court.

<sup>675</sup> In 1937 the Arbitration (Protocol and Convention) Act 1937 was enacted to give effect to the Geneva Protocol on Arbitration Clauses 1923 and the convention on the execution of foreign Arbitral awards 1927 enabling them to become operative in India.

<sup>676</sup> However, a further period of 30 days may be granted by a court upon sufficient cause being shown for condonation of delay.



Procedure Code 1908. (CPC). You can request the annulment of an arbitral award for the following reasons”:

1. “The applicant was under some incapacity”.
2. “Under the legislation to which the parties have submitted themselves or, if there is no indication of that, under the law now in force, the arbitration agreement is invalid”.
3. “No sufficient notice of arbitrator appointment or arbitral proceedings was given to the applicant, and he was therefore prevented from making his case”.
4. “In other cases, the arbitral judgement deals with a dispute that was not foreseen in the arbitration agreement or that did not come under its provisions, or it contains findings on an issue outside the scope of the arbitration agreement”.
5. “There were two possible reasons for this: 1) it was not in accordance with the parties' agreement; 2) it was not in accordance with AC Act provisions (from which the parties cannot derogate); and 3) it was not in accordance with AC Act provisions”.
6. “Legally, the dispute's subject matter is ineligible for resolution through arbitration”
7. “The arbitral award is in conflict with the public policy of India”.

“Although the court can evaluate whether the dispute cannot be settled by arbitration under Indian law, and/or if the award is contradictory to or in conflict with the national policy of India, regardless of the grounds cited by the defendant. An application for setting aside an award was equivalent to a stay of execution proceedings prior to the recent Arbitration and Conciliation (Amendment) Act, 2015. As a result of the Amendment Act, a party seeking a stay of execution of an award would have to file a separate application”.

“As may be seen from sub-section (2) of Section 2 of the Act, Chapter 1 of Part I of the Act applies to arbitrations taking place in India.

Instead of focusing on domestic arbitration, Part II focuses on the enforcement of certain foreign awards, as opposed to Part I. Unlike section 9b of the 1961 act, part II of the 1996 act makes it plain that an award's nature is decided by the place where it is made. Towards the end of the chapter, there is a discussion of the New York Convention awards. When a foreign award is binding, it is specified in Section 46 of the Act”.<sup>677</sup> “Section 47 specifies what type of proof the party seeking execution of a foreign award must present to the court. There is also a section 48 that deals with the criteria for foreign awards to be enforced. If the related party can prove one or more of the grounds listed in Section 48(1) clauses (a) through (e), then a court may decline to enforce the foreign award. Also, if the court finds any of the grounds listed in section 48(2) clauses (a) and b), it can be denied. For example, in accordance with section 49 of this chapter, the foreign award shall be treated as the court's decree and must be enforced”.<sup>678</sup>.

“A distinction must be made between domestic and foreign awards. Domestic awards are distinguished from international awards and foreign awards by the use of the word domestic award. When it comes to international awards, they can be viewed as domestic awards in the country where they were given. As a result of the Act, there are a variety of ways to handle rewards made in India and those made abroad. All domestic arbitrations are covered by the first part of the act. Unlike foreign awards, domestic awards can be challenged under Section 34 of the Act, whereas foreign awards are not subject to a challenge action. The other type of award is one that is made in an arbitration hearing that is not held inside the borders of the Indian subcontinent. As a general rule, the term foreign award is used only when an award must be enforced outside of its original jurisdiction”.

“Section 48 of Act is similar to the New York

<sup>677</sup> “Section 9 (b) Saving - Nothing in this Act shall apply to any award made on an arbitration agreement governed by the law of India”.

<sup>678</sup> Section 49 - Enforcement of foreign awards - Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.



Convention of Article V. Section 48 of the Act allows a party to object to an application for enforcement of a foreign award on limited grounds. A foreign award cannot be challenged or annulled in India under the Act, despite the fact that the contract is governed by Indian law. It is not possible in India to appeal foreign awards on the merits in Indian courts. In an enforcement procedure, the court may refuse to enforce a foreign award if the party opposing enforcement of the award can provide adequate evidence of any of the grounds listed in section 48(1). It covers the defenses available to a party opposing the enforcement of a foreign award in the provision cited above”.

“A foreign award is not specified in Part I of the 1996 Act, but it is defined in Part II of said Act which specifies that Chapter I discusses New York Convention Awards and Part II describes Enforcement of Certain Foreign Awards. Section 44 provides a definition”.

“In this Chapter, unless the context otherwise requires, foreign award means an arbitral award on variations 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 1960–51 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 they said Convention applies.”

Furthermore, Under Article I (3) of the Convention<sup>679</sup>, “a member State when signing, ratifying or acceding to the Convention or even notifying extension under Article X is permitted to make two reservations”<sup>680</sup>. “Firstly, a member State may proclaim that it will only recognize or

enforce awards made in another Member State on the basis of reciprocity”. “To add to that, it may declare that it will only implement the Convention's provisions for recognition and enforcement if any differences between parties' legal relationships, whether contractual or not, are deemed as commercial by the state making the statement. Un state member can declare that it will only recognize and enforce awards sought under the Convention if they are made in another member state by means of a reciprocity reservation. But Section 44(b) of the Act requires that India's central government make an official gazette notice recognizing a reciprocating territory”. “Therefore, an award made in a non-notified Convention country will not be evaluate as a ‘foreign award’ within the meaning of Section 44 of the Act”<sup>681</sup> Both the Act and its enforcement provisions do not acknowledge it. Secondly, “a foreign award is defined as an award issued in one of the Convention nations that has been notified by the Central Government of India in the Official Gazette, according to the Convention's second reservation. However, if the Indian Central Government has not informed a country of its ratification of the New York Convention, an award made in that country will not be enforceable as a foreign award under the Act. The Indian government has notified the regions that will reciprocate”.

The difference between the expressions “recognition” and “enforcement” of awards requires some consideration. As a result, the term “recognition” is omitted from the statute. Both terms are used in the First Schedule to the 1996 Act, as well as in the Convention.

“The terms recognition and enforcement have different meanings. Although a judgement can be acknowledged without being enforced, it must be recognized by the court that directs its enforcement. To avoid the re-agitation of the concerns addressed by the prize,

<sup>679</sup> Article I (1) provide that the New York Convention, 1958.

<sup>680</sup> Article X. 1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned”.

<sup>681</sup> “Section 44 (b) of 1996 Act - 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”.





acknowledgement alone may be requested. Courts who are required to enforce a judgement must not only acknowledge the legal effect of that judgement, but also utilize legal sanctions to guarantee that it is carried out. As a defensive tool, the term recognition is used when an attempt is made to raise in a new arbitration case problems that have previously been settled and decided in a previous arbitration proceeding. An arbitral award recipient has the right to object to any subsequent arbitration relating to the original dispute”.<sup>682</sup>

“There is no way to dispute a court's decision to enforce a foreign award. Because it is an order of court, the foreign award is treated as a court order. In the absence of a procedural norm, a court's judgement and subsequent decree are not issued. This also eliminates any potential of the judgement being above, or not in conformity with the award. Section 50(1) (b)37 of the Act only allows an appeal against a decision declining to enforce a foreign award under Section 48 for this reason”.

“With respect to laws, the parties are free to decide which laws will govern international commercial arbitration in such a way that the substantive law, i.e.- the law that governs the agreement of arbitration, and also the procedural law, i.e.- that governs the arbitration performance. It is possible to impose such a selection or option either explicitly or implicitly. Some components of the arbitral relationship may be subject to different rules depending on whether a contract has an arbitration clause or whether a separate arbitration agreement is in place”.

“The party seeking enforcement of a foreign award must prove to the court that the arbitral authority composition or arbitral procedure differs from where the decision was rendered. There are conditions that must be met if the respondent's answer to the application for enforcement contains one or more grounds

listed in Subsection (1) of Section 48 of the Act”.

“Alternatively, Indian courts may decline to enforce the foreign award if the party opposing the implementation of the award provides satisfactory proof of one of the grounds listed in section

48(1). The provisions set out in section 48(1) i.e.- Article V (e) of the New York Convention<sup>683</sup> can be used as defenses against an enforcement application. Clause (e) of section 48(1) does not mean that the foreign award sought to enforce in India can be challenged in Indian courts on its merits. An Indian court does not have jurisdiction to overturn a foreign judgement, according to the language of the clause. This means that Indian courts have no power to overturn an international commercial award made outside of India under the Act. In Part I of the Act, Section 34, Application for Setting Aside of Arbitration Award, grants the right to annul an award. This clause only applies to awards made in India or awards made in the country. An award relating to international commercial arbitration can only be set aside by an Indian court if it is based in India. A foreign award cannot be challenged on its merits in Indian courts because they lack jurisdiction”.

If a foreign judgement is enforced, the court will not accept an award as one. Before the prize may be utilized as a stepping stone, though, it must be finalized. There is no legal basis for using an award in a lawsuit in India since only the judgment based on the award—and not the award itself—is final under the law of the country where it was created. A new legal foundation for litigation can be found in international awards in the same way as in foreign verdicts. In *Bremer Oel transport GMBH v. Drewry*<sup>684</sup>, “A foreign award, it was ruled, gives rise to a new cause of action based on an

<sup>682</sup> <https://www.hg.org/legal-articles/enforcement-of-foreign-awards-in-india-32348>, visited on 18-05-2021

<sup>683</sup> “Article V Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that (e) The 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”.

<sup>684</sup> *Bremer Oel transport GMBH v. Drewry*, (1933) 45 I.L.L. Rep. 133.



agreement between the parties to execute the award”

“Regarding the binding nature of the foreign award, an award is final if it can no longer be challenged on merits under the laws of the nation in which the award was made. The award can be enforced in India if it is not challenged in the country of origin and is allowed to stand and becomes final in the country of origin. An award's recognition and enforcement in India will be refused if it has not been made binding on the parties or has been set aside or suspended by a competent body of that country's law, according to Article V (1) (e) of the New York Convention. According to the Indian laws, an award shall be enforced by an Indian court as long as it has become enforceable”.

“The registering of a foreign decision is not required. A court's decree does not need to be registered because of clause (vi) of sub-section (2) of section 17 of the Registration Act. It is not necessary to register a court order that affects the rights indicated in section 17(1)(b) and 17(1)(c)”. As long as the property is immovable, it would need to be registered. “Even a decree passed by the foreign court execution of which is sought under section 44-A of the Code of Civil Procedure, 1908<sup>685</sup> would not require registration”.

“In India, the courts have consistently held that a party would not be bound by the jurisdiction of a foreign court if it had not submitted to the foreign court's jurisdiction.<sup>686</sup> What constitutes voluntary submission depends on facts and circumstances of the case. If a defendant shows up before the court where the suit is filed and questions both jurisdiction and merits of action, he is said to have submitted voluntarily”.<sup>687</sup>

## CONCLUSION

As part of its growing dedication to international arbitration, India is striking a balance between domestic legal protections and the recognition and enforcement of arbitral rulings from other countries. By conforming to international accords like the New York and Geneva accords, the Arbitration and Conciliation Act, 1996 and subsequent court interpretations have fortified India's pro-arbitration position. But there are still problems, especially with the courts becoming involved, with how public policy is interpreted, and with the Section 48 procedures. Improving India's standing as an arbitration-friendly country requires ongoing legal clarity and consistency in court rulings, even though revisions through the 2015 amendment have simplified enforcement. Attracting foreign investment and enhancing India's global commercial dispute resolution system will depend on creating an enforcement process that is more predictable and efficient going forward.

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<sup>685</sup> Section 44A of C.P.C. deals with the execution of decrees passed by Courts in reciprocating territory

<sup>686</sup> “Raj Rajendra Sardar Maloji v. Sri Shankar Saran AIR 1962 SC 1737; R.M.V. Vellachi Achi v. R.M.A. Ramanathan Chettiar AIR 1973 Mad. 141”.

<sup>687</sup> Chormal Balchand Firm v. Kasturi Chand AIR 1938 Cal 511



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