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NEED FOR MAJOR LEGAL REFORMS IN RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDIA

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ABSTRACT

The scope of International commercial arbitration is increasing in the present situation while the foreign relation among the countries was also developing. So if there is a question of recognizing and enforcing foreign awards, India's legal framework sometimes lacks in many factors. That's why many judiciary decisions are amended, and the whole Act itself amended the provisions concerning the recognition of foreign awards and its enforcement. So this study "Need for Major Legal Reforms in Recognition and Enforcement of Foreign Arbitral Awards in India" mainly provides what is lacking in the legal framework of recognition of foreign awards in India and what all reforms if made it would be changed. This study also tried to describe the exact legal position existing in the country today and its evidentiary value.

Keywords: foreign awards, arbitration, international Convention, public policy\

INTRODUCTION

The Indian constitution provides a scheme of enjoying Alternate Dispute Resolution under Article 39(A). ADR means the external dispute resolution or settling down the disputes with a third party's help. Maybe it can be said that ADR is a tool used by our judicial system, which reduces the overload of cases in courts and acts alongside the Court. For that, there are different types of dispute settlement system are exists. Arbitration is one of the methods of ADR practised in India. Arbitration is most commonly used in settlement of commercial disputes. It distinguishes itself from mediation and conciliation, all of which are prominent in settlement of labour disputes between management and labour unions. It is a private process where the conflict parties agree that one or several individuals can decide after receiving evidence and hearing arguments. "Arbitration can be defined as a reference to the decision of one or more persons with or without an umpire". Concerning the Arbitration and Conciliation Act, 1996, arbitration in India is controlled. There may be both binding and non-binding arbitration procedure. The decision is definitive because arbitration is binding, can be imposed by a judge and can be appealed on very narrow grounds only. When arbitration is non-binding, the arbitrator's award is advisory and can

be final only if the parties approve it. Part II of the Act includes foreign awards and covers the parties to the New York Convention.

The enforceability and recognition of a foreign award in the countries where the parties to an arbitration agreement do not have any presence have always been in discussions and subject to multiple interpretations. Even where international arbitration awards have been made in a notified country, enforcement in India to date has been difficult. Many debates and performance are held in India to entertain the foreign arbitral awards or not, and through many judicial decisions, it is overruled and changed a lot. Still, there is a chance to make further changes concerning the enforcement of foreign awards.

RECOGNITION OF FOREIGN ARBITRAL AWARDS IN INDIA

The Arbitration and Conciliation Act, 1996 in India entertains both commercial arbitration as well as international commercial arbitration. Commercial arbitration is when disputes are resolved by referring them to a neutral judge, an arbitrator, chosen by the parties based on the facts and claims submitted to the arbitration tribunal for a decision. International commercial arbitration is a way of settling conflicts occurring in international commercial contracts. It is used as an alternative to litigation and is regulated exclusively by the contracting parties' previously agreed terms, rather than by national laws or procedural rules. It is defined in sec 2(1) (f) of the ACA Act. An arbitral award on differences between persons arising out of a legal relationship is considered as a foreign award, whether it is contractual or not. But as far as India's law concerned the ties should come under the meaning of the word 'commercial'. Now the Foreign Awards (Recognition and Enforcement) Act, 1961 is taken over by Arbitration and Conciliation Act. Section 44 of the said Act defines the "foreign award" also. To recognize the award in India, it should be in pursuance of an agreement in writing, the Convention outlined in the First Schedule needs to be applied. The distinction made in one of such territories as the Central Government satisfied that reciprocal provisions by notification in the Official Gazette and declare to be territories to which the said Convention applies. But the award will be reported to be complete only by signature at the place where it is signed irrespective of the location where it is made. The applicability of section 44 is

to be regarded as "two-tier arbitration". The first tier is to be held in India under Part I and the second was to be appellate proceeding and had in New York convention country under Part II. Section 46 of the Act provides the criterion of when such foreign award would be binding on the parties. Any international award that would be enforceable shall, according to this section, be regarded as binding on the persons between whom it was made for all purposes. Apart from that, it may accordingly be relied upon by any of those persons in any legal proceedings in India by way of defence, set aside or for any other reason.

Evidentiary Value

Even where international arbitration awards have been made in a notified country, enforcement in India to date has been difficult. So to make it valid and enforceable, any person applying for enforcing an Award in India shall produce certain documents before the Court like the original award or a copy, Original Agreement for arbitration or a certified copy, and necessary shreds of evidence should be required to prove the award in India as per the mandate under section 47 of the Act.

SIGNIFICANCE OF INTERNATIONAL PACTS

The New York Convention (1958) and Geneva Convention (1927) on awards are the most significant treaty in private international law and adhered by more than 160 nations. Currently, 156 countries are parties to the New York convention. Under the Arbitration and Conciliation (Amendment) Act, 2015, these two avenues are available for recognizing the foreign arbitral awards. And both these Convention have greater importance in applying and enforcing foreign arbitral awards in India. In Part II, Chapter I apply to NY Convention Awards and do not apply to Geneva Convention Awards, which fall under Chapter II.

The two necessary actions contemplated by the Convention are the recognition and enforcement of foreign arbitral awards and the reference by a court to arbitration. The dissatisfaction with the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 caused the New York Convention's establishment. The New

York Convention offered a simple, comprehensive and effective way of resolving international disputes by arbitration. Yet, 62 years after its adoption, some reform proposals or adaptation to current approaches and modern developments are already on the table.

The Convention has defined a minimum legal structure, but it requires national courts to implement arbitral awards in compliance with higher requirements than those provided for in its provisions. Article VII provides flexibility to States that wish to go further without violating the minimum framework for arbitration set out in the Convention. The New York Convention offers significant advantages that are now necessary for transnational dispute resolution and compliance.

Both the conventions are encouraged the recognition and enforcement of foreign arbitral awards. It is made possible by removing some laws and conditions that existed in the national laws that are more stringent than in Convention. The adoption of these conventions had increased the efficiency of international commercial arbitration; by make sure a rapid enforcement of arbitral awards created per the will of the parties.

CURRENT STATUS

Several factors affected the enforcement of foreign awards in the Indian judiciary. Applying the provisions adopted by the Indian legal system, the bench also struggled to build a correct legal framework and a uniform application. Traditionally, when petitioned by a party, the courts have demonstrated a willingness to participate in all facets of international arbitration. Not only were interim orders given, arbitrations were stopped in their wake, but the courts usually showed no restraint in setting aside awards or denying compliance. The struggle and instability of the recognition of foreign arbitral awards are somehow offered in many decisions, thereby overruling many of them. In **Bhatia international case,** the Court addresses the fact that the legislation was not well-drafted. Hence, reading of all the provisions shows that Part I is to meant to apply to international commercial arbitrations outside India if the parties are not expressly or impliedly excluded it. Later in **Venture global case,** the Supreme Court held that Part I can be applied and Indian Courts have the power to set aside the arbitral awards". Court relying on this ratio and

Bhatia case annulled a foreign arbitral award based on purely domestic public policy notions where the seat of arbitration was in England. And thereby India afforded the image of an arbitration-hostile jurisdiction. But after specific years this decision is overruled in the case of, **Bharat Aluminum co vs Kaiser Aluminum technical services** and found that the law governing the arbitration agreement is English Law, Part I of the Indian Arbitration Act stands impliedly excluded". It declares that Part I shall apply to all arbitrations within India. Therefore, it is clear that Part I will not apply to arbitrations with seat outside India. A foreign award will be subject to Indian jurisdiction to be enforced in India following Part II. Otherwise, the Indian Courts cannot interfere with a foreign award.

Arbitration &Conciliation (Amendment) Act, 2015

The instability and uncertainty existed in interpreting and recognizing foreign arbitral awards somehow attained a right path after implementing Arbitration &Conciliation (Amendment) Act, 2015. Through this amendment, sec. 2(2) has been amended; it implies that this Part shall be applicable only if the place of arbitration is in India. But it was subject to an exception that; if at all the palace arbitration is outside India, sections 9, 27 and clause (b) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration. And an arbitral award made outside India can be enforced and recognized under Part II of the Act. Apart from these changes, this amendment made a change concerning Sections 34 & 48 based on the 246th Law Commission Report's recommendation and clarified the term public policy's meaning. It is explained that the award conflicts with India's public policy; only if the award has been caused or influenced by fraud or corruption, or has been in breach of section 75 or section81, or is in violation of the basic policy of Indian law, or is in conflict with the most fundamental principles of morality or justice. This is the current status of recognition of foreign awards in India after implementing the 2015 amendment. These Law Commission proposals were duly incorporated in the Arbitration and Conciliation (Amendment) Act, 2015. Subsequently, Sub-Section 2A was inserted in Section 34 and respective explanations to Public Policy in both Section 34 and Section 48. Thus, as is currently drafted, the Arbitration and Conciliation Act limits the scope of public policy under Section 48.

RECENT JUDICIAL DECISIONS

The judicial decisions made recently by the Supreme Court related to the recognition of foreign arbitral awards can be found with an effect of 2015 amendment as well it is overruling many decisions also. For example, in *Lal Mahal Ltd v Progetto Grano Spa* case Supreme Court of India overrules *Phulchand Exports Ltd v OOO Patriot*. **It reduces** court interference in the enforcement of foreign awards. It is decided that a broad interpretation of "public policy" does not apply to foreign awards. It has limited the judicial Interference of Indian courts regarding enforcement of foreign awards under Section 48 of the ACA, 1996. It provided a ray of hope for India to establish a destination for international commercial arbitration. Then again it is interpreted recently in the case of;

Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors

The Court decided this case on February 13, 2020, by Supreme Court by relying upon the judgment passed in Life Insurance Corporation of India v. Escorts Limited and held that violation of FEMA could not be held to be a violation of the fundamental public policy of the Indian Law. This departed from the landmark judgment passed in Renusagar Power Company Limited v. General Electric Company, where the Apex Court held that "public policy" in the context of an award that breached the provisions of FERA and held that FERA was enacted to protect the national economic interest and such violation would contravene the public policy of India. This case further clarifies the 2015 Amendment to the Act by reiterating that the patent illegality ground is no more a ground to determine public policy's contravention. The Supreme Court observed that provision for an appeal is given in the Arbitration Act scheme against a judgement refusing to accept and execute a foreign award, but not the other way around. There is no provision to bring an appeal against an order accepting an international award and implementing it.

Consequently, it is necessary to bear in mind that the Supreme Court's authority under Article 136 can not be used to override the statutory policy set out in the Arbitration Act. Considering the limited parameters of Article 136, the Supreme Court noted that it must be prolonged to intervene with cases such as the one at issue where there is no provision for appeal against a judgment that

recognizes and enforces a foreign award. And it is made clear that Interference may only be warranted in the interest of settling the law, where any new or particular point is posed, which has not been addressed by the Court on any previous instance. A judgement arising out of such action can be used as a trailblazer to direct the future litigation future in that regard.

While interpreting the expression' public policy' and 'fundamental policy of India', the legislators' intention to narrowly interpret the terms is quite clear from some of the judgments and the 2015 amendment. These decisions indicate that the recent pattern of interpretation of "public policy" has been one in which the courts have declined to review the arbitral awards on merits, thereby upholding the statutory mandate of "minimal intervention of the Courts in the arbitral process" shown in the amendments adopted by the Act on Arbitration and d Conciliation (Amendment) and 2015. It seems, however, that in India a new approach is being adopted. However, because of the promising signs in BALCO, there is still some confusion about implementing international arbitral awards in India following the recent judgments of the Supreme Court in Lal Mahal and BALCO. It would almost fair to see that the Indian arbitration law is consistent with the New York Convention's real intent.

CRITICISM

The recognition of foreign awards in the countries where the parties do not have any presence has always been in talks and is a subject matter of multiple interpretations and gone through many criticisms. Still, some dissatisfactions are existed relating to the recognition and enforcement of foreign awards. That's why many judgements are overruled, and the decisions are changed accordingly. From this change, it is also proved that there is an inconsistency in recognizing the awards and applying it in India. It can be seen that the conventions are lacking in Part II to meet a perfect requirement that is suitable for modern economic needs, especially in the field of business communities. One important thing to be found as an ineffective measure is that the Convention is too short. Only a limited number of articles are there to recognize all the aspects of identifying foreign awards. Because nowadays, the scope of international commercial arbitrations are increased with the developed relation among foreign countries. There is also confusion in some definitions, such as the basis for public policy to resist the implementation of arbitral awards,

which can be used by national courts as a way to bypass the Convention's structure if public policy is violated. Since the word 'public policy' is not specified in the New York Convention, it has been interpreted liberally by the courts in India, to the detriment of the compliance parties. But by taking the increased number into account, it needs to be objectively viewed. But it needs to be critically interpreted by taking into considering the increased number of international arbitration. Apart from this in recognizing the awards, the global arbitration framework requires a uniform interpretation and application of the Convention. In Indian judiciary, it takes lots of time to acknowledge and decide concerning the enforcement of awards. More specific and more transparent legislation always gives a quick remedy. If the legal framework is made without any doubt to apply as it is then the disputes will be resolved as soon as possible, and the awards are enforced in the right way. Like this, still, some aspects need to be improved. So it is essential to require Reform.

NEED FOR REFORMS

The uncertainty and doubtful field now existing in the recognition and enforcement of foreign awards and for their smooth interpretation, some little reforms are needed in the current Indian legal framework. A better reform to the rules will help get a speedy and quick solution to the disputes relating to the enforcement of foreign arbitral awards. Some of the reforms that can be suggested are the following;

· Reform of the meaning in public policy will provide legal certainty to parties seeking to enforce a foreign award. To undermine the Convention. National courts of some States will be ready to use pretexts other than the public policy

· 2015 amendment only made three things to be violating public policy to be India. Whether the award has been caused or influenced by fraud or corruption, or has been in breach of section 75 or section 81, or is in violation of the basic policy of Indian law, or conflict with the most basic principles of morality or justice. Public policy is a board concept, and it should define in proper. Later on, judiciary again interpreted the public policy aspect. So the Act should need to be diagnosed the term more clearly with adding other things that have a chance to violate the nation's public policy and make the law applicable in the case as it is. And no need to any interference of judiciary on defining the term further.

· To eliminate uncertainty or doubt, the test as to whether there is a contravention of the basic policy of Indian law does not require examining the merits of the conflict.

· Excessive delays in the award compliance process since states vigorously oppose enforcement using the state immunity principle. It also takes time to settle a conflict to impose the award in India as well. Fast elimination of the cases must, therefore, be enforced.

· In some countries, a practice that can be found that the rules of conventions are used by the courts unlawfully to protect their national interest may indirectly affect the other countries, including India. This practice should need to be compulsorily prohibited.

· The revision of the New York Convention should be made to ensure a uniform rule of enforcement of foreign awards in all member countries.

· Adopting the new Convention will make a more transparent legal framework in the enforcement of an award. For example, a new convention would solve the public policy issue or, in general, and the misapplications or current problems.

· Indian courts have pronounced inconsistent decisions regarding the limitation period on applications for enforcement of foreign arbitral awards. The Act didn't expressly prescribe a limitation period for an enforcement application. Even though recourse has been made Articles 136 and 137 of the Limitation Act there needs to be a determining the limitation period applicable to petitions for enforcement of foreign awards in the Act itself like the U.S.A., U.K., and Singapore, which prescribe clear time bars to such applications.

An apt reform to these different rules and laws regulating the recognition of foreign awards in India may enforce it without affecting any nationals and local interests unlawfully. Also, a reform will change and make sure that the lawmakers have free to apply the rule without any doubt, and thereby the struggle lies to them will be lowered.

CONCLUSION

Recently in India, the scope of international commercial arbitration has been widened. At the same time, many judicial decisions have interpreted the enforcement of foreign awards differently. A new thing or law has been evolving from each decision regarding the recognition of foreign arbitral

awards. Because of that the Supreme Court even pointed out that, where any new or unique point is posed, which has not been addressed by the Supreme Court on any previous instance; and a judgement arising out of such action can be used as a trailblazer to direct the future course of litigation in that regard. So the interpretation of the same lies to the Supreme Court regarding any new facts. If an apt reform has been made to the laws relating to recognizing foreign arbitral awards, then the struggle of supreme out in interpreting some situations will be lowered. And thereby, a transparent system of applying foreign awards can be achieved in India.

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