

Enforcing Foreign Arbitral Awards in India- Is the tide turning?

Enforcing a foreign arbitral award in another jurisdiction may become a long and tedious process, where the Award Holder may be required to cross hurdles created by domestic laws of the country. Although India has adopted the UNCITRAL Model Law, the Legislature has been amending the Indian Arbitration and Conciliation Act, 1996 ('Arbitration Act') from time to time. The enforcement process can become cumbersome and protracted in India, since the statute provides for an appeal before the jurisdictional Court and special leave to appeal before the Supreme Court of India. However, the tide has been turning into a favorable one, where the Courts do not sit over an award as an Appellate Court but as an Enforcing Court.

This article delves into recent challenges which have been raised against enforcement of foreign awards but have been turned down by courts.

In *Aircon Beibars FZE (UAE Entity) v. Heligo Charters Private Limited (Indian Entity)*, [2022 SCC OnLine Bom 329 decided on 17.02.2022], a petition was filed before the Bombay High Court for recognition and enforcement of a foreign arbitral award (passed under the rules of SIAC) under Sections 47 and 49 of the Arbitration Act. The dispute emerged from a Lease Agreement of a helicopter. As per the Lease Agreement, payments were to be made in intervals, however, the respondent failed to honor its obligation. The parties then entered into a Settlement Agreement providing settlement of the outstanding sum and for the sale of the leased helicopter. Again, respondent did not adhere to the Settlement Agreement, thereafter, petitioner terminated the Settlement Agreement and invoked arbitration. The Arbitral Tribunal awarded the full price of the helicopter (which was not originally provided in the Lease Agreement) in favor of the petitioner. The often-used ground of "contrary to public policy of India" was relied upon by the respondent to avoid the execution of the award. The respondent contended that awarding the full price of the helicopter is contrary to the public policy of India as it will violate Indian law. The other argument raised was that, a part of the award is unreasoned which is a violation of the principle of natural justice and against the most basic notions of morality & justice, therefore, contrary to public policy. The respondent also argued that they were unable to defend the amended claim which changed the nature of the claim. The High Court, however, brushed aside all the arguments raised



Mayank Grover
Partner
E: mayank@singhania.in

by the respondent, holding that the award was not such as to constitute a violation of the fundamental policy of Indian law.

The Court held that it is not for the Enforcing Court to consider arguments on merits; entering into the question of the contractual intent of the settlement deed, would be entering upon the merits of the dispute which is impermissible for this Court. Further, awarding the price of the helicopter is not contrary to the public policy of India. The Court also held that misapplication of any statute should be brought before the Court before whom the award is challenged and not before an Enforcing Court.

As for the argument of not being able to defend the amended claim, the Court held that the respondent's counsel gave no objection when the amendment was brought, thus the respondent had waived the objection. The Court also held that the respondent should have sought time to defend the amended claim and not have proceeded with the trial. Further, the Court opined that the respondent is bringing the agreement under the scope of Section 48(1)(b) of the Arbitration Act, in as much as the Respondent was "otherwise unable to present its case" (the other ground to refuse the enforcement of an award); however, there was no reason to believe that the submissions of the respondent were not advanced before the Arbitral Tribunal.

As for the argument that some part of the award is not reasoned, the Court held that extent of quality or sufficiency of reasoning or insufficient reasoning is not within the scope of Enforcing Court. The Court was of the view that this argument would require entering the merits of the dispute which is beyond the consideration of Enforcing Court.

The upshot of the whole discussion is that the ground of "contrary to public policy of India" cannot be used as an omnibus argument for avoiding the enforcement of an award.

The other recent pronouncement on the enforcement of foreign arbitral awards, was in the case of NCC Infrastructure Holdings Ltd. ('NCC') v. TAQA India Power Ventures Pvt. Ltd. ('TAQA') [Arb. O.P. (Comm. Div.) 410 of 2021 decided on 11.01.2022] by the Madras High Court. Both parties were Indian entities who had agreed to administer the arbitration at the Singapore International Arbitration Centre. Some of the claims had been decided in favor of NCC while some were decided in favor of TAQA. Both parties were engaged in parallel proceedings before different High Courts. NCC had filed for enforcement of that part of the foreign award which was in its favour before the Madras High Court whereas TAQA had filed a similar petition before the Delhi High Court, prior in time. The objection raised by TAQA was that while proceedings for execution may be instituted in more than one court, however, proceedings for recognition and enforcement of foreign award should only be instituted in one court. Since Delhi High Court was already seized of the matter, therefore, proceedings before the Madras High Court were not maintainable.

The Court, however, held that as per Section 47 of the Arbitration Act, "Court" has been specifically defined as the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award, if the same had been the subject matter of a suit on its original civil jurisdiction and thus, the foreign award can be enforced before this Court. This reasoning was based on the fact that TAQA is based out of Cuddalore (a place within the jurisdiction of Madras High Court) and that its assets were situated within the civil appellate jurisdiction of the Court; therefore, the award can be enforced against TAQA before this Court. The Court further held that instituting petitions for recognition and enforcement of a foreign award in more than one High Court is not, per se contrary

to the public policy of India since the assets of the judgment debtor may lie within the jurisdiction of different High Courts.

Another ground raised for obstructing the enforcement of the foreign award was initiation of corporate insolvency resolution proceedings by the award holder against the judgment debtor before NCLT (National Company Law Tribunal) for failure to pay dues. NCLT had dismissed the petition holding that there exists a dispute between the parties and that NCC is not an operational creditor of TAQA. The High Court rejected this argument holding that grounds contained in Section 48 of the Arbitration Act are exhaustive in nature and relied upon the law laid down by the Supreme Court of India in *Vijay Karia & Ors. v. Prysmian Cavi E. Sistemi SRL & Ors.* [(2020) 11 SCC 1 decided on 13.02.2020] wherein it was directed that enforcement of a foreign award under Section 48 of the Arbitration Act may be refused only if the party resisting enforcement furnishes to the Court proof that any of the watertight grounds contained in Section 48 have been made out to resist enforcement and that the Court has the discretion to reject the resistance to enforcement, if made on grounds which only affect party interest. Thus, the foreign award was recognised and held to be enforceable as a decree of the Court.

The location of the assets of the judgment debtor is the heart of every action initiated for recognition and enforcement of a foreign award. It is imperative that the foreign award holder ascertains the territory of the assets and thereafter, approach the appropriate High Court having territorial jurisdiction.

The recent pro-enforcement perspective of Indian Courts has demonstrated a concerted effort to curtail judicial intervention in international arbitration awards, unless the award is inherently unenforceable. This will bring Indian arbitration law in line with the best international practices.

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