

Enforcement of Foreign Awards in India

Under the Arbitration and Conciliation (Amendment) Act, 2015. There are two avenues available for the enforcement of foreign awards in India, viz., the New York Convention and the Geneva Convention, as the case may be.

A. Enforcement under the New York Convention

Sections 44 to 52 of the Arbitration and Conciliation (Amendment) Act, 2015 deals with foreign awards passed under the New York Convention.

The New York Convention defines "**foreign award**" as an arbitral award on differences 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-

- a. In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
- b. 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.^[1]

From the abovementioned conditions, it is clear that there are two pre-requisites for enforcement of foreign awards under the New York Convention. These are:

- a. The country must be a signatory to the New York Convention.
- b. The award shall be made in the territory of another contracting state which is a reciprocating territory and notified as such by the Central Government.

Section 47 provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court (a) original award or a duly authenticated copy thereof; (b) original arbitration agreement or a duly certified copy thereof; and (c) any evidence required to establish that the award is a foreign award. As per the new Act, the application for enforcement of a foreign award will now only lie to High Court.

Once an application for enforcement of a foreign award is made, the other party has the opportunity to file an objection against enforcement on the grounds recognized under Section 48 of the Act. These grounds include:

- a. the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- b. the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- c. the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted

- to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
- d. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - 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.
 - f. the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
 - g. the enforcement of the award would be contrary to the public policy of India.

The Amendment Act has restricted the ambit of violation of public policy for international commercial arbitration to only include those awards that are: (i) affected by fraud or corruption, (ii) in contravention with the fundamental policy of Indian law, or (iii) conflict with the notions of morality or justice.

It is further provided that if an application for the setting aside or suspension of the award has been made to a competent authority, the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Section 49 provides that 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.

B. Enforcement under the Geneva Convention

Sections 53-60 of the Arbitration and Conciliation (Amendment) Act, 2015 contains provisions relating to foreign awards passed under the Geneva Convention.

As per the Geneva Convention, "**foreign award**" means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,-

- a. in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and
- b. between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and
- c. in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter, an award shall not be deemed to be final if any
- d. proceedings for the purpose of contesting the validity of the award are pending in any country in which it was made.^[2]

Section 56 provides that the party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court (a) original award or a duly authenticated copy thereof; (b) evidence proving that the award has become final and (c) evidence to prove that the award has been made in pursuance of a submission to arbitration

which is valid under the law applicable thereto and that the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure. As per the new Act, the application for enforcement of a foreign award will now only lie to High Court.

The conditions for enforcement of foreign awards under the Geneva Convention are provided under Section 57 of the Arbitration and Conciliation Act, 1996. These are as follows:

- a. the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- b. the subject-matter of the award is capable of settlement by arbitration under the law of India;
- c. the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- d. the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
- e. the enforcement of the award is not contrary to the public policy or the law of India.

The Amendment Act has restricted the ambit of violation of public policy for international commercial arbitration to only include those awards that are: (i) affected by fraud or corruption, (ii) in contravention with the fundamental policy of Indian law, or (iii) conflict with the notions of morality or justice.

However, the said section lays down that even if the aforesaid conditions are fulfilled, enforcement of the award shall be refused if the Court is satisfied that-

- a. the award has been annulled in the country in which it was made;
- b. the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
- c. the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration: Provided that if the award has not covered all the differences submitted to the arbitral tribunal, the Court may, if it thinks fit, postpone such enforcement or grant it subject to such guarantee as the Court may decide.

Furthermore, if the party against whom the award has been made proves that under the law governing the arbitration procedure there is any other ground, entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Section 58 provides that where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the Court.

OUTLOOK

The design of the new Act is based on the premise that it will provide an efficient and swift method of dispute resolution for both the domestic as well as international investors. It is apposite to quote Sir LJ Earl Warren, "**It is the spirit and not the form of law that keeps the justice alive.**" Although there have been judgements which have disturbed the calm waters of the arbitration, the cumulative endeavour should be to preserve the spirit underlying the Act which is precisely the objective of the new amendment Act. With a surge in the business opportunities and entrepreneurship in India, it is only proper to anticipate proper implementation of the Act in harmony with the UNCITRAL Arbitration Rules which forms the foundation of the Act.



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[1] Section 44 of the Arbitration and Conciliation(Amendment) Act, 2015

[2] Section 53 of the Arbitration and Conciliation(Amendment) Act, 2015