What are foreign awards and how can they be enforced in India?

It is very important to know about arbitration before beginning with Foreign awards.

Arbitration is an alternate dispute mechanism where their contractual relationship between two parties and they want to solve disputes without going to Court due to Cost and Time factors. In such cases, they can add an Arbitration Clause in the Contract, which proves to be very helpful in times of dispute.

To understand Foreign Arbitral Awards, one should be able to distinguish between International Commercial Arbitration and Foreign Arbitration Award.

Arbitration in India is governed by The Arbitration and Conciliation Act, 1996 and section 2(1)(f) defines international commercial arbitration. In summary, it can be understood as any arbitration between two parties where at least one of the parties is a foreign national company or government, it will be known as international commercial arbitration.

Arbitration has the concept of 'seat', which means, the palace of Jurisdiction whose law applies to the arbitration proceeding. For example, if the arbitration is between a foreign company and an Indian company, but the seat is Indian, then it is international commercial arbitration, but if the Seat is outside India, i.e. Foreign Laws of Arbitration, then it will be a foreign arbitration.

Indian National Parties can choose a foreign seat. Mr. Somdutta himself has been Part of Foreign Arbitration in Singapore with two Indian parties.

Part II of The Arbitration and Conciliation Act talks about requirement valid foreign arbitrations awards, to be capable and enforceable. Not every foreign arbitration award has valid jurisdiction in India. India is significatory to two conventions- the New York Convention and Geneva Convention. One of the conditions for foreign arbitration to be enforceable is for them to be significatory of those conventions and it has to be recognized through publication in official Gazette as convention territory by India. Currently, 54 countries are recognized as Convention Territory.

Can foreign awards be enforced straightaway in India or the award-holder has to wait for legal challenges to the award in the country of the seat before its execution?

In the case of domestic arbitration, one cannot file for enforcement for the award until a period of 90 days is achieved, under section 36 of the Act. If you're the deter i.e. if the award is not in your favour, you can challenge the arbitration in section 34 of the Act. Before the 2015 amendment Application for Enforcement and Challenge of Award could not be parallel, But after the 2015 amendment that has changed.

For the foreign award, there is no definition per se but, section 48 (3) of the Act, says 'if an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) 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'.

If any foreign award has to be challenged, it is to be made sure that the seat (as discussed above) should be exhausted. For example, the Award is of UK convention, the waiting period of UK arbitration will apply, Courts and Parties both have to ensure that Foreign Seat is not infringed.

How and when can enforcement of a foreign award be refused in India? What is the fundamental policy of Indian law and how is it to be determined whether an award violates the same or not?

Under section 47 of the Arbitration and Conciliation Act, to enforce a domestic award one has to approach the civil court having original Jurisdiction, and for

the enforcement of Foreign award, one has to approach the High Court or the Supreme court. Depending on where the assets of award lie.

The court cannot go into the merits of the case at all, hence, the scope of interference in foreign Arbitral Award is very limited,

The grounds where it can be enforced would be better explained and answered through a story. There were arbitration proceedings between an Australian company called white industries and an Indian company called Coal India (which also had a monopoly over coal mining in India, before the present government).

White industries had awarded in their favour and they came to India to enforce it. Indian lawyers are infamous for delaying the proceedings and White Industries case was not spared. The case went on to 10-11 years. After being frustrated and testing all waters, Australia approached UN central Arbitration against the Indian Government, claiming that by unnecessarily delaying the enforcement, India infringing Australias Status of the most favoured nation.

The government of India responded as it cannot be responsible for the decision regarding the arbitral award.

However, the arbitral tribunal did slam a 4 million Dollar penalty on India, justifying it for delay in the justice system as a reason for the violation of the status of Australia being the most favoured nation.

The discussed incident was highly criticized by the economist, as such incidents put India in a very bad light when it is trying to attract foreign fundings.

This incident led to the amendment for the 2015 Judgement.

The scope of Section 48 (1) has narrowed a lot and left only 5 conditions to refuse a Foreign Award.

Section 48 (2) talks about refusal on the ground of Subject Matter or Public Policy. Earlier, public policy has been used as a tool for striking any award at one’s will, but after the Amendment in 2015, the explanation has become more specific regarding, what it means by ‘Public Policy’. In the new explanation, it talks about that in no way, an award can be refused solely based on the merits of the Case. Because it has been already decided.

Under section 48, a foreign Award cannot be set aside by Indian Courts.

Section 48(2) carries the provision regarding the dispute of subject matter, in 48(2)(a) its says that the subject-matter of the difference is not capable of settlement by arbitration under the law of India; it is very important to know what are the subjects of difference.

The answer can be explained by two cases in India, that discuss what is the subject that cannot be resolved by arbitration in India or arbitration cannot be an effective dispute Mechanism.

The case of Booz Allen Hamilton vs. SBI Home Finance, 2011 and the case of A. Ayyasamy vs A. Paramasivam, 2016, from both cases the following subjects were drawn to be outside the Ambit of Arbitration:

- Criminal Cases
- Matrimonial Cases
- Insolvency, Winding Up
- Testamentary Matters
- Eviction, Tenancy
- Mortgage
- Trusts
- Patents, Trademarks, Copyright
- Competition, Bribery, Etc.

The above list is not exhaustive, but a general list of subjects that cannot be settled by Arbitration in India.

Section 48(2)(b) discusses Public Policy, which is the pandora's box due to its Plethora of Interpretations.

We all must have studied the landmark case of Renusagar. This age-old case still stood to be relevant in recent amendments of Arbitration Act,

The Renusagar Judgment lays down three conditions for the non-enforcement of an award, due to Public Policy, those are as follows:

- If it is contrary to Fundamental Policy.
- If it violates the interest of India.
- If it is against the basic notion of Justice and Morality.

The new explanation of Section 48(2)(b) is very similar to the Judgement of Renusagar.

Even in Shri Lal Mahal Ltd vs Progetto Grano Spa, the Renusahar case was referred.

Another case which proved to be beneficial for the 2015 amendment was the case of ONGC v Western GECO, 2014. The Wednesbury principle was implied, i.e. the test of reasonableness. The principle says that if the reasonable man with reasonable foresight would not have done something, then such action if it violates reasonableness or an award that violates the reasonableness cannot be enforced in India.

Through the 2015 amendment and its scope, the Wednesbury principle was set aside and later on occasions, it was admitted that the GECO case Judgment was erroneous.

Mr. Somdutta holds the opinion that even though we are not where we should be in terms of making an Arbitration Act, that isn't incorrectly advantageous to the defeating party but with the above judgements and amendments, we can conclude that slowly and steadily we're making progress in the right direction because we want to uphold our economy by bringing foreign fundings and for that, the setup of error-free Arbitration award enforcement is extremely important.

The proof of the progress we're making as a country can be seen in the case of *Vijay Karia. v. Prysmian Cavi E Sistemi SRL, 2020,* where the Bombay High Court had held that the award passed is not reasonable as it felt that the arbitrator had not interpreted the contract correctly. However, the Supreme Court overruled the Bombay High Court Judgement and held that award is enforceable.

The Supreme Court passed the judgement that the award is to be enforced in India. In its judgement, the Court said that the award is to be read as a whole, fairly and without nitpicking. This Judgement has proven to be progressive.

But again we took step back, in the case of NAFED and the Alimenta S.A., April 2020, NAFED was in the contractual obligation of exporting 5000 metric tons for food grain to the other party in question, however, due to flood, they were not able to do so. Later when the arbitration proceedings began and the matter came to the Supreme Court, it refused the enforcement as NAFED is a government organization and it has to abide by Governments order. Mr. Somdutta personally agrees with it despite the 'controversies' because if there

are crises in your own country for food, one cannot be held liable for not exporting it.

What is the appropriate court for enforcement of a foreign award and what are the appeal procedures?

Section 2(1)(e) defines Court, but after 2015, it has been very clear that one has to approach the High Court. Under Section 47, party applying for the enforcement of the foreign award shall at the time of application has to provide Original Award, Agreement, etc.

In the recent case of P.E.C. Limited v. Austbulk Shipping, the Court said that the 'shall' in section 47 (1) should be replaced with 'may' and such opinions sport a pro-arbitration notion.

For appeal, Section 50 applies which only allows one appeal but as their exceptions always, one can approach the Supreme Court too after the first appeal.

Does a foreign award need to be stamped and registered to be enforced?

No, it does not. Supreme Court categorically stated so in M/S Shriram EPC Limited v. Rioglass Solar. Several judgements are supporting the notion that registration is not necessary.

What would the limitation period be for enforcement of foreign awards?

The Judgement in Fuerst Day Lawson Ltd vs Jindal Exports Ltd cleared the air that the foreign award comes as a decree itself and hence is capable for enforcement. In the Limitation Act, the enforcement of Decree, Article 136 schedule to the Limitation Act is applicable that would be 12 years from the date of the decree.

In the recent Judgement of March 2020, in the case of Bank of Baroda v. Kotak Mahindra Bank, which says that for foreigns decrees (they are not awards, decrees are made by Foreign Courts) to be Enforced, Article 136 will not apply Article 137 (it is the residuary provision which says that when no other limitation is prescribed limitation of 3 years will apply).

The above-discussed judgment has created confusion because foreign awards are considered to be decree, hence, there are opinions that since a foreign award is considered to be a decree even that should have limitation Period of 3 years.

In Mr. Somdutta’s opinion, the limitation should not be reduced, because the above judgement is based on section 44a CPC, which talks about enforcement of foreign decrees, are Decrees passed by Court and not any awards, decision or order, even if it is considered to be Decree.