INDIAN JUDICIARY AND THE ENFORCEMENT OF FOREIGN ARBITRAL AWARD

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ABSTRACT

The border separating the jurisdiction for enforcing foreign awards and the jurisdiction for contesting them is hazy. This distinction becomes crucially important in light of the important topics to be covered in this note, such as whether the current conventions' structure permits the Challenging Jurisdiction of convention awards to be considered concurrent between the "territory where the award is relied upon" and the "territory where the award is enforced"; what are the current Challenging Jurisdiction under the Arbitration and Conciliation Act and its interpretation under This note addresses these issues and makes an effort to delve into the elements that hinder the successful conclusion of the arbitration process and the enforcement of awards in India. It also emphasises the need to reduce excessive court involvement so that the goals of arbitration as a form of alternative dispute resolution are realised.

INTRODUCTION

International commercial conflicts are a natural byproduct of the global economy and frequently include multiple parties. In a nation like India, where delivering swift justice is merely a pipe dream due to excessive delays and backlogs that are a hallmark of the Indian Judiciary, litigation is no longer an option. Investors are desperately searching for international protection of their investments, specifically in terms of an acceptable dispute settlement process, with more than 2500 bilateral investments already in existence. Arbitration has become a popular choice of conflict resolution process, especially in cases of cross-border disputes, as a result of dissatisfaction with the conventional strict and adversarial judicial system. In the Asia-Pacific area, international commercial arbitration has shown astonishing recent growth. This is a reflection of both the region's rapid expansion of global trade and commerce and the rise in the willingness of business parties to use international arbitration as a dispute settlement method.

Alternative Dispute Resolution techniques like arbitration are not without flaws. Recently, this form of ADR has come under fire, mostly because it is challenging to enforce arbitral rulings. In this regard, the effectiveness of arbitration as a conflict settlement method has been called into question. This note will investigate the elements influencing the applicability of foreign judgements in India. An introduction to Indian arbitration law is provided in Part I of the note. In light of judicial interpretation, Part II addresses the definition of the term "international commercial arbitration." In light of the judicial interpretation, or rather "intervention," Part III analyses the meaning and parameters of "court intervention" in the arbitral procedure as well as the execution of foreign arbitral awards in India. The proposed changes to the Arbitration

and Conciliation Act, 1996 are critically analysed in Part IV of this note, along with recommendations for how to successfully enforce foreign awards in India with the least amount of judicial intervention. The conclusion emphasises the necessity to adopt adequate reforms on both statutory and judicial channels along the lines of the suggested improvements in order to remove the obstacles to enforcing foreign awards in India.

HISTORY OF INDIA'S ARBITRATION LAW

By mutual consent, the parties may choose to resolve their differences through arbitration. In arbitration, disagreements are settled by one or more parties acting in a judicial capacity in private rather than by a national court of law, which would have jurisdiction but for the parties' agreement to exclude it. The decision of the arbitrator or arbitrators is final and binding. An award is the common name for the arbitral tribunal's judgement.

The Arbitration (Protocol and Convention) Act of 1937, the Indian Arbitration Act of 1940, and the Foreign Awards (Recognition and Enforcement) Act of 1961 made up the bulk of India's arbitration law until 1996.

Similar to the English Arbitration Act of 1934, the 1940 Act established general rules for arbitration in India. The 1937 and 1961 Acts both aimed to make international arbitral awards enforceable (the 1961 Act implemented the New York Convention of 1958).

The government passed the Arbitration and Conciliation Act, 1996 to update the obsolete 1940 Act (hereinafter the Act). The UNCITRAL Model Law on International Commercial

Arbitration served as the basis for the creation of the complete Act. All three of the prior statutes were repealed (the 1937 Act, the 1961 Act and the 1940 Act). Its main goal was to promote arbitration as a rapid and affordable method of resolving business disputes.

While the parties, arbitrators, attorneys, and judges all thought the 1940 Act, which exclusively applied to domestic arbitration, was a useful piece of legislation in practise, it proved to be unsuccessful, and it was widely seen as being out-of-date.

The current Act is distinctive in two ways. In contrast to the UNCITRAL Model Law, which was intended to apply primarily to international commercial arbitrations, it applies to both domestic and international arbitrations. Second, it goes further than the UNCITRAL Model Law to reduce court intrusion.

The Arbitration and Conciliation Act of 1996's definition of "international commercial arbitration"

When discussing the execution of foreign arbitral awards, the definition and application of the term "international commercial arbitration" assumes a significant role. The term is examined in this section in light of recent judicial interpretation.

A dispute involving legal relationships, whether contractual or not, that are deemed to be commercial under Indian law must be arbitrated in a "international commercial arbitration" if at least one of the parties is one of the following: an individual who is a national of, or habitually

resides in, a country other than India; a body corporate that is incorporated in a country other than India; a business, an association, or a group of people whose c

The term "business relationship" was taken into consideration in the case of R. M. Investment Trading Co. Pvt. Ltd. v. Boeing Co. The Indian Supreme Court noted:

It is important to keep in mind when interpreting the word "commercial" in Section 2 of the Act that the Act is calculated and designed to support the cause of facilitating international trade and promoting it by allowing quick resolution of disputes arising in such trade through arbitration. As a result, any expression or phrase occurring there should be given a liberal construction consistent with its literal and grammatical sense.

The Court further emphasised the activity that creates the framework of commercial relationships by pointing out that trade and commerce go beyond the simple movement of goods and that, in the context of modernity, include services like energy supply, information transmission, banking, insurance, stock exchange, postal and telegraphic services, and transportation. The Supreme Court decided that a consultant service for promotional sale is regarded as a commercial transaction and that any dispute arising therefrom is of that character by applying the same rationale.

COURT INTERVENTION: A BARRIER TO UPHOLDING ARBITRAL AWARDS

One of the main benefits of international business arbitration is that it can be enforced across international borders. To put it another way, it is rather simple to enforce an award made in one

country in another. The 1958 New York Convention on the Recognition and Execution of Foreign Arbitral Awards, which as of this writing includes 145 signatory governments after the admission of Fiji to the convention, is the primary source of this ease of enforcement. The New York Convention permits the recognition of any international arbitral awards as long as they adhere to a set of fundamental minimal requirements (such as the award being in writing, and not contrary to public policy).

According to this Convention, the arbitration agreement is valid, its jurisdictional effects are acknowledged, and arbitration law is presumed to be enforceable. Additionally, by permitting the courts of a requested state to refuse implementation of an award on the grounds of "inarbitrability" defence and public policy exception, it underlines the significance of the integrity of the national legal order. Both grounds must be defined in accordance with their respective national legislation.

However, it has been observed that the "court involvement" problem plagues this technique of alternative conflict resolution's enforcement mechanism. This phrase is frequently used in writing about arbitration. However, it doesn't seem suitable to use the phrase "intervention" because arbitration is a legal conflict resolution alternative that is founded on the autonomy of the parties. Therefore, the role of the court should be restricted to helping the arbitral tribunal fulfil its mandate.

While it is acknowledged that the grounds for vacate the award under the applicable law (lex loci arbitri) should be as limited as possible, progress would be made if it were acknowledged

that the basis for these grounds should be interpreted in accordance with Article V of the New York Convention, as provided by UNCITRAL Model law (Article 34).

The sovereignty of the parties to decide on the "rules of the game" is the essential tenet of the Model Law. This acknowledgement of the parties' independence is the outcome of policy considerations aimed toward international practise as well as the fact that arbitration depends on the parties' consent.

We believe that the principle of party autonomy should be given priority consideration by the apex court, even though it has been established that courts have the authority to interfere with arbitral awards, if any award is against any statutory provision, is patently illegal, or is in violation of India's public policy, as was demonstrated in the more recent case of Oil & Natural Gas Corporation Ltd. v. Saw Pipes (P) Ltd.

The nature of the arbitral process may be considerably impacted by national legislation pertaining to arbitration. At the time of enforcement, these conditions would demand some sort of court assessment of the merits of the arbitral rulings.

In India, Part I of the Arbitration and Conciliation Act, 1996, which relates to arbitration conducted in India and the awards thereunder, facilitates such judicial involvement. Part II, which deals with the enforcement of foreign judgements, is further divided into two independent chapters. The Awards, as governed by the New York Convention and described by Section 44 of the Act, are the subject of Chapter 1. Awards as they are governed by the Geneva Convention are covered in Chapter 2 under Section 53 of the Act. Part I of the Act of

1996 deals with arbitration conducted in India and the enforceability of such awards (domestic or international), while Part II of the Act of 1996 deals with the enforceability of foreign awards in India based on the rules established by the New York Convention or the Geneva Convention.

Second, as will be shown in later sections of this note, objections made on the basis that an award is at odds with "public policy" are increasingly being used as a justification for judicial intervention in arbitral proceedings.

According to statistics on the execution of arbitral judgements in the High Court and Supreme Court from 1996 to 2003, 29.41% of challenges were based on "jurisdiction," 17.64% on "public policy," and 17.64% on "technical grounds - petition to be lodged under Section 48 and not Section 34"). As a result, it is safe to assume that excessive court involvement is to blame for the current state of foreign arbitral award enforcement.

In order to demonstrate that the arbitral process in India is prone to delays because of such interference, it is proposed infra to investigate both of the aforementioned examples of judicial intervention.