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Dispute of enforcement of foreign arbitral awards in India and its impact on international trade

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Abstract
With the promotion of International Trade among different countries apart from presence of agreement, a credence has to be establish among the parties that in case any dispute arises, in spite of having variance in the domestic laws of both the parties, the dispute will be resolved on the basis on principle of justice. Arbitration is considered as a step towards privatization of such justice. Arbitration clauses are most common in international commercial contracts under which parties comes into a private agreement for settlement of any kind of dispute which will be based on the law opted by the parties. The agreement further covers the number of arbitrators to form tribunal, procedure for appointment and removal of arbitrator and competence of tribunal to rule on its own jurisdiction. Since in International trade parties involve are from different nations with different domestic laws, there was a need for a uniform law that could be followed by each and every Country. Therefore to bring such uniformity Geneva Convention was passed in 1927 especially for the enforcement of the foreign award which was followed up by the New York Convention 1958. India has also ratified New Convention under Arbitration and Conciliation Act 1996 for enforcement of Foreign Awards. The New York Convention was introduced in 1996 Act so as international traders do not suffer problem while enforcing the awards and they can get easy Judicial Remedy but from the time of enactment of 1996 Act the scenario has been opposite. Due to various Judicial Pronouncements and the framework of the 1996 Act especially Part II of the act, it has become frantic job for International Traders to enforce the award in India or get any remedy.
Therefore the article will deal with the major loopholes in Arbitration Laws of India for enforcing of foreign awards in past decades, the reformative steps taken with 2015 Ordinance and its effect on the International Trade and Commercial relations among countries.

Keywords: International Trade, impact on international trade, principle of justice

1. Introduction

1.1 History & development of enforcement of foreign award laws

Before the enactment of the Arbitration and Conciliation Act 1996 Act in India, there were 3 regulation for enforcement of the arbitration awards in India. The enforcement of domestic award was regulated under The Arbitration Act 1940. For enforcement of the foreign awards there were two different regulations based on conventions firstly it was Execution of Foreign Arbitral Awards which was based on Geneva Convention and the other was Foreign Awards (Recognition and Enforcement Act) 1961 New York Conventions.

I) Geneva Convention

Geneva Convention was a multilateral treaty which was brought into effect after the First World War. Geneva Convention comprised of Geneva Protocol on Arbitration Clauses of 1923(hereinafter referred as 1923 Protocol) and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (hereinafter referred as 1927 Convention). 1923 Protocol and 1927 Convention was supplementary to each other for making it possible to enforce an award in contracting state other than where the award was rendered [1]. For the enforcement of the award under the convention, it was required for both the contracting states to be a party to the convention. For the enforcement of the Award under the convention the Award must be recognized as final "i.e. award is not subject to appeal or opposition and the award must not be against the "public policy and principle of Law"

II) New York Convention.

In later stage of Geneva Convention, it was realized that the convention was not conclusive to the speedy enforcement of foreign awards which was the requirement of International trade. One of major loopholes in Geneva Convention was, before the enforcement of the award, the matter would have become final in the country where it was rendered. Therefore it effectively prevented the execution of awards on basis that the award was subject matter of litigation, which act as a hindrance in the arbitration process [2].
Realizing the interest of developing International trade, it was important to further the means of obtaining the enforcement in one country of international arbitral award rendered in other country. In 1954 International Chamber of Commerce proposed a draft convention which was adopted by The United nation Economic and Social Council (ECOSOC) in 1955. Finally after the recommendations of number of governments and non-government organization, ECOSOC in 923rd Plenary meeting 1958 adopted a new International Convention on the recognition and enforcement of Arbitral Award i.e. The New York Convention. Further Article VII (2) of the New York convention cease the effect of the Geneva Convention [3].

III) Difference between Geneva and New York Convention

New York Convention provides for recognition and enforcement of arbitral award, whether or not made in the territory of a contracting state [4]. Unlike the Geneva Convention, under New York convention recognition and enforcement of the award can be sought even if none the

contracting state is the state where the recognition and enforcement of award is rendered [5]. Therefore New York convention has widened its area of operation as compare to Geneva Convention. However Article 1(3) of the convention permits the contracting state to limit the jurisdiction states for recognizing and enforcing of award.

IV) The Foreign Award (Recognition and Enforcement Act 1961)

The Foreign Award Act was passed to implement and give effect to the New York Convention. The act aimed at providing a mechanism for speedy referral of disputes to arbitration between the contracting parties and for the speedy enforcement of resultant foreign arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such award is sought.

V) Arbitration, and Conciliation Act 1996 and uncitral Model Law

The 1940 Act consolidated and amended the law relating to arbitration under the Indian Arbitration Act 1899 and 2nd Schedule to the code of Civil Procedure, 1908. The arbitration act was criticized for its mechanisms as it allowed too much judicial intervention. It was pointed out by Supreme Court in the case of *Guru Nanak Foundation v. Rattan Singh and Sons* [6].

Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep".

Therefore Law Commission of India, representatives of trade associations, arbitration bodies and arbitration experts also favored amendment to the arbitration laws and accordingly the Arbitration and Conciliation Act, 1996 (hereinafter referred as 1996 Act) was enacted. Meanwhile The United Nations Commission on International Trade Law adopted the Uncitral Model Law on International Commercial Arbitration in 1985. The general assembly recommended that all states given due consideration to the Model Law for the sake of uniformity of the law of arbitral procedure and the needs of International Commercial Arbitration practice. Therefore need was felt for improvement and harmonization of national laws which were inappropriate for resolving international commercial arbitration dispute. The Model law was intended to reduce the risk of such possible frustration, difficulties or surprise. Based on these recommendation 1996 act was modified and was further divided into four parts 1) domestic arbitration 2) Foreign Awards 3) Conciliation 4) Supplementary Awards

1.2 Enforcement of award under 1996 act.

The 1996 act talks about both domestic and foreign award, Domestic award is the one which is made where the arbitration is seated in India and both the parties are India whereas the foreign award is one which is made when the proceeding is outside India. Normally a domestic award is challengeable under section Sec.34 of the 1996 Act, whereas there are no provisions for challenging the foreign awards under 1996 Act.

Under the 1996 Act, he enforcement of foreign award can be resisted by the on the following grounds a) Invalidation of agreement b) No proper appointment of arbitrator C) the decision taken is beyond the subject of arbitration d) Any failure in composition of arbitral authority or arbitral procedure with law of the country.

I) Award cannot be Challenge on Merit

With the above limited ground given for challenging the enforcement of foreign award in India under Sec. 48(1) of the 1996 Act, it is clear that notwithstanding anything given in Indian Contract laws, no proceeding can be initiated against the foreign award for nullifying that award. Further the enforcement of foreign awards cannot be challenge on Merits. This has been a major issue from the time of enactment of 1961 Foreign Award Act, the same was pointed by Supreme Court in balco case [7].

"….In the 1961 Act, there is no provision for challenging the Foreign Award on merits similar or identical to the provisions contained in Sections 16 and 30 of the 1940 Act. The Indian Law has remained as such from 1961 onwards".

Further the court held:

"…Section 48(1)(e) cannot be interpreted to mean that, by necessary implication, the foreign awards sought to be enforced in India can also be challenged on merits in Indian Courts. The provision only means that Indian Courts would recognize as a valid defense in the enforcement proceedings relating to a foreign award, if the Court is satisfied that the award has been set aside"

II) Award Enforcement for only Notified Countries

The second requirement for enforcing any foreign award in India is that country where the award has been issued must be notified by the Indian Government to be a country to which the New York Convention applies [8] as given under Sec. 44 (b) of 1996 Act. But what if the award is made in a country which has not been notified by the country to come under the New York Convention, this question was dealt in the case of *Transocean Shipping Agency Pvt Ltd v Black Sea Shipping & Ors* [9] in which the award was made in Ukraine which was the part of USSR that time. However when the dispute arose between the parties, Ukraine got disintegrated from USSR and Ukraine become a separate country which was not notified by Indian Government. Therefore the issue aroused that whether the award can be enforceable in India despite the fact Ukraine has not been notified by Indian Government under New York Convention. Both the Bombay High Court and Supreme Court of India held that creating a new political entity do not make any detrainment for enforceability of the award rendered in a territory which was initially notified and hence award was upheld. Though this is very common issue in foreign award, when one country enforce the award let's say under New York Convention in the country where it is rendered but because of the reason the country where the award is rendered has not ratified the convention, party who wants to enforce the award remains remedy-less.

III) Public Policy

Further the court can refused the enforcement of the award if a) The subject matter of the difference is not capable of settlement by arbitration under Indian Laws b) the enforcement of the award is contrary to the public policy of India The term "Public policy" is mentioned under Article V (2) (b) of the New York

Convention. "Public Policy" never meant international Public Policy but Public Policy with regard to that country where the award has to be enforced. Prof Berg an authoritative commentary on International Arbitration stated:

"…In fact, the grounds for refusal of enforcement are restricted to causes which may be considered as serious defects in the arbitration and award: the invalidity of the arbitration agreement, the violation of due process, the award extra or ultra petita, the irregularity in the composition of the arbitral tribunal or the arbitral procedure, the nonbinding force of the award, the setting aside of the award in the country of origin, and the violation of public policy [10].

What does it mean by public policy? This question has become an important issue in the field of arbitration as it is one of the gateways through which judicial intervention can take place in arbitral proceeding for restraining the enforcement of foreign award. Public Policy is an ever shifting and a vague concept; defining it in words is a vigorous task. In the words of Judge Burrough.

"Public Policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but only when other points fail" [11].

Under 1996 Act, Section 34 and Section 48(2) (b) both deal with the concept of Public Policy. Section 34 and Section 48 talks about setting aside arbitral award if it is in conflict with the public policy of India and challenging the enforcement of foreign award on the basis of public policy of India, respectively. Whether there is any difference in the scope of public policy in both the provisions has been a matter of deliberation? This question was raised in *Shri Lal Mahal v. Progetto Gano SPA* [12]. The case dealt with the scope and ambit of the term Public Policy under Section 48(2) (b) and how it is different from the 'Public Policy' referred to in Section 34.

In its judgment in Shri lal Mahal' *s* case, Supreme Court held that when it comes to section 34 of the Act a wider meaning and ambit of "Public Policy" has to be taken, whereas under Section 48(2) (b)a narrower scope of the term "Public Policy" has to be deemed.

Supreme Court first time set the grounds for Public Policy In *RENUSAGAR Power Co. Ltd v. General Electric Co* [13]. (Herein after referred as Renusagar Case) the term "Contrary to Public Policy" under section 48 was interpreted as meaning any enforcement which could be contrary to

(i) Fundamental policy of Indian law;
(ii) The interests of India;
(iii) Justice or morality

But in later Supreme court was of the view that the concept of Public Policy has to be given a more wider view as what has been given in Renusagar case reason being Public Policy is a matter of public good and public interest therefore Supreme Court invoked the concept of Patent Illegality which was applied in *Oil& Natural Gas Corporation Ltd v. Saw Pipes Ltd (hereinafter referred as SAW Pipe* case) [14]. According to this concept, to determine whether any act is against public policy the court should go to the root of the matter and the act should not be "*so unfair and unreasonable that it shock the conscience of the court*". This decision of Supreme Court was highly criticized, as patent illegality simply means finding error in law for which court has to go into the merits of the case which is never a ground for challenging an award under Indian Arbitration.

The decision of Saw Pipes had a obstructive effect on International Trade bodies because Supreme Court while giving the concept of Patent illegality didn't exclude foreign award therefore the principles of patent illegality was applicable to foreign awards in the same manner as it was for domestic award specially after the *Bhatia International v Bulk Trading S.A & Anr* [15] (Hereinafter referred as Bhatia International Case) (Discussed later). In Bhatia international case Supreme Court allowed the applicability of Part I of the 1996 Act in International Commercial Arbitrations therefore a foreign award was allowed to challenge or enforce under Part 1 of the 1996 Act. This point was clearly mention in *Venture Global Engineering v Satyam Computer Service***s** [16] case which Supreme Court extended its decision of Bhatia International and Saw Pipes and held that Part I is applicable in foreign awards and therefore challenge or enforcement of foreign awards can be done under Part I

To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to foreign awards".

These decisions of Supreme Court made the International Traders agitated, the reason being these decision of Indian Court Increased the Judicial Intervention and made Judicial Procedure more-lengthy and time taking process for remedy. Further having an ambiguous definition of Public Policy and increasing the ambit of public policy created problem for International Trades while enforcing of awards as it become easy for the opponent parties to challenge the enforcement of award and followed up by lengthy court procedure which was an unfriendly practice for International Trade and against the intent for introducing arbitration and New York Convention for enforcement of awards.

IV) Bhatia vs. balco Case

I*n Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc.* [17] (hereinafter referred as BALCO Case**),** the issue before the Supreme Court was whether Indian courts have the Jurisdiction over international commercial arbitration when the seat of arbitration is outside India. The Constitutional Bench of the Supreme Court overruled its own decision in Bhatia International Case of while arriving at the judgment. In Bhatia International case as discussed above Supreme Court held that the Indian courts have the jurisdiction even when the seat of arbitration is outside India. The rationale behind the decision was that in Section 2(2) of The Arbitration and Conciliation Act, 1996 the term "only" is not used like it has been used in unictral model law; therefore, the legislative intent of both the provisions was different. However, the Apex Court in BALC*O* case rejected this argument and held that the term "only" in Model Law is used just to in Section 2(2) of The Arbitration and Conciliation Act 1996.Also If we go through to the legislative history of The Arbitration and Conciliation Act 1996 then it is clear that the current is adopted from UNICTRAL MODEL LAW, 1985. Starting with the scope of the said act According to Sec 2(2) of the act, Part I of the act

shall apply where the seat of arbitration is in India, this section can be directly referred to Article 1(2) of the UNICTRAL MODEL LAW according to which the provisions of this Law, except Articles 8, 9, 35 and 36 apply only if the seat of arbitration is in the territory of this State. Therefore if we relate both i.e. Section 2(2) of the said Act and Article 1(2) UNICTRAL MODEL LAW the legislative intent of both i.e. Section 2(2) of The Arbitration and Conciliation Act, 1996 and Article 1(2) of the UNICTRAL MODEL LAW is same as to limit the jurisdiction of the Courts in the arbitral matters whose arbitral seat is outside its local territory. The above decision was supported by *Reliance Industries and Anr. v. Union of India* [18]. That Part I will not apply in cases where seat of arbitration is outside India. Further taking reference of the case *Dozco India P. Ltd. v. Doosan Infracore Ltd.* [19] the Court differentiated between the literal meanings of 'seat' and 'venue of arbitration'. Taking the reference of Bhatia's case, it was held that 'venue of arbitration' is that place which is chosen for the reason of convenience to the parties. The seat of arbitration, on the other hand, indicates the law of proceedings of the arbitration or the curial law of arbitration.

Therefore via BALCO case Court somewhat tried to restore the confidence of the International Traders in Indian Judiciary system for enforcing or challenging of awards. The Impact of case that since Part I of the 1996 Act cannot apply in cases where seat of arbitration is outside India or International Commercial Arbitration therefore any enforcement of the foreign award has to be done as per Part II i.e. New York convention of the 1996 Arbitration act under Sec. 48. But even after the decision the ambiguity of Public Policy that arose in Saw pipes Case and Venture Global Case still exist. "Public Policy" is still undefined and the repercussions of that is that there is unnecessary challenging of awards and therefore Traders are unable to enforce their awards in India. Also BALCO case only have the prospective effect and any contract which has been formulated before BALCO is governed by the law laid down in Bhatia International case.

1.3 Arbitration Ordinance 2015

In 2015 Union Cabinet introduced Arbitration and Conciliation Ordinance, 2015 (hereinafter referred to as 2015 Ordinance). Keeping in mind increasing trade market in India and in best interest of International Traders there were several changes brought in 2015 Ordinance like resolving the conflict of BALCO case and Bhatia case, reducing the ambit of patent illegality and public policy.

I) Definition of Court for International Commercial Arbitration (ICA)

Prior to 2015 Ordinance, the term "Court" under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Arbitration Act) referred to the principal Civil Court of original jurisdiction in a district. As per Section2(1)(e) of the 2015 Ordinance, the definition of "Court" for the purposes International Commercial Arbitration has been changed to mean the High Court in exercise of its original civil jurisdiction. Also for the purpose of filling application for enforcement of foreign award under Section 47 and 56 of the Arbitration Act, the definition of "Court" for International Commercial Arbitration has been changed to mean High Court in exercise of its original civil jurisdiction as well. Therefore the 2015 Ordinance, only with regard to International Commercial Arbitration, under Section 47 and Section 56 provides exclusive jurisdiction to High Court.

II) Eliminating "Patent Illegality" as a criteria for setting aside Arbitral Award under Section 34 (Insertion of Sub Sec. 2A in the Ordinance)

As per the 2015 Ordinance, an arbitral award arising out of an arbitration other than in International Commercial Arbitration, may be set aside if the award is vitiated by "patent illegality" appearing on the face of the award. Therefore arbitral awards given in International Commercial Arbitrations cannot be set aside on the ground of patent illegality

III) Clarification on what constitutes Public Policy under Section 48 and Section 57

According to Section 48(2) of the Arbitration Act, the court can refuse to enforce an arbitral award if such enforcement of the award is contrary to the public policy of India. In Renusagar Case, the Court held that the enforcement of a foreign award would be refused on the ground that it was contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality

The 2015 Ordinance has clarified the meaning of public policy by inserting Explanation 1 to Section 48 along the lines of the Renusagar Judgment. It provides for only 3 conditions under which an award can be said to be in conflict with the public policy of India, they are:

i. The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81,or
ii. It is in contravention with the fundamental policy of Indian Law, or
iii. It is in conflict with the most basic notion of morality or justice.

2. Conclusion

With spreading of Global Market and International Trade between the countries, pertaining to International Trade there is always being focus on strengthen the substantial laws but one other hand there is always being less focus on the procedural aspects one which is arbitration laws which is the core dispute resolution system in International Trade Law. Laws for Enforcement of Foreign Awards is one such laws. Above we have read that how still these laws are having many disparities in despite being enacted for two decades. Be it the languid approach of Judiciary or framers of the legislature, these loopholes in the laws of enforcement of awards have directly affected the International Trade relation of India as international traders are reluctant be in relation with those nations where the they are doubtful about recourse or remedies in case of disputes. Knowing the fact that under International Trade Law, Arbitration is the only procedural aspect via which parties can resolve their disputes and seek remedy, it is required for a nation to have a well framed and effective arbitration laws. Arbitration Ordinance 2015 has shown the positive lean towards a better and strong arbitral award laws which directly positive impact of International Trade in India.

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4. Article 1(1) of the New York Convention
5. This principle is known as principle of reciprocity which was followed under the Geneva Convention, according to which award made in the territory must be a jurisdiction of any one of contracting state. The difference has been discussed in Gas Authority of India Ltd. vs. SPIE CAPAG, S.A., 1994 (1) Arbi LR 429
6. Guru Nanak Foundation v. Rattan Singh and Sons 4 SCC 634, It was also observed in the case of Food Corporation of India v. Joginderpal Mohinerpal. 1989 AIR 1263, 1981.
7. Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc., 9,649, SCC, SC, 2012.
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