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Enforcement of Foreign Arbitral Awards: Issues and Challenges

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Indian national legislation enacted based on joining the 2 International Conventions

❖ **India signed the NY Convention on June 10, 1958, and ratified it on 13th July, 1960**

- Arbitration (Protocol and Convention) Act 1937 - based on India signing the Geneva Convention (1927), under the auspices of the League of Nations
- Foreign Awards (Recognition and Enforcement) Act 1961 – based on India signing the NY Convention (1958), under the auspices of the UN
- The Supreme Court (SC) in *Thyssen Sthlunion GMBH v. Steel Authority of India* 1999 [MANU/SC/0652/1999, para 51] held that there is not much difference in the provisions of the Foreign Awards (Recognition & Enforcement) Act, 1961 and the Arbitration and Conciliation Act, 1996 regarding enforcement of the foreign award.
- The definition of ‘foreign award’ is also same in both the enactments. The only difference appears to be that while under the Foreign Awards (Recognition & Enforcement) Act, 1961 a decree follows, whereas under the present Arbitration Act, 1996, a foreign award is already stamped as the decree.

A nation-state's consent to be bound to a convention/treaty - terms

- Under Article 2.1(b) of the VCLT 1969: “Ratification”, “acceptance”, “approval” and “accession” mean in each case the international act so named whereby a nation-state establishes on the international plane its consent to be bound by a treaty.
- Accession has the same legal effect as ratification, acceptance or approval.
- However, unlike ratification, acceptance and approval, which must be preceded by signature, accession requires only the deposit of an instrument of accession. Accession, as a means of becoming party to a treaty, is generally used by States wishing to express their consent to be bound by a treaty if, for whatever reason, they are unable to sign it.
- Where it is employed in a multilateral treaty, the entry into force provision will expressly provide that the treaty will enter into force upon the definitive signature and the deposit of instruments of ratification, acceptance, approval or accession by a specific number of States.

Commercial Arbitration - legislation

- ❑ The 1937 and 1961 Acts were repealed after the passage of the Arbitration & Conciliation Act, 1996 (ACA). The ACA was drafted with incorporation of modifications to the repealed acts.
- ❑ Further, the basis for the 1996 Act included the UNCITRAL Arbitration Model Law 1985 and the UNCITRAL Arbitration Rules 1976.
- objects and reasons under the ACA
 - domestic arbitration
 - international commercial arbitration
 - enforcement of foreign arbitral awards
 - law relating to conciliation

Part II of the ACA, 1996 as amended in 2015, deals with the Enforcement of Certain Foreign Awards:

- Chapter I contains the primary provisions of the NY Convention (1958) which deals with both arbitral agreement and awards.
- Chapter II, likewise contains, the provisions of the Geneva Convention (1927)
- Thus Part II of the ACA, 1996 regulates the awards made under the NYC (1958) in Chapter I or the GC (1927) in Chapter II for its enforcement.
- S. 52 of the ACA, 1996 provides that Part II Chapter I excludes the application of Chapter II, but Chapter II does not exclude the application of Chapter I .
- Excepting Section 52 (in Chapter I) of the Act, 1996, both the Chapters consist of 8 Sections each dealing with same issue, and wording of the Sections is also almost the same except for the section on Evidence, and the section on Conditions for enforcement of foreign awards.

NY Convention on the recognition and enforcement of foreign arbitral awards

- ❑ The New York Convention, is the UN Convention for the Recognition and Enforcement of Foreign Arbitral Awards, 1958:
 - Requires the enforcement of awards in contracting states. However, in limited circumstances enforcement may be denied.
 - The declarations or other notifications pursuant to Convention art. I(3) and art. X(1). India – will recognise and enforce on a reciprocity basis only; and in relation to differences arising out of legal relationships, contractual or not which are considered as commercial under Indian law.
 - Art. I(3) When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.
 - Art. X(1) Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
 - Out of 159 contracting states, India has notified 48 states (in the gazette)

NY Convention on the recognition and enforcement of foreign arbitral awards

❖ Reciprocity Obligation Under Articles I(1) and I(3) of the Convention

- Part II of the ACA, 1996 (“the Act”) deals with enforcement of certain foreign awards and Chapter I therein (Ss 44-52) deals particularly with Convention awards.
- As per S.44(b) of the Act, a “foreign award” must be made in one of such territories as the GOI, upon being satisfied of reciprocity, may by notification in the Official Gazette, declare to be the territory to which the Convention applies.
- Critics argue that there are reasons why this gazetting requirement ought to be removed:
 - 1st , the requirement of gazetting under the Act is more onerous than the reservation made by India in this regard at the time it acceded to the Convention, *i.e.* it will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State.
 - 2nd , this requirement is counter-productive to the object and purpose of Articles I(1) and I(3) of the Convention inasmuch as it creates unnecessary ambiguity in respect of enforcing awards made in countries which are Contracting States to the Convention but have not yet been notified in the Indian gazette.

Reciprocating countries as determined by the GOI

- Therefore, although a country may have ratified the New York Convention but if it has not been notified by the GOI, an award made in that country will not be enforceable as a “foreign award” under the Act.
- The following countries have been notified by India as reciprocating territories:
 - ✓ Australia; Austria; Belgium; Botswana; Bulgaria; Central African Republic; Chile; China (including Hong Kong and Macau) Cuba; Czechoslovak Socialist Republic; Denmark; Ecuador; Germany; Finland; France; GDR; Ghana; Greece; Hungary; Italy; Japan; Kuwait; Mauritius, Malagasy; Malaysia; Mexico; Morocco; Nigeria; Norway; Philippines; Poland; Korea; Romania; Russia; San Marino; Singapore; Spain; Sweden; Switzerland; Syria; Thailand; Egypt; The Netherlands; Trinidad and Tobago; Tunisia; U.K.; Tanzania; and U.S.A.. India has entered into an agreement with the U.A.E. for Juridical and Judicial co-operation.

Definition of “Commercial”

Black’s Law dictionary defines commercial as relating to or connected with trade and traffic or commerce in general.

In the Arbitration and Conciliation Act, 1996 (ACA): the term ‘**commercial**’ is not defined.

However, in the UNCITRAL Model Law on the basis of which ACA was drafted, in the 2006 revisions the term commercial is referred to in a non-exhaustive list:

- Art. 1 – the term commercial should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, ‘whether contractual or not’. Relationships of a commercial nature include, *but are not limited to*, the following transactions: any trade transaction for the supply or exchange of goods or services; ... factoring; leasing; ... consulting; ... [The words ‘contractual or not’ are also incorporated into ss. 2(f) and 7 of the ACA which defines arbitration agreement].
- ❑ Commercial Courts Act, 2015 (Amendment in 2018) – S. 2. (1)(c) defines 2 commercial activities with the possibility of additional activities as notified by the central government.
- ❑ Contractual or not: claims of tort (delict), breach of antitrust/competition law, securities law (source: Gary Born). Possible reasons for this phrase are in the interests of sustaining business relationships ... there being unequal bargaining strength of the parties.
- Arbitrability is another matter: Worldwide, the concept of non-arbitrability is on the wane, with more categories of disputes now being arbitrable. In India, the courts have ruled that despite allegations of fraud as a criminal offence that come before a tribunal, the same is arbitrable.

Arbitrability of a dispute – example: of the criminal offence of alleged fraud

❑ On arbitrability:

The Indian Supreme Court judgements in:

- In *Ayyasamy v Paramasivam* case, SC Civ. Appeal nos. 8245-6 of 2016, 04.10.2016, [MANU/SC/1179/2016, paras 45-7] the court was applying s. 8 of the ACA (Part I of the ACA: judicial power to refer party to arbitration on the basis of an agreement involving alleged fraud).
 - In *Ameet Lalchand Shah & Ors v Rishab Enterp & Anr.*, SC Civ. Appeal no. 4690 of 2018, arising out of SLP (C) no. 16789 of 2017, 03.05.2018 [MANU/SC/0501/2018, para 31] the SC observed that in the *Ayyasamy case* the court concluded that: ... it is only in those cases where the Court finds that there are serious allegations of fraud which make a virtual case of criminal offence and where there are complicated allegations of fraud then it becomes necessary that such complex issues can be decided only by the civil court on the appreciation of evidence that needs to be produced.
 - In *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Ltd.* Civil Appeal No. 895 of 2014 (Arising out of S.L.P. (C) No. 34978 of 2010), 24.01.2014 [MANU/SC/0054/2014, para 34] the allegations of fraud did not prevent the court from referring the parties to a foreign seated arbitration under s. 45 of the Act (Part II of the ACA: judicial power to refer party to arbitration on the basis of an agreement).
- ✓ Thus, the judgments bring about a uniform positive change in the India arbitration law stance on the issue of arbitrability of the allegations of fraud.

A valid arbitration agreement

❑ **The ACA, 1996 - S. 2. (1) (b)** "arbitration agreement" means an agreement referred to in s.7.

➤ **S. 7 of ACA:** An arbitration agreement in Part I means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. (similar to Art. II of the NY Convention and Art. 7 of the UNCITRAL Model Law)

Requirements for a valid arbitration agreement (s. 7):

- Should be in writing, and is deemed to be in writing if in a document signed by the parties
 - In an exchange of letters, telecommunications, fax, electronic means, etc. (a record)
 - Exchange of statements a claim and defence, in which existence of the arbitration agreement is alleged by one party and not denied by another, or
 - There is a reference in a contract to a document that contains an arbitration clause, which would make the clause a part of the contract.
- ✓ *Caravel Shipping Services Pvt Ltd v Premier Sea Foods Exim Private Ltd*, C.A. Nos. 010800-010801 of 2018 (arising out of SLP (C) 31101-2 of 2016), 29.10.18 [MANU/SC/1252/2018, para 9] the SC held that the only prerequisite for an arbitration agreement is that it be in writing. The fact that the parties have not signed the agreement does not make it invalid. The dispute was with reference to an application under S.8 of the ACA, 1996 on the basis of a bill of lading, where there was reference to an arbitration clause in the printed terms annexed to the Bill of Lading, both of which were not signed.

Definition of International Commercial Arbitration

The ACA, 1996.

- S. 2 (1)(f): International commercial arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in India and where at least one of the parties is-
- i. an individual who is a national of, or habitually resident in, any country other than India; or
 - ii. a body corporate which is incorporated in any country other than India; or
 - iii. a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
 - iv. the Government of a foreign country.

An arbitration agreement containing a unilateral option clause

- The implications of an arbitration agreement (in general):
 - ❑ based on an unequivocal agreement to have the dispute settled by arbitration
 - ❑ results are binding on the parties
 - ✓ If the above 2 criteria are satisfied, then it is a valid and binding arbitration agreement
- But what about split clauses/hybrid clauses? i.e.
 - ✓ precondition: to first try and settle disputes by discussions, negotiation, mediation, etc. failing which proceed to arbitration
- Beware: Resolution of disputes through “a unilateral option clause”. This is a dispute resolution clause which confers an exclusive right, to say, elect or resort to arbitration or litigation. However, this option is conferred upon only one party. Courts have had to weigh whether they should uphold such clauses in the interest of party autonomy or intervene on public policy grounds. Such a clause could be held invalid.
- ❑ Delhi HC judgments in:
 - *Bhartia Cutler Hammer v. AVN Tubes* (1991 (33) DRJ 672) [MANU/DE/0268/1991, para 5] – unilateral option clause is void since there was no mutual arbitration agreement and an opportunity for bilateral invocation. The right to invoke the arbitration is restricted only to the defendant.
 - *Emmsons International Ltd. v. Metal Distributors* (2005 (80) DRJ 256) [MANU/DE/0105/2005, para 16] ... and *Lucent Technology v ICICI Bank* (2009 SCC OnLine Del 3213) [MANU/DE/2717/2009, para 297] unilateral option clause is void on the basis that the clause was a restraint on a party’s recourse to legal proceedings in contravention of s. 28 of the Indian Contract Act. However, in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* (MANU/DE/3204/2009, paras 49-53), the Delhi HC referring to English arbitration and court decisions upheld that an arbitration clause need not necessarily have mutuality.

ACA, 1996 provisions – recognition and enforcement by the court

Definition of binding and final (s. 46 ACA): An award that is determined to be enforceable shall be treated as binding. The award is final if it can no longer be challenged in the country where it was made.

Relevant court & procedure for enforcement:

- ✓ S. 47 – Evidence required for enforcement - ACA (Part II) (same as Art. IV of the Convention)
 - Deals with enforcement by a High Court, and that would be the court having jurisdiction over the subject-matter of the award. Where the subject matter of the award is money, the enforcement application can be filed in the court within whose jurisdiction the bank account of the respondent is located. If the applicant does not find money in the account, he may file another application for enforcement of the award in the court within whose jurisdiction respondent's assets are located. The expression 'subject matter' of the award to the explanation under section 47 is different from the expression 'subject matter of the arbitration' under s. 2(e) of Part I of the Act.
- ✓ A party seeking enforcement of a foreign award is not required to initiate separate proceedings - one for deciding the enforceability of the award to make it a rule of the court or decree and the other to take up execution thereafter.
- ✓ A party holding a foreign award can apply for enforcement, but the court before taking further effective steps for the execution of the award has to proceed in accordance with ss. 47 to 49 of the ACA (same as Arts. IV to VI of the Convention). Once the court decides that the foreign award is enforceable, it can proceed to take further effective steps for execution of the same. The award shall be deemed to be a decree of the court (s. 49).
- ✓ Appeal against enforcement of the award (u/s 50 (1)(b) of the ACA, 1996), if the court refuses to enforce a foreign award (u/s 48)
- ✓ No 2nd appeal allowed, except to the Supreme Court.

Distinction between binding and final under the 2 Conventions

- ❑ Under Article 48(1) (e) of Arbitration Act, 1996, a foreign award in order to be enforced in India must be binding according to the law of the State where or under the law of which, it is made.
- The SC of India in *O.N.G.C. v. Western Co of North America* (Civ. Appeal No. 1557 of 1986) 16.01.1987 [MANU/SC/0014/1987, para 15], said that the foreign award can be said to have become ‘binding’ on the parties only when it has become enforceable and the enforceability must be determined as per the law applicable to the award.
- This provision, too, reflects Article V Para (1) (e) of the NYC (1958).
- The difference, however, is that, under Article 1(2) (d) of the GC (1927), an award has to be final in order to be enforced, whereas the NYC (1958) provides that the award must merely be binding.
- This means that some types of interim awards, particularly conservatory measures, if they are considered to be binding, can be enforced under the Convention, but not under the GC (1927).
- ❖ Examples of interim - conservatory measures awarded:
 - a. To prevent irreparable harm
 - b. To preserve evidence
- ❖ Whether or not such measures can be awarded will depend on
 - i. the institutional rules of arbitration
 - ii. the place of arbitration and
 - iii. the applicable law

Foreign award – no challenge allowed on the merits

- ✓ The Indian courts may refuse to enforce the foreign award on satisfactory proof of any of the grounds mentioned in section 48(1) of the ACA 1996, by the party resisting the enforcement of the award. The provisions set out in section 48 are in the nature of defenses available to the party resisting the enforcement application.
- ✓ The expression “set aside or suspended”, in clause (e) of section 48(1) cannot be interpreted to mean that, by necessary implication, the foreign award sought to be enforced in India can also be challenged on merits in Indian courts. The provision does not confer jurisdiction on Indian courts to annul an award made outside the country.
- ✓ Thus, the Act does not confer jurisdiction on the Indian courts to annul an international commercial award made outside India.
- ✓ The power to annul an award is provided under section 34 in Part I of the ACA, 1996. The applicability of that provision is limited to the awards made in India or domestic awards.
- ✓ The powers of the Indian courts to set aside an award relating to international commercial arbitration are confined to those seated in India . Therefore Indian courts do not have jurisdiction to entertain a challenge to a foreign award on its merits.

Enforcement of foreign awards

- ❑ The enforcement of a foreign award in India is a two-stage process which is initiated by filing an execution petition.
- ✓ Initially, a court would determine whether the award adhered to the requirements of the Act.
- ✓ Once an award is found to be enforceable it may be enforced like a decree of that court.
 - However at this stage parties would have to be mindful of the various challenges that may arise such as frivolous objections taken by the opposite party, and requirements such as filing original/ authenticated copy of the award and the underlying agreement before the court.
- Evidence to be produced for enforcement of foreign awards (S. 47 ACA, 1996):
 - Original award or a duly authenticated copy in the manner required by the country where it is made.
 - Original agreement or duly certified copy.
 - Evidence necessary to prove the award is a foreign award, wherever applicable.

Enforcement of foreign awards – court jurisdiction

☐ Foreign Awards:

- By virtue of the Commercial Courts Act, 2015 and the Amendment Act, where the subject matter is money, the Commercial Division of any High Court in India where assets of the opposite party lie shall have jurisdiction. In case of any other subject matter, Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit shall have jurisdiction.

☐ Award arising out of an India seated arbitration (being an International Commercial Arbitration):

- The Commercial Division of a High Court where assets of the opposite party lie shall have jurisdiction for applications relating to enforcement of such awards if the subject matter is money. In case of any other subject matter, Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit shall have jurisdiction, i.e., where the opposite party resides or carries on business or personally works for gain.

Enforcement of a foreign judgement and the CPC

- ❑ S. 2(6) of the CPC defines foreign judgment as the judgment of a foreign Court.
- At the time of enforcement of foreign judgments in India, two situations may arise depending on whether the foreign judgment is passed by a court in:
 - A reciprocating country: A party seeking enforcement of a decree of a court in a reciprocating country is required to file execution proceedings in India.
 - A non - reciprocating country: A party seeking enforcement of a decree has to file a fresh suit before the relevant court in India. The time limit for filing a suit for enforcement for such foreign judgments is 3 years from such judgment being delivered.
- ❑ The first major step towards enforcement of foreign judgments (of a reciprocating territory) in India is, to file execution proceedings, which is done by following the procedure u/S 44A and Order XXI (execution of decrees and orders) of the CPC.

Enforcement of foreign judgments from non-reciprocating countries

- In case of a foreign judgment from a non-reciprocating country, it can be enforced only by filing a suit upon the judgment.
- Under such cases where a suit is filed before a court in India for enforcing a foreign judgment, the six exceptions under Section 13 shall not be of relevance to the court considering such foreign judgment for enforcement.
- The court shall not examine if such foreign judgment is in fact correct in fact or law since a new obligation arises on such a suit being filed.
- The party is left with the option to sue on the basis of the foreign judgment or on the original cause of action in the domestic court.
- Where a suit on a foreign judgment is dismissed on merits, no further application shall lie for the execution of such foreign judgment as it had merged in the decree which dismissed such suit for execution.
- In an event a decree is passed in favour of the party filing such a suit for enforcing the foreign judgment, it may proceed to execute it.

Limitation period to enforce a foreign arbitral award

- Foreign awards
- Various High Courts have given varying interpretations on the limitation period within which a party may enforce an award.
- The Bombay HC in *Noy Vallesina v Jindal Drugs Ltd* 2006 (5) Bom CR 155 [MANU/MH/0296/2006, paras 5 & 6] has observed that since a foreign award is not a decree per se and would not be binding on parties unless a competent court records it as enforceable, it would undergo a two-step process. Thus, the application for enforcement of a foreign award would fall within the residuary provision of the Schedule to the Limitation Act, that is, the limitation period would be 3 years. Thereafter, on recognizing the award as a decree, the limitation period for execution of such a decree would be 12 years therefrom.
- However, the Madras HC held a contrary view in *Compania Naviera 'Sodnoc' v. Bharat Refineries Ltd.* AIR 2007 Mad 251 [MANU/TN/8070/2007, para 42] by referring to foreign awards as deemed decrees, and the corresponding limitation period would be 12 years. It held that, “the foreign award is already stamped as a decree and the party having a foreign award can straight away apply for enforcement of it and in such circumstances, the party having a foreign award has got 12 years time like that of a decree holder.”
- However, an application for execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

Recognition and enforcement; when refused

- ❑ The term 'recognition' is a defensive process as it is used as a shield against an attempt to re-agitate the same issues which have already been decided through an arbitration award.
- ❑ 'Enforcement' of an award may follow, and is carried out with legal effect through legal sanctions.
- ❑ Grounds for refusing to enforce the foreign award by a reciprocating country/territory:
 - 'Recognition and enforcement' may be refused as noted under article V of the Convention, which is incorporated under the First Schedule of the ACA, 1996 (the Schedule refers to s. 44 of the Act).
 - Grounds for refusal to enforce u/s 48 of ACA which is similar to Arts. V & VI of the Convention, barring the use of the term 'recognition and enforcement' which is substituted by 'enforcement', and inclusion of explanatory notes.
 - S. 48 2(b) incorporates the term "award contrary to the public policy of India"
- Legal critics distinguish domestic public policy from transnational or international public policy. India's public policy to be harmonised with the general norms of other civilised nations. Not restricted to viewing through the lens of parochial domestic policy. Economic ramifications, also considering that India wants to become a global hub for international arbitration.
- Q: In relation to fraud, bribery and corruption that may have influenced a foreign award, what is India's definition of corruption? In the SC judgement of *Sunil Dutt v State of U.P.* AIR 1966 SC 523, para 15: ... the word corrupt is not necessarily synonymous with dishonesty or fraud, but is much wider. It includes conduct which is neither fraudulent or dishonest if it is otherwise blameworthy or improper.

Recognition and enforcement; when refused – extracts from recent SC judgements

- ❑ The fundamental policy of Indian law has been pronounced in *Renusagar Power Co. Ltd. v. General Electric Co.*, [MANU/SC/0195/1994] : 1994 Supp (1) SCC 644, and followed. The case required application of the Foreign Awards Foreign Awards (Recognition and Enforcement) Act, 1961, ss. 9 & 10, and s. 7(1)(a)(v) – that 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, and s.7(1)(b)(ii) – that the enforcement of the award will be contrary to public policy.
- In *Associate Builders v. Delhi Development Authority*, Civil Appeal No. 10531 of 2014 (Arising out of SLP (Civil) No. 14767 of 2012) 25.11.2014 [MANU/SC/1076/2014, para 12] describes the ‘evolution of the state of the law’ on the subject concerning objection to enforcing an arbitral award under s. 34 of the ACA, 1996. S. 34 (1) & (2) (Part I-domestic), and S. 48 (1) & (2) (Part II-foreign awards) are similar.
- However, unlike in S. 34, S. 48 (1)(a) reads as follows:
 - enforcement of a foreign award may be refused, if proof is provided that the ... 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; ...
- And, unlike in S. 34, S. 48 (1)(e) reads as follows:
 - enforcement of a foreign award may be refused, if proof is provided that the ... 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.
- And, unlike in S. 34, S. 48 (2)(a) reads as follows:
 - enforcement of a foreign award may also be refused, if the court finds that the ... the subject-matter of the difference is not capable of settlement by arbitration under the law of India.

Recognition and enforcement; when refused – extracts from recent SC judgements

- *Associate Builders vs. Delhi Development Authority* (25.11.2014 - SC)(2015) 3 SCC 49 [MANU/SC/1076/2014] :, makes it clear that if a statute like the Foreign Exchange Regulation Act, 1973 dealing with the economy of the country is concerned, it would certainly come within the expression "fundamental policy of Indian law".
- Further, the judgment relies on a string of earlier apex court judgements and adds to the legal discourse as follows [MANU/SC/1076/2014, para 12]:

➤ When it came to construing the expression "the public policy of India" contained in Section 34(2)(b)(ii) of the Arbitration Act, 1996, this Court in *ONGC v. Saw Pipes* MANU/SC/0314/2003 : 2003 (5) SCC 705, held-

31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar* case [MANU/SC/0195/1994 : 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be--award could be set aside if it is contrary to:(a) Fundamental policy of Indian law; or(b) The interest of India; or(c) Justice or morality, or(d) in addition, if it is patently illegal. Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

... The judgment in *ONGC v. Saw Pipes* has been consistently followed till date.

Recognition and enforcement; when refused – extracts from recent SC judgements

- Contd. – *Associate Builders v Delhi Development Authority*

In a recent judgment, *ONGC Ltd. v. Western Geco International Ltd.* MANU/SC/0772/2014 : 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held-

35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in *ONGC [ONGC Ltd. v. Saw Pipes Ltd.* MANU/SC/0314/2003 : (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

Recognition and enforcement; when refused – extracts from recent SC judgements

- Contd. – *Associate Builders v Delhi Development Authority*

□ The judgement in *Associate Builders* also refers to authorities such as *Centrotrade Minerals and Metal Inc. v Hindustan Copper Limited* SC judgement [MANU/SC/8146/2006] which dealt with Part I/Part II of the ACA,

The judgement in *Associate Builders* covered the various grounds on which an award may be set aside:

- ✓ Fundamental Policy of Indian Law
- ✓ Interests of India – this ground may need to evolve on a case by case basis.
- ✓ Justice
- ✓ Morality
- ✓ Patent illegality

Reciprocating countries - awards and judgments – in general

- Since foreign awards, domestic awards and foreign judgments (from reciprocating countries) are to be executed in India as a decree passed by an Indian court, the modes of execution for foreign awards and judgments and domestic awards and judgments are also common.
- On an application made by the decree-holder for execution of the decree/ award (whether foreign or domestic), the court may order the execution of the decree / award by one or more of the following modes:
 - ✓ by delivery of any property specifically decreed
 - ✓ by attachment and sale or by sale without attachment of any property
 - ✓ by arrest and detention in prison
 - ✓ by appointing a receiver
 - ✓ by any other manner as the nature of the relief granted may require.
- In case of decrees involving payment of money, execution by detention in prison shall be ordered only after the judgment debtor is given an opportunity of showing cause as to why he should not be imprisoned. In doing so, the court has to record in writing and be satisfied that the judgment debtor would obstruct or delay the execution of the decree. An executing court cannot go behind the decree, that is, it does not have the power to modify the terms of the decree and must take it as it stands.
- In case there are multiple decree-holders, the assets, after deducting the costs of realization, shall be distributed among all such persons.

Registration of foreign judgment not required; foreign awards not liable for stamp duty

□Registration of foreign award

A foreign judgment does not require registration. When a decree is passed by the court, it does not require registration in view of clause (vi) of sub-section (2) of section 17 of the Registration Act. A decree or order of a court affecting the rights mentioned in section 17(1)(b) and 17(1)(c) would not require registration. It would, however, require registration where the decree or order on the basis of compromise affects the immovable property other than that which is the subject-matter of the suit or proceeding. Even a decree passed by the foreign court execution of which is sought under section 44-A of the Code of Civil Procedure, 1908 would not require registration .

□The Supreme Court of India in *Shriram EPC Limited vs Rioglass Solar Sa* Civil Appeal No. 9515 of 2018 Arising out of SLP (Civil) No. 13913 of 2018) 13.09.2018 [MANU/SC/0978/2018, paras 16, 23] has held that under the present state of the law, foreign awards are not liable to stamp duty under the Indian Stamp Act, 1899. This judgement has put to rest an issue on which various High Courts of India had given differing opinions.

□Payment of interest pending enforcement

A deposit made pursuant to an order of court, does not stop the accrual of interest payable under the award. Depositing a sum in court to obtain stay of execution of the decree on terms that the decree-holder can draw it out on furnishing security, does not pass title to the money to the decree-holder. The payment is not in satisfaction of the decree . The decree holder would therefore be entitled to claim interest payable under the award till realization.

Foreign Judgments from Non-Reciprocating Countries – in general

- The procedure for enforcement and execution of decrees in India is governed by the CPC, while that of arbitral awards in India is primarily governed by the 1996 Act as well as the CPC.
 - Domestic and foreign awards are enforced in the same manner as a decree of the Indian court. This is true even for consent awards obtained pursuant to a settlement between parties. However, there is a distinction in the process for enforcement of an award based on the seat of arbitration. While the enforcement and execution of an India - seated arbitral award (“domestic award”) would be governed by the provisions of Part I of the Act, enforcement of foreign - seated awards (“foreign award”) would be governed by the provisions of Part II of the Act.
 - The NY Convention applies to the recognition and enforcement of arbitral awards made in the territory of another State. To this territorial criterion for a foreign arbitral award, there is added the following criterion in Art. I(1): ‘It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.’ ...The latter criterion of non-domestic arbitral awards was considered by the US Court of Appeals for the Second Circuit in the case *Bergesen v. Joseph Muller Corp.* The court held that an award made in the state of New York between two foreign parties may be considered a non-domestic award within the meaning of the New York Convention and its U.S. implementing legislation.
- A few steps that are crucial for ensuring successful enforcement of arbitral awards and execution of decrees are:
- ✓ Making effective service on opposite party/judgment debtor is crucial to prevent objections at a later stage;
 - ✓ Taking necessary steps by way of attachment/notice/arrest/appointment of receiver or in another manner;
 - ✓ Principles of natural justice apply to even execution proceedings.

Foreign Judgments from Non-Reciprocating Countries – in general

1. In case of a foreign judgment from a non-reciprocating country, it can be enforced only by filing a suit upon the judgment.
2. Under such cases where a suit is filed before a court in India for enforcing a foreign judgment, the six exceptions under S. 13 of the CPC shall not be of relevance to the court considering such foreign judgment for enforcement.
3. The court shall not examine if such foreign judgment is in fact correct in fact or law since a new obligation arises on such a suit being filed.
4. The party is left with the option to sue on the basis of the foreign judgment or on the original cause of action in the domestic court.
5. Where a suit on a foreign judgment is dismissed on merits, no further application shall lie for the execution of such foreign judgment as it had merged in the decree which dismissed such suit for execution.
6. In an event a decree is passed in favour of the party filing such a suit for enforcing the foreign judgment, it may proceed to execute it.

Enforcement of foreign award by 3rd party

- ❑ In many legal systems, non-parties to a contract may, in appropriate circumstances, invoke the benefits under the contract, as 3rd party beneficiaries. The 3rd party would then be able to invoke or be bound by an arbitration clause.
- In *Nisshin Shipping Co v Cleaves & Co* [2004] 1 All E.R. (Comm.) 481 (Q.B.) – brokers who were 3rd party beneficiaries of charters were entitled to arbitrate against party thereto.
- 3rd party beneficiary status is the exception to the general rule (such as collateral contracts between the 3rd party and one of the contracting parties, beneficiaries of a trust may sue the trustee to carry out the contract, agency, insurance, etc.) that contracts do not grant enforceable rights to non-signatories (privity of contract).
- Therefore the burden of proof is on the 3rd party *to show that the contracting parties intended to confer a benefit/right under the arbitration agreement on him*. For ex: party A contracts with party B to deliver a product to party C for C's benefit, then in that case non-performance of the contract could trigger enforcement by C under his contract rights.

Enforcement of foreign award by 3rd party; Transfer or assignment of arbitration agreements

- ❑ “It is generally accepted that if a 3rd party is bound by the same obligations stipulated by a party to a contract and this contract contains an arbitration clause or, ..., such a 3rd party is also bound by the arbitration clause, ..., even if it did not sign it.” Final Award in ICC Case No. 9762, XXIX. Y.B. Comm. Arb. 26, 40 (2004).
- ❑ There is the general presumption of “automatic” transfer of the agreement to arbitrate together with the underlying contract. Most courts in the U.S., the U.K. and in civil law jurisdictions uphold this principle. The intention of the parties is very important. This is irrespective of the separability doctrine which gives independent status to the arbitration agreement from the underlying contract.
- ❑ In some jurisdictions, whether an arbitration agreement has been validly assigned is treated as procedural, to be determined by the law of the arbitral seat.
- ❑ In other jurisdictions, the substantive law that governs the underlying contract has been applied to determine the issue of assignability.

The power to compel non-signatories – s. 45 of the ACA, 1996

- *Chloro Controls Chloro Controls (India) Pvt Ltd v Severn Trent Water Purification* (2013) 1 SCC 641. Civil Appeal No. 7134 of 2012 (Arising out of SLP (C) No. 8950 of 2010) and Civil Appeal Nos. 7135-7136 of 2012 (Arising out of SLP (C) Nos. 26514-26515 of 2011), 28.09.2012 [MANU/SC/0803/2012, note: para 167]

Facts: dispute bet foreign and Indian parties

network of interlinked agmts

Shareholders agmt (SA) was the principal agmt. (contained an Arb. Agmt.)

London as seat and English law as governing law

Agmts included Int'l distribution agent (jurisd Pennsylv, USA)

Managing Director's agmt. (no Arb. Agmt.)

Financial and tech know-how (ICC Arb London)

Export Sales agmt (rules of the American Arb. Assoc. arb. conducted in Pennsylv)

Trademark registered user license agmt (no Arb. Agmt.)

Not all the above agreements had the same parties

The above agreements were part of a composite transaction emanating from the parent SA agreement

The power to compel non-signatories – s. 45 of the ACA, 1996

- Appellate Court overruled and Supreme Court concurred – facts of the case in this case (*Chloro Controls*) fell within s. 45 which is different from s. 8 of ACA. SC did not overrule *Sukunya Holdings* 2003 SC (which held that causes of action cannot be bifurcated and arbitration is to be restricted only to the parties to the arb. Agmt.) . The SC distinguished it.
- SC held that u/s 45, “person claiming through or under” is to be given a more expansive interpretation to include multiple and multi-party agmts, albeit in exceptional circumstances”
- The SC held that s. 45 is to be read along with s. 44 and article II (1) and (3) of the NYC, which would therefore permit a non-signatory to be referred to arbitration.
- Held (para 167 – Manupatra): Section 45 is a provision falling under Chapter I of Part II of the 1996 Act which is a self-contained Code. The expression 'person claiming through or under' would mean and take within its ambit multiple and multi-party agreements, though in exceptional case. Even non-signatory parties to some of the agreements can pray and be referred to arbitration provided they satisfy the pre-requisites under Sections 44 and 45 read with Schedule I. Reference of non-signatory parties is neither unknown to arbitration jurisprudence nor is it impermissible.

Related case law

1. Interpretation of a confusing arbitration clause
2. Early case law indicating the pro-enforcement of a foreign arbitral award, with the aid of the VCLT and the NY Convention
3. Intervention by a 3rd party (RBI) on the ground of public policy
4. Model arbitration clause providing for mediation – LCIA India (formerly)

Case law – interpreting an arbitration clause – choice of law – conflict of laws

- ❑ Where the seat is not clearly stated and the parties cannot reach an agreement, it may be necessary to carry out an exercise of contract interpretation under the proper law of the arbitration agreement. The case of *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 provides an example:
 - The English court was required to interpret a contract which provided (with a striking degree of confusion) that it was “governed by and construed in accordance with the laws of England and Wales”; that “subject to Clause 20.2 [Dispute Resolution], the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the Contract”; that “any dispute or difference between the Parties to this Agreement arising out of or in connection with this Agreement shall be referred to arbitration”; that “[t]his arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland”; and finally that “[a]ny such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment”. Notwithstanding the statement that “the seat of the arbitration shall be Glasgow, Scotland”,
 - The court held as a matter of contractual interpretation that the remaining provisions cumulatively indicated an “intention to seat the arbitration in England under the supervision of English courts (the reference to the Arbitration Act 1996 would otherwise be meaningless), with Glasgow being merely the intended venue for hearings. Though one might disagree with the outcome, it illustrates the contractual interpretation approach to clauses that are unclear as to choice of seat.

Case law (1998) - pro-enforcement - recognition and enforcement of a foreign arbitral award

- ❑ In *Transoceanic Shipping Agency (P) Ltd vs Black Sea Shipping & Ors.* decided 14.01.1998 [C.A. 112/1998 arising out of SLP(C) no. 19694/1997). In 1996, the petitioners in the Bombay HC sought to have the Judgment pronounced and Decree passed in terms of the Award under the provisions of s. 6 of the Foreign Awards (Recognition & Enforcement) Act, 1961.
- Bombay HC judgment: *Transoceanic* (1st respondent) was the shipping agent for *Black Sea Shipping*. As per written agreements *Transoceanic* was sending the balance rupee freight amount in terms of the rouble and rupee agreement which existed between the USSR and India.
- The USSR dissolved in December 1991 and the agreement of rupee freight stood cancelled. Consequently, all of the rights, title and interest in respect of the transaction devolved on the Govt. of Ukraine which became an independent sovereign state. The balance rupee freight in the hands of *Transoceanic* became non-convertible currency.
- In 1992 a fresh agreement was concluded wherein *Transoceanic* was to remit the balance rupee freight in accordance with the law. To alleviate the problem, *Black Sea Shipping* requested *Transoceanic* to make the payments owed to them to *M/s Akshay Exports* for export to *Black Sea Shipping*. In the meantime, *Transoceanic* did not dispute the amount of Rs. 6.4 crores owed to *Black Sea Shipping* and approached the RBI for approval to make remittances and to make payment of the same amount to *M/s Akshay Exports*. Despite the admission of liability, *Transoceanic* did not remit the amount.
- All liabilities subsisting, existing and/or remaining under the Agreement of March, 1983 were taken over and were agreed to be governed under the Agreement of May, 1992. This is specifically provided in express terms in the First Addendum to the Agreement dated May, 1992.
- This dispute between the petitioners and the 1st respondents arose in the year 1994 when the 1st respondents refused to pay the amount which the 1st respondents admitted as lying with it on behalf of the petitioners.

Case law (1998) – pro-enforcement – applicability of the NY Convention & the VCLT

- Held: The question which arises for consideration is whether the Award has been made in the territory of a foreign State notified by the Government of India as having made a reciprocal provision for enforcement of the Convention. Section 2 of the 1961 Act which defines a 'foreign award' uses the terminology of 'territory' and not 'country' in sub-clause (b) thereof. It is not in dispute that the Government of India had notified the entire territory of erstwhile USSR as territory for the purpose of section 2 of the Act. In exercise of the powers conferred by S. 2 of the Act notification in Sept. 1992 was issued by the Government of India whereby it was declared that being satisfied with reciprocal provisions having been made, USSR is a territory to which Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 set forth in the Schedule to the Act would apply. It is not in dispute that in the year 1972 when the said notification was published in the Gazette, Ukraine was an integral part and parcel of USSR. On the dissolution of USSR, Ukraine became a separate sovereign State but the territories to which the said notification dated February, 1972 applied had remained the same.
- Reliance has been placed on Article 34 of Vienna Convention on Succession of States (1978) in respect of treaties which reads as under : "Article 34: Succession of States in cases of separation of parts of a State which reads :
 - 1. When a part or parts of the territory of a State separate to form one or more States whether or not the predecessor State continues to exist;

Case law (1998) – pro-enforcement – applicability of the NY Convention & the VCLT

- (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;
- (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone. Paragraph 1 does not apply if : ...
- These documents go to show that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 continued to be in force in respect of Sovereign State of Ukraine though In my view, since the expression used in sub-clause (b) of S. 2 of the Act is 'territory' and not 'Country', the requirements of section 2 of the Act to make the Award as a foreign award have been complied with.
- Therefore, prior to 1992 an award made in Ukraine was an award made in a reciprocating territory as notified and this position continues even after the political separation of various Soviet Socialist Republics. Ukraine continues to be a signatory to the New York Convention and the notification of February, 1972 continues to operate in the territories then forming part of the USSR, including the territory of Ukraine.
- The reference to arbitration was required to be made in accordance with the law where the petitioners were registered in the State of Ukraine and, therefore, the Law of Arbitration as applicable to the State of Ukraine applied to the proceedings which required the appointment of the arbitrator to be made in the manner in which the 2nd respondent was appointed as the Arbitrator.

HC: A case of direct impact on foreign investment inflows vs 3rd party RBI intervention

- *NTT Docomo Inc. v and Tata Sons Ltd.* (O.M.P. (EFA)(Comm.) 7/2016 and IA's 14897/2016 and 2585/2017) 28.04.17, [MANU/DE/1164/2017, para 63] declared a foreign award as enforceable. The Delhi HC further declared that the award shall operate as a deemed decree of the court. The said judgement may have tossed up a question of law, namely:
- Whether a 3rd party/stranger to a foreign seated arbitration would be entitled to object to enforcement of a foreign award passed in such proceedings?
- During the pendency of the proceedings, Docomo and Tata entered into a settlement and jointly applied to the Delhi HC to place on record the consent terms and seeking disposal of the proceedings in terms of the settlement. Under the consent terms, the parties agreed that the award be declared enforceable in India and that Tata would remit the awarded amount to Docomo.
 - Before the settlement was brought on record, RBI filed an intervention application in the proceedings primarily on the ground that since the award required remittance of money to an entity outside India, the RBI's role would not be negated. On merits, it was argued that the award was illegal and contrary to the public policy of India. The Delhi HC dismissed the intervention application on the basis that since RBI was not a 'party' as defined under S. 2(h) of the ACA, 1996, it cannot seek to intervene in proceedings for the enforcement of the Award. The HC further held that neither the CPC nor the ACA recognized the locus standi of an entity, which is not a party to the suit or as in the present case, an award, to oppose a compromise arrived at between the parties.
 - It has also been held that a 3rd party to an arbitration agreement cannot ask for arbitration unless the applicant claims through or under the signatory party under certain circumstances (see the *Chloro Controls* case).

Model arbitration clause providing for mediation – LCIA India (formerly – not offered)

- **Mediation and Arbitration**

“In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall first seek settlement of that dispute by mediation in accordance with the LCIA India Mediation Rules, which Rules are deemed to be incorporated by reference into this clause.

If the dispute is not settled by mediation within [] days of the appointment of the mediator, or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA India Arbitration Rules, which Rules are deemed to be incorporated by reference into this clause.

The language to be used in the mediation and in the arbitration shall be [].

The governing law of the contract shall be the substantive law of [].

In any arbitration commenced pursuant to this clause,

(i) the number of arbitrators shall be [one/three]; and

(ii) the seat, or legal place, of the arbitration shall be [City and/or Country].”

For existing disputes and modifications – LCIA India (formerly - not offered)

- **Existing disputes**

If a dispute has already arisen, but there is no agreement between the parties to arbitrate and/or to mediate, the parties may enter into an agreement for those purposes. In such cases, please contact the LCIA India Secretariat if recommended wording is required.

Modification to Recommended Clauses

The LCIA India Secretariat will be pleased to discuss any modifications to these standard clauses. For example, to provide for party nomination of arbitrators or for expedited procedures.

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