



## ARBITRAL AWARDS

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### I. ABSTRACT

*Mahatma Gandhi once said that differences shall always persist whether religious or other, but the same shall invariably be settled by Arbitration.*

In India, the Arbitration and Conciliation Act, 1996 (“ACA”) embodies laws relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards to govern Arbitration and Conciliation proceedings and matters connected therewith or incidental thereto. Recent amendments to the act have brought several changes to the existing laws wherein even the Hon’ble Supreme Court of India (“SC”) has rendered certain judgments thereby upholding, defining and striking certain laws and concepts. This research paper explicitly focuses on Arbitral Awards; its enforcement power, validity and conditions to challenge the same. It deals with the implications of the Jurisdiction, exceptions, factors catering to the functioning of Arbitration proceedings and the current scenario in terms of the laws and judgements rendered. It does a critical analysis of the Act and consequently bestows suggestions and recommendations in pursuance of the same.

### II. INTRODUCTION

*Frances Kellor* in her book<sup>1</sup> talks of arbitration long before courts were established or laws and principles were formulated by the judges. It describes arbitration as mankind's earliest search amongst many things.

The meteoric developments in trade, commerce and technology not only domestically but also on the global front have massively resulted in parties from various domains to get connected both domestically and internationally by entering into agreements and contracts to secure their rights and to allow them to access justice in matters of dispute. There has been an enormous rise in parties craving for alternative modes and mediums to resolve their disputes in order to steer clear from the clutches of litigation which is considered to be extortionate, slow, imperceptive and a complex process. This inefficiency has over the last decade inclined numerous parties to refer their disputes to alternative dispute resolution (“ADR”) mechanisms imbibing superior efficiency and specialised expertise to dispose of issues at hand in an expeditious and inexpensive fashion.

Consequently, this led to the incarnation of ADRs like mediation and arbitration. Arbitration is the most preferred modus operandi to resolve disputes wherein the parties present arguments and evidence to a dispute resolution practitioner known as “Arbitrator” whose decision is formally denoted as an “Award”, making the parties bound by the same. It imposes an opportunity to settle disputes outside the bulwarks of courts and judicial authorities in a secluded and private manner. It is pertinent to establish that parties can approach the Arbitration

<sup>1</sup> *American Arbitration by Frances Kellor: Its History, Functions and Achievements*



Tribunal (“AT”) only if there exists an arbitration agreement or an arbitration clause in an agreement.

AT are set up because they cater to speedy disposal of disputes. It is no hidden mystery that the Awards passed are not usually recognized nor given their due weightage and validity in order to make the parties strongly abide by it. Many times its free flow of solutions, outcomes and justice is often blocked or tarnished by the cavalier manner of interference of Courts. Awards passed abroad or in international disputes determining obligations, rights and duties need not be muddled to make them enforceable and not challengeable.

### **III. ARBITRAL AWARDS**

An arbitral award is the decision or the judgment rendered by the arbitrator before an AT on the basis of the substance of the case, the evidence and the legal arguments presented by the two parties being bound by an arbitration agreement or an arbitration clause in an agreement. An award is the final decision of the arbitrator analogous to a decision of a judge or the decision of a jury in court. Such Award may be granted in the form of financial compensation to be paid by one party to another, or non-financial compensation in the form of an injunction or restriction aimed at prohibiting one of the parties from carrying out or beginning any particular act. The arbitrator's decision shall be legally binding and enforceable in court, unless expressly provided in the agreement and voluntarily acknowledged by the parties that the same is unenforceable and non-binding. Then such an award may be

challenged before the competent court of jurisdiction.

However, a binding award can also be challenged for the following reasons:

- The arbitrator went beyond powers outlined in the arbitration clause of the agreement
- There was some prejudicial misconduct on behalf of the arbitrator
- The agreement containing the arbitration clause is unscrupulous or otherwise void, making it unenforceable
- The winning party won through fraud or corruption to obtain the decision
- There subsists a mathematical error when calculating the winning party’s award by the Arbitrator

Interestingly, the principle of res judicata meaning “a matter already judged” as illustrated under S.11 of the code<sup>2</sup> which contemplates a rule of conclusiveness, based on either of the contentions in the light of the facts, subject matter, law applicable or associated to a particular case also applies to arbitral proceedings as the fundamental concept of the same is based upon public policy and private interests. Further, Interim awards are included within an award as per S.2 of the ACA. S.5 of the Act also envisages that the extent of Judicial intervention is restricted to the provisions of this part of the act. Moreover, S.8 prescribes the power of courts to promote parties to arbitration where there lies an arbitration agreement. AT having its own jurisdiction over disputes of diversified subject matters under S.16 of Chapter IV of the ACA along with the rules on international commercial Arbitration under Article 16 of Chapter IV of the UNCITRAL Model 1958 not only functions

<sup>2</sup> The Civil Procedure Code 1908



within the national domain but also has complete expertise and power to hear international disputes as well. Therefore, the Domestic Awards are governed by Part I and are passed under S.2 to S.43 of the Act<sup>3</sup>. Whereas, the International Awards are governed by Part II and are passed under S.44 of the Act.

(i) JURISDICTION AND EXECUTION OF DOMESTIC ARBITRAL AWARDS:

As canonized by the SC, S.36 contemplates that an award needs to be enforced as per the provisions of CPC similar to a decree but it wouldn't be equivalent to a decree passed by the Civil Court. The AT is not bestowed with the power of execution of a decree as a civil court would. Hence for the execution of a decree, the award is to be enforced in the same manner as if it were a decree under the CPC<sup>4</sup> as the enforcement mechanism provided is the same as enforcing a decree. Order XXI of the CPC<sup>5</sup> incarnates the provision for making an application for execution of a decree and the manner in which it will be entertained. Further, S.38<sup>6</sup> also iterates that any court which passed a decree or by one to which it was rendered for execution can execute the same. S.39 - 45 deals with the conditions and jurisdiction to transfer a decree from one court or state to another. Hence, an Award passed in the AT shall not only be governed by the provisions of the Act but be in sync with CPC, as an Award is nothing but executed as a decree by fiction.

The enforcement of an award under S.17 of the old act<sup>7</sup> provided application to the competent civil court for the grant of an

award in order to obtain a judgment on the compensation before enforcing the decree issued. In addition, S.14(2) demonstrated that the original award must be filed in the court of competent jurisdiction, which may then be amended or corrected by the court through S.15 of the Act. In addition, S.16 gave the power to remit the award, and finally the court would issue a judgment under S.17 of the Act, which was to be followed by a decree with regards to the provisions of CPC.

The recent amendment of 2019 has resulted in some significant renditions to eradicate any of the prevailing drawbacks with the vision to strengthen the act. This along with various SC Judgments have acted as a guiding light and made execution of awards under the said provisions more transparent, clearer and simpler. S.42 of the Act imparts jurisdiction to courts to which all applications under Part I of the Act are made before, during or after arbitral proceedings. It is interesting to emphasize on the expression "with respect to the Arbitration Agreement" as it widens the scope of S.42 further making the clauses in the agreement equally massive points of consideration, giving it enough relevance and weightage so that both are in sync with each other<sup>8</sup> as to include all matters which indirectly or directly associate to the agreement. In addition to this, S.36 of the Act also links an Award to a decree of the civil court and that there is absolutely no provision for an AT to execute its own award. Placing it evidently that a decree has to be inevitably brought for execution before the executing authority or the Court of predominant jurisdiction.

<sup>3</sup> The Arbitration and Conciliation Act, 1996

<sup>4</sup> www.mondaq.com on Feb 22, 2018

<sup>5</sup> The Civil Procedure Code, 1908

<sup>6</sup> The Civil Procedure Code, 1908

<sup>7</sup> Arbitration Act of 1940

<sup>8</sup> Arbitration and Conciliation Act (Amendment 2019)



This raises doubt or question of significance, as to whether under the ACA a judgement must first be filed with the Court having jurisdiction over arbitration proceedings for execution and then obtain the precept for transfer of the Decree, or can the award be directly enforced before the court where the debtor's assets need to be verified. The SC conclusively concluded in *Sundaram Finance Limited case*<sup>9</sup> that the reasoning supporting this concept is based on the jurisdiction clause found in S.42 of the Act which applies with respect to an application submitted to the Court under Part I of the Act based on which the court assumes jurisdiction over the arbitration procedure. Applications must therefore only be submitted to the Court of Justice. However, S.32 of the Act provides that arbitration proceedings must be concluded by a final award. Thus, where a judgment has already been delivered and execution is sought, the arbitration procedure shall already stand concluded in the event of the rendition of such final judgment. Therefore, S.42 of the Act, which deals with the question of jurisdiction with regard to 'arbitration measures', would be irrelevant.

Thus the SC has made it clear by stating that the enforcement of an order by its execution can be filed anywhere in the country where it can be applied.

#### (ii) ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDIA:

Indian government and the ACA recognizes "New York Convention"<sup>10</sup> and "Geneva

Convention"<sup>11</sup>. When a party receives a binding award from a country which is a signatory to any of these two conventions and the award is made in a territory which has been notified in India, the award would then be enforceable.

Foreign Awards passed with The New York Convention are envisaged under S.44 - 52 and with The Geneva convention, under S.53-60 of the ACA (Amendment), 2015. S.48 - 57 of the said act lays down conditions for enforcement of foreign awards.

Moreover, the Calcutta HC in *Serajuddin & Co. Case*<sup>12</sup>, laid down some germane conditions for an award to be classified a foreign award as follows:

That an Arbitration should be:

- held in foreign Country
- conducted by a foreign Arbitrator
- conducted by applying foreign law, and
- one of the parties in the proceedings is of foreign national.

In addition, the requirements for a foreign award to be enforceable are:

- There should be a commercial transaction
- There should exist a written agreement between the two parties
- The agreement shall be valid and binding
- The award passed should be unambiguous

<sup>9</sup> Sundaram Finance Limited ("Appellant") and Abdul Samad (CIVIL APPEAL No.1650 of 2018)

<sup>10</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

<sup>11</sup> Geneva Convention on the Execution of Foreign Arbitral Awards, 1927

<sup>12</sup> Serajuddin & Co. V. Michael Golodetz & Ors, AIR 1960 Calcutta 47



(iii) PROCEDURE FOR ENFORCEMENT OF FOREIGN JUDGMENTS IN INDIA:

The Indian Judicial System Catalogues Foreign Awards into two groups:

(a) Awards from the 'Reciprocating Territories' and

(b) Awards from the 'Non-Reciprocating Territories' of India.

The Awards coming from the 'non-reciprocating territories' of India are required to surpass the filter of the 'Indian Judiciary' before they could be enforced. Therefore, it is significant to establish and assert that a fresh suit is required to be instituted in an Indian Court having jurisdiction to enforce such a foreign Award. In this fresh suit the foreign judgment would be treated as evidence and it would only have evidentiary and persuasive value in the eyes of Indian Judiciary which must be filed within three years since it was originally passed.

Indeed, this implies that enforcement of a foreign award from non-reciprocating territory is limited and restricted as it has to pass through the colander of the Indian Judiciary which decides the implications on merits keeping public policy and various other such norms and factors into consideration. However, it does not tarnish the scope of attaining justice as the filter of Indian Judiciary is wide and diversified enough for any such award falling within its ambit to be enforced.

The HC of Delhi<sup>13</sup> in one of its leading cases, iterated that courts cannot try a suit on a foreign judgement so as to decide if the decision on grounds of materials and facts are right or not. The Court observed that while adjudicating such a suit, the court has a duty to "merely" look into the applicability of law and if the foreign Court has applied its conscience to the case.

Whereas, a party seeking enforcement of a decree of a court in a 'reciprocating territory' is required to file execution proceedings in India. The meaning and scope of Reciprocating Territories of India flows from S.44-A of CPC<sup>14</sup>. The Section<sup>15</sup> suggests that it means any territory or country outside India which the Central Government may by notification in the official gazette recognize.

It is intriguing to note that a decree passed by a 'superior court' located in any of such reciprocating territories<sup>16</sup>, can be executed merely by filing a certified copy of that decree in the authorized District Court. The District court may then treat the decree as if it was passed by itself<sup>17</sup>. A 'superior court' in effect of this section would mean any such court as may be specified by notification. Hence, such foreign decrees can be directly enforced in India by filing an execution application by the rectitude of S.44A of CPC<sup>18</sup>. Thereafter, S.51 and Order XXI of the CPC will be applicable.

It is pertinent to understand that to be reciprocating or non-reciprocating territories, the foreign award has to satisfy the conditions

<sup>13</sup> Formosa Plastic Corporation Ltd. Vs. Ashok Chauhan & Ors. Execution Application No. 206 of 1998 in Ex. No. 38 of 1998

<sup>14</sup> Code of Civil Procedure, 1908

<sup>15</sup> Section 44-A Code of Civil Procedure, 1908

<sup>16</sup> Union of India

<sup>17</sup> www.nishithdesai.com

<sup>18</sup> Code of Civil Procedure, 1908



laid down within S.13 of the CPC and failure to it would make such an award inconclusive.

It is necessary to highlight that reciprocity is a bilateral arrangement and Reciprocating Territories are not an exception to this rule. Thus all the reciprocating territories of India mutually agree to enforce court orders passed by the Indian Courts in their territories as well. In the backdrop of globalization and integration of world economies, such mutuality seems to be a cardinal necessity.

#### **IV. INTERPRETATIONS**

##### **1. Are Arbitral Awards unclear as to enable them to be appealed in Judicial Courts, thereby increasing litigation proceedings?**

The Act does provide for the interference of courts with respect to the following issues, namely:

- Matters which are to be referred for arbitration (S.8, 45 & 54)
- Appointment of arbitrators (S.11)
- Interim measures, etc. (S.9)
- Challenge to arbitrators (grounds and procedure) (S.12, 13 & 14)
- Challenging the arbitration awards (S.34)
- Contempt Proceedings (S.27)
- Enforcement of awards (S.36, 49&58)
- Appealable orders (S.37 and S.59)

However, specifically the issue of challenging arbitral awards, has been provided for u/s 34, irrespective of whether the award is final or interim. The scope of this provision has over the last two decades enabled thousands of parties to file applications across various courts of India

seeking redress over the awards being passed. Even though the HCs having original jurisdiction, have not admitted all the applications, the district courts have allowed such applications to be filed. So till the application under S.34 is pending the awards cannot be enforced. Therefore, the persistence of this crucial issue cannot be overlooked and there awaits a formulation of a system which makes the awards final and challengeable only on limited points of contentions as the Arbitrator rendering such an award is wilfully chosen by the parties themselves with complete knowledge and qualification and thus there shall not arise any other appreciation on merits of the case. Hence, the awards shall be restricted from being appealed on merits by keeping them within the jurisdiction of S. 34 of the Act.

S.31 of the Act enumerates the form and contents of Arbitral Awards. Specifically dealing with clause 3 of this section it clearly depicts that the Arbitral Award shall state the reasons on which it is based, unless:

- a. It has been mutually agreed upon by the parties that no reasons are to be given, or
- b. The arbitral award is on agreed terms under S. 30.

Thus an award passed under the act will be considered valid only if it satisfies these two conditions, which are:

- i. It must be certain and
- ii. It must contain the final decision.

Therefore, an award must be fulfilled and well-reasoned not leaving any subject matter to be discussed at a later stage with any ambiguity. It should be diaphanous in displaying the rights, liabilities and duties imposed on the parties. This final decision of the Arbitrator shall be framed and formulated in a manner so as to leave no questions



unanswered or stones unturned. Basing it solely on the pleadings, evidence and submissions of the respective parties, it should be backed up with full proof reasoning for the final outcome or decision. However, most of the awards lack such competence and fail to provide strong reasons in support. This leads the aggrieved party to challenge the award irrespective of the nature of the award being binding or non-binding in purview of S. 34 of the Act.

The Amended S.34 clarifies the concept of public policy to mean only if<sup>19</sup>:

- the award was fraudulent or corrupted or in violation of S.75 or S.81;
- it contradicts the basic Indian policy; or
- it contradicts notions of morality or justice.

Lastly, two more grounds laid down under S.34(b) to be decided by the courts, are:

- Dispute which cannot be settled by arbitral Process
- The arbitral award is not in consonance with the Indian public policy.

A challenge according to this section can only be submitted after prior notification to the other party. S.34<sup>20</sup> of the Act mirrors Article 34 of the UNCITRAL Model<sup>21</sup>, and the scope of setting aside arbitral award is very minimum under S.30 or 33 of the 1940

Act. In *Prestress Products (India)5 Case*<sup>22</sup>, the court held that the amended Act was enacted with the sole intention of curbing judicial intervention<sup>23</sup>.

However, the contingencies incarnated are too vast as to enable any such award to be appealed or set aside without facing valid encumbrances. This has collapsed the entire structure and sole purpose behind the formulation of ATs as an award is not usually made binding or given much ascendancy. Leading the matter to be ultimately decided by the court through its leisurely and unperceptive proceedings.

In order to surpass this prevailing and seemingly stumbling block of Arbitration, the SC through its judgment in *DCM Shriram Aqua Foods Ltd. Case*<sup>24</sup>, held that the awards should be intelligible, reasoned and adequate in order to avoid wastage of time for the parties concerned in dispute. Justice N.V Ramana observed that “Muddled” awards would be problematic to the ideal of arbitration, which is nothing but a speedy and harmonious way to determine disputes<sup>25</sup>. The bench wanted to remind that the courts must not lose sight of the fact that the legislative intention to grant S.34 (4) of the ACA was to justify the decision after the court had given the opportunity to reverse the curable defects and that the provision cannot be brushed aside.

<sup>19</sup> [www.legalservicesindia.com](http://www.legalservicesindia.com) 'Emergence of New Era in Arbitration' by Ansh Arora

<sup>20</sup> The Arbitration and Conciliation act 1996

<sup>21</sup> UNCITRAL Model on International Commercial Arbitration 21 June 1985

<sup>22</sup> Municipal Corp. of Greater Mumbai v. Prestress Products (India)5 2003 (2) ARBLR 624 Bom, 2003 (3) BomCR 117

<sup>23</sup> [www.mondaq.com](http://www.mondaq.com)

<sup>24</sup> DCM Shriram Aqua Foods Ltd. V. M/s. Crompton Greaves Ltd.(CIVIL APPEAL NO. 2153 OF 2010)

<sup>25</sup> [www.hindu.com](http://www.hindu.com) by krishnadas rajagopal on december 19 2019



The bench stated that if there are loopholes in the reasoning, the Court needs to consider the documents submitted by the parties along with the contentions raised before the AT so that awards with inadequate reasons are not set aside in cavalier manner<sup>26</sup>.

Lastly, the Court observed that the verdict is significant as the government has declared its thrust on putting India on the Global map as an international hub for arbitration.

In addition to this, in *TPI Ltd. Case*<sup>27</sup> it was eluded that if it were permissible for the Courts to re-examine the correctness of the Award, then the entire proceedings would amount to a futile exercise.

## 2. Should Domestic Arbitral Awards be challenged on merits under section 34 of the Act?

The prevalent task after obtaining an award is to get the same enforced, which is applicable only in terms of domestic awards by filing it in a civil court. The award can be challenged only on an application to the court under S.34 of the act.

There is no special method to make the application, however, S.34 lists three contingencies which are:

- The ATs composition was not in accordance with and
- The Arbitral proceeding wasn't in consonance with the agreement.
- In absence of such an agreement, the composition was not according to Part I of the Act.

Thus an application submitted under this section to revoke a decision in connection with a treaty on international commercial arbitration is inapplicable. If the court is allowed to set aside an award specifically on merits then the whole act of arbitration itself becomes futile, defeating the entire purpose of having such proceedings resulting in another round of litigation. Public policy as considered in the Act and decisions rendered by the courts are in terms of Indian public policies and merits of the foreign award would be in consonance of the award.

The SC in *MMTC Ltd Case*<sup>28</sup>, held in terms of S.34, that a court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under S.34(2)(b)(ii). The Court observed that the insertion of Explanation 1 to S.34(2)(ii) has modified public policy to mean: fraud or corruption in the making of the award, violation of S.75 or S.81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Thus court should not go into any other aspect except those mentioned in S.34 nor look into the merits on the basis of which the award was awarded originally.

## 3. Can foreign Awards be challenged in India?

Obtaining an award in one's favour is half the work done from the international AT as the cardinal aspect is its enforcement. The ACA does not provide challenges for foreign arbitral awards specifically. Though

<sup>26</sup> www.indianexpress.com By: Express News Service | New Delhi | Published: December 19, 2019 3:35:02 am

<sup>27</sup> TPI Ltd. V. Union of India Civil Appeal No. 6875 of 1999

<sup>28</sup> MMTC Ltd VS M/s Vedanta Ltd Civil Appeal No. 1862 of 2014



S.48(1)(e) read along with other substantive provisions showcases that even if it is impermissible to challenge a foreign award, it is possible to resist its enforcement on grounds available as for domestic awards<sup>29</sup>. However bare reading of S.48(1)(e) suggests that a foreign award can be challenged in a country where it was made or under the law of the country in which it was made.

Considering both cases the court rendered its decision in *Satyam Computers Case*<sup>30</sup> that even a foreign award can be challenged in India on the ground of public policy as encrypted under S.34. The decision was passed by relying upon *Bhatia International case*<sup>31</sup>, which held that Part I of ACA will also apply to Part II unless expressly or impliedly excluded by the parties through an agreement, failing which the whole of part I would apply. The same would also apply in international commercial arbitrations and to all such proceedings relating thereto. Further, when the arbitral proceeding is held in India, Part-I provisions would definitely apply.

The SC upheld a challenge to foreign awards on the grounds that the relief contained violated Indian statutes and public policy<sup>32</sup>. The court also held that application of S.34 to a foreign award would not be inconsistent with S.48 of ACA, or any other provision of part II. Thus, public policy's extended definition cannot be bypassed by taking the award to foreign country for enforcement.

This decision has allowed foreign awards to be challenged on grounds listed in S.34 of Part I of the Act, which includes an award

against Indian public policy. Although, scope of Part I can be avoided by the parties by accepting the same under their contract, the grounds for opposing enforcement are in Part II of the Act which are similar to the grounds for challenging the award set out in Part I. It is generally accepted that any attempt to exclude the effect of Part II of the Act leads to failure of proceedings.

The judgment in *Satyam Computers*, held that foreign awards may be challenged unless the arbitration agreement specifically excludes the application of Part I of the Act. However, the reasons for refusal to enforce under Part II of the Act reflect the justification in Part I. Therefore, the exclusion of Part I is ineffective if Part II applies. This decision has led to an increased number of challenges to foreign awards in India and raised an alarm that India is noncompliant with the New York Convention. It opposes the object and reason of the New York Convention and is also in violation of Article III of the Convention<sup>33</sup> and to the Indian legislature's intention, as it introduces an additional ground for challenging a foreign award through judicial legislation originally intended for domestic awards. It makes S.48 ineffective, as each time an enforcement application under S.48 is filed before Indian courts, the opposite party files objection under S.34, availing the benefit of challenging the foreign award on merits<sup>34</sup>.

The decision is also contrary to *ONGC Vs. Saw Pipes*<sup>35</sup>, wherein the court accepted that S.34 and S.48 are non-identical and hence,

<sup>29</sup> www.scribd.com Grounds for Challenge to Arbitral Award Uploaded by Nikhil Guliani

<sup>30</sup> (2010) 8 SCC 660

<sup>31</sup> Appeal civil 6527 of 2001

<sup>32</sup> The Indian Arbitration and Conciliation Act, 1996

<sup>33</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

<sup>34</sup> www.legalservicesindia.com

<sup>35</sup> Civil Appeal No. 7419 of 2001



the assumption that the effort of the respondent to avoid enforcement of the award under S.48 deprives the appellant the benefit of the public policy rule of India, is incorrect.

The SC's intervention in the Satyam computers case on grounds of public policy is most unfortunate, as it does not consider the decision in Renuagar case. The present decision allows foreign awards to be challenged on merits on the ground of "patently illegal", notwithstanding the enforcement proceedings in any other jurisdiction. In effect, the decision considers a foreign award similar to a domestic award, if the execution of the award has to be done according to Indian laws.

As per legislative intent the grounds to challenge awards within Part I, S.34<sup>36</sup> of Act apply only to Domestic Awards and not to Foreign Awards, but On September 6, 2012, SC in Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc.<sup>37</sup> reconsidering its previous decisions, concluded that the ACA should be interpreted in a manner as to give effect to Indian Parliament intent as it originally was supposed to be<sup>38</sup>. The Court reversed its earlier rulings of Bhatia International case and Satyam Computer case, stating that findings in them were incorrect.

Part I of the Act has no application to arbitrations seated outside India irrespective of whether the parties wanted to apply the Indian Arbitration Act or not. The court applied the Doctrine of Prospective Overruling which means that these findings

of the SC are applicable only to arbitration agreements executed after 6 September 2012. Thus, all disputes of arbitration agreement up to 6 September 2012 and before shall be decided by old precedents regardless of fact that such rulings were incorrect and have been reversed by the SC. This is done to not cause problems in already settled arbitration proceedings on the basis of the principles or precedents laid down consequently.

#### **4. Do Indian courts have the authority to entertain a challenge to foreign Arbitral Awards on merits only?**

Foreign award is an award given through an international convention or treaty recognized by the ACA. The Indian courts can choose to enforce a foreign award under S.48(1) of the Act, which also act as defences for the party resisting enforcement of award. The provision states that Indian courts have no power to annul an award made outside the territory of India.

Consequently, it can be stated that an award arising out of an India seated international commercial arbitration agreement, can by the virtue of the Commercial Courts Act and Amended Act only be referred to the Commercial division of a HC depending on the subject matter of the Award. Whereas, the jurisdiction in any such non international commercial award arising out of an India seated arbitration would ordinarily lie before the commercial/civil courts having original jurisdiction in a district and the commercial division of HC in exercise of its ordinary original civil jurisdiction. Limited grounds are provided for challenging the

<sup>36</sup> Arbitration and Conciliation Act, 1996

<sup>37</sup> CIVIL APPEAL NO.7019 OF 2005

<sup>38</sup> www.lawoctopus.com 'Setting Aside Arbitral Award: Contemporary Scenario in India' on 21st July by swati duggal



enforcement of foreign award under S.48(1) of the Act, it is evident that notwithstanding anything provided in Indian Contract law, nothing can be done to nullify the foreign award and no proceeding can be initiated against<sup>39</sup>. Further the enforcement of foreign awards cannot be challenged on merits. This has been a prevalent issue since enactment of 1961 Foreign Award Act which was substantiated by SC in *Bharat aluminium company vs Kaiser aluminium technical services*<sup>40</sup>. The 1961 Act provided no provision for challenging the Foreign Award on merits similar to the provisions contained in S.16 and S.30 of the earlier enactment of 1940 Act. Since 1961 there has been no change in the situation.

The Court also held that S.48 does not confer jurisdiction on two courts to annul the award and only provides an alternative to parties in order to challenge the award in cases where the law of the country has no provision or law to challenge the award where the seat of arbitration is located.

The words “set aside or suspend” in S.48 does not mean that the foreign award sought to be enforced can be challenged on the merits by the Indian Courts but rather the provision recognizes the two nation’s courts which are competent possessing the jurisdiction to annul or suspend the award and doesn't in any manner ipso facto confer jurisdiction on two courts to again annul or set aside awards made outside the territory of India<sup>41</sup>.

Thus, the courts lack jurisdiction in accordance with the act over international commercial awards which haven't arisen from an Indian seated arbitration.

### **5. Can a foreign award be deemed unenforceable if it is passed in derogation to the Public Policy?**

The conditions in order to pass a foreign award can be explained through the judgment of *NAFED Case*<sup>42</sup>, wherein the SC observed that a foreign award can be rendered unenforceable if the transaction violates the Indian public policy or law. However, this decision of the court is seemingly problematic when it comes to its precedential value as it fails to provide reasoning to depart from the earlier decisions of the court in matters of similar subject. This decision has thus put the exception of public policy for enforcement of foreign awards in a state of haze. It permits review on the stage of merits which is in derogation to the pro enforcement bias as enshrined under S.48 of the Act, thereby widening up the public policy exceptions incarnated by the earlier decisions.

This impression of the SC has been a reflection of another cardinal judgment in the case between *Renusagar Case*<sup>43</sup>. wherein the SC iterated that the term “public policy” in S.7(1)(b)(ii) of the 1961 Act did not refer to the public policy of New York, but instead that of India. Moreover, the Court determined the grounds which would be in violation of

<sup>39</sup> www.lawresearch journal.com.Volume 2; Issue 3; May 2016; Page No. 05-09

<sup>40</sup> Civil App 3678 of 2007

<sup>41</sup> www.lawsenate.com on BALCO case.

<sup>42</sup> NAFED V. Alimenta S.A Civil Appeal No. 667 of 2012

<sup>43</sup> Renusagar Power Ltd. V. General Electric Co. 1994 AIR 860, 1994 SCC Supl. (1) 644



the public policy of India if the enforcement is contrary to:

- (i) fundamental policy of Indian law;
- (ii) interests of India; or,
- (iii) justice or morality.

It is paramount to note that this judgment was passed under the primordial Arbitration regime, stood the test of time and is highly relevant as per the current ACA wherein S.48(2)(b) reflects the standards set out in Article V(2)(b) of The New York Convention<sup>44</sup>. Therefore, these two judgments make it transparent as to when such foreign awards may be deemed unenforceable, when applied for or executed in the Indian Civil Courts.

#### **6. Is the limitation period to set aside an arbitral award as stipulated under section 34(3) of the Arbitration and Conciliation Act, 1996 justifiable?**

S.34(3) of the Act states that an application for termination may not be made after three months from the date on which the party making the application received the award or, if the application was made with S.33, then the date on which the application was rejected. If primarily the court is satisfied that the applicant has been sufficiently prevented from submitting the application within the said three months, then an application within

an extended 30 days can be granted, but not thereafter.

The SC through its judgment in *Tecco Trichy case*<sup>45</sup> laid down that the time period to challenge an award only commences from the moment of the actual receipt of the Award. Whereby, a “signed copy” is delivered in accordance with the provisions set out under S.31(5) of the Act. The Court observed that the award’s delivery is a matter of substance and not formality; as parties are conferred certain rights. Additionally, in *Himachal Techno case*<sup>46</sup> the court extended the principle of S. 9 Clauses Act<sup>47</sup> to S.34(3) of the ACA by prescribing that the time limit for filing an application to challenge<sup>48</sup> an Award would commence a day after its receipt by the party.

S.34(3) allows the party to render an application after the expiry of 3 months upon highlighting that the applicant was “prevented by sufficient cause” from doing so. In such cases, the statute has given discretion to the courts to entertain the application within a period of 30 days “but not thereafter”<sup>49</sup>.

However SC in *Popular Construction case*<sup>50</sup> held that it is possible for the court to permit an application beyond the original period of 30 days being the statutory outermost ambit for exercise of powers as the expression “but not thereafter” found in S.34(3) expressly excluded the applicability of S.5 of the Limitation Act.

<sup>44</sup> The convention on the Recognition and Enforcement of Foreign Awards 10th June 1958

<sup>45</sup> Union of India v. Tecco Trichy (2005) 4 SCC 239

<sup>46</sup> State of Himachal v. Himachal Techno (2010) 12 SCC 210

<sup>47</sup> General clauses act 1897

<sup>48</sup> section 34(3) of Arbitration and conciliation act 1996

<sup>49</sup> www.barandbench.com by tariq khan on Nov 3 2019

<sup>50</sup> Union of India v. Popular Construction (2001)8 SCC 470



In *P. Radhabai case*<sup>51</sup> the SC putting emphasis on the term “had received the arbitral award” found application of S.17 was excluded expressly. It also held that extending the benefit of S.17 of the Limitation Act 1963 would do injustice to the parts of S.34 (3). The SC<sup>52</sup> refused the benefit of S.4 of the said Act on the ground that the section was meant only for the time period prescribed by the Act<sup>53</sup> and is outside the view of S.34(3).

It is evident that the application of the principle of express exclusion with reference to the wordings of S.34(3) and Limitation Act answers about the applicability being negative. The SC on two occasions while applying S.12 and S.14 answered the question affirmatively. It would be in accordance with the purpose of arbitration law to come to an effective and rapid resolution of disputes in order to avoid that the principle of “behind the provisions” of the limitation Act is invoked and read in S.34 (1) within specified periods of time. The advantages of the calculation principle are contained in the limitation Act<sup>54</sup>.

The grounds and time limit as specified under S.34 thus indirectly or directly promote litigation proceedings bringing the parties back to square one and the entire arbitral proceedings a jest.

### 7. Should 3rd parties be allowed to enforce Arbitral Awards?

Arbitration is most lucrative when it comes to its processing but the costs attached to it have surged lately, giving rise to the concept of third-party funding (“TPF”) and capitalization as arrangements for financially unsound applicants to pursue their arbitral interests successfully. An agreement entered and signed into by two or more parties often captivates interests and rights of a non-signatory to such an agreement. This issue has been prevailing since a long time and hence there have been numerous cases filed and referred across various courts in India in pursuance to the right of intervention by such affected third parties. The issue mainly rotates around its implementation and validity as such an agreement is often invalid in some jurisdictions, giving rise to recovery problems.

In England the Court of Appeal’s decision in *Arkin v Borchard Lines Ltd*<sup>55</sup> described commercial funders as groups providing help to those seeking justice but could not afford. The Australian High Court<sup>56</sup> recognised the authenticity of funding instrumentations, while the Singapore Parliament passed a law<sup>57</sup> by which allowance was permitted for TPF for international arbitration and related court proceedings under certain circumstances, with specific criteria required for funders. Similarly, Hong Kong too approved TPF of arbitrations seated in Hong Kong by adopting its own law<sup>58</sup> on 14 June 2017.

<sup>51</sup> *P. Radhabai & v. P. Ashok Kumar* (2018)13 SCALE 60

<sup>52</sup> *Assam Urban Water v. Subhash Projects & Marketing* (2012)2 SCC 628

<sup>53</sup> The Limitation act 1963

<sup>54</sup> [www.arbitrationblog.kluwerarbitration.com](http://www.arbitrationblog.kluwerarbitration.com) by Devansh Mohta/January 8, 2019

<sup>55</sup> 2005,2 Lloyd's Rep 187

<sup>56</sup> *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 ALR 58

<sup>57</sup> Civil Law (Amendment) Act (Bill No. 38/2016)

<sup>58</sup> Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016



However, the enforceability of an award at the seat of the arbitration depends on the legality of the TPF agreement. The Irish SC's decision<sup>59</sup> stated that such agreements could be violative of a country's public policy. Hence due to presence of a TPF agreement the arbitration award violated Ireland's public policy and the award was liable to be set aside<sup>60</sup>.

The concept of TPF can be understood from the CPC, Order XXV Rule 1<sup>61</sup> amended by Maharashtra<sup>62</sup>, Gujarat, Madhya Pradesh and Uttar Pradesh to grant powers to the courts to secure the costs of the proceedings by calling on the financier to become a party and deposit the costs in court. However, there are no laws or regulations that specifically allow or prohibit the financing of arbitration by third parties. The presence of TPF clauses in specific state amended Code cannot establish the legality of a similar clause in the present arbitration act. In 1954, the SC in *the matter of G, A Senior Advocate vs unknown*<sup>63</sup> opined that there is nothing morally wrong in TPFs if the counsels are not involved in the contingent fee structures<sup>64</sup>.

It can be concluded that there is no consensus on whether the enforcement of an award can be challenged in a jurisdiction on the basis of a TPF arrangement. However, rulings in

favor of execution based on the New York Convention, have proved beneficial.

The English Court<sup>65</sup>, iterated that the TPF in place of the applicant gives credibility to the validity of the agreement and the enforcement solely depends on the approach of the Courts.

From a bare perusal of the above cited academic literature, the place where the award has to be executed is where TPF agreements should be acceptable by law. TPF can be found to be legal at the place it was entered into but the award can be annulled by the court if that jurisdiction does not recognize it. India should also consider recognizing TPF by enacting the necessary statutes and rules.

As per the Irish SC, a TPF agreement can be held to be violating national laws. But rulings of the English, Australian and Singaporean courts, say otherwise. From the funder's point of view, whose sole aim is to recover investment, such countries which have specific laws or where TPF is widely accepted are ideal jurisdictions for participating. Although there are no laws in India allowing or restricting a TPF arrangement, there are state amended CPC rules that allow TPF during a dispute. An award thus obtained due to TPF cannot be

<sup>59</sup> *Persona Digital Telephony Limited & Sigma Wireless Networks Limited v. The Minister for Public Enterprise, Ireland and the Attorney General* [2017] IESC 27

<sup>60</sup> [www.latestlaws.com](http://www.latestlaws.com) by Third Party Funding in International Commercial Arbitration: Indian and International Perspective By: Harleen Kaur on 20th Jan 2020

<sup>61</sup> Civil Procedure Code, 1908

<sup>62</sup> Order XXV of the Civil Procedure Code was amended for Maharashtra by Bombay High Court Notification P 0102/77, dated September 5 1983.

<sup>63</sup> (1955) 1 SCR 490

<sup>64</sup> Rule 20, Bar Council of India's Standards of Professional Conduct and Etiquette, Chapter II, Part VI, Bar Council of India Rules 1975 (read with Section 49(1)(c) of the Advocates Act 1961, read with the proviso thereto, (1955) 1 SCR 490

<sup>65</sup> *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm)



termed as violative of the public policy of India.

Lastly, the provisions of Foreign Exchange Management Act 1999 (“FEMA”) also apply if an arbitration is funded by a third party seated in India or by an Indian funder. FEMA classifies all transactions as 1). Current and 2). Capital account transactions<sup>66</sup> involving foreign exchange. If FEMA recognizes TPF or the Act makes an amendment so as to have a set of sections which recognize the same or can have an overriding effect over other laws acting as hurdles, such changes would be beneficial due to the increasing international arbitration around the world. TPF is also favoured in the report of the Committee<sup>67</sup>. With the increasing global presence of TPF, India can be expected to evolve quickly as a pro-arbitration jurisdiction which supports TPFs.

#### **8. What is the role of section 89 of the Civil Procedure Code, 1908 in domestic arbitration for domestic awards as The Arbitration & Conciliation Act, 1996 is already present?**

S.89 states that in case of a possibility of settlement acceptable to the parties, the court formulates the terms of settlement and gives them to the parties for their consideration and after their observation, the court refers for any of (a) arbitration, (b) conciliation, (c) judicial settlement, or (d) mediation.

Disputes can be referred to arbitration or conciliation as if the proceedings were referred for settlement under the provisions of the ACA. Under Lok Adalat, the

provisions of the Legal Services Authority Act, 1987 and all other provisions of that Act would apply. Another method is judicial settlement, where an established institution or person in which the provisions of Lok Adalat and Legal Services Authority Act, 1987 apply. Whereas in mediation, the court shall affect a compromise between the parties and follow the procedure laid down.

The Law Commission and Malimath Committee<sup>68</sup> made recommendations to settle disputes without a trial, accordingly S.89<sup>69</sup> was incorporated by S.7 of the CPC Amendment Act 1999 with an aim to reduce the burden on the courts by suppressing pending litigation.

To proceed towards alternative means of resolution, the court must determine a possibility of settlement which may be acceptable by the parties. The Court has the power to go beyond the decision of the parties to the proceedings under S.89, but the same should only be invoked in cases where there is a possibility of resolution and the parties to the dispute are open to the idea of a settlement. Peripheral use of S.89 can be counterproductive and lead to further delays in the implementation of judicial process. In the case of a marital dispute or a family division lawsuit, alternative dispute resolution (ADR) can be invoked as a legal obligation to separate the issues to be dealt

<sup>66</sup> sections 5 and 6

<sup>67</sup> Justice B.N Krishna Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017)

<sup>68</sup> Sarkar, S.C., and Prabhas C. Sarkar. *The Law of Civil Procedure*. 11th ed. Vol. 1. Delhi: Wadhwa and Company Nagpur, 2006. 498.

<sup>69</sup> Civil Procedure Code.1908



individually and those to be assessed by the courts<sup>70</sup>.

However, the existence of Arbitration and Conciliation Act 1996 invokes a question as to the validity of S.89 when it is already in effect. This can be understood by knowing that under ACA the parties refer to arbitration, whereas, according to S.89, the court effectively asks the parties to choose one or the other ADR. Therefore, S.89 CPC and S.8 ACA<sup>71</sup> stand on a different footing and it would be applicable even in a scenario where there is an arbitration agreement<sup>72</sup>.

The HC granted rule making power for all proceedings before the Court by the ACA under S.82. However, the rules made need to be in consonance with the said Act. The Rule making power is also conferred upon the Central Government under S.84 of the Act. Contrary to this, when parties agree to go for arbitration under S.89, the option of the parties to choose arbitration and the procedure for the same is not stated in the Act<sup>73</sup> and S.82 and S.84 have no applicability under such circumstances. The Act applies to proceedings only after the stage of reference and not before. Drawing analogy on the same, the act would only apply after the stage of reference to conciliation. S.89 does not in any manner create an obligation on courts to compulsorily follow ADRs but merely allows courts to refer cases to the authority. Thus, S.89 of the CPC cannot be used to interpret and understand the provisions under S.8 of the ACA. The court needs to apply its mind to the condition contemplated under S.89 of the Code and if the application under

S.8 is rejected the court is duty bound to follow the procedure as per the said section. S.89<sup>74</sup> provides for an effective method to resolve disputes between parties where there is scope for the same. ADR is a medium of increasing access to justice by not decreasing the quality of justice and hence there is the ACA to look into ADRs to solve disputes. Similarly, domestic awards, referred under S.89 of the act would attract provisions of CPC and for awards referred under the arbitration act parties follow the procedures of the act only.

## V. CONCLUSION & RECOMMENDATIONS

The presence of ACA has efficiently helped resolve disputes not only domestically but also internationally by recognizing international treaties to conduct arbitration on global levels. The law of Arbitration in India has gone through several changes with changing times. This has helped with its conduct and has not affected the diversity of religions and customs which persist. Though, India should expedite the process of examining the accession and ratification of international and regional conventions on the enforcement of international arbitral awards. Especially, provisions allowing the courts to set aside an award, if there lies a defect to the extent that it affects the terms of the award, should be removed. It is no disputed fact that the guidance of such civil courts is indeed critical however, it would be precise to state that the courts which are embedded with such supervisory powers shall utilize the same with extreme caution as to not inadvertently

<sup>70</sup> Vidyodaya Trust v. Mohan Prasad R: 2008 (3) MLJ 967 (SC)

<sup>71</sup> Arbitration and Conciliation Act, 1996

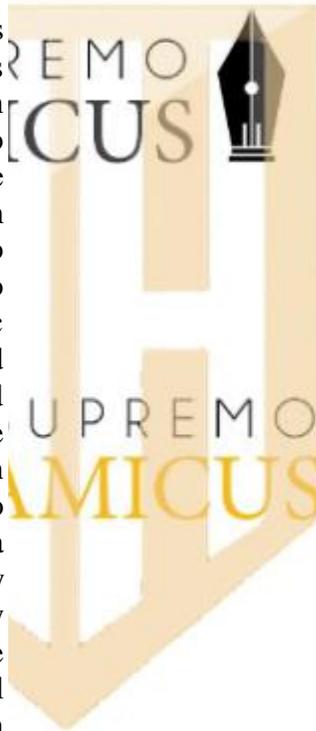
<sup>72</sup> Sukanya Holdings Pvt. Ltd. v. H. Jayes Pandya: AIR 2003 SC 2252

<sup>73</sup> The Arbitration and Conciliation Act, 1996

<sup>74</sup> The civil procedure code 1908



affect the entire Arbitration proceedings. Particularly, the ground of failure to apply the applicable law to the dispute should be removed, as it opens an award to substantive review. Further the additional time limit to challenge an award shall be curbed and allowed only as a leverage if the party is able to show sufficient cause and valid reasoning as to why their interest or right to challenge an award was hindered or prevented. The fact that a domestic court of a country is given power to look into merits of a foreign award is very difficult to implement and the courts would be tasked with a lot of responsibility and a need to consider several factors affecting the nations to which the parties belong and then pass an award. From an international perspective various nations do not recognize third party's rights to enforce awards. India perhaps also needs to take such an approach with changing times due to globalization. What is more vital is to distinguish its applicability from domestic arbitration as international arbitration should be subject to less restrictions and be provided with a more favourable treatment. The grounds leading to setting aside a foreign award should be lesser than those available to vacate a domestic award. The lack of a definition of international public policy applicable to foreign awards is a deficiency of Indian law that needs to be addressed. The act itself has been replaced and several amendments have also been introduced. Even after so many changes the act seems to be plagued with a lot of unresolved issues, contradicting provisions and ambiguous interpretations. After critical analysis specifically of arbitral awards there are serious issues pending that need to be looked and corrected accordingly so as to have arbitration proceedings function smoothly.



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