



ENFORCEMENT OF ARBITRAL AWARDS IN INDIA: LEGAL HURDLES AND EMERGING CHALLENGES

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ABSTRACT

This study throws light on the Indian legal framework in place for the enforcement of domestic and foreign arbitral awards in the country, primarily focusing on the Arbitration and Conciliation Act, 1996, and the New York Convention, 1958. While arbitration has proved to be an efficient alternative to traditional litigation, various challenges persist. The efficacy of arbitration is primarily affected by the inconsistencies in the judicial interpretation of “public policy” under Section 34 of the Arbitration and Conciliation Act, leading to excessive judicial intervention and unpredictable outcomes. Additionally, bureaucratic delays, complexities in the execution of awards, and the influence of corruption and political factors further impede effective enforcement. This paper analyses the legal complexities it encounters and the judicial and administrative inefficiencies that impede the execution of these arbitral awards, while also highlighting the need for legal reforms to streamline procedures, ensure consistent judicial interpretations, and establish the finality of arbitral awards, thereby reinforcing viability and prominence of arbitration as a mechanism for resolution of disputes in India.

INTRODUCTION

Certain disputes necessitate opting for alternative non-judicial adjudication mechanisms, and this necessity has, in turn, furthered the growth of the Alternative Dispute Resolution [“ADR”] machinery, such as arbitration, in India. The concept of “arbitration” has been defined in Black’s Law Dictionary¹ as “A process of dispute resolution in which a neutral third party (the arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.”² The practice of arbitration was envisaged as an out-of-court dispute resolution

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¹ Black HC, Connolly MJ and Nolan JR, *Black’s Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (West 1990).

² *Ibid.*

mechanism which has now emerged as a favoured alternative to traditional litigation, for it offers a more efficient and hassle-free approach towards adjudication of disputes.

The Arbitration and Conciliation Act, 1996³ [“Arbitration Act”] constitutes the foundational legal framework governing the arbitration proceedings within India. The Arbitration Act provides for a robust framework to enforce both domestic arbitral awards (India-seated awards) and foreign arbitral awards (foreign-seated awards) within the jurisdiction of India. While the Act aims to facilitate the effective enforcement of these awards, numerous legal hurdles and emerging trends and challenges impede its smooth execution. The scope of the legislative framework established to govern the enforcement and execution of the arbitral awards and its various provisions has been subject to significant judicial evolution through a series of High Court and Supreme Court pronouncements over the years.

LEGAL FRAMEWORK FOR ENFORCEMENT OF ARBITRAL AWARDS

The degree of enforceability of an arbitral award hinges primarily on issuing a court order within the jurisdiction where the enforcement is sought.⁴ The Arbitration Act is the primary legislative framework for arbitration in India. It establishes the legal framework required for governing the enforcement proceedings of domestic and foreign arbitral awards in Indian courts. Notably, Section 36(1) of the Arbitration Act further provides for “the enforcement of an arbitral award in accordance with the provisions of the Code of Civil Procedure, 1908,⁵ in the same manner as if it were a decree of the Court.”⁶ Furthermore, the treaty, The Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁷ [“New York Convention”], while not a statute in itself, plays a pivotal role in guiding the recognition and enforcement of foreign arbitral awards in the courts of States that are a signatory to the convention, including India,⁸ enhancing India’s standing in the global arbitration regime.

³ The Arbitration & Conciliation Act 1996.

⁴ Khindria T, ‘Enforcement of Arbitration Awards in India’ [1995] International Business Lawyer 11.

⁵ The Code of Civil Procedure 1908, order 1, rule 3.

⁶ The Arbitration & Conciliation Act 1996, s 36(1).

⁷ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (the New York Convention).

⁸ Gorthy K, ‘Deciphering Arbitration Awards- a Comprehensive Guide to Enforcement in India’ [2023] SSRN Electronic Journal.

1. Enforcement of domestic arbitral awards:

In the context of India, the procedure for enforcement of a domestic arbitral award mirrors the execution process of a court decree,⁹ where the award holder is entitled to initiate proceedings for the enforcement of an award arising out of arbitration within a period of three months from the date of award's receipt.¹⁰ In the duration of this interim period, the award may be challenged in accordance with provisions listed under Section 34¹¹ of the Arbitration Act. Alternatively, a thirty day extension may be granted by the court upon the establishment of a satisfactory justification for failure to comply with the prescribed three-month time frame.¹² While Section 34 outlines the manner and grounds for challenging an arbitral award, enforcement is generally precluded until the expiry of this challenge period. However, once the court recognises the award as enforceable at the stage of its execution, the validity of the award becomes *res judicata* and hence, precluding further challenges.

2. Enforcement of foreign arbitral awards:

The New York Convention establishes a framework for the recognition and enforcement of a binding foreign arbitral award in countries that are a signatory to the convention as provided for under article I (1) of the Convention,¹³ provided that the award originates from a designated convention territory. As a signatory to this New York Convention, India has an obligation to recognise and enforce foreign arbitral awards that satisfy the conditions stipulated within the Convention.¹⁴ The procedure for enforcement of a foreign arbitral award in India is two-fold. The enforcement proceeding is initiated by the filing of an execution petition. Subsequently, the court conducts a judicial review to ascertain whether the arbitral award in question complies with the criteria outlined in the Arbitration Act and applicable international conventions,¹⁵ such as the New York Convention. Upon a finding of enforceability, the award is accorded the status of a court decree and is subject to execution accordingly.

⁹ 'Enforcement of Arbitral Awards and Decrees in India' (*Nishith Desai Associates*) (Accessed: 25 December 2024).

¹⁰ The Arbitration & Conciliation Act 1996, s 34(3).

¹¹ The Arbitration & Conciliation Act 1996, s 34.

¹² 'Enforcement of Arbitral Awards and Decrees in India' (*Nishith Desai Associates*) (Accessed: 25 December 2024).

¹³ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (the New York Convention), article I(1).

¹⁴ Rajasekaran V and Korada H, 'Enforcement of Arbitral Awards in India: An Analysis of Potential Issues and Strategies for Success' (*SCC Times*, 18 April 2024).

¹⁵ *Ibid.*

Section 34(2)¹⁶ of the Arbitration Act sets forth two distinct classes of grounds for challenging an arbitral award. Section 34(2)(a)¹⁷ encompasses grounds such as the incapacity of a party, the invalidity of the arbitration agreement, issue of jurisdiction, procedural impropriety, a party's inability to present its case, and the improper composition of the arbitral tribunal, including instances of bias or lack of independence. In addition to these, Section 34(2)(b)¹⁸ provides for setting aside an award if the court determines that the subject matter of the dispute is not amenable to settlement through arbitration or if the award is in contravention of the public policy of India¹⁹. In the landmark *Kinnari Mullick Judgment*,²⁰ the Supreme Court of India unequivocally established that a court may only relegate the disputed parties to an arbitral tribunal upon an express written application to this effect by either party, and this relegation must occur prior to the court setting aside the arbitral award passed by the tribunal. Furthermore, the Supreme Court also held that once the award is set aside by the court, the parties are precluded from seeking a referral of the dispute to the same or a different arbitral tribunal a second time.

LEGAL AND PROVISIONAL HURDLES IN ENFORCEMENT OF AN ARBITRAL AWARD

While securing an arbitral award presents inherent legal complexities, it merely marks the commencement of an impending legal journey towards securing its enforcement. In addition to the prolonged nature of litigation proceedings, the broad and ambiguous ambit of “public policy” as a ground for annulment of an arbitral award under Section 34 of the Arbitration Act poses a significant obstacle towards the effective enforcement of such awards.

1. Judicial inconsistency of arbitral awards:

The scope of “public policy” as a ground for setting aside an arbitral award under the Arbitration Act has undergone significant judicial scrutiny. Initially, the Supreme Court in *Renusagar Power Co. Ltd.*²¹ held that “public policy” primarily encompasses the fundamental policy of India, the national interest of India, and the concepts of justice and morality. Whereas, in *Saw Pipes Ltd.*²² the Court significantly broadened this interpretation of “public policy of

¹⁶ The Arbitration & Conciliation Act 1996, s 34(2).

¹⁷ The Arbitration & Conciliation Act 1996, s 34(2)(a).

¹⁸ The Arbitration & Conciliation Act 1996, s 34(2)(b).

¹⁹ *Ibid.*

²⁰ *Kinnari Mullick v. Ghanshyam Das Damani* (2018) 11 SCC 328.

²¹ *Renusagar Power Co. Ltd v. General Electric Co.* 1994 AIR 860.

²² *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* AIR 2003 SC 2629.

India” within the context of international commercial arbitration to encompass awards contravening the Indian statutory provisions. However, in subsequent judgments of the Supreme Court, including cases of *Lal Mahal*²³, *Western Geco*²⁴, and *Associate Builders*²⁵, the Court has reiterated the *Renusagar* position and held that the “public policy” grounds must be narrowly construed, focusing primarily on fundamental policy violations.²⁶ This divergence in judicial standings exhibits inconsistency stemming from differing interpretations of the provision and consequently undermining the foreseeability and effectiveness of arbitral awards.

2. Ambiguous interpretation of “public policy” under Section 34:

As a consequence, the concept of “public policy” under Section 34 of the Arbitration Act remains susceptible to divergent judicial interpretations, resulting in significant ambiguity. This inherent ambiguity allows for considerable judicial discretion in determining the applicability of public policy grounds for challenging an arbitral award. Consequently, the adjudication of such challenges lacks the requisite certainty and predictability. This unpredictability creates room for the disputed parties to contest arbitral awards on public policy grounds, even in matters where such grounds may lack substantial merit.

3. Excessive judicial intervention:

The exercise of discretionary power by courts in matters of public policy has often been criticised for exhibiting excessive judicial activism. This stems from the fact that diverse interpretations have led to a lack of consistent precedent, leading to decisions that may be influenced by the subjective judgment of individual judges rather than relying on established legal principles. This excessive judicial intervention undermines the autonomy of the parties involved, a fundamental principle underlying the arbitration process. In addition to this, excessive judicial scrutiny further delays the enforcement proceedings by diminishing the finality of arbitral awards, posing significant obstacles in the swift and effective resolution of disputes through arbitration.

²³ *Shri Lal Mahal Ltd. v. Progetto Grano Spa* 2013 SC 191.

²⁴ *Oil & Natural Gas Corpn.Ltd vs Western Geco International Ltd.* AIR 2015 SC 363.

²⁵ *Associate Builders vs Delhi Development Authority* 2015 (3) SCC 49.

²⁶ Mullick AK, ‘Impediments to Enforcement of Awards in India’ (*NLIU Law Review*, 16 November 2024).

4. The issue with foreign arbitral awards:

The challenges associated with the interpretation and application of Section 34, particularly concerning the discretionary power of the judiciary to determine the scope of “public policy” as a ground for setting aside an arbitral award, become particularly acute in cases involving foreign arbitral awards. While international policy primarily comprises a broad range of legislations and judicial decisions, the determination of the exact scope of international public policy mainly rests on the discretion of a national judge. This provision is explicitly stated in Article V(2)(b)²⁷ of the New York Convention, which states that the fundamental principles constituting a public policy are the ones existing in the country where enforcement is sought.

EMERGING TRENDS AND CHALLENGES

Beyond the established legal hurdles, the ever-evolving and dynamic nature of the arbitration regime presents a new set of emerging trends and challenges in impeaching effective enforcement of arbitral awards in India. These challenges encompass both administrative complexities and judicial inefficiencies, as well as the various factors arising from the evolving socio-economic landscape of the country.

1. Bureaucratic and adjudicative delays:

The growing significance of arbitration as a preferred machinery for the resolution of disputes arises out of its inherent ability to deliver speedy resolutions and award swift reliefs to the disputed parties. However, contrary to this expectation, the prolonged nature of enforcement and execution proceedings of arbitral awards has proved to be a matter of growing concern. This sentiment resonates with the opinion of Hon’ble Justice S.K. Kaul, who emphasises that parties, particularly government entities, should honour arbitration awards and refrain from pursuing the litigation process solely to utilise the appeal mechanism in India.²⁸

2. Execution of arbitral awards:

Even upon successful enforcement of an arbitral award, the issue of its execution continues to pertain. These issues consist of tracing and recovery of assets of an award debtor, reluctance to enforce foreign arbitral awards due to reasons such as cultural biases or political interests, and

²⁷ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (the New York Convention), article V(2)(b).

²⁸ Upadhyay S, ‘Courts Strictly Following Principles of Non-Interference to Arbitral Awards; Parties to Arbitration Must Accept Awards: Justice SK Kaul’ (*Live Law*, 19 February 2023).

other impediments. The execution of arbitral awards becomes particularly complex in the context of multinational contracts or cross-border arbitrations, owing to the complexities involved in the determination of appropriate jurisdiction, the question of applicable laws, and navigating procedural discrepancies.

3. Corruption and inefficient political machinery:

The prevalence of corruption and unfair political practices may also act as a hindrance in the effective enforcement and execution of arbitral awards. The issue of inefficient political machinery transcends national boundaries and is rather a case of global concern. Parties with significant financial or political influence may exert such undue influence on the courts, officials, or other relevant authorities for the purpose of either delaying the enforcement proceedings, manipulating the outcome of the award, or even avoiding its enforcement altogether.

CONCLUSION

Arbitration as a machinery for out-of-court dispute resolution has undergone significant evolution over the past few decades. This evolution is driven by innovative legislative reformation and the proactive role played by the judiciary for its interpretation. While India has made substantial progress in the promotion of both domestic and international arbitration, impediments including procedural delays and gaps in the legislative framework in place for governing Indian arbitral matters continue to hinder the efficient enforcement of these awards. Furthermore, the tussle between the Indian courts with their divergent interpretations of Section 34 of the Arbitration Act has furthered this dilemma. This grappling has resulted in additional legal hurdles including excessive judicial intervention, difficulties in enforcement of foreign arbitral awards, and inefficient execution of arbitral awards.

In order to ensure the continuance of arbitration as a viable alternative to traditional litigation, there is an urgent need for comprehensive legal reforms aimed at streamlining the enforcement and execution procedures in the context of arbitral awards, thereby enhancing the finality of such awards, and ensuring their uniform and binding execution across all jurisdictions.