

# Enforcement of Foreign Judgements & Awards - Effective Strategies

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# An Overview

- Introduction
- Domestic and Foreign Award – in India
- Domestic and Foreign Judgment – in India
- Essential ingredients of Foreign Award
- Grounds to challenge the Foreign Award
- Essential ingredients of Foreign Judgment
- Grounds to challenge the Foreign Judgement
- Effective Strategies re Enforcement of Foreign Award
- Effective Strategies re Enforcement of Foreign Judgement
- Pro-enforcement trends in India re Foreign Awards
- Conclusion

# Introduction

- Globalisation of economy has compelled various countries, including India, to implement effective and efficient methods for resolving commercial disputes.
- In cross border transactions ARBITRATION is often used as the viable mode for resolving disputes.
- Most valuable characteristic of International Arbitration is the ability to ‘enforce a foreign award’, as majority of countries are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the “**New York Convention**”).
- **The Code of Civil Procedure, 1908 (“CPC”)** governs enforcement of foreign judgements in India, whereas, enforcement of foreign awards is governed by the **Arbitration & Conciliation Act, 1996** (the “**Arbitration Act**”).
- Foreign awards are enforced as a decree of Indian court.
- Enforcement of awards passed in arbitrations seated in India (“**Domestic Award**”) is governed by **Part I** of the Arbitration Act; **And**
- Enforcement of foreign awards pronounced in arbitrations seated outside of India (“Foreign Award”), is governed by **Part II** of the Arbitration Act.

# Domestic and Foreign Award – in India

## DEFINITION OF ARBITRAL AWARD:

**Section 2(1)(c)** of the Arbitration Act defines ‘arbitral award’ and includes interim awards

**Section 7** of the Arbitration Act states that arbitral award made under PART I of the Arbitration Act will be considered as a ‘Domestic Award.’

## DEFINITION OF FOREIGN AWARD:

**Section 44** of the Arbitration Act defines ‘Foreign Award’ as an arbitral award passed on the differences between persons arising out of legal relationships, whether contractual or not, which are deemed to be commercial under the Indian law.

***Serajuddin and Co. v. Michael Golodetz [1959 SCC online Cal 196]***, specifies necessary elements of a foreign award delivered in foreign arbitration, namely:

- “Arbitration should have been held in foreign land.
- By foreign arbitrator(s).
- Arbitration by applying foreign laws.
- A foreign national is involved as a party.”

# Domestic and Foreign Judgment – in India

## **DEFINITION OF A JUDGEMENT:**

**Section 2(9)** of the CPC defines the term ‘judgement’, and its essential elements are:

- (i) a concise statement of case;
- (ii) the points of determination;
- (iii) the decision there on; and
- (iv) the reasons for such decision.

## **DEFINITION OF A FOREIGN JUDGEMENT:**

**Section 2(6)** of the CPC defines ‘Foreign Judgement’ to mean the judgement of a foreign court, i.e., a court situated beyond the limits of India having no authority in India and is not established or continued by the President of the Union of India.

## Essential ingredients of Foreign Award

### Documents Required (Section 49 of the Arbitration Act):

- i. Original award or the certified copy;
- ii. Original arbitration agreement or authenticate copy;
- iii. Evidence to prove that the award rendered is foreign in nature; and
- iv. English translation of the award, if the award is in the local language of the foreign country.

### Conditions For Enforcement (Section 58 of the Arbitration Act)

- i. Award has been made in pursuance of the submission to the arbitration;
- ii. Subject-matter of the award should be capable of settlement;
- iii. Award is made in the manner agreed by the parties;
- iv. Award has become final in the country it is made;
- v. Enforcement of the award is not contrary to the public policy of India; and
- vi. Other party has received sufficient notice before the award is passed.

## Grounds to challenge the Foreign Award

- i. The parties to the agreement were under some incapacity.
- ii. The agreement in question is not in accordance with the law to which the parties have subjected it, or under the law of the country where the award was made.
- iii. Award is beyond the scope of the agreement or submission to arbitration.
- iv. The foreign 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.
- v. Enforcement of the award would be contrary to the public policy of India.

The Delhi High Court in ***Cruz City I Mauritius Holdings v Unitech Limited, [2018 SCC Online 3619]*** has held that the **'public policy' defense is to be construed narrowly**, and foreign awards **will only** be held unenforceable if **they contravene the basic rationale, values and principles** which underpin Indian laws.

# Essential ingredients of Foreign Judgment

## JURISDICTION OF FOREIGN COURTS

- i. Person is the subject of foreign country or resides there when the action commenced.
- ii. Person selected foreign court as the forum.

## PRESUMPTION (Section 14 of the CPC)

Upon receipt of a certified copy of foreign judgment, the Court presumes that such foreign judgment was pronounced by a court of competent jurisdiction unless contrary appears on the record.

## Process for Enforcement (Section 44-A Of The CPC)

- Decree must be that of **a superior court** of a reciprocating territory
- Decree should be final or non-appealable
- **Certified copy** of the decree must be filed in a District Court or a High Court
- “Decree” should be a money decree, i.e., any decree under which a sum of money is payable
- Certificate of part satisfaction (if any) should be given by the foreign court



## Grounds to challenge the Foreign Judgement – Section 13 of the CPC

- i. Judgment is not pronounced by a court of competent jurisdiction;
- ii. Judgment is not given on merits of the case;
- iii. Prima facie judgement appears to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
- iv. The foreign proceedings are opposed to natural justice;
- v. Judgment is obtained by fraud; and
- vi. Judgment sustains a claim founded on a breach of any law in force in India.

# Effective Strategies For Enforcement Of Foreign Award

## Asset Tracing

- To initiate execution proceedings before any court in India where assets are located
- Asset tracing agents can help in locating the assets and identifying its quality.
- Check if the Indian counterparty has subsidiary, corporate office or substantial assets in another country – some diligence should be done before agreeing to the seat of the arbitration.

## Seeking Interim Reliefs (TRO equivalent) - International Commercial Arbitration

A foreign entity can optimize provisions of Section 9 of the Arbitration Act against its Indian opponent

- i. Can be used for preservation, interim custody, or sale of goods
- ii. Securing the amount of claim in an arbitration
- iii. The arbitration agreement should not, expressly or impliedly, exclude the applicability of Section 9 of the Arbitration Act – Case Specific - Must seek advice from Indian counsel

# Effective Strategies For Enforcement Of Foreign Award (Contd.)

## PRE-ARBITRATION CONSIDERATION

- i. Must draft a detailed Arbitration clause
- ii. To choose a seat of arbitration where maximum assets of the opposite-party are located
- iii. To agree re the procedural framework of the arbitration
- iv. Selecting an arbitrator(s) is an advantage and must be given due consideration. Following qualities preferred in arbitrators: (i) fair and reasonable, (ii) domain knowledge and experience, (iii) unbiased, (iv) no conflicts, (v) commercially savvy, etc.
- v. Try to fix the timelines of the arbitration by an agreement
- vi. Manner of incurring and splitting the arbitration costs
- vii. To assess whether Part I of the Arbitration Act should apply – Must consult an Indian counsel

# Effective Strategies for Enforcement of Foreign Judgement

Re the enforcement of foreign judgments in India, two (2) situations may arise, depending on the country where the foreign court is located:

**Reciprocating Country** (“Reciprocating territory” means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of **Section 44A** of the CPC); Or

## **Non-Reciprocating Country**

A party seeking enforcement of a foreign decree:

- from a reciprocating country must file execution proceedings in India;
- from a non-reciprocating country must file a **fresh suit**
- Statute of limitation to file enforcement proceedings re the foreign judgment is three (3) years from date of delivery of judgement
- Asset Tracing (as discussed) becomes critical – time saving mechanism
- Consult Indian counsel re alternative modes of execution of the foreign judgement
- Check whether the judgement debtor has substantial assets located outside of India

## Pro-enforcement Trend in India re Foreign Awards

- Over the years *the Indian judiciary has*, especially, in context to enforcement of foreign awards, *misinterpreted the Arbitration Act*, leading to frustration and setting a negative trend amongst foreign investors.
- In the past 5 to 7 years, *the Indian courts have been liberal* and in conformity with international norms relating to enforcement of foreign arbitral awards.

### MAJOR JUDICIAL TREND re PRO-ENFORCEMENT

The Supreme Court of India in its celebrated case of ***Bharat Aluminium Co v. Kaiser Aluminium Technical Services [(2012) 9 SCC 552.]*** (“BALCO”) judgement, *settled the principle* that Part I of the Arbitration Act *only applies* to arbitrations seated *within India*. And the foreign awards are only subject to the jurisdiction of Indian courts when they are to be enforced in India.

- FINALITY OF INTERNATIONAL AWARDS

In a case decided by Delhi High Court [***NTT Docomo v Tata Sons; 2017 (4) ArbLR 127***], the judgment *demonstrated that India respects finality of international awards* and is a foreign investment-friendly country.

## Pro-enforcement Trend in India re Foreign Awards

### COURTS **TO NOT INTERFERE** WHILE EXECUTING FOREIGN AWARD

The ruling of Supreme Court of India, in the case of ***Vijay Karia v. Prysmian Cavi E Sistemi SRL 34; 2020 11 SCC 1*** highlights the trend of Indian courts' towards a favourable pro-enforcement regime

In this case, the Supreme Court encouraged the Indian courts to adhere to the principle of non-interference while executing the foreign arbitral awards in the domestic regime. Also, the court outlined the extent of “appropriate” defenses available to the parties under Section 48 of the Arbitration Act and confirmed the pro-enforcement mechanism.

In another case, ***Centrotrade Minerals and Metals Inc v Hindustan Copper Ltd.***, on June 2, 2020, the Supreme Court of India, decided that it has been recognized that one of the primary objectives of the New York Convention is to ease the enforcement and that only the courts of the seat may annul an arbitral award. Enforcement courts must limit themselves to enforcement only.

Recently, the Supreme Court in ***Government of India v Vedanta Ltd (Formerly Cairn India Ltd) and Others; (2020) 10 SCC 1***, made a notable observation that the enforcement court cannot set aside a foreign award, even if the conditions under Section 48 of the Arbitration Act are made out. The power to set aside a foreign award vests only with the court at the seat of arbitration since primary jurisdiction is exercised by the courts at the seat of arbitration.

# Pro-enforcement Trend in India re Foreign Awards

- Indian legislature introduced amendments in the years 2015 and 2019, to promote India as a favourable seat for conducting International Arbitration.

## Key Provisions And Amendments of 2015 in the Arbitration Act:

- i. Amendment to the definition of the term 'Court'
- ii. Section 2(2): Part-I of the Arbitration Act shall apply where the seat of arbitration is in India
- iii. Section 8 (Referring parties to arbitration): Judicial authority shall refer the parties to the arbitration unless it finds that prima facie no valid arbitration agreement exists
- iv. Section 9 (Interim Measures): Arbitral proceedings must be commenced in ninety (90) days if the Court grants interim relief before commencement of arbitration proceedings
- v. Section 11: Appointment of Arbitrators
- vi. Section 17 (Interim measures by Arbitral Tribunal): Arbitral Tribunals shall have the same powers under Section 17 as are available to a court under Section 9.
- vii. Section 29A and 29B: Time limit for arbitral award and fast-track procedure
- viii. Section 34 (Scope of Public Policy): Added provisions re contravention of the fundamental policy of Indian law, or conflict with the notions of morality or justice

## Conclusion

- For enforcement of foreign award or a foreign judgement, preference should be given to the jurisdiction of courts where the assets are situated.
- Re foreign judgement, if the country is a reciprocating territory, then the enforcement procedure will be easier as compared to foreign judgement procured from a non-reciprocating territory.
- The BALCO judgement led to an evident shift in the Indian judicial mindset and the ethos of the New York Convention stood reinstated. Moreover, the Indian Legislature enacted number of favourable amendments to the Arbitration Act in 2015, and subsequently in 2019.
- Importance of effective and timely enforcement of a foreign award has been recognized by the Indian judiciary, and it has gradually adopted a pro-arbitration stance and promotes executing the foreign award when no conflict of law exists.
- The recent judicial rulings in India are adopting ways to make India a friendly jurisdiction when it comes to enforcement of foreign awards.
- Irrespective, seeking Indian counsel on enforcement strategies will only help entities to save time, efforts, energy and costs in achieving its goals of enforcement in India.



**Thank You**