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Has India Truly Delivered on Its Obligations Under Articles I and V of the New York Convention Over the Last 60 Years?

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India signed the Convention on the Recognition and Enforcement of Arbitral Awards, 1958, commonly known as the New York Convention ("the Convention"), on 10th June, 1958 and ratified it on 13th July, 1960. Often criticised as a "non-friendly" arbitration jurisdiction by the international community, this post analyses how India has fared in its obligations under the Convention on the occasion of its 60th anniversary.

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

Part II of the Indian Arbitration & Conciliation Act, 1996 ("the Act") deals with Enforcement of certain foreign awards and Chapter I therein (Sections 44-52) deals particularly with Convention awards. As per Section 44(b) of the Act, a "foreign award" must be made in one of such territories as the Government of India, upon being satisfied of reciprocity, may by notification in the Official Gazette, declare to be the territory to which the Convention applies. However, there are two reasons why this gazetting requirement ought to be removed to bring India's arbitration regime into sync with the Convention standards.

Firstly, 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. Secondly, 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.

In Transocean Shipping Agency (P) Ltd. vs. Black Sea Shipping, the Indian Supreme Court interpreted an award made in the year 1995 in Ukraine to be a "foreign award" under the Act although Ukraine was not a gazetted country. It held that India had recognized the USSR as a territory to which the Convention applies by way of a gazetted notification dated 7th February, 1972 and that on the said date, Ukraine formed part of the USSR. Thus, by implication, an award made in Ukraine was covered by the same notification. It is interesting to note that on the date of the award,

Ukraine was not a part of the USSR. Ukraine was however, a signatory to the Convention since 1960 and continued to remain so even after the break-up of the USSR in 1991-92. This was definitely one of the key factors, if not the most important, which weighed with the Court to treat the award in question as a "foreign award" and which shows that in essence, the Court was inclined to read down and do away with the strict requirement of gazetting.

Unfortunately, neither the Arbitration and Conciliation (Amendment) Act, 2015 ("2015 Amendment") nor the proposed Arbitration and Conciliation (Amendment) Bill, 2018 deal with this provision.

Enforcement obligation under Article V of the Convention: Of non-binding and annulled awards

Section 46 of the Act states that any Convention award shall be treated as binding for all purposes. Some scholars and commentators[1)] argue that an award is binding under the Convention when there is no recourse on merits. This interpretation however, raises two concerns.

Firstly, the Act starts on an erroneous footing in defining "when" foreign awards are considered as binding. As a matter of law, all Convention awards are binding per se given the clear language of Article III of the Convention. Thus, enforceability of an award cannot be a pre-condition to its binding force. Not to forget, the parties enjoy the freedom to enter into an agreement that the arbitral award will be binding inter se. Therefore, to this extent, Section 46 is out of tune and needs to be amended.

Secondly, it gives rise to an unwarranted confusion between the concepts of 'finality' and 'binding' nature of an award. If an award can no longer be challenged on merits, it is final whereas it can remain binding from the time it was issued till the time it attains finality. Finality, therefore, cannot be the defining criterion to adjudge the binding nature of an award. Although Section 46 is unequivocal on this issue, yet the confusion is often caused in its interpretation by scholars and practitioners.

In so far as the issue of enforcement of annulled foreign awards is concerned, Indian Courts have to be satisfied that the award has been set aside in one of the two countries i.e. the country "in which the award was made" (the first alternative) or the country "under the law of which the award was made" (the second alternative), as held in Bharat Aluminium Company v Kaiser Aluminium Technical Services, Inc. The second alternative is treated as an exception only when courts of the first alternative had no power to annul the award under its national legislation. The discussion on this blog here also shows how the 2015 Amendment narrows down the scope of the public policy ground for setting aside arbitral awards and challenging enforcement.

This approach is in line with the Convention because while the annulment of a foreign award by the courts of primary jurisdiction is definitely a factor to be taken into consideration, the wording of the Convention clearly vests national courts with the discretionary power to enforce annulled awards. Although the blog post here raised concerns on exercise of such discretion in an unpredictable manner, there are three main scenarios where the Indian courts could exercise their discretion, namely (1)

Public policy exception, (2) Annulment where basis of the award remains valid (*i.e.* when a mere procedural formality of the primary jurisdiction is not met; however such formality does not vitiate the arbitration process per se), and (3) Exercise of non-existent powers (i.e. when the court of annulment has exercised powers that it possesses under its local laws but that are not recognized under Indian law).[2)]

To infuse further clarity into the term "public policy", the Indian legislature has taken some much-needed pro-active steps by introducing Explanations I and II to Section 48(2) of the Act through the 2015 amendment. This is a welcome change to prevent recalcitrant parties from delaying enforcement proceedings on "public policy" ground and to guard the courts to objectively assess the validity of such defence.

Section 48(1) of the Act contains the exact grounds as are under Article V(1) of the Convention on which enforcement of a foreign award "may be" refused. Section 48(1)(e) deals particularly with non-binding, annulled and suspended awards. The Delhi High Court in Glencore Grain Rotterdam BV vs. Shivnath Rai Harnarain (India) Co has interpreted the term "may be" to mean that the conditions for refusing enforcement are to be narrowly construed, and, as far as possible the Court may exercise its discretion in favour of enforcement. It has recently held in Cruz City 1 Mauritius Holdings vs. Unitech Ltd. that the word "may" cannot be read as "shall" and the court cannot be compelled to refuse enforcement even if any of the grounds under Section 48 are established.

Scholarly opinion also suggests that the Indian courts may in principle recognize or enforce a foreign award even if a ground for refusal of recognition and enforcement has been established.[3)] This approach seems clearly in line with the spirit of the Convention because the Indian courts, such as in Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd., also treat Section 48 as a self-contained order and the grounds mentioned in Section 48(1) as being exhaustive. The exercise of judicial discretion in dealing with annulled awards is thus, clearly pro-enforcement.

To conclude in the words of the Indian Supreme Court in Kandla Export Corporation & anr. vs. M/s. OCI Corporation & anr., enforcement of foreign awards should take place as soon as possible if India is to remain as an equal partner, commercially speaking, in the international community. This resonates with the growing need to bring the Indian practice in consonance with its Convention obligations under Article V of the Convention. As previously discussed on this blog, the arbitration framework in India post 2015 is a step forward towards a pro-enforcement regime, however, much needs to be done before India can truly claim its practice and procedures to be in conformity with the Convention standards.

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References

↑1 Anirudh Wadhwa & Anirudh Krishnan (eds.), Justice R.S. Bachawat's Law of Arbitration & Conciliation, Sixth Edition, Volume 2 [LexisNexis (2018)] [hereinafter "Bachawat"] at pp. 2865 and 2872

↑2 Bachawat at pp. 2868–2871

↑3 Kumar A., Upadhyay R., Jegadeesh A., Chheda Y, 'Interpretation and Application of the New York Convention in India' in: George A. Bermann. (eds.), 'Recognition and Enforcement of Foreign Arbitral Awards', Ius Comparatum – Global Studies in Comparative Law, Vol.23, pp.445-476 [Springer International Publishing (2017)] at p.457

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