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The Ambiguous Time-Bar for Enforcement of Foreign Awards in India

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Indian courts have pronounced inconsistent decisions regarding the limitation period on applications for enforcement of foreign arbitral awards. This blog post discusses the conflicting jurisprudence and advocates adoption of purposive interpretation for its redressal. Sections 47 to 49 of the Indian Arbitration and Conciliation Act 1996 ("the Act"), which forms part of the chapter on New York Convention awards are relevant in this regard. Section 47 states the evidence which the party applying for enforcement is required to produce before court. Section 48 lays down the grounds for refusal of enforcement on the request of the award debtor. Section 49 provides that '*where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court*'. Since neither the Act nor the Limitation Act 1963 specifically prescribes a limitation period for an enforcement application, recourse has been made to Articles 136 and 137 of the Limitation Act. Article 136 prescribes a limitation period of 12 years for execution of a decree and Article 137 prescribes a limitation period of 3 years for any application for which no limitation is provided. The issue of whether a time bar of 3 years applies to an enforcement application or that of 12 years hinges on the question whether a foreign award should straight off be treated as a decree.

The Rocky Landscape of Indian Jurisprudence

In 2006, the Bombay High Court in *Noy Vallesina Engineering Spa v Jindal Drugs* viewed the enforcement of a foreign award in two stages: 1) inquiry into the enforceability of the award and 2) commencement in case the award is found enforceable. It held that, in the first instance, the application which is filed is not for the execution of a decree but for the execution of an *"award which is capable of being converted into a decree".* Therefore, it held that an award's enforcement period is governed by the residuary Article 137 (3 years). It determined that, only after a court finds the award enforceable, in terms of Section 49, the award is deemed to be a decree and Article 136 (12 years) becomes applicable. Thus, an award creditor has 3 years from the date of the award to apply for recognition and after the award becomes a decree, i.e., when a court records satisfaction under Section 49, the award creditor receives a further period of 12 years to apply for execution.

In 2019, the same Bombay High Court in *Imax Corporation v E-City Entertainment (I)* took a contrary view after considering *Thyssen Stahlunion GMBH v Steel Authority of India* and *Fuerst Day Lawson v Jindal Exports* and held that Article 136 (12 years) applied to an enforcement petition. In *Thyssen*, the Indian Supreme Court ("Supreme Court") compared the enforcement provisions of the repealed Foreign Awards Act, 1961 with those of its replacement, the Act, and observed that while under the Foreign Awards Act a decree follows the award, under the new Act a foreign award is already stamped as a decree. In *Fuerst*, the issue was whether two separate applications are required for enforcement and execution and the Supreme Court held that awards are already stamped as decrees and can be enforced and executed in one and the same proceeding. The Bombay High Court in *Imax,* therefore*,* concluded that to advance the object of the Act the word "stamped" should be understood as "regarded" and a foreign award should be regarded as a decree.

Interestingly, the Bombay High Court considered the Supreme Court decisions of *Thyssen* and *Fuerst* in both *Noy* and *Imax* but arrived at contrary views. In *Imax*, it took the Supreme Court observation as indicative of the nature of foreign awards; however, in *Noy* it observed that the Supreme Court had in neither case considered this decree question by referring to the Limitation Act or dealt with the issue in consideration. The Supreme Court had only stated that a separate application for recognition of the award is not necessary because, under the new Act, the court is not required to pronounce judgment in terms of the award for the award to operate as a decree.

The most recent development came from the Delhi High Court in February 2020, *Cairn India v Government of India*. In this case, the Court ruled that to effectuate the Act's object, which is speedy disposal of disputes, Article 136 of the Limitation Act should apply to enforcement petitions. The Limitation Act should be read "*pragmatically*" rather than in a "*pedantic manner*". The Court stated that the Act "*presupposes that a foreign award is a decree"* whose execution can only be impeded under Section 48 of the Act. Section 48, similar to Article V of the New York Convention, provides grounds for refusal of enforcement of a foreign award. The Court further held that pragmatically, 'enforcement' in Section 48 should be treated as execution. It also observed "*[t]hat a foreign award is enforceable on its own strength and not necessarily dependent on whether or not it goes through the process of Section 48 proceedings emerges from the principle enunciated in international arbitration conventions that there are no limits on the forums in which recognition and/or enforcement of such awards can be sought" (Para 22).*

Unlike *Imax*, *Cairn* disputed the legal outcome of *Noy*. *Cairn*, on the basis of Section 48, questioned *Noy*'s reasoning that an award becomes a decree under Section 49 only after the court's satisfaction of its enforceability. *Cairn* stated that, according to *Noy* for a court's satisfaction of enforceability, the award requires examination under Section 48, but an anomaly will occur if no objection under Section 48 is filed as then the court can never arrive at the satisfaction under Section 49 and the award can never become a decree.

Though the Supreme Court has not dealt specifically with the question, it recently, in *Bank of Baroda v Kotak Mahindra Bank* held that the limitation period for execution of

a foreign decree under Section 44A of the Civil Procedure Code 1908 ("CPC") is governed by the limitation law of the reciprocating country where the decree was issued. It observed that Article 136 of the Limitation Act, being restricted to decrees of Indian courts, is not applicable. This judgement, however, does not apply to foreign arbitral awards for three reasons. Firstly, the CPC, conscious of the different legal domains in which arbitration functions, explains that a foreign decree does not include an arbitration award, even if such an award is enforceable as a decree. Secondly, the Supreme Court applied the reciprocity principle which is unavailable for application in case of arbitral awards. Finally, a foreign award is regarded as already stamped as a decree but not a 'foreign' decree.

Conclusion

Indian courts continue to grapple with clearly determining the limitation period applicable to petitions for enforcement of foreign awards. Yet, the statutes themselves (whether focused on arbitration or limitation periods) of leading international arbitration hubs, like the U.S.A., U.K., and Singapore, that prescribe clear time bars to such applications. India lacks such legislative certainty and the question of what time limitation applies to enforcement petitions in India pivots on the question whether a foreign arbitral award is to be treated straight off as a decree.

The point of conflict is Section 49 of the Act which states that the award can become a decree only if the court is satisfied that it is enforceable. It is accepted that one enforcement proceeding may consist of stages; 1) deciding the enforceability of the foreign award and 2) taking steps for execution, if the award is found enforceable. The satisfaction under Section 49 is arrived at after clearing the first stage, an application for which may be subjected to 3 years limitation. It is only after the passing of the first stage that 12 years limitation may be applied. *Noy* has based its reasoning on this premise and admittedly, has provided a sound literal interpretation of the legal matrix involved.

However, given the pro-enforcement policy of Article III of the New York Convention and the objective of the Act, i.e., speedy disposal of disputes, reduced supervisory jurisdiction of courts, and prompt enforcement of awards including foreign awards, smooth enforcement should be enabled by the adoption of a purposive approach. The purposive interpretation of Sections 47 to 49 of the Act implies the application of Article 136 (12 years) of the Limitation Act to enforcement applications. Contrarily, allowing only 3 years' limitation to the first stage of enforcement applications, by applying Article 137, is damaging to the decretal interest of award creditors. The interpretation of the Act should not defeat substantive and concluded arbitral proceedings between parties. The bifurcation of enforcement proceedings into stages and consequent application of different limitation periods, though literally sound, would be against the purpose of the Act. Therefore, until the Supreme Court clarifies the situation in unequivocal terms or the legislature prescribes a certain answer to the conundrum, one can best wish that High Courts adopt the purposive approach.

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