



Shardul Amarchand Mangaldas

# RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

2 April 2023

---

Tejas Karia

Partner and Head, Arbitration

[tejas.karia@amsshardul.com](mailto:tejas.karia@amsshardul.com)



# Outline

- Conditions and limitation period for enforcement of arbitral awards
  - Conditions for enforcement of domestic awards
  - Conditions for enforcement of foreign awards
  - Limitation period for enforcement of awards
- Challenges in executing foreign arbitral awards in India
- Foreign judgments from non-reciprocating countries
- Enforcement of Annulled Foreign Awards in India
- Miscellaneous and procedural aspects
  - Enforceability of emergency arbitrators' orders
  - Stamp duty on arbitral awards



# CONDITIONS AND LIMITATION PERIOD FOR ENFORCEMENT OF ARBITRAL AWARDS



Shardul Amarchand Mangaldas

# CONDITIONS FOR ENFORCEMENT OF DOMESTIC AWARDS



# Enforcement of Domestic Awards

- Section 36 of the Arbitration Act – provides for enforcement of arbitral awards.
- Applies to all arbitral awards arising from India-seated arbitrations.
- When the time for making an application to set aside an order as prescribed by Section 34 (3 months), has expired, the award will be enforced under the Code of Civil Procedure, 1908 (“**CPC**”) as if it were a decree of the Court.
- The 2015 Amendment introduced Section 36(2) - no automatic stay of enforcement- when application to set aside the award is filed; separate application for stay to be filed- Court has discretion to grant stay.
- Prior to amendment, Section 36 did not envisage automatic stay (*Hindustan Construction Company v. UoI*, 2019 SCC OnLine SC 1520).
- Settlement arrived at in pre-institution mediation under Section 12A of the Commercial Courts Act, 2015 (“**CCA**”), to be treated as an award under Section 30(4) of the Arbitration Act so that it can be given meaningful enforceability [*Patil Automation (P) Ltd. v. Rakheja Engineers (P) Ltd.*, (2022) 10 SCC 1].



# Enforcement of Domestic Awards

- Upon observing large pendency in disposing execution petitions/applications under Section 34 of the Arbitration Act, the Supreme Court directed to prepare a road map for early disposal of such cases (***Chopra Fabricators & Manufacturers (P) Ltd. v. Bharat Pumps & Compressors Ltd.***, (2023) 2 SCC 481).
- After expiry of three months from the date of the arbitral award, award becomes enforceable in accordance with provisions of the CPC, irrespective of whether a challenge has been filed under Section 34 or not (***M/s. Rendezvous Sports World v. Board of Control for Cricket in India***, 2016 SCC OnLine Bom 6064).
- Enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, which would have jurisdiction over the arbitral proceedings (***Sundaram Finance Limited v. Abdul Samad & Anr.***, 2018 SCC OnLine SC 121).
- Decree holder has the right to exercise option of either approaching Seat Court or moving directly to the Court within whose jurisdiction the Judgment Debtor or its properties may be situate. (***Gujarat JHM Hotels v. Rajasthali Resorts; High Court of Delhi***)

# Proper court for enforcement of Domestic Awards (India Seated)



Shardul Amarchand Mangaldas

- Award in an international commercial arbitration seated in India:
  - If the subject matter is money, the Commercial Division of a High Court where assets of the opposite party lie.
  - If the subject matter is not money, the Commercial Division of a High Court where the opposite party resides or carries on business or personally works for gain.
- Domestic Arbitration between Indian parties seated in India:
  - Commercial Court exercising such jurisdiction which would ordinarily lie before any principal Civil Court of original jurisdiction in a district.
  - As well as the Commercial Division of a High Court in exercise of its ordinary original civil jurisdiction.

***Jaycee Housing (P) Ltd. v. High Court of Orissa, (2023) 1 SCC 549***



# Choice of foreign seat by Indian parties

***PASL Wind Solutions Pvt Ltd. v. GE Power Conversion India Ltd***, 2021 SCC OnLine SC 331

- Both parties were Indian. The settlement agreement provided that any dispute was to be resolved in Zurich under ICC Rules. Substantive law was Indian.
- The Supreme Court held that two Indian parties can choose a foreign seat of arbitration and an award passed therein is enforceable as a foreign award under Part II of the Arbitration Act.
- The Court underlined that party autonomy was the guiding spirit of arbitration, and the same empowered two Indian parties to choose a seat other than India.
- The Court also held that a Section 9 petition for interim relief, filed in relation to a foreign seated arbitration between Indian parties, is maintainable before Indian courts.



# CONDITIONS FOR ENFORCEMENT OF FOREIGN AWARDS



# Proper court for enforcement of Foreign Awards

- **Explanation to Section 47 (Introduced by 2015 Amendments):**
  - High Court having original jurisdiction to decide the questions forming subject-matter of the Award if the same had been subject-matter of a Suit on its original civil jurisdiction; or
  - High Court having jurisdiction to hear appeals from decrees of the court subordinate to such High Court.
- If the subject matter is money, the Commercial Division of a High Court where assets of the opposite party lie.
- If the subject matter is not money, the Commercial Division of a High Court where the opposite party resides or carries on business or personally works for gain.



# Requirements under Section 47 – not compulsory

***PEC Ltd. v. Austbulk Shipping Sdn. Bhd.***, (2019) 11 SCC 620

- The view that it is obligatory for a party to file the original arbitration agreement or the original award or evidence to prove that the award is a foreign award at the time of filing an application for enforcement would have the effect of stultifying enforcement proceedings.
- Keeping in view the object and purpose of the New York Convention (smooth and swift enforcement of foreign awards), Supreme Court held that the word “*shall*” in Section 47 of the Arbitration Act has to be read as “*may*”.
- The object of the New York Convention will be defeated if the filing of the arbitration agreement at the time of filing the application is made compulsory.
- The party seeking enforcement can be asked to cure the defect.

# Enforcement of foreign awards from non-convention countries



Shardul Amarchand Mangaldas

- **Arbitration agreement entered into prior to 6 September 2012:**
  - Will be governed by law laid down in ***Bhatia International v. Bulk Trading S.A.***, (2002) 4 SCC 105, which held that awards that do not fall within the purview of Part II of the Arbitration Act (convention awards), would then be covered by Part I (unless Part I was excluded).
  - Under Part I, an award is final and binding on parties and persons claiming under them and can be enforced as if it were a decree of the court.
- **Arbitration Agreement entered after 6 September 2012:**
  - Will be governed by ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.***, (2012) 9 SCC 552, which held that Indian courts do not have jurisdiction over foreign seated arbitrations. There is no provision in the Arbitration Act for enforcement of awards passed in non-convention countries (Part II only applies to Convention Awards).
  - Filing of Suit to enforce the Non- Convention Awards



# LIMITATION PERIOD FOR ENFORCEMENT OF AWARDS



# Limitation for enforcement of arbitral awards

- **Limitation period for enforcement of domestic awards (*M/s Umesh Goel v. Himachal Pradesh Cooperative*, (2016) 11 SCC 313).**
  - Supreme Court has held that arbitral awards are deemed as decrees for the purposes of enforcement. The Limitation Act, 1963 (“**Limitation Act**”), applies to arbitrations. Therefore, the limitation period for enforcement of domestic awards is twelve (12) years (i.e., limitation period for execution of any decree).
- **Limitation period for enforcement of foreign awards (*Government of India v. Vedanta Limited*, 2020 SCC OnLine 749)**
  - Supreme Court held that the period of limitation for enforcement of a foreign award would be three (3) years as per the residuary provision of Article 137 of the Schedule to the Limitation Act.
  - The period of limitation would begin to run from when the right to apply for enforcement accrued.
  - The bar on condonation of delay in execution proceedings under Section 5 of the Limitation Act would not apply to enforcement of a foreign award inasmuch as these are substantive proceedings under the Arbitration Act, which is a complete code in itself.



# CHALLENGES IN EXECUTING FOREIGN ARBITRAL AWARDS IN INDIA



# Challenges in executing a foreign award

- Enforcement of Foreign Awards under Section 49 of the Arbitration Act read with the relevant provisions of the CPC, as if the award were a decree, takes a very long time.
- The Privy Council in 1872 noted that “*the difficulties of the litigant in India begin when he has obtained a decree*” (***Court of Wards v. Maharaja Coomar Ramaput Singhad***).
- India’s credibility as an arbitration-friendly jurisdiction rests primarily on the efficiency and efficacy of its award enforcement regime.
- There cannot be a second bite at the cherry by parties tactically misusing the provisions of CPC.
- Executing Court should not permit the derailing the process of execution because of objections that are beyond the strict confines of the Arbitration Act, being a complete code in itself.

# No appeal against an order of enforcement of foreign award



Shardul Amarchand Mangaldas

- An appeal in cases of foreign awards would only apply on the grounds set out in Section 50 and specifically no appeal will proceed to the Commercial Appellate Division if it is against an order rejecting objections to enforcement.
- Section 13(1) of the CCA would not apply to cases unless they are expressly covered under Section 50 since the Arbitration Act is a complete code in itself. ***Kandla Export Corporation v. M/s OCI Corporation***, (2018) 14 SCC 715
- Legislative policy so far as recognition and enforcement of foreign awards is that an appeal is provided against a judgment refusing to recognise and enforce a foreign award but not the other way around, i.e., an order recognising and enforcing an award.
- The Court discouraged the fact that the matter had been argued as if it was a first appeal. ***Vijay Karia v. Prysmian Cavi E Sistemi SRL***, (2020) 11 SCC 1

# Resistance to enforcement of Foreign Award by a non-signatory



Shardul Amarchand Mangaldas

## ***Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd.***, (2022) 1 SCC 753

- Requirements of Section 47 (1) are procedural. Non-signatory's objections to enforcement of a foreign award do not fall within the ambit of the grounds contemplated under Section 48(1) of the Arbitration Act as is settled law that Section 48(1) ought to be construed narrowly.
- In any event, the import of the word "*parties*" as contemplated under Section 48(1)(a) cannot be extended to non-signatories as the same would run afoul of the express language of Section 48(1)(a) when read with Section 44 of the Arbitration Act.
- Referring to Section 46 of the Arbitration Act, the Court observed that the provision refers to *persons* as between whom the award was made and does not restrict the binding value of an award to only parties to an arbitration agreement. Accordingly, the Court held that the award would also be binding on non-signatories to an arbitration agreement.
- The Court differentiated between Section 35 and Section 46 of the Arbitration Act and stated that Section 35 speaks of "*persons*" in the context of an arbitral award being final and binding on the "*parties*" and "*persons claiming under them*", respectively. Section 35 would, therefore, refer to only persons claiming under parties and is, therefore, more restrictive in its application than Section 46 which speaks of "*persons*" without any restriction.

# Order rejecting impledament of non-signatory is not an Award



Shardul Amarchand Mangaldas

***Goyal MG Gases Pvt. Ltd. V. Panama Infrastructure Developers Pvt Ltd (High Court of Delhi 29.03.2023)***

- Award should decide a substantive dispute and answer the attributes of the decision on the merits of the dispute between the parties or accords in conclusively settling a dispute which pertains to core issue.
- To qualify as an award, it must be with respect to an issue which constitutes a vital aspect of the dispute.
- The order passed by the Arbitral Tribunal would have the attributes of an interim award only when same decides the 'matters of moment' or disposes of a substantive claim raised by the parties.
- Rejecting the application for impleadment neither decides the substantive question of law nor touches upon the merits of the case.



# Suggestions to streamline execution process

***Shubh Karan Bubna v. Sita Saran Bubna***, (2009) 9 SCC 689

- To streamline execution processes, the Supreme Court has suggested a number of steps:
  - A complete change in attitude and treatment both by the courts and the lawyers alike, wherein judges should not believe that adjudication is the only judicial function;
  - Judges and lawyers should bestow equal and sufficient focus on ensuring that the litigant gets the relief;
  - Courts and lawyers should give as much importance to final decree proceedings and executions, as they give to the main suits; and
  - Stakeholders to agree and conclude both in perception and practice that success means nothing to a party unless she/he gets the relief.
  - Therefore, to be meaningful and efficient the scheme of the court should enable a party to get the relief quickly.



# FOREIGN JUDGMENTS FROM NON- RECIPROCATING COUNTRIES

# Requirements for enforcement of foreign judgments from non-reciprocating territories



Shardul Amarchand Mangaldas

- As a preliminary requirement, foreign judgments (either from a reciprocating or non-reciprocating territory) sought to be executed in India have to satisfy the tests prescribed under Section 13 of the CPC and must be “*conclusive*”.
- According to Section 13 of the CPC, a foreign judgment shall not be conclusive if:
  - It has not been pronounced by a court of competent jurisdiction;
  - It has not been given on the merits of the case;
  - It appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
  - The proceedings in which the judgment was obtained are opposed to natural justice;
  - It has been obtained by fraud; and
  - It sustains a claim founded on a breach of any law in force in India.

# Requirements for enforcement of foreign judgments from non-reciprocating territories



Shardul Amarchand Mangaldas

- Section 44A of the CPC provides for execution of decrees passed by superior courts in reciprocating territories. India has notified 11 countries as reciprocating territories.
- However, judgments from non-reciprocating territories cannot be directly enforced and fresh suits must be instituted before Indian civil courts for their enforcement, where which such judgments will only hold evidentiary value.
- In the event a decree has been obtained by the party filing a suit for enforcing the foreign judgment, the same shall be executed as per the procedure prescribed under Order XXI of the CPC.
- A foreign judgment has to be certified as required under Section 86 of the Indian Evidence Act, 1872 (“**Evidence Act**”). Section 86 of the Evidence Act provides that the court may presume that any document purporting to be a certified copy of any judicial record of any foreign country is genuine and accurate, if the document is certified by any representative of the Central Government in or for such country.

# Requirements for enforcement of foreign judgments from non-reciprocating territories



Shardul Amarchand Mangaldas

***Marine Geotechnics LLC v. Coastal Marine Construction & Engineering Ltd.***, 2014 SCC OnLine Bom 309

- Section 13 of CPC enunciates the well-established principle of private international law that a court will not enforce a foreign judgment that is not of a competent court.
- Section 13 makes no distinction between judgments of a court in a reciprocating territory and those of courts in non-reciprocating territories.
- That distinction comes only in Section 44A of CPC, an independent provision that says that a decree of a court in a reciprocating state may be executed in India.
- A decree from a non-reciprocating state cannot be executed under Section 44A of CPC.
- Any person holding a decree of a non-reciprocating foreign territory has to file, in a domestic Indian court of competent jurisdiction, a suit on that foreign decree, or on the original, underlying cause of action, or both.
- The party can only execute the resultant domestic decree.



# ENFORCEMENT OF ANNULLED AWARDS

# Recognition and Enforcement of Foreign Awards Annulled at the seat of Arbitration



Shardul Amarchand Mangaldas

- Section 48 (1) (e) and Section 48 (3) of the Arbitration Act
- “*Double-control*”: Enforcing Court being second controller of the Award
- Detachment Theory: Internationalization of the Award – liberated from the local laws Arbitration escaping the hold of any national law and thus subject directly to International Law.
- Internationalist Approach: Award being transnational nature. (French Courts)
- Territorial Approach: *ex nihilo nihil fit* (out of nothing comes nothing) – Validity of an Award should only be assessed by the national court at the seat. (Singapore and Brazilian Courts)
- Conflict of Law Approach: Middle position – Annulment should be respected excepted when reasons exists to think that it lacked procedural integrity or offends public policy of enforcing state.
  - Discretion – “may” be refused – would cater to situations where a corrupt court judgement annulling an award at the seat be disregarded.
  - *Yukos Capital v. OAO Rosneft*: In the Netherlands and the United Kingdom
  - The United States approach: Refuse to enforce award vacated at the seat of arbitration unless it offends U.S. public policy



# ENFORCEABILITY OF EMERGENCY ARBITRATORS' ORDERS



# Emergency arbitration under the Arbitration Act

- Emergency arbitration is not expressly mentioned in the Arbitration Act.
- The Law Commission of India had recommended in its 246<sup>th</sup> Report that the definition of 'Arbitral Tribunal' be amended to read as follows:

"Section 2(d): "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator."

- This recommendation was not incorporated in the 2015 amendments to the Arbitration Act.
- In 2019, the High Level Committee headed by Justice BN Srikrishna made further recommendations to expressly include emergency arbitration in the Arbitration Act.
- The 2019 and 2021 Amendments to the Arbitration Act did not incorporate any provisions for emergency arbitration.

# Enforceability of emergency arbitrators' orders



Shardul Amarchand Mangaldas

*Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors.*, 2021 SCC OnLine SC 557

- An India-seated emergency arbitrator's ("EA") orders are enforceable.
- On a conjoint reading of the provisions of the Arbitration Act coupled with emphasis on party autonomy and there being no interdict, either express or by necessary implication, would show that an EA's orders, if provided for under institutional rules, would be covered by the Arbitration Act.
- Given that the definition of "*arbitration*" in Section 2(1)(a) means any arbitration, whether or not administered by a permanent arbitral institution, when read with Sections 2(6) and 2(8), would make it clear that even interim orders that are passed by EAs under the rules of a permanent arbitral institution would, on a proper reading of Section 17(1), be included within its ambit.
- The EA's order under Section 17(1) gets enforced under Section 17(2) read with the CPC. Section 37 provides for appeals only from an order granting or refusing to grant any interim measure under Section 17(1) of the Arbitration Act. Therefore, no appeal lies under Section 37 of the Arbitration Act against an order of enforcement of an EA's order made under Section 17(2) of the Arbitration Act.

# Way forward for enforcement of emergency arbitration orders in India



Shardul Amarchand Mangaldas

- **Amazon** is a significant breakthrough for recognition of EAs' orders as orders passed under Section 17(1) of the Arbitration Act, and therefore enforceable under Section 17(2).
- Parties in India-seated arbitrations can now straightaway approach the Court for enforcement of an EA's order and need not specifically apply to courts under Section 9 of the Arbitration Act to first obtain a fresh interim relief in terms of the EA's order.
- Foreign-seated EAs' orders are not directly enforceable in India without applying to courts under Section 9 of the Arbitration Act (**Raffles Design International India Private Limited & Anr. v. Educomp Professional Education Limited & Ors.**, 2016 SCC OnLine Del 5521, **Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd.**, 2022 SCC OnLine Del 2112).
- However, a foreign-seated EA's order is an additional factor which can be taken into account in a Section 9 petition (**Uphealth Holdings Inc. v. Glocal Healthcare Systems**, AP/809/2022).
- Statutory recognition of emergency arbitration (domestic and foreign-seated) will go a long way towards boosting emergency arbitrations and reduce the burden of Courts in India.



Shardul Amarchand Mangaldas

# STAMP DUTY ON ARBITRAL AWARDS



# Stamp duty on domestic awards

***M. Anasuya Devi v. M. Manik Reddy***, (2003) 8 SCC 565

- Supreme Court has held that the question whether an award requires stamp duty and registration is within the ambit of Section 47 of the CPC and not covered by Section 34 of the Arbitration Act.
- Section 34 of the Arbitration Act provides for setting aside of the award on the grounds enumerated therein and it was not in dispute that an application for setting aside the award would not lie on any other ground, which is not enumerated in Section 34 of the Arbitration Act.
- The question as to whether the award is required to be stamped and registered, would be relevant only when the parties would file the award for its enforcement under Section 36 of the Arbitration Act.
- Court held that it was at this stage the parties can raise objections regarding its admissibility on account of non-registration and non-stamping under Section 17 of the Registration Act, 1908.



# Stamp duty on Foreign Awards

***Shriram EPC Ltd. v. Rioglass Solar SA***, (2018) 18 SCC 313

- Supreme Court held that the expression “*award*” under Item 12 of Schedule I to the Indian Stamp Act, 1899 (“**Stamp Act**”) does not include a foreign award.
- Consequently, a foreign award not being includible in Schedule I to the Stamp Act is not liable for stamp duty.
- Court held that the fact that a foreign award has not borne stamp duty under the Stamp Act would not render it unenforceable.
- Section 47 of the Arbitration Act deals with is production before the court of proof of the fact that a foreign award is sought to be enforced. In no manner does Section 47 interdict the payment of stamp duty if it is otherwise payable in law.



# QUESTIONS