



PROLONGED ARBITRATIONS DUE TO ENFORCEMENT DELAYS: A CAUSE FOR CONCERN

Nabira Farman

INTRODUCTION

Arbitration has indeed been offered as a remedy for a jammed judicial system as a type of alternative conflict resolution. Amongst some of the widely mentioned numerous advantages of arbitration, the fact that experts are empanelled to judge the dispute according to its specificity stands out. However, this was not the objective behind alternative dispute resolution (ADR). The objective was rather the hope that it will avoid the usual delays of the Indian courts.

In a commercial arbitration, the winning party wishes the award to be carried out as soon as possible. It's a legitimate expectation to have. Unlike mediation and several other forms of ADR, the goal of arbitration is to reach a binding decision on the conflict. Every arbitration agreement stipulates that the participants will follow up the resolution after it has been rendered in the nature of an award. To be clear, this is explicitly stated in both ad hoc and institutional arbitration rules.

The problem lies in the implementation of the awards. Just like contractual promises are breached, similarly promises to carry out the execution of the award is often defaulted by the losing party. Even when the decision is in favour of the award-winning party, it is not easy to cull out the compensation awarded from the other party. This is where involvement of the court begins and execution becomes even tougher due to the sluggishness of the Indian Judicial System. In this article, the author aims to throw light on this issue and further suggests some measures that can be taken to rectify the situation.

BACKGROUND

An arbitral tribunal differs significantly from a national court and therefore, it has no responsibility in the implementation of its ruling. The arbitral tribunal normally has no further involvement in the dispute anymore once the award has been made, unless it is compelled to make a new award, or to rectify or construe its preceding award. When the arbitration panel issues a final award, its job is normally completed, and it becomes *functus officio* (Tupman, 1987).



An appeal in arbitral proceedings may be feasible in certain instances and under certain scenarios, but arbitral awards tend to be enforceable no matter being favourable or unfavourable. However, this happens until they've been challenged on premises of either exceeding jurisdiction, due process has not been followed, or violation of public policy. The winning party challenging the award for being unhappy with specific features of it, risk achieving a Pyrrhic victory, in which case the award will be thrown out totally if the objection is effective. If this occurs, the winner will be forced to begin or face new proceedings. This will entail either a fresh arbitration or, if the grounds for the completely disregarding the award was the tribunal's lack of jurisdiction, it would point towards a court procedure (Kolkey, 1988).

In most cases, the losing side has far more leeway. To begin with, the most favourable result is when the losing party continues to execute the award willingly, in compliance with its promise. In some instances, however, the losing side may be using the award as a reference point for settling the case. It may seem strange that the winning party in an arbitration would agree to a lower payment than the sum awarded, but it may be preferable to take a lower payment now rather than risk facing additional challenges or enforcement operations to retrieve the entire amount (Chan, 2011).

PROCESS OF ENFORCEMENT OF AN AWARD

Domestic Awards

As per the declared Statements and objections of the 1996 Arbitration and Conciliation Act (hereinafter the 'Act'), one of the primary aims behind the enactment says that each final award is enforced in the same manner as if it were a Court decree. As a result, the Act's design is such that the opposing party against whom award has been made must object towards the award and ask the court to have it set aside. On the other side, the winning party is not required to take any procedural actions. If the challenges to the award are still not maintained (or if no challenges are lodged within the specified time), the award automatically becomes enforceable like a decree. It should be noted that, in this aspect, the Indian law deviates significantly from the Model Law (Ray & Sabharwal, 2007).

According to Article 35 of the Model Law, a request for enforcement is necessary, and the basis for refusing enforcement are outlined under Article 36. As previously indicated, this has been relinquished under the Indian paradigm, with the effect that, throughout the case of domestic awards, if no motion to set aside an arbitral award as per Section 34 has indeed been filed (or if any



objections have already been dismissed), the award can be immediately carried out as a court judgement. When the period for filing objections has passed or they have been dismissed, the award can be executed in the same way as a court order under the Civil Procedure Code of 1908 (Sharma & Iyer, 2021). Despite the fact that it is not a decree, Section 36 stipulates that an arbitration award has the same legal authority. *Ex parte* awards granted by the tribunal under Section 28 of the Act are also enforceable under Section 36 of the Act. A settlement reached between the parties under Section 30 can also be enforced as if it were a Court Decree under the same provision (Shetty & Dev, 2020).

Foreign Awards

The party trying to make a foreign arbitral award enforceable under the Act must submit the following records to a competent authority having the requisite jurisdiction:

- (i) the authentic copy of the original award;
- (ii) the authentic copy of the original agreement; and
- (iii) such testimony as may be required to verify that the award is indeed a foreign award. Even a single application will suffice to determine the enforcement of the foreign award and execute the award's decision (*Fuerst Day Lawson v Jindal Exports*, 2001).

REQUIREMENTS OF ENFORCEMENT

Conditions of Enforceability of awards

A foreign arbitral award must meet certain criteria in order to be given effect under the Arbitration Act.

Firstly, it has to be a Commercial transaction. To resolve business issues originating out of a legal connection, the award must be granted in a convention country. The Supreme Court has ruled that the term “commercial” should be widely defined to include a wide range of activities that constitute a fundamental aspect of international trade (*RM Investment & Trading v Boeing*, 1994).

Secondly, the award has to be a written instrument. According to the Geneva as well as New York Conventions, a foreign award must necessarily be made in writing, however it does not have to be formal or follow a certain format.

Thirdly, the validity of the Agreement plays a major role. The foreign arbitral award has to be authentic and based on a legally enforceable business agreement. The Supreme Court held that a dispute resolution clause having arbitration cannot be enforced if the contract of which it forms a part is ruled unlawful (*Khardab Company v Raymon & Co (India)*, 1962).

Finally, the Hon'ble Apex Court of India declared that courts should strive to enforce an arbitral award that is plain, unambiguous, and amenable of determination under Indian law (*Koch Navigation v Hindustan Petroleum Corp*, 1989).

Conditions that lead to unenforceability of awards

An Indian court can disallow the execution of a foreign arbitral award under sections 48 and 57 of the Arbitration Act. This happens when the foreign award happens to fall under the category of the following legislative defences:

- The agreement is invalid due to the incapacity of either or both parties to the contract.
- The agreement is deemed void for any other lawful reason.
- The award also exceeds to decide issues which are not the scope of the arbitration agreement.
- The arbitral tribunal was not formed according to the will of both the parties.
- The award has been put aside or ceased to be valid by a court having competent jurisdiction in the country where the seat of the arbitration lies.
- Indian law does not deal with the subject matter ensued in the award.
- The enforcement goes against the fundamental public policy of India.

When it comes to determining which legislations belong within the umbrella of the "fundamental policy of Indian law," Courts in India have stated that the term does not point towards the various provisions of numerous Indian statutes (Malhotra, 2007).

In a landmark ruling, the Delhi High Court explained that a violation of a legal provision is inadequate to raise the defence of “public policy” whenever it comes to enforcing a foreign award. It went on to say that the term "fundamental policy of Indian law" rather pertains to the values and legislative philosophy that constitute the foundation of Indian legislation and laws (Sunder & Loya, 2021). The term "fundamental policy," according to the Court, refers to the underlying and substrata reasoning, ideals, and principles that constitute the cornerstone of the nation's laws (*Cruz City 1 Mauritius Holdings vs. Unitech Limited*, 2011).

THE PROBLEM WITH IMPLEMENTATION OF ARBITRAL AWARD

There are certain difficulties that a party faces when pursuing enforcement of an Award. As discussed earlier, the arbitral tribunal is out of the picture once the award is made by the arbitrators. However, as per the Act, an Arbitral Award cannot be executed as a Decree until the challenge window under Section 34 (3) of the Act has expired or the objections lodged have been dismissed. When an award is given, it is normal procedure for the party who is adversely impacted by it to file a petition with the Court under Section 34 of the Act, and followed by that, the Court will serve notice.

Before the Arbitration and Conciliation Amendment (2015) Act, delays in enforcement petition estopped the winning party from executing the award. However, the courts realized that owing to the delays in our country's judicial system, it can even take many years for a Section 34 Petition to be resolved, and the party with the arbitral ruling in its favour is stuck in midpoint until then. As a result, the noble goal of eliminating legal proceedings and turning the arbitral award into a Court ruling was frustrated (A. Mehta et al., 2020). Identifying this problem as a major hurdle in enforcement of awards, through successive amendments made by the legislature in the 2015 Amendment Act, the position that stands today is that the court has the discretion to grant a conditional stay on the award's execution as it deems appropriate to impose, including the authority to give interim orders not just against parties but also but also against any third parties involved, while protecting the interests of the award-holder (Gupta, 2019).

However, the bigger problem still remains unsolved. An award is executed by way of an execution petition. This is where the problem arises. Now the fate of the award is in hands of the court. This is the juncture where the arbitration suffers the same lacunae as any other case in the court does, that is, delays in adjudication and disposal.

The CPC's Order XXI's execution procedure is extensive, difficult, and cumbersome, and it's nearly a never-ending saga. Until the point when the execution petition is finally disposed of, the award-losing party cleverly liquidates its assets beforehand in order to avoid the execution processes (Jain, 2018). Therefore, the award-winning party usually seeks interim injunctions under Section 9 of the Act to prevent the other party from taking any action that may adversely affect the execution of the award (Tiwari & Ray, 2018).

When it comes to foreign awards, India has faced similar backlash from the international community due to its delayed execution. An award was rendered in favour of White Industries in the investor-state arbitration between White Industries Australia Limited and the Republic of India under a bilateral investment treaty (BIT) signed between the two. Due to various judicial delays in the implementation of an ICC award, the UNCITRAL Tribunal concluded that India had broken its responsibilities under the BIT (*White Industries Australia v Republic of India*, 2011). This case demonstrates the challenges faced by investors attempting to enforce the arbitral award in a country like India, which is still developing and has a problem of strained judiciary (Ray, 2012).

THE ROLE OF LIMITATION IN CONFINING TIMELINES

Since several inconsistent and radically opposing judgements were delivered by different Indian High Courts, the subject of the limitation period to be applied to the execution of a foreign award in the Indian soil, has been a contentious issue for a long period of time. The matter was eventually resolved lately by the Supreme Court of India last year. (*Government of India v. Vedanta Ltd.*, 2020)

Part II of the Act governs the enforcement of awards under New York Convention in India. Section 47 lays out the steps that have to be taken in order to file an application for the recognition and enforcement of a foreign award. Section 48 re-enacts Article V of the New York Convention and lays out the limited grounds for refusing the enforcement. While Section 49 provides that a foreign award which is enforceable according to Section 48 is regarded to be a decree for the primary intention of enforcement. The Limitation Act of 1963 governs the time restriction for bringing court action in India (D. Mehta & Wahi, n.d.)

The Supreme Court pointed out that Section 43 of the Limitation Act indicates that it applies to commercial arbitration in the same way as it does to court cases. It went on to say that there is no particular framework in the Limitation Act made especially for enforcing a foreign award. It then considered Articles 136 where the provision entailed a 12-year limitation term for the performance



of a decree. It further dealt with Article 137 which as a residuary provision provides a three-year limitation period (Sunder et al., 2020).

Relying on its decision in *Bank of Baroda v. Kotak Mahindra Bank*, 2020, the Court stated that Article 136 does not apply to foreign decrees. The Supreme Court went on to say that a legal fiction is only developed for a particular function in law. As a result, a foreign award for the purpose of enforcement, can be said to be decree of the adjudicating authority which rendered the decision, however it cannot likewise be treated as a decree made by Indian courts. In conclusion, Article 137 will regulate the enforcement applications of foreign. Thus, the limitation period of 3 years commences soon after the right to apply arises (Advani & Khan, 2020).

We now know that a petition for execution of a foreign award falls inside the four walls of the law on limitation. However, there is no law that could time bound the adjudication of execution petitions. These petitions linger in courts for innumerable days to years.

SUGGESTIVE SOLUTIONS

The only suggestion which is simple to make, yet challenging to implement is to expediate the execution by putting a cap on the course of proceeding in an execution petition. The legislature's intent behind the Act lied in the quick resolution and speedy disposal of commercial disputes. Therefore, an arbitral award is bound to take place within a year from its commencement. Even when certain relaxation is provided in stretching it for another 6 months, it cannot be done without the will of both the parties. As we discussed earlier, arbitration panel's role is over once the award is granted. Therefore, the concept of party autonomy no more remains tied in the process at the execution state. It goes into the court litigation way and thus, the discretion of the judge overpowers everything. It must be born in mind that to give effect to the true intent and objective behind the arbitration process, not only the award but the decree calling for execution of the award has to be made in time-bound manner as well. The limitation period accruing on the award-winning party for execution may not be greater concern but the usual prolongation and lingering of execution petition in courts frustrates the objective behind opting for arbitration. According to the author, this time period should be confined to a maximum of 1 year from the date of filing of the execution petition.

CONCLUSION

India's low achievement in arbitration might be attributed to a number of factors. Our judicial courts, which are overworked and underequipped to handle business disputes, typically take 3-4

years to reach a decision. Furthermore, courts' frequent easing of statutory deadlines adds to the delay, affecting the award's enforcement. The acceptance of foreign awards without conditions and conformity to international law by all parties is not a cakewalk. Establishing accountability, which has typically been problematic in the country's court system, is the real concern.

However, arbitration is an alternative to court litigation. Although it is impossible to oust out the jurisdiction of courts completely from the way of arbitration, it can be ensured that it does not indoctrinate its vices into the arbitral process. By giving a strict timeline to the execution process, arbitration can be prevented from being tainted with delays.

REFERENCES

- Advani, H., & Khan, T. (2020, October 22). *Vedanta Judgment Breaks The Glass - Litigation, Mediation & Arbitration - India*. Mondaq.Com. <https://www.mondaq.com/india/arbitration-dispute-resolution/996936/vedanta-judgment-breaks-the-glass>
- Bank of Baroda v Kotak Mahindra Bank*, 2020 SCC OnLine SC 324
- Chan, D. (2011). *Options available to an unsuccessful party in an arbitration*. <http://arbitrationblog.kluwerarbitration.com/2011/08/12/options-available-to-an-unsuccessful-party->
- Gupta, S. (2019, August 5). *Applicability of the 2015 Arbitration Amendment Act: Which Position Should Prevail? – Indian Arbitration Forum*. Indian Arbitration Forum. <https://www.indianarbitrationforum.com/iaf1/>
- Jain, S. (2018, February 25). *Where to File for Execution of an Arbitral Award? SC settles the Debate - IndiaCorpLaw*. IndiaCorpLaw. <https://indiacorplaw.in/2018/02/file-execution-arbitral-award-sc-settles-debate.html>
- Khardab Company v Raymon & Co (India)*, AIR 1962 SC 1810
- Koch Navigation v Hindustan Petroleum Corp*, AIR 1989 SC 2198
- Kolkey, D. M. (1988). Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations. *Fall*, 22(3), 693–715.
- Malhotra, O. P. (2007). The Scope of Public Policy under the Arbitration and Conciliation Act, 1996. *Student Bar Review*, 19. <https://heinonline.org/HOL/Page?handle=hein.journals/nlsind19&id=141&div=&collection=>



Mehta, A., Sreenivas, A., & Ghosh, S. (2020, April 13). *Conditional or Unconditional Stay, That is the Question – The Fate of Arbitral Awards in India, Pending Challenge - India Corporate Law*. India Corporate Law. <https://corporate.cyrilamarchandblogs.com/2020/04/conditional-or-unconditional-stay-that-is-the-question-the-fate-of-arbitral-awards-in-india-pending-challenge/>

Mehta, D., & Wahi, D. (n.d.). *Government of India v. Vedanta Limited: Supreme Court fortifies pro-enforcement approach, clarifies limitation period | Koinos*. Indian Arbitration Law Blog. Retrieved October 16, 2021, from <https://indianarbitrationlaw.com/2020/10/09/government-of-india-v-vedanta-limited-supreme-court-fortifies-pro-enforcement-approach-clarifies-limitation-period/>

M/s Fuerst Day Lawson Ltd. v Jindal Exports Ltd., AIR 2001 SC 2293

Ray, A. (2012). *White Industries Australia Ltd. v. Republic of India: A New Lesson for India*. *Journal of International Arbitration*, 29(5).

Ray, A., & Sabharwal, D. (2007, January 5). *Indian Arbitration at a Crossroads. White and Case LLP*.

RM Investment & Trading v Boeing, AIR 1994 SC 1136

Sharma, A., & Iyer, L. S. (2021, May 17). *Enforcement of Domestic Award: Practical Realities | SCC Blog*. SCC Online Blog. <https://www.sconline.com/blog/post/2021/05/17/enforcement-of-domestic-award-practical-realities/>

Shetty, R., & Dev, R. (2020, May 6). *Enforcement Of Domestic Arbitral Awards - The Jurisdiction Conundrum - Litigation, Mediation & Arbitration - India*. Mondaq.Com. <https://www.mondaq.com/india/arbitration-dispute-resolution/929490/enforcement-of-domestic-arbitral-awards--the-jurisdiction-conundrum>

Sunder, B., Kabra, A., & Desai, V. (2020, November 6). *India Upholds Enforcement of Foreign Arbitration Award*. *The National Law Review*. <https://www.natlawreview.com/article/limitation-period-enforcement-foreign-awards-india>

Sunder, B., & Loya, K. A. (2021, May 4). *India: Define Public Policy Through the Arbitration and Conciliation Act, 2015*. *The National Law Review*. <https://www.natlawreview.com/article/demystifying-public-policy-to-enable-enforcement-foreign-awards-indian-perspective-0>

Tiwari, T., & Ray, A. K. (2018, April 13). *Issue Of Jurisdiction And Execution Of Arbitral Awards - Litigation, Mediation & Arbitration - India*. Mondaq.Com. <https://www.mondaq.com/india/arbitration-dispute-resolution/691498/issue-of-jurisdiction-and-execution-of-arbitral-awards>

Tupman, W. M. (1987). *Staying Enforcement of Arbitral Awards under the New York Convention*. *Arbitration International*, 3(3), 209–225. <https://doi.org/10.1093/ARBITRATION/3.3.209>