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Enforcement Mechanism for Foreign Arbitral Awards and Judgements in India:

Identifying Challenges and Proposing Reforms

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Foreword

Enforcement mechanisms for foreign arbitral awards play a pivotal role in ensuring the efficacy and credibility of international arbitration. These mechanisms ensure that parties can enforce arbitration awards across different jurisdictions, promoting confidence in resolving cross-border disputes. These mechanisms contribute to a stable and predictable international legal framework by upholding the finality and enforceability of arbitral decisions. They also encourage parties to choose arbitration as a preferred method for resolving disputes, as it offers the advantage of enforceability that may only sometimes be guaranteed in national court judgments. Robust enforcement mechanisms also strengthen the rule of law in international commerce and foster a conducive environment for global business interactions.

In the Indian context, effective enforcement mechanisms for foreign arbitral awards enhance India's attractiveness as a destination for foreign investment by offering a reliable dispute resolution mechanism. The prospect reassures investors of fair and impartial arbitration, which can mitigate concerns about potential legal uncertainties in Indian courts. Enhanced investor confidence leads to increased flows of foreign investments in India.

By honouring and enforcing foreign arbitral awards, India demonstrates its commitment to international legal standards and obligations, which enhances its standing in the global economic community. In addition, a robust arbitration framework promotes economic growth by facilitating smoother and quicker resolution of commercial disputes, thereby fostering a more conducive environment for business and trade. Overall, foreign arbitral awards are crucial in bolstering investor confidence, reducing legal bottlenecks, and promoting India as a reliable partner in the global economy.

This monograph by Ms. Yashasvi Singh critically analyses India's legal framework for enforcing foreign arbitral awards and judgments from national and international legal perspectives. It examines the relevant conventions and notifications impacting India's enforcement regime. It explores practical challenges and shortcomings in enforcement mechanisms and offers suggestions for improving dispute resolution mechanisms. I commend the author for her rigorous research, which will benefit scholars, policymakers, and the business fraternity.

Maj Gen Dhruv C Katoch, SM, VSM
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Director, India Foundation

INTRODUCTION

Globalisation has significantly increased interdependence among nations, leading to a surge in cross-border trade involving diverse jurisdictions with varying, and sometimes conflicting, laws and regulations. This expansion has also heightened legal complexities, particularly regarding the choice of applicable laws for contracts, modes of dispute resolution, and the recognition and enforcement of foreign awards and decrees.

In order for nations to survive and mutually co-exist, it is not just apparent but also predominantly important, that trade amongst them is a combination of commerce and law. Attempts were made in the form of international treaties wherein nations made an effort to form and reach a common ground which was in the mutual interest of all concerned. However, while treaties generally hold sanctity, violations of treaty obligations do occur, and treaties bind only their signatories, limiting their enforceability against non-signatories.

Apart from international treaties there are other ways as well to bind states to be compliant with international law. In recent years, with the growth of international treaty law and the increasing role of international tribunals, questions involving the application of conventional international law and the decisions of international tribunals by national courts have assumed great practical importance.[1] This is more so because in times of disputes, states have preferred assuming sovereignty of an undefeatable nature, duly ignoring the obligations and the framework of international law within which all states ought to operate. Courts remain perplexed by the problem, and their pronouncements reflect a limited understanding of the role of international law and international tribunal decisions in domestic courts. In the words of Justice O'Connor: *As international tribunals gain strength both in numbers and in authority, their relationship with the domestic courts of member nations will be of critical importance... Our courts will have to interpret specific provisions of the different treaties and authorising statutes to determine what effect to give to the judgment of various international tribunals*.[2]

Enforcing foreign awards has always been contentious, especially in the context of globalisation and cross-border movement of people. Questions regarding the applicability of laws governing private individuals seeking relief in international fora and subsequently trying to enforce foreign judgments in India have become prominent. The enforcement of foreign arbitral awards and judgments is vital for international commercial law, fostering cross-border trade and investment. India is emerging as a preferred destination for foreign direct investments and business ventures, with significant growth in manufacturing, digital technologies, sustainable initiatives, start-ups, and entrepreneurship, thus marking its presence on the global stage.

In this globalised business environment, India has seen a rise in international commercial disputes, necessitating a robust legal framework for enforcing foreign arbitral awards and judgments. Common disputes include interpretation and violation of investment treaties, contractual disputes, intellectual property disputes, antitrust violations, and construction and infrastructure issues. Effective enforcement of arbitral awards and court judgments is crucial for businesses operating across jurisdictions. Businesses prefer resolving disputes in jurisdictions with efficient, unbiased courts, minimal delays, and pro-business environments, avoiding red-tapism.

This study critically analyses India's legal framework for enforcing foreign arbitral awards and judgments, considering both national and international legal perspectives. It explores the Arbitration and Conciliation Act, 1996, governing India's arbitration landscape and providing the legal foundation for enforcing foreign arbitral awards, and the Code of Civil Procedure, 1908, for enforcing foreign judgments. The study also examines relevant conventions and notifications impacting India's enforcement regime.

Furthermore, the study delves into Indian jurisprudence and court interpretations of the enforcement regime, including grounds for refusal of enforcement and procedural requirements. It explores practical challenges and potential solutions, focusing on the role of courts, recognition of public policy exceptions, and the impact of recent legal developments. The aim is to provide a comprehensive understanding of the enforcement process in India, addressing legal and practical aspects to enhance the effectiveness of the enforcement regime.

REVIEW OF LITERATURE

Presented hereby is a brief review of the literature that has been consulted for preparing this monograph.

A. Books / Commentaries / Digests

- The book *Arbitration Agreements and Awards – Law of International and Domestic Arbitration* deals exclusively with awards and agreements regarding arbitration law. It contains an exhaustive commentary on law and procedure relating to international commercial arbitration, agreements having foreign element and foreign awards enforcement in India. The book is a useful guide for challenging an award in domestic arbitration proceedings. It also incorporates the practice and procedure as enunciated by the decisions of the Supreme Court of India and various High Courts while making an attempt to state the principles of law with precision.

- *Arbitration of Commercial Disputes – International and English Law and Practice* provides an excellent understanding of both domestic and international arbitration law. The first section of the book focuses on the fundamental principles of international arbitration law. The UNCITRAL Model Law and the New York Convention are the starting points for this analysis. The book has been written in a lucid and easily understandable way. It proves to be a Godsend for the busy litigator.

- *Quo Vadis Arbitration? – Sixty Years of Arbitration Practice* asks as to what changes can be noted in arbitration law as it is now and as it was sixty years ago, and also how arbitration will develop further. The book notices two trends with regard to this question: the trend towards harmonization of arbitration legislation, and more recently, a trend towards the use of conciliation. The book deals with both. It compares the arbitration laws from all parts of the world on the basis of selected topics. It has proven to be useful for the present study because it traces

the systematic development of the law of arbitration and the New York Convention. It also describes the UNCITRAL Arbitration Rules.

- *The Law and Practice of Arbitration and Conciliation* is a commentary on the Arbitration and Conciliation Act, 1996. The book proves to be an invaluable guide in understanding the evolution of domestic arbitration law. For the purposes of the present study, the book has been useful in understanding the Act of 1996 in the framework of the New York Convention.

- *The Commentary on the Commercial Courts Act, 2015* explains the provisions of this Act in a very detailed manner. Despite the Act being a relatively new legislation, the description of each provision provided in a lucid manner by the author is very helpful in understanding the Act and the purpose behind it. The book begins with a historical survey of origins of the commercial court in England and examines the need for such courts in India. The book also undertakes a comparative study of similar provisions in the United Kingdom Civil Procedure Rules, 1998.

- The book *Arbitration – Step by Step* explains the provisions of law, judgments of courts and experiences of practitioners of arbitration. The book avoids technicalities and explains the subject in a simple and clear manner, such that even persons without training in law can understand the process easily.

- *International Commercial Arbitration – An Introduction* is a book which introduces the reader to nuances of international commercial arbitration. The book contains explanation of the Arbitration and Conciliation Act, 1996 as well as the UNCITRAL Model Law on International Commercial Arbitration. Along with providing a comparative analysis of law in different jurisdictions, the book provides practical illustrations and model clauses for agreements.

- *Arbitration in India* is a comprehensive book that includes detailed analysis of the law pertaining to enforcement of foreign arbitral awards in India. The book provides description of evolution of law relating to arbitration in India and its practice, supplemented by numerous case laws. An interesting part of the book is the examination of the effect of public policy on the basis of analysis of Indian jurisprudence on the subject.

- The book *Judicial Process and Precedent* is a scholarly work shedding light on several important legal concepts in functioning and also provides a comprehensive analysis of case laws with regard to the judicial process in the Indian legal system. It is an enlightening book wherein the author has painstakingly made an effort to consider all aspects pertaining to the system of precedents, among others. Though not directly dealing with the topic under discussion, this book was relevant in setting foundation and pace for the present study.

- And lastly the book *Justice Frustrated: The Systemic Impact of Delays in Indian Courts* which is written by dynamic lawyers having experience in cross border mergers and acquisitions, contracts, foreign investments, intellectual property, corporate financing, among others, caught the attention of the author of this monograph owing to the reason that it dealt with a young outlook towards the issues under study, and also because the authors of the book have experience of cross border transactions and the issues caused both therein and thereafter.

B. Websites

The following websites were majorly relied upon for the purpose of the present study for the reasons mentioned against the name of the website:

i) Websites referred for the authentic text of the Geneva Protocol, Geneva Convention and the New York Convention:

- *www.wipo.int*
- *www.uncitral.org*
- Official website of the United Nations

ii) Websites referred for research on and to access the text of judgments passed by Indian courts, including the Supreme Court and various High Courts:

- *www.indiacode.nic.in* – For accessing the text of legislations passed by the Indian Parliament.
- *www.scconline.com*
- *www.manupatrafast.com*

iii) Website referred for access to books and analytical articles for the purpose of understanding and analyzing the topic of research:

- *www.ndl.iitkgp.ac.in*– The website of the National Digital Library of India provided free access to a number of books, which were useful in understanding the present topic and conducting research on different aspects of the topic.

- *www.mondaq.com* – This website was referred to access analytical articles written by different Advocates on the topic of present study.

It may be mentioned here that these are the major sources that have been consulted during the preparation of this monograph. It is not an exhaustive compilation. All the sources which have been referred to are duly acknowledged and cited in the bibliography. Further, the exact links of the websites that have been relied on have been provided as footnotes.

LAW RELATING TO ARBITRATION IN INDIA

India's judicial backlog reflects growing rights awareness, prompting a shift from adversarial litigation to adopting alternative dispute resolution mechanisms.

Arbitration, being less adversarial and more private than litigation, helps maintain relationships and allows parties to choose governing laws and procedures, leading to settlements without the larger repercussions of public court disputes.

The term 'arbitration', derived from the Latin term 'arbitrari' meaning 'to judge', involves an independent third party chosen by disputing parties to consider arguments and render a binding decision. However, there is no universal meaning to the term 'arbitration'. Different legal systems carry out the process in different ways. Nevertheless, the core principles that can be observed in all definitions include the need for an arbitration agreement, a dispute, a reference to a third party for its determination, and an award by the third party.[3]

The legislation in effect at present that deals with arbitration as a mode of dispute resolution is titled the Arbitration and Conciliation Act, 1996. The long title of the Arbitration and Conciliation Act captures the objective and essence of the Act and has been quoted herein for ease of understanding: *"An Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto."*

The Arbitration and Conciliation Act, 1996, applies to both domestic and international arbitrations, detailing specific provisions for each and identifying those applicable to both, thus differentiating between the two types.

Characteristics of Arbitration

1. ***An arbitration agreement***:

   Arbitration's authority stems from a contract, with the tribunal empowered by the arbitration agreement. In complex multi-party cases, India's Supreme Court occasionally applies the 'Group Companies Doctrine' for resolution. The Apex Court in selective instances, has allowed for joinder of even a "non-signatory to an arbitration agreement to be bound to the terms and conditions thereof".[4]

2. ***An arbitral tribunal***:

   It is the parties who choose an arbitral tribunal or select a process by which the arbitral tribunal may be appointed.

3. ***A dispute or difference***:

   The requirement for a dispute is a key element of the arbitral process.[5]

4. ***A judicial process***:

   Arbitration is a judicial process, though it does not mirror judicial proceedings. In fact, the procedure should be tailored to meet the demands of the case. It is pertinent to highlight here that:

   a. The power exercised by the arbitral tribunal is quasi-judicial, and

   b. The arbitral tribunal is not bound by the rules of procedure as contained in the Code of Civil Procedure, 1908.

   However, this does not in any manner bar the arbitral tribunal from exercising the powers of a court as duly enumerated under the Code of Civil Procedure, 1908. The Hon'ble Supreme Court of India has, in the case of *Srei Infrastructure Finance Limited* v. *Tuff Drilling Private Limited*, Civil Appeal No. 15036 of 2017 arising out of SLP (C) No. 16636 of 2015 and decided on 20.09.2017, been of the view that the arbitral tribunal is not incapacitated from drawing sustenance from any provisions of the Code of Civil Procedure.[6]

5. ***A binding award***:

An arbitral award is final, binding, and enforceable in domestic and international courts.

6. ***Limited grounds for appeal:***

ADR aims to shorten resolution time and cut costs, limiting grounds for appeal to ensure award finality.

7. ***Enforceability:***

Awards passed by arbitration tribunals are enforceable under international conventions and are, more often than not, also duly recognised by courts in the municipal jurisdiction. As such, these awards may be recognised and enforced in multiple jurisdictions.

Benefits of Arbitration

The benefits of arbitration may be broadly highlighted under the following heads:

1. ***Saves time***:

Arbitration is faster than litigation with limited discovery and flexible scheduling. The Arbitration and Conciliation Act, 1996, mandates domestic arbitration awards within twelve months since 23.10.2015, encouraging similar timelines for international cases.

2. ***Saves money***:

Litigation's high costs and public scrutiny contrast with arbitration's quicker, more cost-efficient resolution, favouring arbitration for efficiency.

3. ***Streamlining of and better control over the process and outcome:***

Arbitration's popularity in commercial contracts stems from its flexibility. Parties can either choose institutional rules or create their own, unlike rigid court

procedures. They can also appoint experts to aid the tribunal, enabling creative solutions and effective grievance redressal, making arbitration a preferred dispute resolution method.

4. ***Win-win solution***:

Arbitration offers a private, less adversarial win-win outcome, shielding companies from scrutiny and stock impact, with subject expert arbitrators ensuring thorough dispute understanding, unlike potentially non-expert judges in litigation.

5. ***Reducing adverse effect on commercial relationship between parties***:

Arbitration fosters a collaborative, less adversarial environment, prioritising dispute resolution over procedural delays, and allowing parties to freely voice concerns before an independent tribunal.

LEGAL FRAMEWORK FOR RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDIA

Before proceeding with the discussion, we may briefly digress to understand the two terms - 'recognition' and 'enforcement'.

- **Recognition**

  The term 'recognition' can be understood as an acknowledgement of the legality of an order or act.

  In the case of T.V.V. Narasimham v. State of Orissa, AIR 1963 SC 1227, the Hon'ble Supreme Court observed that recognition signifies an admission or an acknowledgement of something existing before. To recognise is to take cognizance of a fact. It implies an overt act on the part of the person taking such cognizance. Recognition is an act prior to enforcement.

- **Enforcement**

  'Enforcement' makes legal rights effective. P.Ramanatha Iyer's Advanced Law Lexicon (p. 1598, Book 2, 3rd edn., Wadhwa Nagpur) defines the term 'enforce' as "to put in execution, to cause, to take effect".

  In Pratalmull Rameshwar v. K.C.Sethia, AIR 1960 Cal. 702, the Calcutta High Court held that enforcement is not merely the technical part of execution, but also includes the whole process of getting an award as well as its execution. Further, enforcement in the case of contracts means doing something to make the opposite party perform his part of the contract *(S.M.D.Kiran Pasha v. Government of Andhra Pradesh, (1990) 1 SCC 328).*

Indian law for recognition and enforcement of foreign arbitral awards

In India, the Arbitration and Conciliation Act, 1996, is the primary law relating to the recognition and enforcement of foreign arbitral awards. The following clauses from the preamble of this legislation are relevant in this context:

- One of the purposes and intents of the Act is to consolidate and amend the law relating to international commercial arbitration and the enforcement of foreign arbitral awards;
- The Act has been passed in furtherance of the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law in 1985, and
- The Act takes into consideration the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

Foreign Arbitral Awards

In India, foreign arbitral awards are enforced in the same manner in which decrees of an Indian court are enforced. Such enforcement is governed by Part II of the Arbitration and Conciliation Act, 1996.

- **Definition of a Foreign Award:**

  'Foreign award' is defined under Section 44 of the Act as an arbitral award made in pursuance of an arbitration agreement in a country other than India. Such awards include both those given in international commercial arbitrations and those arising out of legal relationships that are not considered commercial in India. Such a foreign arbitral award should have been passed:

  (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

  (b) in one of such territories as the Central Government, being satisfied that

reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

The 'Convention' referred to above is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, or New York Convention, of which India is a signatory. This Convention provides the framework for enforcement of foreign arbitral awards and has been incorporated into the Arbitration and Conciliation Act, 1996 as Schedule I to the Act.

- **Grounds for setting aside an arbitral award**

The Act also recognises grounds on the basis of which an arbitral award may be set aside. These grounds are enumerated in Section 34 and are as follows:

a. One of the parties to the agreement suffered from some incapacity; or

b. Legally invalid agreement; or

c. Subject of dispute is non-arbitrable; or

d. The appointment of an arbitrator was not duly notified to either of the parties, or a party was not duly informed about the arbitration proceedings being conducted, or when the said party could not present their case; or

e. The dispute submitted to arbitration was not covered by the agreement and hence could not be so submitted for being beyond the scope of the agreement; or

f. The constitution of the tribunal is improper or not in accordance with the stipulated procedure in the contract and/or law; or

g. The award pronounced by the arbitral tribunal is against the public policy of the country, that is, India.

The explanation of sub-section (2) of Section 34 of the Act of 1996 provides guidance with respect to the public policy of India. The explanation was modified

by the enactment of the Amendment Act in 2015 and became effective on October 23, 2015.

As per the said explanation, an award pronounced by the arbitral tribunal on a dispute submitted before it is in conflict with the public policy of India if:

a. The passing of the award entailed elements of fraud or corruption, or otherwise, the violation of Section 75 or Section 81 of the Act; or

b. The award was in breach of the fundamental policy of Indian law, or

c. The arbitral award is not in accordance with the principles of morality or justice.

It ought to be noted here that the courts while entertaining such cases do not carry out a review of the merits of the dispute.

Relevant amendments made to the Arbitration and Conciliation Act, 1996

- ***Arbitration and Conciliation (Amendment) Act, 2015***

In order to negate the judgment of the Supreme Court in the matter of *ONGC Limited* v. *Western Geco International Limited*[7], through which the Apex Court enlarged the meaning of the term 'public policy' (explained in subsequent parts of this document), the amendment made vide the Arbitration and Conciliation (Amendment) Act, 2015 narrowed down the scope of the term 'public policy'.

Further, sub-section 2A was also added to state that an award shall not be set aside merely on the ground of erroneous application of law or by re-appreciation of evidence, and that an arbitral award may be set aside by the Court only if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.

It is noteworthy that sub-section 2A is not applicable to international commercial arbitrations.

Additionally, prior to the amendment's passage, courts considered the mere filing of an application to set aside an arbitral award as a stay on the arbitral award. The Amendment Act of 2015 provides explicitly that there cannot be an automatic stay on the award when an application for not accepting the same, that is, for setting it aside, is made, and that if a stay is desired, such party should move a separate application for stay.

- ***Arbitration and Conciliation (Amendment) Act, 2019***

By this amendment, in Section 34 (2), in clause (a), for the earlier words "furnishes proof that," the words "establishes on the basis of the record of the arbitral tribunal that" were substituted. This will reduce the delay in proceedings to a great extent, as the introduction of new evidence at the stage of seeking setting aside of the award is not possible.

We shall now proceed to understand the New York Convention, which forms the basis for the recognition and enforcement of foreign arbitral awards.

The New York Convention: A Prologue

The New York Convention was a great step forward. It became no longer necessary to obtain leave for enforcement of the award in its country of origin when enforcement of the award in a foreign contracting state was sought. It is considered to be one of the most successful and effective conventions. At present, 172 states have acceded to it.

- **Objective**

The object and purpose of the Convention can be summarised as follows: *"The Convention is based on a pro-enforcement bias. It facilitates and safeguards the enforcement of arbitration agreements and arbitral awards, and in doing so, it serves international trade and commerce. It provides an additional measure of commercial security for parties entering into cross-border transactions."*[8]

- **Substantive Provisions**

The Convention has sixteen articles in all, which deal with various aspects. Presented here is a brief introduction to a few of the same.

- Article I states that the Convention deals with the recognition and enforcement of arbitral awards. The contracting states are allowed certain reservations that have been explained under the section that deals with the Convention and India (Section 48 of the Arbitration and Conciliation Act, 1996).[9] The intent of the Article is to confine the application of the Convention to awards that have a genuine international element.

- Article II stresses that the subject matter of the agreement must be capable of settlement by arbitration. It also states that the dispute is to be arbitrated unless the agreement is null and void, inoperative, or incapable of being performed. In an American case, it was commented that the clause must be interpreted to encompass only those situations such as those comprising elements of fraud, mistake, duress and waiver that can be applied neutrally on an international scale.[10]

- Article III lays down upon the Contracting States an obligation to enforce a foreign arbitral award, not levying any additional charges than those which would be levied for enforcement of a domestic arbitral award and in accordance with the procedural law of the territory where the award is relied upon.

- Article IV covers the formal requirements that must be met in order for foreign arbitral awards to be recognised and upheld. This article requires the party requesting enforcement to submit both the original agreement and the duly authenticated original award, or their duly certified copies. The party seeking enforcement must submit a translation of the award if it is not in the official language of the nation in which it is being relied upon or enforced.

- The circumstances under which recognition and enforcement may be refused are outlined in Article V.

- According to Article VII, the provisions of the New York Convention will not invalidate any multilateral or bilateral agreements the Contracting States could

have made regarding the recognition and enforcement of arbitral awards or deny any interested party the right to make use of an arbitral award in the manner and to the extent permitted by the law or international agreements of the nation where the award is sought to be relied upon.

- The notion of reciprocity is outlined in Article XIV, which states that a contracting state may not use the Convention against other contracting states unless it is also required to apply the Convention.

- **Defenses**

The following limited defenses[11] are available for a signatory nation to reject the implementation of a foreign arbitral award:

1. A party to the arbitration agreement was, under the law applicable to him, under some incapacity;

2. The arbitration agreement was not valid under its governing law;

3. A party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;

4. The award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration or contains matters beyond the scope of the arbitration (subject to the proviso that an award which contains decisions on such matters may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those matters not so submitted);

5. The composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place (the 'lex loci arbitri');

6. The award has not yet become binding upon the parties or has been set aside or suspended by a competent authority, either in the country where the arbitration took place or pursuant to the law of the arbitration agreement;

7. The subject matter of the award was not capable of resolution by arbitration;
8. Enforcement would be contrary to public policy.

- **Public Policy**

A foreign award conflicts with the public policy of India if:

(i) the making of the arbitral award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81 of the Arbitration and Conciliation Act, 1996; or

(ii) the arbitral award is in contravention with the fundamental policy of Indian law; or

(iii) the arbitral award is in conflict with the most basic notions of morality or justice.

The dispute's merits shall not be taken into account in such a situation. When studying case law in the later sections of this study, we will further explore the boundaries of this phrase. In such a case, the merits of the dispute will not be considered.

- **Reservations**

Countries that have acceded to the Convention have three types of reservations:

a. Conventional reservation: According to this, a contracting state will only uphold a foreign judgment if it was rendered in a nation that has ratified the Convention.

b. Commercial reservation: This means that contracting states will limit enforcement only to foreign awards passed in commercial disputes.

c. Reciprocity reservation: According to this reservation, the treatment given to an award granted in a contracting state will depend on the treatment given to the nation weighing the issue of the award's execution by that contracting state.

THE NEW YORK CONVENTION IN CONTEXT

The New York Convention & UNCITRAL Model Law on International Commercial Arbitration, 1985

Most of the provisions of the New York Convention have been carried forward to the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as "the Model Law").

While the Convention deals exclusively with the recognition and enforcement of foreign arbitral awards, the Model Law deals with the recognition and enforcement of arbitral awards in Articles 35 and 36. Article 34, for its part, establishes a 'setting aside procedure' as the exclusive recourse against an arbitral award. The grounds for setting aside an award under the Model Law are virtually identical to the grounds for refusing to recognise and enforce it.

The Model Law constitutes a sound and promising basis for the desired harmonisation and improvement of national laws in various nations around the world. It covers all stages of the arbitral process, from the arbitration agreement to the recognition and enforcement of the arbitral award, and reflects a worldwide consensus on the principles and important issues of international arbitration practice. Therefore, its scope is wider than that of the New York Convention. Although the Convention was prepared by the United Nations prior to the existence of UNCITRAL, promotion of the Convention is an integral part of the Commission's programme of work. As its name indicates, it provides for the recognition and enforcement of arbitral awards rendered in foreign countries. At present, 144 states are parties to it.[12]

Geneva Convention and Geneva Protocol

According to Article VII(2) of the Convention: *The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution*

of Foreign Arbitral Awards of 1927 shall cease to have effect between contracting states on their becoming bound and to the extent that they become bound, by this Convention.

Therefore, when parties become bound by the New York Convention, the Geneva Convention shall cease to have effect between them.

EVOLUTION OF INDIAN LAW PERTAINING TO ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Prior to the enactment of the Arbitration and Conciliation Act, 1996, India had two legislations pertaining to the recognition and enforcement of foreign arbitral awards:

A. The Arbitration (Protocol and Convention) Act, 1937

This Act was made subsequent to the Geneva Protocol, 1923, and the Geneva Convention, 1927, for giving effect to the Protocol and for enabling the said Convention to become operative in India[13]. It was applicable only to British India when made.

The Act gave an exhaustive meaning to the term 'foreign award' and defined it as an "award relating to differences on commercial matters made after July 28, 1924". The other essential components are as below:

a. In pursuance of an agreement for arbitration to which the Geneva Protocol applies; and

b. Between persons subject to the jurisdiction of 'powers' notified in the Gazette by the Governor General in Council, with whom India has reciprocal arrangements, as members of the Geneva Convention; and

c. In one of the territories notified in the Gazette where the Geneva Convention applies.

The Act dealt with the aspect of the finality of an arbitral award and made it clear that an award will not be treated as final if any proceedings related to its challenge are pending in the country in which the award was made. The Act further stayed proceedings under the Code of Civil Procedure, 1908, insofar as the matter was referred to arbitration. This Act also provided that it shall be enforceable in British India as if it were made there itself and that it would be binding.

As per Section 5 of the said Act, any person interested in a foreign award may apply to any court having jurisdiction over the subject matter of the award to file it in Court, upon which the Court shall issue notice to the parties to the award requiring them to show cause why the award should not be filed. If the Court was satisfied that the award is enforceable, it shall order that the award be filed and then pass a judgment thereon.

Section 6(2) provided that once judgment was pronounced, a decree shall follow, and no appeal shall lie from such a decree except if the decree was in excess of the award.

Section 7 laid down the conditions for the enforceability of a foreign award and stated that a foreign award will not be enforceable if the court dealing with the case is satisfied that:

a. The award has been annulled in the country in which it was made, or

b. The party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented, or

c. The award does not deal with all the questions referred to or contains decisions on matters beyond the scope of the agreement for arbitration.

The Court was also empowered to postpone enforcement of the award in case it did not deal with all the questions referred to. Besides the above, the Court may also grant permission to the party resisting enforcement to prove the existence of any other grounds than those stated in Section 7.

Thus, the Act gave courts room to manoeuvre when it came to the enforcement of foreign awards.

B. <u>Foreign Awards (Recognition and Enforcement) Act, 1961</u>

This Act was made to give effect to the New York Convention, which was incorporated in the Schedule to the Act.

The Act of 1961 also provided that the Act of 1937 ceased to apply to the awards to which this Act of 1961 shall apply.

While a major portion of this Act was similar to the Act of 1937, Section 7 of this Act provided for when a foreign award may not be enforced. This provision was similar to Section 34 of the Arbitration and Conciliation Act, 1996, and provided, *inter alia,* that enforcement of the foreign award may be refused if the court dealing with the case is satisfied that enforcement of the award will be contrary to public policy.

C. Arbitration and Conciliation Act, 1996

As explained in the previous sections, this legislation was made in accordance with the UNCITRAL Model Law, and it repealed both of the above laws.

Part II of this Act deals with the enforcement of foreign arbitral awards. While Chapter I of Part II deals with the New York Convention Awards, Chapter II deals with the Geneva Convention Awards. The New York Convention is incorporated into the second schedule, and the Geneva Convention into the third schedule.

ENACTMENT OF THE COMMERCIAL COURTS ACT, 2015

A significant measure undertaken by the Parliament to boost the trust of domestic as well as foreign investors in the Indian market was the enactment of the Commercial Courts Act, 2015. This step was taken to reduce the pendency of commercial disputes and expedite their disposal. This Act enables the creation of a separate bench of high courts to hear commercial disputes of certain value.

In this section, we shall understand the provisions of the Commercial Courts Act, 2015, and evaluate its utility and impact so far. But, before proceeding with the analysis of the Act, it is relevant to examine the applicable observations in the award dated November 30, 2011 of the arbitral tribunal in *White Industries Australia Limited* v. *The Republic of India*[14], wherein, while holding India guilty and liable to pay compensation under the bilateral investment treaty between the Governments of India and Australia, the arbitral tribunal made certain scathing remarks about India's judicial system. Holding India liable for breach of a particular clause in the treaty, the arbitral tribunal observed: *"In these circumstances, and even though we have decided that the nine years of proceedings in the set aside application do not amount to a denial of justice, the Tribunal has no difficulty in concluding the Indian judicial system's inability to deal with White's jurisdictional claim in over nine years, and the Supreme Court's inability to hear White's jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White with "effective means" of asserting claims and enforcing rights."*

Thus, it became imperative for India to address such perceptions about its judicial system. The enactment of the Commercial Courts Act, 2015, is the first step in this direction. We shall now examine the provisions of this legislation.

Preamble

The Preamble of the Act reads: "*An Act to provide for the constitution of Commercial Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and matters connected therewith or incidental thereto.*"

Thus, it is understood from the above that commercial courts shall be created to adjudicate commercial disputes of specified value.

Important Definitions

- The Act, in Section 2(1)(c), contains an elaborate definition of a commercial dispute.

- According to this definition, a 'commercial dispute' means, *inter alia,* a dispute arising out of ordinary transactions of merchants, bankers, financiers, and traders, such as those relating to mercantile documents, including enforcement and interpretation of such documents, those arising out of carriage of goods, issues related to maritime law, shareholder agreements, joint venture agreements, technology development agreements, etc.

- It is further clarified that a conflict between parties shall not cease to be a commercial dispute merely because it deals with and involves certain other matters, such as one of the contracting parties being a body carrying out public functions (such as a state) or taking action for the recovery of immovable property.

- The term 'specified value' in relation to a commercial dispute has been defined in Section 2(1)(i) as the value of the subject matter in respect of a suit as determined in accordance with Section 12 of the Act, which shall not be less than three lakh rupees or such higher value as may be notified by the Central Government.

Constitution of Commercial Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate Division

- Section 3 of the Act enables state governments to consult with the concerned high courts and constitute the required number of commercial courts at the district level. The state government is empowered to specify the pecuniary value of the disputes and the local limits of the area to which the jurisdiction of a particular commercial court shall extend.
- Section 3A enables the designation of the required number of courts at the district level as commercial appellate courts, except in the territories over which the high courts have ordinary original civil jurisdiction.
- Section 4 provides that in all high courts having ordinary original civil jurisdiction, the Chief Justice of the High Court may constitute a commercial division having one or more benches presided over by a single judge. Such judges of the High Court who have experience in dealing with commercial disputes are nominated by the Chief Justice of the High Court to preside over these benches. The Commercial Appellate Division, constituted under Section 5, has one or more division benches.

Jurisdiction of Commercial Courts and Commercial Divisions

- According to Section 6, commercial courts "*shall have jurisdiction to try all suits and applications relating to a commercial dispute of a specified value arising out of the entire territory of the state over which it has vested territorial jurisdiction.*"
- Commercial Divisions of High Courts are entrusted with the responsibility of trying all suits and applications relating to a commercial dispute of a specified value filed in a High Court having ordinary original civil jurisdiction.
- Jurisdiction in respect of arbitration matters of a specified value – According to Section 10, all appeals and applications arising out of international commercial arbitration are to be heard by the Commercial Division of High Courts, and those other than international commercial arbitration, by commercial courts.

- The Act clearly provides that commercial courts and Commercial Divisions of High Courts shall not entertain proceedings relating to any commercial dispute in respect of which the jurisdiction of the civil court is either expressly or impliedly barred under any other law for the time being in force.

Other important provisions

- Section 8 of the Act, beginning with a non-obstante clause, bars civil revision applications or petitions against any interlocutory order of a commercial court. It further states that, subject to the provisions of Section 13, any challenge shall be raised only in appeal against a decree of the commercial court. Section 21 gives overriding effect to the Act.

- The Act, through Section 12, provides for the determination of 'Specified Value'. This is an important provision, as whether a particular matter should be heard by a commercial court is dependent upon the specified value of the subject matter of such a dispute. This section also provides that once a commercial court arrives at a decision that it has jurisdiction to hear a commercial dispute, an appeal against, or an application for revision of the decision, under the Code of Civil Procedure, 1908, do not lie against such a decision.

- It is provided in Section 12A that a suit that does not contemplate or provide for any urgent interim relief shall not be instituted without exhausting the remedy of pre-institution mediation as per the rules made by the Central Government. Based on this mediation, the parties may arrive at a settlement. The mediation should be completed in a time-bound manner, that is, within three months, extendable for a further period of two months by consent between the parties.

- Appeals to the appellate courts have to be disposed of within six months from their date of filing (Section 14).

- The Act specifically prescribes that the commercial courts, commercial divisions, appellate divisions should be manned by judges with experience in dealing with commercial litigation.

- The Act also contemplates continuous training for the judicial officers of the courts designated under the Act.
- This Act has also amended certain provisions of the Code of Civil Procedure, 1908, insofar as the same apply to commercial disputes of specified value. Some of the novel concepts introduced as a result of the changes are case management hearings (where the judge and parties establish a mutually agreeable schedule for disposal of the matter) and summary judgments (where, when a party applies for them, the judge may rule in favour of that party without going through an elaborate trial if the facts clearly favour that party).

Critical evaluation of the Act

As can be seen from the above discussion, the Commercial Courts Act, 2015, is an important piece of legislation aiming to reduce delays in the disposal of cases instituted with respect to commercial disputes. One of the main pain-points identified by the World Bank with reference to the ease of doing business in India is the poor enforceability of contracts. This Act shows that the government is serious about redressing this problem and making the environment business-friendly.

Some of the notable provisions of the Act are making mediation mandatory before the institution of suits, barring appeals against interlocutory orders, and amending certain provisions of the Code of Civil Procedure, 1908, in relation to the matters covered by the Commercial Courts Act, 2015.

However, despite the best intentions manifested in the form of the Commercial Courts Act, 2015, implementation of the Act is ridden with challenges. Some of these challenges were identified by an independent think-tank in an empirical study or quantitative assessment carried out by them.[15] The results of the study are concerning.

- Firstly, the study found that not all High Courts had notified commercial divisions.
- Secondly, there was no co-relation observed between the number of commercial cases and the number of courts designated as commercial courts. For instance, in Tripura, though there was only one case, eight judges were designated for the purpose.

- Thirdly, the study found that as of 2019, the disposal rates across all states were less than 10%, which reflects poorly on the impact of the legislation.

- Lastly, it was found in many states that commercial disputes were adding to the burden of judges.

Assessment

The legislation is a useful step to resolve commercial disputes expeditiously. The fact that this Act is important for the enforcement of foreign arbitral awards is also recognised by the Law Commission of India in its 253rd report titled 'Commercial Division and Commercial Appellate Division of High Courts Bill, 2015'. The Law Commission emphasised the need for commercial courts for the following reasons:

- A stable and efficient dispute resolution mechanism is needed for economic development,

- The impression that India is a difficult place to do business in view of the slowness and inefficiency of the judicial system[16] should be changed,

- Foreign investors should be assured that Indian courts are fast in their disposal and not plagued by delays,

- The process followed by commercial courts could be the basis for reforms to be carried out in the Code of Civil Procedure, 1908.

  As can be seen from the description of the provisions above, the Commercial Divisions of the High Courts are now the fora to seek enforcement of a foreign award. This shall definitely inspire the confidence of investors owing to the ease of conducting proceedings, that too in a time-bound manner, under the Commercial Courts Act, 2015.

INTERNATIONAL CASE LAWS RELATED TO ENFORCEMENT OF ARBITRAL AWARD

The following cases exemplify application and interpretation of the New York Convention.

Bergesen v. Joseph Miller Corp.[17]

Facts:

A disagreement developed between a Swiss business and a Norwegian ship owner. The arbitration would take place in New York, in accordance with the arbitration agreement. The award was pronounced in favour of the applicant. As such, the applicant, in accordance with the New York Convention, later sought to have the award confirmed in the United States, where the District Judge approved the arbitral award.

Owing to the fact that it was neither a foreign award nor a domestic award, Miller argued in the appeal that the New York Convention did not apply to the enforcement of such arbitral awards as the instant American award. The defendant challenged the recognition by claiming that only awards made in the territory of another contracting state were covered by the Convention.

Issue:

The issue under consideration was whether the award was admissible and enforceable.

Judgment and Reasoning:

Recognition was granted on the ground that, even though the award did not meet this territorial test, it could qualify as an award not considered as domestic within the meaning of the Convention.

Nothing in the Convention, its history, the implementing law, or either of those things' histories, according to the Court, establishes exclusivity. In fact, Article VII of the Convention provides that the Convention shall not "*deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon*."[18]

Fertilizer Corp. of India v. IDI Management, Inc.[19]

Facts:

In this case, an arbitral award from India sought enforcement in the US and was contested due to pending review for legal errors in Indian courts.

Issue:

Whether the award is enforceable?

Judgment and Reasoning:

The court opined that the arbitral award was final and binding for the purposes of the Convention and noted the comments of Professor Gerald Aksen, former General Counsel of the American Arbitration Association: "*The award will be considered "binding" for the purposes of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being "binding."*[20]

The court stayed the enforcement proceedings pending litigation in India, referencing local law under Article 6 of the Convention to determine the award's binding status.[21]

INDIAN CASE LAWS RELATING TO THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

This section seeks to explore a few cases decided by Indian courts with respect to recognition and enforcement of foreign arbitral awards. Only that part of the case is being highlighted which is related to the present topic.

PEC Limited v. Austbulk Shipping SDN BHD[22]

Facts:

The appellant chartered a vessel from the respondent to transport goods from Australia to India. A payment dispute arose, and the respondent appointed an arbitrator as per their agreement. The appellant did not appoint an arbitrator, contested the contract and arbitration clause, but the arbitrator ruled against them based on exchanged documents.

The respondent sought to enforce the arbitrator's award in Delhi High Court. The appellant argued that the award was not a valid foreign award under Section 44 of the Arbitration and Conciliation Act, 1996, and that the respondent did not file the original charter-party agreement.

Issues:

The Supreme Court considered the following two issues:

(i) Whether an application for enforcement under Section 47 of the Act is liable to be dismissed if it is not accompanied by the arbitration agreement?

(ii) Whether there is a valid arbitration agreement between the parties, and what is the effect of a party not signing the charter?

Judgment and reasoning:

The Court noted that Section 47 of the Arbitration and Conciliation Act, 1996 stipulates, among other things, that the party requesting the enforcement of a foreign award shall produce before the Court the original arbitration agreement or a duly certified copy of it at the time of filing the application for enforcement of a foreign award.

In this case, the respondent did not file the agreement at the juncture when it was moving the court for enforcement of the arbitral award. However, it must be noted that it was subsequently filed at the time of filing the statement of objections.

The appellant asserted that the word 'shall' used in Section 47 indicates that filing the agreement is mandatory, and for non-compliance of this provision alone, the application for enforcement ought to have been rejected.

The Court did not agree with this argument and opined that the word 'shall' appearing in Section 47 of the Act relating to the production of the evidence as specified in the provision at the time of application has to be read as 'may'. The Court gave importance to the pro-enforcement bias of the New York Convention and observed that the object and purpose of the Convention is to promote, aid and expedite the recognition of the arbitration agreement within its purview and the enforcement of the foreign arbitral awards. According to the Apex Court, the approach of the Court for enforcement should have a strong pro-enforcement bias, a pragmatic, flexible, and non-formalist approach, and should avoid excessive formalism. The Court observed that the view that "*it is obligatory for a party to file the arbitration agreement or the original award or the evidence to prove that the award is a foreign award at the time of filing the application would have the effect of stultifying the enforcement proceedings.*"

The Court further stipulated that the failure to file the arbitration agreement at the time of moving an application for its recognition and enforcement would not, in any manner whatsoever, prejudice the party objecting to the execution of the award and that the error could be rectified subsequently.

With regard to the second question about determining the existence of an arbitration agreement between the parties, the Court remarked that since the aid contract was

regulated by English law, there is no requirement as such for the charter-party agreement to be signed by the parties in order for it to be enforceable.

The Court also observed that abundant material was examined by both the arbitrator and the High Court to record a finding that there existed a valid arbitration agreement. The Court also referred to the definition of arbitration agreement contained in the Arbitration and Conciliation Act as including an arbitral clause in a contract or an arbitration agreement, signed by the parties, or contained in an exchange of letters or telegrams.

As a result, the judgment of the Delhi High Court was upheld by the Supreme Court.

Renusagar Power Company Ltd. v. General Electric Co.[23]

Note: *Insofar as enforcement of foreign awards in India is concerned, the above case is a landmark delivered by the Hon'ble Supreme Court.* ***It may be seen that this judgment was delivered in 1994, much before the enactment of the Arbitration and Conciliation Act, 1996****. The law that governed this case was the Foreign Awards (Recognition and Enforcement) Act, 1961, which was repealed by the Arbitration and Conciliation Act, 1996. However, the observations made in this case are relevant even in the present context, and hence, it is relevant to examine this case in detail.*

Facts:

Renusagar Power Company and General Electric Company had a contract in place that provided for arbitration as the preferred mode of dispute resolution mechanism and further laid down that the said arbitration was to be conducted in accordance with the Paris Guidelines of the International Chamber of Commerce. A situation arose when the parties to the agreement went into conflict, which led to the General Electric Company invoking an arbitration clause and referring the matter to arbitration.

Subsequent to the invoking of the arbitration clause by the General Electric Company, the Renusagar Power Company objected to it on the ground that the dispute that had occurred did not fall within the purview of the arbitration agreement between the

parties. This ground of challenge was rejected by the Supreme Court. In the meantime, an arbitral award was rendered in favour of General Electric Co., which sought to enforce the same before the High Court of Bombay. The Hon'ble High Court enforced the award, as a result of which Renusagar Power Company appealed to the Hon'ble Supreme Court.

Issues:

The following issues considered by the Hon'ble Supreme Court are relevant for our present purpose:

(i) What is the scope of inquiry in proceedings for enforcement of a foreign award under Section 5 read with Section 7 of the Foreign Awards Act?

(ii) Does Section 7(1)(b)(ii) of the Foreign Awards Act preclude the enforcement of the award of the Arbitral Tribunal for the reason that the said award is contrary to the public policy of the State of New York?

(iii) What is meant by 'public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act?

Judgment and reasoning:

The main arguments for Renusagar Power Company were:

(i) The arbitral tribunal had failed to inform it of the potential effects of certain of the tribunal's decisions, thereby rendering it unable to present its case in violation of Section 7(1)(a)(ii) of the Foreign Awards (Recognition and Enforcement) Act 1961,

(ii) The terms of the award were grossly unfair, so enforcement would be contrary to public policy, in violation of Section 7(1)(b)(ii) of the 1961 Act.

The Hon'ble Supreme Court rejected the contentions of Renusagar Power Company. It was observed that Renusagar Power Company cannot take the ground that it was not able to effectively present its case, as it voluntarily refused to appear before the arbitral tribunal on a particular date when the matter was considered, and in the subsequent sittings in which it participated, it did make oral submissions and presented

documents as well. It is noteworthy that the arbitral tribunal, while pronouncing the award, also took into consideration the counter claims made by Renusagar Power Company.

The following findings of the Hon'ble Supreme Court are relevant:

(i) When a party seeks enforcement of foreign arbitral awards under the Foreign Awards (Recognition and Enforcement) Act 1961, the scope of inquiry by the court in which the application for enforcement is made is limited to the grounds mentioned in Section 7 of that Act and does not extend to considering the merits of the award.

(ii) The words 'public policy' used in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961, refer to the public policy of India and not the public policy of the country whose law governs the arbitration or where the arbitration is conducted. In view of the language of the New York Convention, enlarging the definition of 'public policy' to include that of the country whose law governs the arbitration agreement or seat of arbitration would run counter to the intention of the Convention as well as the Foreign Awards (Recognition and Enforcement) Act, 1961.

(iii) There is no practically feasible or universally accepted explanation of international public policy, and thus the usage of the term 'public policy' in the New York Convention cannot be taken to mean international public policy. Therefore, the expression 'public policy' should be construed to mean the public policy of the country in which the award is sought to be enforced.

(iv) The justification and rationalisation of public policy allowed to be taken by Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act 1961 should be construed in a narrow manner, keeping in mind the pro-enforcement bias envisaged by the New York Convention.

(v) Under Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act 1961, enforcement of a foreign arbitral award may be refused on the ground that it is against public policy, if doing so, the enforcement of such a foreign arbitral award would be contrary to:

(a) Fundamental policy of Indian law;

(b) Interests of India;

(c) Justice or morality.

(vi) Violation of statutes of India, such as the Foreign Exchange Regulation Act, 1973, which was enacted to safeguard India's economic interests and ensure that India does not lose its foreign exchange, would be contrary to the public policy of India, as envisaged in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961.

Thus, the above judgment is an authority to construe the meaning of public policy.

Oil and Natural Gas Corporation v. Saw Pipes Limited[24]

Facts:

The respondent couldn't fulfil its contract with ONGC due to European employment issues. ONGC approved the delay but deducted a penalty, leading to arbitration. The tribunal rejected ONGC's claim for liquidated damages. ONGC challenged the award, citing public policy violations and patent illegality. The Bombay High Court dismissed ONGC's appeal, prompting a Supreme Court review.

Issue:

The short issue relevant for the purposes of our present study is whether patent illegality can be used as a ground to challenge an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996.

Judgment and reasoning:

The Hon'ble Supreme Court overturned the arbitration award, directing ONGC to refund the amount retained by it towards liquidated damages to Saw Pipes. The following observations need to be quoted in full: *"In our view in addition to the narrower meaning given to the term 'public policy' in the Renusagar case, it is required to be held that the award could be set aside if it is patently illegal. The*

result would be that the award could be set aside if it is contrary to:

(a) fundamental policy of Indian law;

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter, and if the illegality is of a trivial nature, it cannot be held that the award is against public policy. An award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such an award is opposed to public policy and is required to be adjudged void."

The Court in Renusagar interpreted "public policy" narrowly but broadened it in ONGC, including "patent illegality" under Section 34 of the Arbitration and Conciliation Act, 1996. This case is relevant for understanding court interpretations of "public policy."[25]

IMPORTANT FINDINGS OF COURTS

M. Anasuya Devi and Anr. v. M. Manik Reddy and Ors[26]

The Hon'ble Supreme Court opined in this case that only grounds listed in Section 34 can justify setting aside an arbitral award. The Court held: "*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 Act. It is at this stage that the parties can raise objections regarding its admissibility on account of non-registration and non-stamping under Section 17 of the Registration Act*."

M/S. Shri Ram EPC Limited v. Rioglass Solar SA[27]

The Hon'ble Supreme Court held in this case that a foreign award is not liable to be stamped under the provisions of the Indian Stamp Act, 1899.

Naval Gent Maritime Ltd v. Shivnath Rai Harnarain (I) Ltd[28]

and

Vitol S.A v. *Bhatia International Limited*[29]

and

Narayan Trading Co. v. *Abcom Trading Pvt. Ltd.*[30]

The Delhi High Court, Bombay High Court, and Madhya Pradesh High Court have adopted the same view that a foreign award does not require registration and that the same can be enforced as a court decree.

The courts have also keenly observed and noted that the issue of whether the stamp duty paid is adequate cannot be a factor in determining the basis of the issue of whether a foreign award may be enforced in India.

Sundaram Finance Limited v. Abdul Samad and Anr.[31]

In this judgement pronounced by the Hon'ble Supreme Court, it was made plain that anyone who has an arbitration award in their favour can initiate the execution proceedings in the relevant jurisdiction where the assets of the other party are located, which can satisfy the award.

LEGAL FRAMEWORK FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN INDIA

The legal foundation and basis for the recognition and enforcement of foreign judgments in India will be covered in this section of the present study.

In the modern era, where trade relations have internationalised, parties across borders enter into contractual relations and choose the jurisdiction whose law applies to a particular contract in accordance with their mutual convenience. In such a scenario, it is possible that an action for enforcement of a judgment in a dispute is required to be implemented in a jurisdiction different from that of the judicial forum that delivered the said judgment. This may be due to various reasons, such as the property of a party being located in a different jurisdiction, regulatory requirements, agreements between parties, etc. For such a contract to be effective, it is *sine-qua-non* that the judgment pronounced by a certain jurisdiction is recognised and, therefore, is capable of being enforced in a different jurisdiction. Such recognition and enforcement are essential not just in commercial matters but also in matters related to family law, such as the validity of a marriage, arbitration, etc. As such, deliberating upon and understanding the legal structure governing the acknowledgment, acceptance, and ultimately the implementation of judgments pronounced in foreign jurisdictions is of vital importance.

Therefore, it is important to understand the legal framework pertaining to the recognition and enforcement of foreign judgments in India.

It may be clarified here that there is no single and comprehensive legislation in India dealing with both the recognition and enforcement of foreign judgments in different kinds of matters. The legal framework in this regard is based on principles of common law (reciprocity), private international law, and provisions of the Code of Civil Procedure, 1908.

Recognition of foreign judgments

Section 13 of the Code of Civil Procedure, 1908, provides for the recognition of a foreign judgment. The section has been extracted and quoted herein below for ease of reference:

Section 13. When foreign judgment not conclusive– A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim to be litigating under the same title, except—

(a) where it has not been pronounced by a court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where 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;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India.

While Section 2(5) of the Code of Civil Procedure, 1908, defines a foreign court as a court situated outside India and not established or continued by the authority of the Central Government, Section 2(6) defines a foreign judgment as the judgment of a foreign court.

It has been held by the Hon'ble Supreme Court in *Moloji Nar Singh Rao Shitole* v. *Shankar Saran*, AIR 1962 SC 1737, (1963) 2 SCR 577 that the rules contained in Section 13 are not just procedural but substantive in nature.

In accordance with Section 13, a foreign judgment is conclusive when the following six conditions are satisfied:

1. **Court of competent jurisdiction**:

   The judgment should have been passed by a court of competent jurisdiction. The

competence of a court contemplated in this provision is not according to the laws of that particular country but according to principles of international law. The courts have also held that objections regarding the jurisdiction of foreign courts should be raised in the first instance.[32]

In the case of *Moloji Nar Singh Rao Shitole* (*Supra*), referring to *Halsbury's Laws of England*, Vol. VIII, p. 144, para 257 (3rd Edn.), the Hon'ble Supreme Court identified the following circumstances in which jurisdiction is conferred on foreign courts:

a. Where the person is a subject of the foreign country that has delivered the judgment;
b. Where the person is a resident of the foreign country in which the action was commenced;
c. When the person was temporarily resident in the foreign country when any process in connection with the case was served on him;
d. When the person, in his capacity as a plaintiff, chooses the foreign jurisdiction and later on, he himself is sued in that jurisdiction;
e. When a party presents himself or itself in a foreign jurisdiction after service of process; and
f. Where a particular jurisdiction is chosen by agreement between parties.

It may also be taken note that Section 14 of the Code of Civil Procedure, 1908, provides for presumption regarding a foreign judgment. According to this section, when a certified copy of a foreign judgment is produced, it is presumed that the judgment was pronounced or passed by a court of competent jurisdiction.

2. <u>Judgment is on merit</u>:

In order to be conclusive, the judgment of the foreign court should have been given on the merits of the case. Only in such a case will it operate as *res judicata*[33]. This means that the evidence adduced by the parties should have been considered by the court before passing the judgment. The fact that the foreign judgment is not on merit should be proved by the party raising such a contention.[34] In order to

reach a conclusion about whether the judgment is given on merit or not, the court should consider whether the same was given after consideration of the facts and evidence in the matter.[35]

3. **Based on a correct understanding of international law and recognizing the law of India when applicable**:

According to clause (c) of Section 13, if a judgment appears to have been based on an incorrect understanding of international law or does not recognise Indian law in cases where the same is applicable, such judgment is not to be considered conclusive.

In *International Woollen Mills* v. *Standard Wool (UK) Ltd*, (2001) 5 SCC 265, a suit was filed in England with respect to a contract that was entered into in India. The Court in that case proceeded to give its judgment by taking the view that Indian law is not applicable and that the matter is governed by the laws of England. Such a judgment was held to be based on an incorrect understanding of the principles of international law.

4. **Adherence to natural justice**:

As per this section, if principles of natural justice, *viz.*, notice, opportunity of hearing, and reasoned order, are not adhered to while passing a judgment, such judgment is not conclusive. Thus, this provision points to procedural irregularities in the conduct of the matter. Bias on the part of the judge would also vitiate the proceedings on the grounds of principles of natural justice.[36]

5. **Judgment not fraudulently obtained**:

Fraud vitiates a judgment. Such fraud could be either on the part of the party in whose favour the judgment was delivered or on the part of the court that pronounced the judgment.[37] Further, it is not enough to show that the court was merely mistaken or wrong; it has to be established that the court was misled or tricked to deliver the particular judgment.[38]

6. **Not founded on a breach of Indian law**:

According to this provision, all judgments pronounced by a foreign court that

otherwise do not adhere to the laws in force in India or judgments delivered by a foreign court that are contrary to Indian law are not conclusive.

Enforcement of foreign judgments

Once it is clear that a judgment is conclusive in terms of Section 13 of the Code of Civil Procedure, 1908 steps may be taken for its enforcement. In the absence of an international arrangement, judgment delivered by a court in a foreign country cannot be enforced in another country.

In this regard, it is important to examine the provisions of Section 44A of the Code of Civil Procedure, 1908, which play a prominent role in the enforcement of foreign judgments. This provision was inserted by way of an amendment in 1937, which was carried out to give effect to the policy in the Foreign Judgments (Reciprocal Enforcement) Act, 1933.

As per Section 44A, judgments delivered by foreign courts are divided into:

(a) Judgments delivered by courts in reciprocating territories; and

(b) Judgments delivered by courts in non-reciprocating territories.

Judgments delivered by courts in reciprocating territories

Explanation 1 to Section 44A provides as follows: *"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 this section; and superior courts, with reference to any such territory, means such courts as may be specified in the said notification.*

Therefore, the notification published by the Central Government in the Official Gazette contains details about countries that shall be treated as reciprocating territories and the superior courts therein. In the case of such territories, the foreign judgment delivered by a superior court will be enforced under Section 44A of the Code of Civil Procedure, 1908.

At present, the list of reciprocating territories includes and contains the names of the United Arab Emirates, United Kingdom, Singapore, Bangladesh, Malaysia, Trinidad & Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua New Guinea, Fiji, and Aden. The latest to be included in this list is the United Arab Emirates, which was done by way of an Extraordinary Gazette Notification No. 36 of 2020 dated January 17, 2020, issued by the Ministry of Law and Justice, Government of India.

In respect of judgments passed by superior courts in reciprocating territories, Section 44A provides the documents that ought to be furnished for the recognition and enforcement of the foreign judgment. The information contained therein provides for the following:

(a) The concerned party ought to furnish a certified copy of the decree which shall be filed in the district court. It is pertinent to mention here that it is mandatory that this be executed in India as if it had been passed by that district court;

(b) Further, the concerned party also ought to furnish, along with the certified copy, a certificate from the superior court. This certificate ought to contain

the details of the extent, if any, to which the decree has already been satisfied or adjusted.

As per Section 47 of the Code of Civil Procedure, 1908, all the questions between the parties with respect to the decree, its execution and satisfaction shall be determined by the district court.

Judgments delivered by courts in non-reciprocating territories

It ought to be highlighted here that the procedure for enforcing the judgment pronounced by the superior court of a non-reciprocating territory, that is, a country that is not notified by the Central Government in terms of Section 44A(1) of the Code of Civil Procedure, 1908, would require filing of a suit for a judgment based on the foreign judgment in accordance with the provisions of the Code of Civil Procedure, 1908. In other words, a new lawsuit ought to be brought in India based on the decree or judgment pronounced in the said non-reciprocating territory,

which decree or judgment shall form the basis or foundation for taking action in such lawsuit. If the issue is commercial in nature, a suit is filed under the Commercial Courts Act, 2015. More often than not, such a process is cumbersome and expensive.

Modes of execution

The modes of execution of a foreign arbitral award and a foreign judgment are common. These include delivery of any property specifically stated in the decree, by attachment and sale or by sale without attachment of any property, by arrest and detention in prison, by appointing a receiver, and in any other manner as the nature of the relief granted may require.[39] In other words, arbitral awards and judgments rendered in foreign jurisdictions generally have a similar mechanism for their recognition and enforcement. The various modes adopted include the surrendering of property that is mentioned in the said award or decree, the attachment and sale of such property, the sale of the mentioned property without initiating action against any other property, arrest and detention within the confines of a jail, the appointment of a receiver, and any other means necessary to give effect to the relief that has been granted.

Benefits of Section 44A

A country being notified under Section 44A of the Code of Civil Procedure, 1908, is a reflection of the strong ties between such a country and India. It also brings forth a sense of security in cross-border disputes and boosts confidence in the Indian legal system.

Further, in the present era of globalisation, entities in India may borrow from banks and financial institutions in foreign countries due to various reasons, such as preferential terms, a better rate of interest, taxation concerns, etc. The ease of enforcement of judgments will enable faster recovery of loans in cases of default. One of the consequences could also be an increase in capital inflows, an improvement in technology in India, an enhancement of production capacity, and the generation of newer employment avenues and opportunities.

CASE LAWS DEALING WITH RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN INDIA

In this section, the author has analysed Indian court stances on acknowledging, accepting, and implementing foreign judgments, focusing on recognition and enforcement principles, with limited detail on other case facts.

Satya v. Teja Singh[40]

Facts:

This is a matter pertaining to the recognition of a foreign decree.

The matter arises out of a case for maintenance filed by the appellant against her husband, the respondent herein, under the provisions of the Code of Criminal Procedure, 1973. As per the facts of the case, the appellant, Satya got married to the respondent, Teja Singh, in India. They had two children in India. Subsequently, Teja Singh left for the United States for his higher studies, while his wife and children remained in India. After the five-year period, he applied for and obtained a decree for divorce from a court in Nevada, United States, on the ground of separation from his wife for three years with no possibility of reconciliation. When the wife initiated proceedings for maintenance in Jalandhar, Punjab, India, Teja Singh took the defence that he had already obtained the divorce decree and hence was not liable to pay maintenance.

The Judicial Magistrate took into consideration the fact that Teja Singh had not permanently settled in Nevada, invalidated the divorce decree, and granted maintenance to Satya and her children. This judgment was upheld by the Sessions Court. However, when it reached the High Court, it was observed by the Court that

the court in Nevada had jurisdiction to pass the divorce decree as Teja Singh was domiciled there and the domicile of the wife follows that of the husband. Satya appealed to the Supreme Court by way of a special leave petition.

Issue:

The primary issue involved in the case was: are Indian courts bound to recognise divorce decrees passed by foreign courts?

Judgment and Reasoning:

The Supreme Court noted that Indian laws governing private international law must be the primary factor in determining whether recognition ought to be given to the judgment pronounced by the Nevada court. The Hon'ble Supreme Court noted that each nation has developed its own laws governing private international law and that India could not automatically accept the laws evolved in and developed by other nations.

The Court quoted the following paragraph from a book[41] in this regard: "*Today, undoubtedly private international law is national law. There exists an English private international law as distinct from a French, a German, or an Italian private international law. The rules on the conflict of laws in the various countries differ nearly as much from each other as do those on internal (municipal) law.*"

Thus, according to the Court, principles of private international law vary greatly from country to country and are moulded by the distinct social, political, and economic conditions in a country. The Court further observed that principles governing divorce are so different among countries that while a man and woman may be considered husband and wife in one jurisdiction, they may be treated as divorced in another.

The Apex Court observed that the Nevada court granted divorce on the ground that Teja Singh was a *bona fide* resident within its jurisdiction. In order to confer jurisdiction on the basis of residence, the Court held that the residence should be actual and genuine and accompanied by the intent to make the place his residence, and that a mere sojourn or temporary residence is not sufficient. The Court observed that

American courts refuse to grant recognition to divorce decrees in the following instances:

i. If the judgment is without jurisdiction;

ii. If the judgment is procured by fraud;

iii. If treating it as valid would offend public policy.

In the present case, since domicile is a jurisdictional fact, according to the Court, the decree was open to collateral attack that the respondent was not a *bona fide* resident of Nevada. The Court also noted that the appellant was not represented in the matter before the Nevada Court and that she did not submit to that court's jurisdiction. According to the court, prior to the decree, Teja Singh never resided in Nevada, and after securing the divorce decree, he immediately left Nevada. Thus, it is clear that he never intended to reside in Nevada or make the place his home.

The Court highlighted that Section 13(a) of the Code of Civil Procedure, 1908, makes a foreign judgment conclusive as to any matter thereby directly adjudicated upon, except where it has not been pronounced by a court of competent jurisdiction.

Because the judgment rendered by the Nevada Court was in a civil action, the Apex Court failed to accept the arguments made by the respondent that this clause cannot be made applicable to the current proceedings as it was derived from the provisions of the Code of Civil Procedure, 1973.

The Court also quoted the following observations made in *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul Majid*[42]: "A *judgment of a foreign court to be conclusive between the parties must be a judgment pronounced by a court of competent jurisdiction and competence contemplated by Section 13 of the Code of Civil Procedure in an international sense and not merely by the law of a foreign state in which the court delivering judgment functions.*"

Allowing the appeal, the Apex Court stated that "no rule of private international law could compel a wife to comply with an order which her husband had obtained by

resorting to trickery and deception, and that such decrees are not in consonance with our ideas and notions of substantive fairness and substantial justice."

Moloji Nar Singh Rao Shitole v. Shankar Saran[43]

Facts:

In this case, a court in Gwalior (which was not a part of British India prior to India's independence and whose courts were foreign courts for courts in British India) passed a decree in favour of the appellant. The respondents had not appeared before the court in Gwalior. Thereafter, the appellant prayed before the Gwalior court to transfer the decree for execution to a court in Allahabad, as the properties of the respondents were located in that city. The prayer was granted, and subsequently, the appellant instituted a case in Allahabad court, which was registered as an execution application. The respondents filed their objections under Section 47 of the Code of Civil Procedure, 1908. According to them, the Gwalior court was a foreign court to whose jurisdiction they had not submitted, and therefore, the order/judgment/decree rendered by the Gwalior court was a nullity.

Thereafter, the case was then referred to the High Court, which opined that the decree was null and invalid owing to the fact that it was issued by a court in a foreign jurisdiction, which the respondents had refused to submit to. As a result, an appeal was filed before the Hon'ble Supreme Court of India.

Issues:

The primary question before the Supreme Court was whether the decree passed by the Gwalior court in November 1948 was executable in the state of Uttar Pradesh, which was a part of British India. For determining this issue, the Court had to examine if:

(i) The decree passed by the Gwalior Court was a foreign decree;

(ii) The court in Gwalior was competent to transfer execution to the Allahabad Court;

(iii) If not, was the decree executable under Sections 43 and 44 of the Code of Civil Procedure, 1908? and

(iv) The respondents can object to the execution of the decree on the ground that it is a nullity owing to being a foreign decree.

Judgment and reasoning:

Examining the question of whether the decree was a foreign decree, the Court looked at the definition of 'foreign court' as it existed before the independence of India and concluded that it was a foreign decree as it was delivered by a court beyond the limits of the provinces of British India. According to the Court, its execution is governed by Section 13 of the Code of Civil Procedure, 1908, and its conclusiveness is governed by clauses (a) to (f) of that section.

The Court held that the rules in Section 13 were substantive in nature and not just procedural. According to the court, the respondents were not subjects of Gwalior state; they did not owe allegiance to the ruler of Gwalior; they did not agree to be subject to the jurisdiction of the Gwalior court; they did not even appear before the Gwalior court; and therefore, they were under no obligation to accept the judgments of the courts in Gwalior.

The Court also refused to accept the arguments made by the appellant that the status of Gwalior changed subsequent to India's independence and Gwalior's accession to India, as the status changed subsequent to the delivery of the decree. The Court also did not consider the Gwalior court competent to transfer execution to Allahabad, as the decree was passed when the Gwalior court was not governed by the Code of Civil Procedure, 1908. The appeal was finally dismissed by the Supreme Court.[44]

Karnataka State Road Transport Corporation v. Mr. Nigel Roderick Lloyd Harradine & Anr., Civil Revision Petition No. 453/2017 (Judgment of the Karnataka High Court dated July 14, 2023)

Facts:

In this case, the respondents were travelling in a car in Karnataka, when they met with an accident due to a collision with a bus belonging to the Karnataka State Road Transport Corporation (KSRTC), which was coming from the opposite direction.

The respondents were nationals of the United Kingdom, and they preferred a claim with respect to the accident before a court there. The foreign court directed KSRTC to make a payment of a certain amount of compensation. The decree-holders (respondents herein) filed a petition before the concerned civil judge in Bangalore for the execution of this decree.

The Civil Judge considered the rival contentions and observed that the judgment and decree passed by the foreign court were unchallenged. It held the foreign judgment to be enforceable. This revision petition was passed against the order dated August 17, 2017 passed by the Civil Judge, Bangalore.

Issue:

Whether the judgment passed by the foreign court is executable in India?

Contentions and Judgment:

KSRTC, which had filed its statement of objections before the court in the UK, contended that the judgment pronounced by the UK court was without jurisdiction. Since the accident had taken place in India, according to KSRTC, the Indian law, the Motor Vehicles Act, was applicable in the matter. KSRTC also submitted that, as per Indian law, compensation payable is only for negligence on the part of the driver of the offending vehicle, and the same has not been considered, hence the very judgment is not in accordance with the law applicable in India. It was also contended that the civil court could not have entertained the execution petition as a certified copy of the decree was not produced by the decree-holders, as it is a fact that only a photocopied version of the judgment of the foreign court was produced. In order to advance their case, KSRTC also relied on the findings in *Satya* v. *Teja Singh* (*Supra.*) matter that for a foreign judgment to be executable in India, it should have been passed by a court having jurisdiction over the subject matter and parties to the dispute.

However, the respondents further argued that delving into the merits of the case would ultimately result in the negation of the entire purpose and objective of the execution proceedings. The respondents proceeded with their arguments on the line that KSRTC had in fact consented to the jurisdiction of the said case by virtue of presenting its objections before the said court.

In its decision dated July 14, 2023, the Karnataka High Court ruled that the judgment of the said foreign court was not enforceable. The High Court further noted that there was nothing in the judgment pronounced by the foreign court that indicated that a proper evaluation of the claim was carried out based on merit. Furthermore, it was also noteworthy that the foreign court did not pay any heed to the objections filed by KSRTC.

The High Court relied on the judgment of the Supreme Court in *M/s. International Woollen Mills* v. *M/s. Standard Wool (UK) Ltd.,* AIR 2001 SC 2134, wherein the Supreme Court considered Section 13(b) of the Code of Civil Procedure, 1908 and held that if an ex parte decree is passed, the same cannot be presumed to be on merits. It also relied on the judgment in *Alcon Electronics Private Limited* v. *Celan SA of FOS 34320 Roujan, France & Anr.,* (2017) 2 SCC 253 wherein the Apex Court held that a judgment is considered to be rendered on merits if an opportunity is extended to the parties to the case to put forth their arguments, and after considering rival submissions, the court gives its decision in the form of an order or judgment.

The High Court noted that while the trial court invoked Section 44A of the Code of Civil Procedure, 1908, and held the foreign judgment to be enforceable as it was conclusive (i.e., it was not challenged), it failed to take note of the fact that it was not on merits. Thus, the High Court held as follows: *"But in the case on hand, taking into note of the material on record, it discloses that the Court has not followed the principles of natural justice while recording the reasons and, very importantly, based on the application of the appellant itself, conclusively decided the issue with regard to jurisdiction and passed the order coupled with costs, hence, the order passed by the foreign court is not conclusive and not on merit and hence, the same cannot be executable."*

ISSUES AND OUTCOMES

Arbitration has emerged as a vital mechanism for dispute resolution in India, offering parties a viable alternative to the traditional court system. With globalisation and an increasing number of cross-border transactions, the significance of a robust arbitration regime cannot be overstated. However, despite significant progress in recent years, the Indian arbitration landscape still faces various challenges that hinder its efficiency and effectiveness. In this section, the author aims to explore and propose legislative and policy changes necessary to fortify India's arbitration framework, thereby fostering a more conducive environment for arbitration proceedings.

India's journey in establishing a modern arbitration regime can be traced back to the enactment of the Arbitration and Conciliation Act in 1996, which was largely based on the UNCITRAL Model Law. While this legislation marked a significant milestone in promoting arbitration as a preferred method of dispute resolution, subsequent developments have revealed certain lacunae and shortcomings that call for immediate attention.

As we have understood above, while the legal framework in India acknowledges, accepts, and implements arbitral awards passed in foreign jurisdictions as well as judgments pronounced by courts of law outside the country, there do exist certain issues with this regime. A few of the shortcomings are:

1. **Lack of uniformity:** Though legislation made by the Indian Parliament is applicable with reference to the subject matter, there is no uniformity with reference to the procedures adopted by different courts in different states, owing to amendments carried out in procedural law by state governments. It is difficult for foreign parties to get clarity on the different procedural rules applicable in courts in different states in India. It, therefore, becomes cumbersome to understand the applicable laws in detail so as to incorporate the same into the concerned

contracts with precision. This is a non-attractive feature so far as issues pertaining to international commercial aspects are concerned.

2. **Lack of comprehensive reciprocal arrangements:** As seen in the discussion above, Indian law is not applicable to all arbitral awards but only to a select few types of foreign arbitral awards and foreign judgments that have been specified in the respective legislation. Further, as can be seen from the notification issued by the Government of India stating the reciprocating territories, there are only a handful of countries recognised as such. In such a scenario, bilateral treaties may be relied upon. However, India does not have such arrangements with many countries, and issues arise with respect to recognition and enforcement of foreign awards and judgments passed in those countries.

3. **Lengthy arbitral proceedings and the adoption of dilatory tactics:** One of the foremost issues plaguing India's arbitration framework is the protracted nature of arbitration proceedings. Lengthy timelines not only undermine the efficiency of the process but also deter parties from opting for arbitration over traditional litigation. Moreover, the proliferation of frivolous challenges and dilatory tactics often prolongs the resolution of disputes, defeating the very purpose of arbitration as a quick and cost-effective means of settling disputes.

4. **Composition and functioning of the Arbitral Tribunal:** Arbitrators play a pivotal role in resolving disputes impartially and efficiently, and their qualifications, integrity, and ethical conduct are paramount to maintaining trust in the arbitration system. The composition and functioning of arbitral tribunals merit closer scrutiny. While the Act provides parties with the autonomy to appoint arbitrators of their choice, concerns regarding impartiality, independence, and competence have been raised in numerous instances.

5. **Systemic issues:** In addition to the several legislative gaps and lacunae plaguing the arbitration regime in India, there are several systemic issues as well, such as infrastructure constraints and procedural inefficiencies that mar the overall efficacy of India's arbitration regime.

6. **Long and complex procedures in courts:** The court procedure in India is lengthy, time-consuming and requires the filing of multiple documents in courts. This is accentuated by delays in the Indian legal system. While taking steps to enforce foreign judgments in India, these delays and complex procedural rules cause an impediment for parties, all of whom may not be financially and legally sound enough to bear the burden caused as a result.

7. **Rejection owing to public policy considerations**: Indian courts may refuse to acknowledge and/or implement arbitral awards passed in foreign jurisdictions if the said awards are contrary to India's public policy. The same applies for the acknowledgment and enforcement of judgments pronounced by courts in foreign jurisdictions. The term 'public policy' is neither precisely defined nor is there a definite and specific interpretation uniformly applicable to it. As such, it is subject to interpretation, which means it is prone to varying definition by different fora, and thus, there could be a lack of uniformity in the outcome of a suit for enforcement based on the forum before which the suit is preferred.

SUGGESTIONS

Having dealt with the subject in depth and considering the issues identified while conducting the present study, the following suggestions are offered for improvement of the dispute resolution and enforcement scenario:

1. **Tackling the issues of reciprocity:** Attempts may be made to expand the scope of reciprocal arrangements with as many nations as possible in order to make India a preferred destination for international commercial enterprises, not just from a business perspective but also from a legal point of view.

2. **Tackling lengthy proceedings and deliberate delays:** Addressing the issue of prolonged arbitration proceedings before arbitral tribunals in India requires a comprehensive approach that combines legislative reforms, policy changes, and procedural innovations. By implementing carefully delineated statutory time limits as against an overall limitation period, employing case management techniques, leveraging technology, introducing expedited procedures, providing incentives for efficiency, and ensuring judicial support with minimal interference, India can foster a more efficient and effective arbitration regime that promotes timely resolution of disputes and enhances investor confidence. Here are several key strategies:

   a. **Statutory time limits and expedited procedures**:

      In the recent past, though attempts have been made to minimise the duration of arbitral proceedings and the passing of awards within the prescribed time limit, there still remains a possibility of introducing further statutory time limitations. For instance, prescribed time limitations for different stages of arbitration proceedings can help mitigate the problem of prolonged proceedings. This could include setting deadlines for the appointment of arbitrators, submission of pleadings, exchange of evidence, and issuance of awards. By imposing time constraints, parties and arbitrators would be encouraged to

manage the proceedings more efficiently, thereby reducing unnecessary delays. Introducing expedited procedures for smaller or less complex disputes can help fast-track arbitration proceedings. This could involve simplified procedural rules, limited rounds of submissions, and shorter timeframes for the resolution of disputes. Expedited procedures would be particularly beneficial for addressing straightforward matters promptly, thereby freeing up resources for more complex cases.

b. Preventative measures:

Implementing measures to identify and address potential dilatory tactics at the outset of arbitration proceedings can help prevent delays and ensure the efficient resolution of disputes. This can include requiring parties to submit detailed case management plans outlining the steps they intend to take to advance the arbitration process, as well as providing for pre-arbitral conferences where procedural issues can be discussed and resolved. By proactively addressing potential sources of delay, parties can be encouraged to engage in the arbitration process in good faith.

c. Case management techniques:

Implementing case management techniques, such as pre-arbitral conferences and procedural orders, can expedite arbitration proceedings. Pre-arbitral conferences could play a crucial role in streamlining arbitral proceedings by providing parties and arbitrators with an opportunity to discuss key procedural issues upfront. During these conferences, parties can identify and narrow down the scope of disputes, establish timelines, agree on procedural rules, and address any preliminary matters. By facilitating open communication and consensus-building, pre-arbitral conferences could help streamline the arbitration process, reduce the likelihood of disputes arising during proceedings, and set clear expectations for all parties involved. Moreover, these conferences would also enable arbitrators to proactively manage the proceedings, identify potential areas of contention, and establish a framework for efficient case management, ultimately leading to a faster and more cost-effective resolution of disputes.

d. Use of technology:

Introducing and embracing formalised filing technological solutions could significantly expedite arbitration proceedings. Electronic document management systems can significantly expedite arbitral proceedings by streamlining the process of handling and accessing documents. It would be useful for the centralised storage and organisation of all case-related documents in digital format, eliminating the need for physical paperwork and facilitating easy retrieval of information, thereby reducing the time and resources spent on manual document management tasks such as sorting, filing, and transporting documents. Further, such technological solutions would enable efficient sharing and exchange of documents among parties, arbitrators, and other stakeholders through secure online platforms. Parties can electronically submit pleadings, evidence, and submissions, while arbitrators can access these documents remotely, regardless of their location and, as a consequence, eliminate delays associated with postal services or physical delivery, ensuring timely receipt and review of documents. Moreover, such solutions can also include features such as version control, audit trails, and document tracking, which enhance transparency and accountability throughout the arbitration process. Parties could, thus, track the progress of document submissions, monitor changes made to documents, and maintain a clear record of communication, thereby reducing the risk of disputes and facilitating efficient resolution of procedural issues. This could further help speed up the arbitration process.

e. Sanctions and Costs:

Empowering arbitrators with the authority to impose sanctions or costs on parties for engaging in dilatory tactics can serve as an effective deterrent. This can include ordering the payment of costs incurred as a result of delays, as well as imposing fines or penalties on parties found to have acted in bad faith. Clear guidelines outlining the circumstances under which sanctions may be imposed can provide arbitrators with the necessary discretion to address dilatory tactics while ensuring due process and fairness.

3. **Composition and functioning of the Arbitral Tribunal:** A robust mechanism for the vetting and appointment of arbitrators, coupled with stringent ethical standards, is essential to ensuring the integrity and fairness of the arbitration process. By selecting qualified arbitrators, promoting impartiality and independence, establishing a code of conduct, providing training and education, ensuring accountability and oversight, and promoting transparency and disclosure, the mechanism shall uphold ethical principles, safeguard parties' rights, and maintain trust in the arbitration system. Ultimately, these measures would contribute to the effectiveness and legitimacy of arbitration as a means of resolving disputes. Below is how such a mechanism can safeguard the integrity and fairness of the arbitration process:

   a. **Qualifications and experience**:

      A rigorous vetting process would ensure that arbitrators possess the requisite qualifications, expertise, and experience to adjudicate disputes effectively. By establishing criteria for arbitrator selection based on legal knowledge, subject matter expertise, and practical experience, the mechanism can ensure that arbitrators are well-equipped to understand the complexities of the dispute and render informed decisions.

   b. **Impartiality and Independence**:

      Ethical standards mandate that arbitrators remain impartial and independent throughout the arbitration process. By requiring arbitrators to disclose any conflicts of interest or relationships that may compromise their neutrality, the mechanism will promote transparency and ensure that parties have confidence in the integrity of the decision-making process. Additionally, provisions for challenging arbitrators and replacing them in cases of bias or lack of independence would further safeguard against partiality and ensure fairness.

   c. **Code of conduct:**

      Establishing a formalised and well-defined code of conduct for arbitrators would set forth clear ethical principles and guidelines governing their behaviour

and decision-making. This code could typically include provisions regarding impartiality, independence, confidentiality, and the avoidance of conflicts of interest. Adherence to the code of conduct would reinforce the integrity of the arbitration process and instil confidence in parties that their rights would be protected and their disputes would be resolved fairly.

d. Accountability and Oversight:

A robust mechanism for vetting and appointing arbitrators would include mechanisms for accountability and oversight to ensure compliance with ethical standards. Oversight bodies or professional associations may monitor arbitrator conduct, investigate complaints of ethical misconduct, and impose sanctions or disciplinary measures for violations of the code of conduct. Accountability mechanisms would demonstrate a commitment to upholding ethical standards and deter arbitrators from engaging in behaviour that undermines the integrity of the arbitration process.

e. Transparency and Disclosure:

Transparency in the arbitrator selection process and the disclosure of relevant information would promote accountability and foster trust in the arbitration system. Parties should be provided with information about the selection criteria, qualifications, and background of potential arbitrators to make informed decisions. Similarly, arbitrators should disclose any relationships, interests, or affiliations that could give rise to conflicts of interest or raise doubts about their impartiality. Transparent processes and full disclosure will enhance the legitimacy and credibility of the arbitration process.

4. Addressing systemic issues: In addition to the legislative amendments that are required to handle the issues plaguing the arbitration regime in India, addressing systemic issues such as infrastructure constraints and procedural inefficiencies is pivotal for enhancing the overall efficacy of India's arbitration regime.

a. **Investing in specialised arbitration institutions:**

Investing in specialised arbitration institutions is crucial for strengthening the arbitration regime in India by addressing various systemic challenges and

enhancing the overall efficiency, credibility, and attractiveness of arbitration as a preferred mode for resolving commercial disputes. By providing institutional support, infrastructure, and services tailored to the needs of parties involved in arbitration, these institutions can play a pivotal role in promoting the use of arbitration, fostering investor confidence, and positioning India as a leading destination for arbitration in the global arena.

- Specialised arbitration institutions play a crucial role in providing the institutional support and infrastructure necessary for the smooth conduct of arbitration proceedings. By investing in state-of-the-art facilities, including well-equipped hearing rooms, technological resources, and administrative support, these institutions can create a conducive environment for parties to resolve their disputes efficiently and effectively. Such infrastructure not only facilitates the conduct of arbitration proceedings but also enhances the perception of arbitration as a reliable and professional dispute resolution mechanism.

- Specialised arbitration institutions offer a range of services tailored to the needs of parties involved in arbitration, thereby enhancing the overall user experience. These services may include case management assistance, the appointment of arbitrators, the provision of procedural rules, and administrative support throughout the arbitration process. By streamlining administrative procedures and providing guidance to parties, these institutions can help expedite arbitration proceedings and reduce the burden on disputing parties, thereby making arbitration a more attractive option for resolving disputes.

- Specialised arbitration institutions often house panels of experienced arbitrators and mediators with expertise in various fields, thereby ensuring the appointment of qualified and impartial decision-makers. By maintaining a comprehensive list of accredited arbitrators and mediators specialised in diverse fields, these institutions can facilitate the appointment process and help parties identify suitable arbitrators based on their expertise, experience, and qualifications who could be better-suited for dealing with and resolving disputes of a particular nature. This not only enhances the quality of arbitral tribunals but also instils confidence in the integrity and fairness of the arbitration process.

- Specialised arbitration institutions can play a pivotal role in promoting best practices and standards in arbitration through the development of model clauses, guidelines, and codes of conduct. By disseminating information and raising awareness about arbitration-related issues, these institutions can contribute to the professionalisation of arbitration practice and foster a culture of excellence among practitioners, arbitrators, and other stakeholders. This, in turn, enhances the credibility and reputation of arbitration as a preferred method for resolving commercial disputes.

- Specialised arbitration institutions can serve as focal points for the development and dissemination of arbitration-related research, training, and education. By organising seminars, workshops, and training programmes on arbitration law and practice, these institutions can contribute to the capacity-building efforts aimed at enhancing the competence and skills of arbitration practitioners, legal professionals, and judges. This would not only aid and promote a better understanding of arbitration principles and procedures but would also ensure the availability of qualified professionals to meet the growing demand for arbitration services in India.

b. **Promoting the use of technology for streamlining arbitral processes:**

- While certain aspects of this issue have already been deliberated upon in earlier sections of this study, we shall now emphasise promoting the use of technology for streamlining the arbitral procedures in India in several ways. Electronic filing systems enable parties to submit documents and pleadings digitally, reducing paperwork and streamlining administrative processes. This not only saves time and resources but also facilitates efficient communication between parties and arbitrators.

- Virtual hearings and video conferencing platforms allow for remote participation in arbitration proceedings, eliminating the need for physical attendance and reducing logistical challenges. This enables parties, witnesses, and experts to participate from anywhere in the world, facilitating the timely resolution of disputes without the constraints of geographical limitations.

- Electronic document management systems centralise the storage and organisation of case-related documents, making it easier for parties and arbitrators to access and review information. Features such as search functions and version control further enhance efficiency by simplifying document retrieval and tracking changes.

- The use of technology can expedite the exchange of evidence and streamline the presentation of arguments during hearings. Presentation tools, such as electronic exhibits and multimedia presentations, enhance the clarity and effectiveness of presentations, thereby facilitating a more focused and efficient arbitration process.

- Overall, promoting the use of technology in arbitral procedures in India improves accessibility, enhances communication, and accelerates the resolution of disputes, ultimately contributing to a more efficient and effective arbitration system.

c. Streamlining procedural rules:

Streamlining procedural rules is crucial to fostering further growth of arbitration in India by expediting arbitration proceedings, enhancing efficiency, reducing associated costs, and promoting user satisfaction. Procedural rules form the backbone of arbitration proceedings, governing the conduct of parties, arbitrators, and other stakeholders. However, overly complex or burdensome procedural requirements can hinder the effectiveness of arbitration as a dispute resolution mechanism. Therefore, it is essential to streamline procedural rules to make arbitration more accessible, efficient, and attractive to parties seeking timely and cost-effective resolution of their disputes.

- **Clear and Concise Provisions**: One of the primary objectives of streamlining procedural rules is to ensure that they are drafted in a clear and concise manner. Clear and understandable rules enable parties, arbitrators, and other stakeholders to navigate the arbitration process effectively, minimising confusion and procedural disputes. Ambiguous or overly complex provisions can lead to unnecessary delays and increased costs as parties struggle to

interpret and apply the rules correctly. Therefore, procedural rules should be drafted in plain language, avoiding unnecessary legal jargon or technical terminology. Additionally, provisions should be structured logically and sequentially to facilitate easy reference and understanding.

- **Flexibility and Adaptability**: Streamlined procedural rules should adopt a flexible approach that allows for the adaptation of procedures to suit the specific needs and circumstances of each dispute. Arbitration is prized for its flexibility and ability to tailor procedures to the unique characteristics of individual cases. Therefore, procedural rules should provide parties and arbitrators with the discretion to customise procedures based on factors such as the complexity of the dispute, the amount in controversy, and the preferences of the parties. By allowing for flexibility and adaptability, streamlined procedural rules ensure that arbitration remains a responsive and efficient method of dispute resolution that can accommodate a wide range of disputes and party preferences.

- **Proportionality and Cost-Effectiveness**: Procedural rules should promote proportionality and cost-effectiveness by avoiding unnecessary or disproportionate procedural requirements. Complex and time-consuming procedures can significantly increase the cost of arbitration and deter parties from choosing arbitration as a means of resolving their disputes. Therefore, streamlined procedural rules should focus on achieving a fair and efficient resolution of disputes while minimising unnecessary procedural delays and expenses. Proportionality principles should be embedded in the rules to ensure that procedures are commensurate with the complexity and value of the dispute. Additionally, procedural rules should encourage parties to adopt cost-effective measures such as limiting the scope of discovery, avoiding unnecessary motions and applications, and promoting the use of alternative dispute resolution mechanisms where appropriate.

- **Expedited Procedures for Small Claims**: Introducing expedited procedures for small claims or disputes of low value can further streamline arbitration proceedings and make them more accessible to a wider range of parties.

Expedited procedures typically involve simplified procedural rules, shorter timeframes for resolving disputes, and limitations on the scope of evidence and arguments. By expediting the resolution of smaller disputes, streamlined procedural rules encourage parties to opt for arbitration as a cost-effective and efficient alternative to traditional litigation. Expedited procedures should be designed to strike a balance between efficiency and fairness, ensuring that parties have an adequate opportunity to present their case while avoiding unnecessary delays and expenses.

- **Technology Integration with a focus on Cyber Security**: Streamlining procedural rules involves embracing technology to facilitate the conduct of arbitration proceedings. Electronic filing systems, virtual hearings, and online case management platforms can streamline administrative processes, reduce paperwork, and enhance communication between parties and arbitrators. By leveraging technology, streamlined procedural rules make arbitration more accessible, efficient, and responsive to the needs of modern users. Technology integration should be accompanied by robust cyber security measures to protect sensitive information and ensure the confidentiality of arbitration proceedings. Additionally, procedural rules should provide clear guidance on the use of technology and establish standards for electronic communication and evidence submission.

- **Transparency and Predictability**: Procedural rules should promote transparency and predictability in arbitration proceedings by establishing clear timelines, deadlines, and procedural milestones. Transparent procedures ensure that parties are aware of their rights and obligations throughout the arbitration process, while predictable outcomes enhance confidence in the arbitration system. Streamlined procedural rules should provide parties with clear guidance on the steps involved in the arbitration process, including the submission of pleadings, the exchange of evidence, and the scheduling of hearings. Additionally, procedural rules should establish deadlines for key procedural milestones and empower arbitrators to enforce compliance with these deadlines.

d. Promoting arbitration by raising awareness, building capacity and introducing benefits:

Fostering a culture of arbitration requires concerted efforts to raise awareness and build capacity among legal practitioners, the judiciary, and businesses. Training programmes, workshops, and educational initiatives aimed at familiarising stakeholders with the nuances of arbitration and its advantages can play a crucial role in promoting its wider adoption. Promoting and strengthening arbitration in India would require a multifaceted approach that encompasses raising awareness, capacity building, and introducing benefits to incentivize parties to choose arbitration as their preferred method of dispute resolution. Here are several key steps that can be taken to achieve these objectives:

- **Educational Campaigns and Outreach Programmes**: Launching educational campaigns and outreach programmes aimed at legal professionals, businesses, government officials, and the general public can raise awareness about the benefits of arbitration and its role in dispute resolution. These campaigns can include seminars, workshops, webinars, and conferences organised by government agencies, arbitration institutions, bar associations, and industry bodies. Additionally, targeted outreach efforts through social media, print media, and other communication channels can help reach a wider audience and generate interest in arbitration.

- **Training and Capacity Building Programmes**: Implementing training and capacity building programmes to enhance the skills and knowledge of arbitration practitioners, including arbitrators, lawyers, and other professionals, is crucial for building a robust arbitration ecosystem in India. These programmes can cover various aspects of arbitration, including procedural rules, case management techniques, evidence presentation, and decision-making skills. Training sessions can be conducted by experienced arbitrators, legal scholars, and industry experts, either through in-person workshops or online courses. Additionally, specialised training programmes can be developed for judges and court personnel to improve their understanding of arbitration principles and procedures.

- **Promotion of Arbitration Clauses**: Encouraging parties to include arbitration clauses in their contracts can help promote the use of arbitration as a means of resolving disputes. Arbitration clauses can be incorporated into various types of contracts, including commercial agreements, construction contracts, and international transactions. To facilitate the adoption of arbitration clauses, awareness campaigns can highlight the advantages of arbitration, such as confidentiality, flexibility, and the expertise of arbitrators. Additionally, model arbitration clauses endorsed by arbitration institutions or professional associations can be made available to parties to streamline the drafting process and ensure compliance with best practices.

- **Incentives for Arbitration Adoption**: Introducing incentives for parties to opt for arbitration over traditional litigation can help promote the use of arbitration and strengthen its role in dispute resolution. These incentives can take various forms, including tax benefits, expedited procedures, reduced filing fees, and cost recovery mechanisms. Government agencies and arbitration institutions can collaborate to offer incentives tailored to the needs of different sectors and industries, thereby encouraging parties to choose arbitration as a cost-effective and efficient alternative to court litigation.

- **Promotion of Institutional Arbitration**: Promoting the use of institutional arbitration, where arbitration proceedings are administered by recognised arbitration institutions, can enhance the credibility and efficiency of arbitration in India. Institutional arbitration offers several advantages, including access to institutional support, the appointment of arbitrators, and the administration of proceedings according to established rules and procedures. Awareness campaigns can educate parties about the benefits of institutional arbitration and highlight the services offered by leading arbitration institutions in India, such as case management, the appointment of arbitrators, and facilities for hearings.

- **Collaboration with International Organisations**: Collaborating with international organisations, such as the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of

Commerce (ICC), and the International Centre for Settlement of Investment Disputes (ICSID), can facilitate knowledge sharing and capacity building in the field of arbitration. India can participate in training programmes, conferences, and workshops organised by these organisations to learn from global best practices and exchange experiences with other jurisdictions. Additionally, collaboration with international arbitration institutions can help promote India as a preferred seat for arbitration and attract foreign parties to choose Indian law and institutions for their disputes.

- **Creation of Specialised Arbitration Centers**: Establishing specialised arbitration centres in key commercial hubs across India can provide a dedicated platform for the resolution of domestic and international disputes. These centres can offer state-of-the-art facilities, including hearing rooms, mediation suites, and conference facilities, to accommodate arbitration proceedings of varying sizes and complexities. By providing a conducive environment for arbitration, specialised centres can attract parties seeking efficient and effective dispute resolution services and contribute to the growth of arbitration in India.

- **Promotion of Online Dispute Resolution (ODR)**: Embracing online dispute resolution mechanisms can enhance access to justice and promote the use of arbitration as a convenient and cost-effective means of resolving disputes. Online dispute resolution platforms can facilitate the resolution of disputes through mediation, arbitration, and negotiation conducted online, thereby reducing the need for physical hearings and streamlining the dispute resolution process. Awareness campaigns can educate parties about the benefits of online dispute resolution and promote the use of online platforms for resolving disputes in a timely and efficient manner, while also being cost-effective.

- **Enhanced Court Support for Arbitration**: Improving the supportive infrastructure and judicial attitude towards arbitration can bolster confidence in the arbitration process and promote its growth in India. This can be achieved through specialised arbitration benches in the courts, dedicated arbitration

divisions, and training programmes for judges on arbitration law and practice. While the Commercial Courts Act, 2015, has created specialised courts and divisions to specifically deal with commercial disputes, these courts have been overburdened, and the timely resolution of cases filed before them is a far cry. From every-day experience, it can be seen that these courts and divisions have been functioning in a similar manner to the other courts, thereby defeating the objective of their creation. It is necessary to enhance the number of these specialised courts and ensure that an adequate number of specially trained judges are placed in these commercial courts for the purpose of speedy resolution and conclusion of cases. Further, their establishment at a level lower than the High Court could also be explored. Additionally, establishing fast-track procedures for the enforcement of arbitral awards and judicial support for interim measures can enhance the effectiveness of arbitration and make it a more attractive option for parties seeking timely resolution of their disputes.

- **Public-Private Partnerships**: Encouraging public-private partnerships for the promotion and development of arbitration infrastructure and services can leverage the resources and expertise of both government agencies and private sector stakeholders. Public-private partnerships can involve collaborations between government bodies, arbitration institutions, law firms, industry associations, and corporate entities to develop arbitration centres, training programmes, and promotional activities. By harnessing the strengths of public and private sector partners, public-private partnerships can accelerate the growth of arbitration in India and position the country as a leading destination for dispute resolution in the region.

5. **Addressing court procedures and promoting the working of the business, political, and legal networks in tandem:** By ensuring that the business, political, and judicial networks work in tandem while strictly upholding the principles of justice and fairness, India can promote itself as an attractive jurisdiction from an international perspective. This will also provide adequate security to the individuals seeking justice by mitigating factors that prolong justice delivery.

6. **Addressing issues pertaining to rejection owing to public policy considerations**: Guidelines for interpreting the term 'public policy' may be laid down so that this exception is not misused and used only in exceptional cases where enforcement may genuinely affect the principles of the Indian legal system. Setting down specific standards for determining what constitutes 'public policy' shall also, in turn, aid in the uniform handling of such cases before the courts of law in India, irrespective of the state or forum it is being attempted to be recognised and enforced in.

7. **Enactment of a comprehensive law**:

   The need of the hour is to enact clear and comprehensive legislation dealing with the recognition and enforcement of both foreign arbitral awards and foreign judgments in India. This will lay down the principles in one place.

8. **Constant harmonisation with international best practices:**

   India should constantly study the evolving position internationally through a study of foreign judgments, the law in foreign countries, and the rules of some of the best arbitration centres. This will enable understanding and consolidation of the best practices, which may be considered for incorporation in Indian law.

CONCLUSION

It may be stated that though the above shortcomings exist, it cannot be denied that the Indian Parliament and courts have made efforts to address them. While the Parliament amended the Arbitration and Conciliation Act to bring it in alignment with international best practices and also introduced the Commercial Courts Act, the judiciary has provided more clarity through its consistent interpretation of law.

Another significant step taken for easing and making effective the acknowledgment and implementation of arbitral awards passed in foreign jurisdictions in India is the amendment to the Arbitration and Conciliation Act, 1996, by way of an amendment in 2021. Before the modification made by way of an amendment, it was permissible for any party to file an application under Section 34 for the purpose of reversing, that is, setting aside an arbitral award, and courts interpreted this to mean that a stay on the order was automatically granted immediately upon the submission of such an application.

However, pursuant to the amendment made in the year 2015, it is clearly specified that there would be no automatic stay immediately upon filing of the application for setting aside the arbitral award. As such, this amendment clarified that there were narrower grounds for the purpose of putting a stay on an arbitral award. As per the modified legal provision, an award pronounced by an arbitral tribunal could be set aside only based on a few specific and identified reasons. The law provides that the permissible reason for setting aside an arbitral award is only when the said award is induced by fraudulent or corrupt practices. By stating or providing so, an attempt has been made to remove one of the major roadblocks to the implementation of awards.

Further, it is also seen that the courts in India have generally been pro-enforcement. The courts are likely to take a negative stand only in situations where the decree that is pronounced is contrary to the law and public policy in India. This aspect is to be strengthened further with adequate support from the government. If the vision to see India as a preferred destination or seat for arbitration is to be achieved, it will require

government support in setting up dispute resolution institutions and strengthening the legal provisions further, along with the judiciary adopting a consistent pro-enforcement approach and continuing respect for the rule of law. We may look towards neighbourhood jurisdictions such as Singapore to adopt the best practices put into action by them and to learn from their experience to formulate India-specific strategies.

In conclusion, while India has made significant strides in promoting arbitration as a preferred mode of dispute resolution, there remains considerable room for improvement. This monograph endeavours to identify key legislative and policy reforms essential for strengthening India's arbitration regime and positioning it as a leading destination for arbitration in the global arena. By addressing the identified challenges, adopting a few changes as suggested above, and harnessing the potential of arbitration, India can unlock new avenues for economic growth, foster investor confidence, and bolster its reputation as a business-friendly jurisdiction.

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4 *This issue may be understood further from the judgment of the Hon'ble Supreme Court of India in the case of* **Cox and Kings Limited *v.* SAP India Private Limited and Ors.**, *Arbitration Petition (Civil) No. 38 of 2020 decided on 06.05.2022*

5 **Arenson *v.* Casson Beckman Rutley& Co.**, *[1977] AC 405*

6 *This issue may be further understood from the judgment rendered by the Hon'ble Supreme Court of India in the case of* **Nahar Industrial Enterprises Limited *v.* Hong Kong and Shanghai Banking Corporation**, *(2009) 8 SCC 646 observed that: "It may however be noticed in this regard that just because the Tribunal is not bound by* the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice.*"*

7 *(2014) 9 SCC 263*

8 "ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges" *(2011) p. XI, available at: https://icac.org.ua/wp-content/uploads/ICCAs-Guide-to-the-Interpretation-of-the-1958-New-York-Convention-A-Handbook-for-Judges-2.pdf, last visited on February 17, 2024*

9 *The India section of the New York Convention Guide, available at: https://newyorkconvention1958.org/ index.php?lvl=cmspage&pageid=11&menu=581&opac_view=-1 last accessed on March 23, 2024 provides that India will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State. India will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.*

10 **Leede *v.* Ceramiche Ragno**, *684 F 2d 184 at 187*

11 *These defenses are mentioned under Article V of the Convention.*

12 *www.uncitral.org*

13 *This is provided in the Preamble to the Act.*

14 *The text of the award is available at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/378/white-industries-v-india, last visited on March 15, 2024.*

15 *Ameen Jauhar and Vaidehi Misra, "*Commercial Courts Act, 2015: An Empirical Impact Evaluation*", Vidhi Centre for Legal Policy, available at https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital _10June_noon.pdf, last visited on February 15, 2024*

16 *The Law Commission was disturbed by the observations of the Courts in US and UK in this regard (US courts in* **Shin-estu Chemical *v.* ICICI Bank** *(Supreme Court of New York, 2003);* **Bhatnagar *v.* Surendra Overseas Ltd**. *(1995) 52 F. 2.d 1220 (3rd Cir), and* **Modi Enterprises *v.* ESPN Inc** *and UK courts in* **European Asian Bank *v.* Punjab & Sind Bank** *(1982) 2 Lloyds' Report (CA); and* **The VishvaAbha** *(1990) 2 Lloyd's Report 312).*

17 *710 F 2d 929*

18 *In the case of* **Lander Company, Inc. *v.* MMP Investments, Inc.,** *107 F.3d 476, the Court clearly applied the Convention, noting in this respect that* Lander *differed from* Bergesen *case only in so far as the nationality of the parties was concerned and that this difference was irrelevant for the determination of the case. The decision was same as the one in* Bergesen.

19 *517 F.Supp 948*

20 Id.*at 968*

21 *Another case into consideration could be* **QH Tours Ltd *v.* Ship Design & Management (Australia) Pty Ltd.** *(1991) 105 ALR 371 wherein Foster, J observed: "*I am not satisfied that there is any rule of law which prohibits the empowering of an arbitrator to decide the initial validity of the contract containing the arbitration clause... I consider that, generally speaking, it [the arbitration clause] can be regarded as severable from the main contract with the result that, logically, an arbitrator, if otherwise empowered to do so, can declare the main contract void ab initio without at the same time destroying the basis of his power to do so.*"*

22 *(2019) 11 SCC 620*

23 *1994 Supp (1) SCC 644*

24 *(2003) 5 SCC 705*

25 *In the case of* **Phulchand Exports Ltd. *v.* O.O.O.Patriot,** *(2011) 10 SCC 300, the Court examined the nature of transaction between the parties and ultimately dismissed the appeal by observing as follows: "*Whether particular transaction is contrary to a public policy would ordinarily depend upon the nature of transaction. Where experienced businessmen are involved in a commercial contract and the parties are not of unequal bargaining power, the agreed terms must ordinarily be respected as the parties may be taken to have had regard to the matters known to them. Having regard to the subject matter of the contract, the clause for reimbursement or repayment in the circumstances provided therein is neither unreasonable nor unjust; far from being extravagant or unconscionable…The Arbitral Tribunal has only awarded reimbursement of half the

price paid by the buyers to the sellers and, therefore, the award cannot be held to be unjust, unreasonable or unconscionable or contrary to the public policy of India." *[Emphasis Supplied]*

Further, the judgment in **Shri Lal Mahal Ltd. *v.* Progetto Grano Spa**, *(2014) 2 SCC 433 is interesting because though it was authored by the judge who also authored the* Phulchand *(*Supra.*) judgment, the Court was inclined to relook at its previous judgment in* Phulchand *(*Supra.*). The Court distinguished between the proceedings for setting aside an award and proceedings for enforcement of an award. While in the former, the award is not conclusive and enforceable, it is binding in the latter case for enforcement.*

According to the Court, the definition of 'public policy' cannot be applied in the same manner in both the proceedings for setting aside an arbitral award and proceedings for enforcement. Thus, the Court followed its decision in Renusagar *(*Supra.*) and held that enforcement of a foreign award can be opposed on the ground of public policy when the award is contrary to:*

a. *Fundamental policy of Indian law;*

b. *The interest of India; and*

c. *Justice and morality.*

The Court explicitly and clearly repelled a challenge to enforcement on the ground of patent illegality of the award. Thus, in this case, which had arisen from a request for enforcement of a foreign award and wherein it was prayed that the foreign award not be enforced, the Court was of the opinion that examining the merits of the matter would not be permissible at the enforcement stage. As a result, the Court directed that the foreign award be enforced.

This judgment reflects the restrictive approach of Courts when enforcement of an award is challenged. This judgment was welcome after confusion created by the judgment in Phulchand *(*Supra.*).*

In yet another case of **Oil and Natural Gas Corporation *v.* Western Geco International Limited**, *(2014) 9 SCC 263, the Hon'ble Supreme Court while determining whether a Court can sit in appeal over the arbitral award pronounced by a foreign arbitral tribunal? Western Geco contended that Section 34 of the Arbitration and Conciliation Act, 1996 did not permit courts to interfere with or sit in appeal over an arbitral award given by an arbitral tribunal. However, the Hon'ble Supreme Court rejected this contention and allowed ONGC to deduct liquidated damages. In this decision, the Court decided that an arbitral tribunal could be held in contempt of court for failing to draw a conclusion that it should have drawn or for drawing a conclusion that is, at least in theory, incorrect. Thus, in this matter, the Court rejected Western Geco's contention pertaining to non-interference and modified the amount that ONGC could deduct as liquidated damages.*

In the case of **Cruz City 1 Mauritius Holdings *v.* Unitech Limited,** *2017 SCC OnLine Del 7810 the Hon'ble Delhi High Court observed that whether the award was recognizable and enforceable in India or not cannot be decided by the arbitral tribunal. It could be done only by the courts in India…though the width of the discretion to decide on enforceability of a foreign award is narrow and limited, but if sufficient grounds are established, the court is not precluded from rejecting the request for declining enforcement of a foreign award. This decision was approved by the Hon'ble Supreme Court in* **Vijay Karia *v.* Prysmian Cavi E Sistemi SRL**, *(2020) 11 SCC 1.*

Further, through its judgment in **Ssangyong Engineering & Construction Co. Ltd. *v.* National Highways Authority of India,** *(2019) 15 SCC 131, the Hon'ble Supreme Court:*

a. *Clarified the scope of the ground of public policy for setting aside an arbitral award after amendment to the Arbitration and Conciliation Act, 1996 in 2015;*
b. *Affirmed that the 2015 amendment is prospective in application; and*
c. *Adopted a certain approach towards dealing with or recognizing minority awards.*

26 *(2003) 8 SCC 565*

27 *(2018) SCC Online 147*

28 *174 (2009) DLT 391*

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34 **International Woollen Mills *v.* Standard Wool (UK) Ltd**, *(2001) 5 SCC 265*

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40 *(1975) 1 SCC 120*

41 *"Martin Wolff,* Private International Law", *p. 11, 2ndEdn., Clarendon Press, Oxford (1950)*

42 *(1963) 3 SCR 22*

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44 *In the case of* **Ramanathan Chettiar & Anr. *v.* Kalimuthu Pillai & Anr,** *(1912) SCC OnLine Mad 35, the Madras High Court held that the circumstances which give jurisdiction to a court are, alternatively, the following:*

a. *Where the defendant is a subject of the foreign country whose court passed the judgment;*

b. *Where the defendant was a resident in the foreign country when the action was initiated;*

c. *Where the defendant, in his character as plaintiff, chose the foreign jurisdiction in which he is subsequently sued;*

d. *Where the defendant has voluntarily appeared before the foreign court;*

e. *Where the defendant had contracted to submit himself to the forum which delivered the judgment.*

Further, in the case of **Y. Narasimha Rao & Anr. *v.* Y. Venkata Lakshmi,** *(1991) 3 SCC 451 The Court relied on its decision in* Satya *v.* Teja Singh *(*Supra.*) in this regard. The Court further interpreted Section 13 of the Code of Civil Procedure, 1908 to deduce a rule for recognizing foreign judgments in matrimonial matters in India. According to this rule, the authority exercised by the foreign court and the justifications for the relief given to the party before it ought to be applicable and for it to be so, it must be in compliance with the law applicable to their marriage at the time when the marriage between the parties was solemnized, in order for the foreign judgment to be recognized.*

Certain exceptions to this rule were also recognized by the Court and they are as under:

a. *When a divorce is sought on the grounds permitted by the matrimonial law under which the marriage between the parties was solemnized and the action is brought in the jurisdiction where the respondent is domiciled or habitually resident;*

b. *When though the respondent voluntarily submits to the jurisdiction of the court in a foreign jurisdiction, the respondent disputes the claim made by the appellant based on a defence available under the matrimonial law of the jurisdiction where the marriage was solemnized;*

c. *Where the respondent agrees to the decision pronounced by the foreign court despite the fact that the jurisdiction of the said does not follow and comply with the laws, rules, regulations and norms of the matrimonial law which was applicable to the marriage between the parties.*

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