CHAPTER 8

Practical lacunae in international trade laws: need for a wholesome approach

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8.1 International Context

International commercial dispute resolution over the past decade has undergone substantial change and International Commercial Arbitration is being preferred more over the traditional court-based litigation. The two most significant factors that contribute to the rapid growth of International Commercial Arbitration are the relative efficiency and cost effectiveness. It is a well known fact that the attributes associated with any arbitration procedure are:

1. Cost effectiveness
2. Comparative flexibility
3. Speedy Recourse
4. Secrecy
5. More often than not the arbitrators are persons who have direct knowledge of the technicalities of the case on hand which a Judge may or may not have.

The same above attributes can also be associated with International Commercial Arbitration, thus making it a very acceptable dispute resolution mode in International Disputes.

International Commercial Arbitration offers the advantage of a tribunal with arbitrators from different countries who apply rules acceptable at a transnational level. Awards by the arbitral tribunals are likely to receive a greater level of enforcement and

recognition at the international level rather than the judgments rendered by national courts. International Commercial Arbitration has advantages like choice of arbitrators, choice of forum and also choice of arbitral procedure to suit the case presented. International Commercial Arbitration plays a vital role for creating a trans border rule of law.

The United Nations Commission on International Trade Law (UNCITRAL) has framed a Model Law which provides guidelines for arbitration of trade related disputes at an international level. The Arbitration Rules provided by the Model Law were prepared by different experts from important arbitral institutions are based on experience of existing arbitration regimes. Procedures from common law and civil law are also incorporated in these rules to strike a balance or providing guidance, procedural protections and maximum flexibility to the concerned parties.

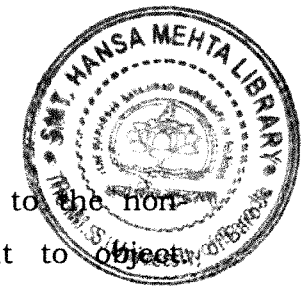
The UNCITRAL Model Law has been promulgated to bring uniformity and to overcome the drawbacks in International Commercial Arbitration. India adopted the Arbitration and Conciliation Act 1996 based on the UNCITRAL Model Law. The 1996 Act for enforcement of Arbitral awards requires conditions like a copy of the award, the arbitration agreement and any additional evidence to prove that the award is foreign. When all the conditions are complied with and if court is satisfied that the award is enforceable then it is deemed to be a decree of that court. A court may set aside foreign arbitral awards on different grounds out of which the setting aside of the awards on the grounds of public policy is most difficult. Both the Model Law and the 1996

Act place a duty on the arbitrators and provide for removal of biased arbitrators in case of breach of this duty.[1]

The selection of arbitrators is the most crucial part of any arbitral proceedings. The UNCITRAL Model Law vests enormous powers with the arbitrators. Under the Model Law an arbitrator can be appointed by an agreement between parties and if the parties cannot decide upon an arbitrator the court can appoint an arbitrator of its choice. If the parties have not included any of the institutional rules in the arbitration clause then the decision on that particular rule will be left to the discretion of the arbitrator.

Effective International Commercial Arbitration depends on the enforcement of the arbitral award by a court in a country where the losing party holds its assets. The New York Convention 1958 has provided foundation for International Commercial Arbitration. It is the most widely accepted treaty for the Recognition and Enforcement of Foreign Arbitral Awards. The most important factor in International Commercial Arbitration is the issue of jurisdiction. The power of arbitral tribunals to decide upon their jurisdiction has been provided by the arbitration rules and if a party has any objection to the jurisdiction of an arbitral tribunal, it can make a prompt formal objection about the same. The Arbitration Rules require that such objections cannot be made after the statement of the defense or a counter claim has been submitted. This suggests that the right to object is lost after this stage in the proceedings but whether the right has been waived will depend upon the applicable national law. On the other hand, a party which knows that the Arbitration Rules have not been

[1] Sandeep S. Sood: "Finding Harmony with UNCITRAL Model Law: Contemporary Issues in International Commercial Arbitration in India after the Arbitration and Conciliation Act of 1996" 2007



complied with and which fails to object promptly to the non-compliance, is deemed to have waived its right to object. The resolution of disputes under International Commercial Arbitration is carried out under the supervision of major international institutions and rule making bodies. The most significant of them are the International Chamber of Commerce (ICC), the international branch of the American Arbitration Association), the Singapore International Arbitration Centre (SIAC), the International Centre for Dispute Resolution (ICDR) and The London Court of International Arbitration (LCIA).

There are different views of different jurists upon different aspects of the application and importance of the model law. Some feel that the model law is not popular enough as compared to the International Courts, whereas some feel otherwise. There are enforcement issues relating to such arbitration as well. All these have been discussed hereunder with a special reference to the Indian Arbitration and Conciliation Act, 1996.

The enforcement of Commercial Arbitral awards by the domestic courts is more popular over enforcement of awards passed by an International Court as it binds only the parties to the dispute. It is also believed that the firms involved in commercial disputes prefer arbitration which is private and takes less time for settlement of disputes over the litigation in a court which is time consuming. Any international ruling by either a court or an arbitral tribunal has an enforcement effect, a precedential effect or a persuasive effect. The enforcement effect is relevant for ICA as precedential effect and the persuasive effect would lead to practical difficulties. The domestic court, for the settlement of a commercial dispute can either send the parties to an arbitral tribunal by enforcing the

arbitration agreement as favored by the New York Convention or can force the parties to litigate in the court. International courts do not have the domestic or local advantage and the states will be adamant to enforce the awards passed by the international courts.[2]

UNCITRAL model law allows choice of law to the parties while binding arbitral tribunals to domestic law rather than basing their decisions on non national law. The problem occurs when neither the arbitration agreement nor the domestic law provides a solution as to which law is applicable by arbitral tribunals for International Commercial Arbitration if the arbitration agreement is silent on the choice of law. The principle of neutrality is more inclined towards transnational law and the problem of favor emptoris does not arise by applying principle of neutrality and by adopting CISG (Contracts for International Sale of Goods) rules.[3] Arbitral awards are soft precedents and where the arbitration clause does not provide for a specific law the arbitral tribunals customarily apply non national and transnational laws to International Commercial Arbitration disputes.

The general principles of counterclaim and set-off in the litigation process in the courts can also be applied in International Commercial Arbitration, as Counterclaim is admissible in International Commercial Arbitration when it is within the arbitration clause but raises a few jurisdictional issues. Institutional rules of arbitration after a thorough analysis provide that a split arbitration clause may allow the filing of counterclaim in international Commercial Arbitration. The similarities between

[2] Mark L. Movsesian: "International Commercial Arbitration and International Courts", 2008

[3] Stefan Kirchner: "Transnational Law and the Choice-of-Law Competence of Arbitral Tribunals in International Commercial Arbitration", 2007

counterclaim and set off in International Commercial Arbitration are deceptive as both are based on reciprocal debts of the parties. For a defendant setoff is better but is limited to the amount requested by the plaintiff. Switzerland being the most sought after arbitral destination most of the parties adopt Swiss Rules of International Arbitration which provides jurisdiction for set-off claims in its Article 21(5). The counterclaim and the setoff provisions in International Commercial Arbitration operate in a different way than in the process of litigation due to jurisdictional issues.[4]

The drafting of international agreements, specially the provisions relating to the arbitration clause has to be done carefully and with some knowledge as the effectiveness of resolution of dispute in International Commercial Arbitration depends upon the clarity of the arbitration clause. The arbitration clause needs to be very clear in its meaning. In case of ambiguous arbitration clauses where the method of arbitration is not clear the parties lose the autonomy to arbitrate. When the arbitration clauses are negligently drafted it reflects the lack of attention and seriousness of the parties. The clauses which are vague, general and those which exclude the essential or important elements are practically difficult to enforce. On the other hand extremely elaborated clauses become rigid and inflexible.[5] There can also be abusive arbitration clauses favoring one of the parties. All the flaws in drafting the clauses cannot be attributed to drafters alone as there are also disparities in the applicable rules of arbitration which need to be addressed.

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[4] Vladimir Pavic: "Counterclaim and Set-off in International Commercial Arbitration", 1 Annals International Edition (2006)

[5] Luis Alfonso Gomez Dominguez: "Causes and Consequences of Faulty Arbitration Clauses", 2007

The other point which is much debated is the Enforcement of foreign arbitral awards with respect to procedural problems relating to jurisdiction and the limitation period. A national court while enforcing foreign arbitral awards must give due consideration to both the contractual freedom of parties as well as the jurisdictional issue. The New York Convention and The UNCITRAL Model Law which are usually followed for the enforcement of the foreign arbitral awards also have their own ambiguities for the calculation of the limitation periods. Even the Limitation Acts enacted by different countries are also ambiguous on the issue of Limitation periods The New Limitation Act 2000 in Canada has no reference to the limitation period for enforcement of ICA awards and the argument that there is no limitation period at all may not be acceptable.[6] There should be federal/ inter provincial reforms regarding the limitation periods so that they will not become hurdles for the enforcement of foreign arbitral awards.

[6] Antonin I. Pribetic: ""Winning is Only Half the Battle": Procedural Issues Relating to the Recognition and Enforcement of Foreign Arbitral Awards", 2009

8.2 Provisions of a treaty as against provisions of the Model Law

The second part of art.1 sets forth that "this law" (meaning the national arbitration statute adopting the Model Law) is "subject to any agreement in force between the State and any other State or States". Accordingly, any bi-lateral or multi-lateral treaties signed by the adopting state prevail over the national arbitration law, if it has adopted art. 1 of the model law. The analytical commentary explains that this part of art. 1 might be regarded as superfluous since the priority of treaty law would follow most, if not all, legal systems from the internal hierarchy of sources of law. However it was decided to retain this clarification because it was seen as a useful declaration of legislative intent, which would do no harm to the effectiveness of bi or multi-lateral treaties in force in the adopting state.

As regards the adopted model law's relationship to the national laws on the same legislative level, the national arbitration statute will in most cases override any general provisions in other laws that affect the arbitration process. This is due to the adopted model law's lex specialis character.

8.2.1 The territorial scope of the model law's application art 1(2)

The drafting of art.1 involved dealing with some of the most fundamental issues in international commercial arbitration. One of these issues was to decide what type of territorial scope the model law should have- that is, it had to be decided which connecting factor was wanted to be attached to the model law's application.

On the one hand, there was support for the so-called "strict territorial criterion" which used exclusively the place of arbitration as a connecting factor for the model law's application. As the commission pointed out, this view was supported by the fact that where nations allowed a choice of procedural law, the parties rarely made use of that choice. The commission further stated that the model law itself allowed the parties wide freedom in shaping the rules of the arbitral proceedings, including the faculty of agreeing on the procedural provisions of a 'foreign' law so long as they did not conflict with the mandatory provisions of the model law.

On the other hand, there was support for the view known as the "autonomy criterion", here the place of arbitration should not be the exclusive determining factor. It was suggested that the model law should also be applied if the parties so specified in their arbitration agreement and if the place of arbitration was not in the adopting country. The disadvantages of this approach were soon pointed out by the working group, which feared that the court of the lex loci arbitri would consider itself competent and intervene in the proceedings. This intervening court would then have to apply the chosen procedural rules, namely the adopted model law provisions.

8.2.2 Arbitrability art. 1(5)

Whether a dispute is arbitrable or not, namely its arbitrability, is commonly determined by a state's national laws or by its constitution. The issue can have far-reaching consequences on the whole arbitral process and the model law devotes a number of

provisions to this topic: art. 1(5), art. 34(2)(b)(i) and art. 36(1)(b)(i). A general rule excluding all those issues which by law are accepted from arbitration is expressed in art. 1(5) as otherwise the model law's lex specialis character would override these laws, provided they are on the same legal level as the adopted model law. Common examples of issues exempt from arbitration are bankruptcy, anti-trust, security, patent, trademark and copyright issues.

The real importance of arbitrability, however, lies in connection with art. 34 and 36: these provisions determine that an arbitral award may be set aside or its enforcement may be refused if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State". It is therefore vital to determine these non arbitrable subject-matters prior to entering into the arbitration agreement as otherwise the entire proceedings will be in vain. Determining the arbitrability of a dispute can prove to be difficult because theoretically the affected state's whole legislation has to be examined. This difficulty was not countered by the model law's broad reference to "any other law of this State". Recently, this shortcoming was officially recognized by UNCITRAL and a number of possible solutions were presented: one proposed solution was to reach a world-wide consensus on a list of non-arbitrable issues", another was to "agree on a uniform provision setting out three or four issues that are generally considered non-arbitrable and then call upon States to list immediately thereafter any other issues deemed non-arbitrable by that State".

8.3 Indian context

India enacted The Arbitration and Conciliation Act, 1996 which is the arbitration statute governing domestic as well as the international arbitration for India. Part I of the Act applies to both domestic and International Commercial Arbitration when the place of arbitration is India and Part II will apply to foreign awards. There is a lacuna in the Act as neither Part I nor II apply to arbitrations held in a non signatory country to the New York or the Geneva Conventions. Part II applies only to arbitrations held in a convention country. This is a major concern pertaining to international contracts and such other lacunae have been discussed hereunder.

The Arbitration and Conciliation Act 1996 was adopted by India to improve commercial arbitration where Part I of the Act deals with domestic and international arbitral awards when the arbitral tribunal is situated in India and Part II of the same Act incorporates the provisions relating to enforcement of foreign awards. It also elaborates certain conditions to be fulfilled for the foreign awards to be enforceable in India. The 1996 Act makes it mandatory for the court to refer the dispute to arbitration, if it is provided for in the contract between the parties. It also elaborates on the power of the arbitral tribunal to provide interim measures for the parties to arbitration. Enforcement of awards under the 1996 Act has been given considerable leverage but the matters to which the old Act applies still suffer from the stringent rules. According to 1996 Act all awards passed outside India (irrespective of Indian law as applicable) are all foreign awards. Part I of the act provides for limitation period but Part II of the Act

does not provide any limitation period for enforcement of awards.[7] These kinds of grey areas are existent in the Indian Arbitration and Conciliation Act 1996 and also a question mark as to the effects of the agreements under the 1940 Act, such questions need to be answered so that the Act becomes more meaningful.

At this juncture it is important to discuss certain provisions of the Act and see the lacunae associated with them.

8.3.1. Conditions for enforcement:

a. Foreign award defined:

In order to be considered as a foreign award, (for the purposes of the Act) the same must fulfill two requirements. First it must deal with differences arising out of a legal relationship (whether contractual or not) considered as commercial under the laws in force in India. The expression "commercial relationship" has been very widely interpreted by Indian courts. The Supreme Court in the case of ***R.M. Investments Trading Co. Pvt. Ltd. v. Boeing Co. & Anr.***[8] while construing the expression "commercial relationship" held:

"The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not..."

The second requirement is more significant and that is that the country where the award has been issued must be a country notified by the Indian Government to be a country to which the

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[7] Shailendra Swarup: in his lecture on "Domestic and International Commercial Arbitration and Enforcement of Convention Awards in India"
[8] (1994) 4 SCC 541

New York Convention applies.[9] Only a few countries have been notified so far and only awards rendered therein are recognised as foreign awards and enforceable as such in India. The countries which have been notified are:

Austria, Belgium, Botswana, Bulgaria, Central African Republic, Chile, Cuba, Czechoslovak Socialist Republic, Denmark, Ecuador, Arab Republic of Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, Italy, Japan, Kuwait, Republic of Korea, Malagasy Republic, Mexico, Morocco, Nigeria, The Netherlands, Norway, Philippines, Poland, Romania, San Marino, Singapore, Spain, Sweden, Switzerland, Syrian, Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania, and United States of America.

That leaves a pertinent question that in the event of a dispute with someone not belonging to a notified country, what would be the means available for resolution of the dispute.

An interesting issue came up before the Supreme Court as to what would happen in a case where a Country has been notified but subsequently it divides or disintegrated into separate political entities. This came up for consideration in the case of ***Transocean Shipping Agency Pvt. Ltd. v. Black Sea Shipping & Ors.***[10] Here the venue of arbitration was Ukraine which was then a part of the USSR a Country recognized and notified by the Government of India as one to which the New York Convention

9 Section 44 (b) of the Act.

10 (1998) 2 SCC 281

would apply. However by the time disputes arose between the parties the USSR had disintegrated and the dispute came to be arbitrated in Ukraine (which was not notified). The question arose whether an award rendered in Ukraine would be enforceable in India notwithstanding the fact it was not a notified country. Both the High Court of Bombay (where the matter came up initially) and the Supreme Court of India in appeal, held that the creation of a new political entity would not make any difference to the enforceability of the award rendered in a territory which was initially a part of a notified territory. On this basis the Court recognized and upheld the award. This decision is of considerable significance as it expands the lists of countries notified by the Government by bringing in a host of new political entities and giving them recognition in their new avtar also.[11] At another level the judgment demonstrates the willingness of Indian courts to overcome technicalities and lean in favour of enforcement.

8.3.2. Comparison with domestic enforcement regime:

There are two fundamental differences between enforcement of a foreign award and a domestic award. As noted above, a domestic award does not require any application for enforcement. Once objections (if any) are rejected, the award is by itself capable of execution as a decree. A foreign award however, is required to go through an enforcement procedure. The party seeking enforcement has to make an application for the said purpose. Once the Court is satisfied that the foreign award is enforceable, the award becomes a decree of the Court and executable as such.

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[11] Sumeet Kachwaha: "Enforcement of Arbitration Awards in India" Asian International Arbitration Journal, (2008) Vol.4

The other difference between the domestic and foreign regime is that (unlike for domestic awards) there is no provision to set aside a foreign award. In relation to a foreign award, the Indian Courts may only enforce it on refuse to enforce it - they cannot set it aside. This "lacuna" was sought to be plugged by the Supreme Court in the recent decision of ***Venture Global Engineering v. Satyam Computer Services***[12] (discussed further below) where the Court held that it is permissible to set aside a foreign award in India applying the provisions of Section 34 of Part I of the Act.

8.3.3. Conditions for enforcement:

The conditions for enforcement of a foreign award are as per the New York Convention. The only addition being an "Explanation" to the ground of public policy which states that an award shall be deemed to be in conflict with the public policy of India if it was induced or affected by fraud or corruption.

Indian Courts have narrowly construed the ground of public policy in relation to foreign awards. In ***Renusagar Power Co. v. General Electrical Corporation***[13] the Supreme Court construed the expression "public policy" in relation to foreign awards as follows:

"This would mean that "public policy" in Section 7 (1) (b) (ii) has been used in narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India..... Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy

12 Judgment dated 10th January 2008, in C.A. No. 309 of 2008

13 (1994) Suppl (1) SCC 644

if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

8.3.4. Judicially created new procedure and new ground for challenge to foreign award.

As noticed above, there is no statutory provision to set aside a foreign award under the Act. Foreign awards may be set aside or suspended in the country in which or under the laws of the award was made (Section 48 (1) (e) of the Act, corresponding to Article V (e) of the New York Convention) but there is no provision to set aside a foreign award in India. This fundamental distinction between a foreign and a domestic award has been altered by the Supreme Court in the recent case of ***Venture Global Engineering v. Satyam Computer Services Ltd.***[14] *(Venture Global).* Here the Supreme Court was concerned with a situation where a foreign award rendered in London under the Rules of the LCIA was sought to be enforced by the successful party (an Indian company) in the District Court, Michigan, USA. The dispute arose out of a joint venture agreement between the parties. The respondent alleged that the appellant had committed an "event of default" under the shareholders agreement and as per the said agreement exercised its option to purchase the appellant's shares in the joint venture company at book value. The sole arbitrator appointed by the LCIA passed an award directing the appellant to transfer its shares to the respondent. The respondent sought to enforce this award in the USA. The appellant filed a civil suit in an Indian District Court seeking to set aside the award. The District Court, followed by the High Court, in appeal, dismissed the suit holding that there was no such procedure envisaged under Indian law.

14 decision dated 10th January 2008 in Civil Appeal No. 209 of 2008 (Venture Global)

However, the Supreme Court in appeal, following its earlier decision in the case of ***Bhatia International v. Bulk Trading***[15] held that even though there was no provision in Part II of the Act providing for challenge to a foreign award, a petition to set aside the same would lie under Section 34 Part I of the Act (i.e. it applied the domestic award provisions to foreign awards). The Court held that the property in question (shares in an Indian company) are situated in India and necessarily Indian law would need to be followed to execute the award. In such a situation the award must be validated on the touchstone of public policy of India and the Indian public policy cannot be given a go by through the device of the award being enforced on foreign shores. Going further the Court held that a challenge to a foreign award in India would have to meet the expanded scope of public policy as laid down in *Saw Pipes* case (i.e. meet a challenge on merits contending that the award is "patently illegal").

The Venture Global case is far reaching for it creates a new procedure and a new ground for challenge to a foreign award (not envisaged under the Act). The new procedure is that a person seeking to enforce a foreign award has not only to file an application for enforcement under Section 48 of the Act, it has to meet an application under Section 34 of the Act seeking to set aside the award. The new ground is that not only must the award pass the New York Convention grounds incorporated in Section 48, it must pass the expanded "public policy" ground created under Section 34 of the Act. In practice, the statutorily enacted procedure for enforcement of a foreign award would be rendered superfluous till the application for setting aside the same (under Section 34) is decided. The statutorily envisaged grounds for

15 2002 4 SCC 105

challenge to the award would also be rendered superfluous as notwithstanding the success of the applicant on the New York Convention grounds, the award would still have to meet the expanded "public policy" ground (and virtually have to meet a challenge to the award on merits). The *Venture Global* case thus largely renders superfluous the statutorily envisaged mechanism for enforcement of foreign awards and substitutes it with judge made law. The Judgment, thus one feels, is erroneous. Moreover, in so far as the Judgment permits a challenge to a foreign award on the expanded interpretation of public policy is per incuriam as a larger, three Bench decision in the case of *Renu Sagar* (supra) holds to the contrary. Further *Saw Pipes* (on which *Venture Global* relies for this proposition) had clearly confined its expanded interpretation of public policy to domestic awards alone (lest it fall foul of the *Renu Sagar* case which had interpreted the expression narrowly). The Supreme Court in *Venture Global* did not notice this self-created limitation in *Saw Pipes* nor did it notice the narrower interpretation of public policy in *Renu Sagar* and therefore application of the expanded interpretation of public policy to foreign awards is clearly *per incuriam.*

Be that as it may, till the decision is clarified or modified, it has clearly muddied the waters and the enforcement mechanism of foreign awards has become clumsy, uncertain and inefficient in this regard.

8.3.5. Procedural requirements

A party applying for enforcement of a foreign award is required to produce before the Court:

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award. [16]

a. The relevant court:

The Indian Supreme Court has accepted the principle that enforcement proceedings can be brought wherever the property of the losing party may be situated. This was in the case of ***Brace Transport Corporation of Monrovia v. Orient Middle East Lines Ltd.***[17] The Court here quoted a passage from Redfern and Hunter on Law & Practice of International Commercial Arbitration (1986 Edn.) *inter alia* as follows:

"A party seeking to enforce an award in an international commercial arbitration may have a choice of country in which to do so; as it is some times expressed, the party may be able to go forum shopping. This depends upon the location of the assets of the losing party. Since the purpose of enforcement proceedings is to try to ensure compliance with an award by the legal attachment or seizure of the defaulting party's assets, legal proceedings of some kind are necessary to obtain title to the assets seized or their proceeds of sale. These legal proceedings must be taken in the State or States in which the property or other assets of the losing party are located."

16 Section 47 (1) of the Act

17 (1995) Supp (2) SCC 280

b. Time limit:

The Act does not prescribe any time limit within which a foreign award must be applied to be enforced. However various High Courts have held that the period of limitation would be governed by the residual provision under the Limitation Act i.e. the period would be three years from the date when the right to apply for enforcement accrues. The High Court of Bombay has held that the right to apply would accrue when the award is received by the applicant.[18]

8.3.6. Post enforcement formalities:

The Supreme Court has held that once the court determines that a foreign award is enforceable it can straight away be executed as a decree. In other words, no other application is required to convert the judgment into a decree. This was so held in the case of ***Fuerst Day Lawson ltd. v. Jindal Exports Ltd.***[19] where the Court stated:

"Once the Court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of Court / decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from objectives contained in para 4 of the Statement of Objects and Reasons, Sections 47 to 49 and Scheme of the Act that every final arbitral awards is to be enforced as if it were a decree of the Court.... In our opinion, for enforcement of foreign

18 2007 (1) RAJ 339 (Bom) and AIR 1986 Gujarat 62
19 (2001) 6 SCC 356

award there is no need to take separate proceedings, one for deciding the enforceability of the award to make rule of the Court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the Court enforcing a foreign award can deal with the entire matter."

One interesting feature of enforcement of a foreign award is that there is no statutory appeal provided against any decision of the court rejecting objections to the award. An appeal shall lie only if the court holds the award to be non-enforceable. Hence a decision upholding the award cannot be appealed against. However a discretionary appeal would lie to the Supreme Court of India under Article 136 of the Constitution of India. Such appeals are entertained only if the Court feels that they raise a question of fundamental importance or public interest.

Thus viewed in its totality, India does not come across as a jurisdiction which carries an anti - arbitration bias or more significantly which carries an anti - foreigner bias. It is seen that notwithstanding the interventionist instincts and expanded judicial review, Indian courts do restrain themselves in interfering with arbitral awards.

Judged on this touchstone, India qualifies as an arbitration friendly jurisdiction.