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# **EXECUTION OF FOREIGN ARBITRAL AWARD: POWER OF EXECUTING COURTS IN INDIA**

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## **Abstract**

Execution of foreign arbitral award in India is governed by Arbitration and Conciliation Act 1996. This paper examines the scope of the Act in determining the rights of the parties to the award, rate of interest, limitation period in executing the foreign arbitral award. Where the rate of interest of award has not been determined between the parties of foreign arbitral award the question is whether the Executing Court in India has the power to grant the interest (including post- award interest) or determine the rights of parties, can Section 31 (7) (b) directly be applied to the proceedings under Part II of Arbitration and Conciliation Act 1996 under the guise that is *lexi fori*, power of the Enforcement Court in India to determine the validity of or to set aside the foreign arbitral award. Unlike the foreign award, the enforcement of foreign arbitral award is governed by a special statute. The Act does not exclusively cover the power of Executing Courts in India in enforcing the Foreign arbitral award. But the Court has arrived in a conclusion through narrow construction of the Act.

Execution of foreign arbitral award in India is governed by Arbitration and Conciliation Act 1996. A foreign award is considered to be an arbitral award related to matters considered commercial under Sec.53 of the Act. Arbitral award is the decision passed by an arbitral tribunal. With respect to the enforcement of foreign arbitral award, the Country shall be a party to the New York Convention or the Geneva Convention. India became the signatory to the New York Convention on 1958 which **aims to ensure the enforcement of awards**. To the effect that Arbitration and Conciliation Act was enacted on 1996. Hence there is no need of question as to whether a foreign arbitral award can be enforced in India. Section 44 of Arbitration and Conciliation Act defines a foreign award as an arbitral award on disputes between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India<sup>1</sup>. Domestic award and foreign award are the types mentioned in the

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<sup>1</sup> Arbitration and Conciliation Act, 1996, 44, No. 26, Acts of Parliament, 1996(India)

Act, 1996. Part I and Part II deals with execution of domestic award and foreign award respectively. Part I of the Arbitration Act, 1996 exclusively applies to all arbitrations arising between domestic parties and pertaining to a domestic dispute. Even if the domestic parties involved in a purely domestic dispute contractually agrees to denude the Courts of this country of their jurisdictions, the same will not ipso facto take such arbitrations outside the applicability of Part I and operate to exclude the jurisdiction of Indian Courts therein<sup>2</sup>. Place of Arbitration shall be at the option of the parties binding upon the arbitration clause failing on which, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The question is whether Section 34 and 37 of Act confers power to modify an arbitral award. The answer is not per se. The foreign arbitral award is not enforceable as such until it acquires the status of decree. A foreign award deemed to be the decree of the Court when the enforcement Court adjudicates the enforcement and execution of the foreign award. A substantive application has to be filed under Section 47 of the Arbitration and Conciliation Act before the executing Court in India to that effect. The Court will look into the ingredients of Section 47 to 49 to give effect the award.

### **Limitation period for executing foreign arbitral award**

There is no express provision in the Arbitration and Conciliation Act 1996 regarding the period of limitation with respect to the execution of foreign award. In that case, Limitation Act may be applied. Issue of period of Limitation is mixed question of law and facts. However, the Limitation Act also does not contemplate an explicit provision for the enforcement of foreign arbitral award hence it would necessarily fall under the residuary provision Article 137. Since execution petition of the foreign arbitral award has to be filed under Section 47 of the Act, O.XXI has no role in enforcing the award and hence Section 5 of Limitation can't be directly applied. Needless to emphasize it has been subject to protractor discussions before the Courts of India, where Art. 136 and Art. 137 of the Limitation Act are being applied interchangeably in various judgments. The question before the Court is whether Art 136 or 137 shall be applied. The issue of limitation for enforcement of foreign awards being procedural in nature, is subject to the *lex fori* i.e. the law of the forum (State) where the foreign award is sought to be enforced. In *Bank of Baroda v. Kotak Mahindra Bank*<sup>3</sup>, it was ruled that for foreign decrees to be enforced, Article 136 does not apply. Limitation period of execution of the same shall only be governed by the law that prevalent in the country which it has passed instead, Article 137 is

<sup>2</sup> Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc, (2012) 9 SCC 552

<sup>3</sup> Bank of Baroda v. Kotak Mahindra Bank, AIR ONLINE 2020 SUPREMECOURT 1474

applicable (it is the residuary provision which says that when no other limitation is prescribed limitation of 3 years will apply).

Section 49 of the Act contemplates that when the foreign award is enforceable under Section 47 of the Act, the award shall be deemed to be a decree of that Court. The Hon'ble Supreme Court of India in *Government of India v. Vedanta & Ors*<sup>4</sup> has finally resolved the ambiguity in application of the Law of period of limitation in executing foreign arbitral award while deciding the issue of maintainability. Article 137 applies to the enforcement of foreign awards, which provides a period of 3 years from "when the right to apply accrues". The right to apply would accrue from the date of making the award, would be governed by Article 137 of the Limitation Act, 1963 which prescribes a period of three years from when the right to apply accrues<sup>5</sup>.

### **Rate of interest in the arbitral award**

Where the arbitral award is for payment of money, the rate of interest of award shall be determined from the terms of the agreement between the parties. If not so, the rate of interest is governed by Section 31(7) (a) & (b) of the Arbitration and Conciliation Act 1996. The arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest (post – award interest) at the rate of eighteen per cent per annum from the date of the award to the date of payment.<sup>6</sup> And the question is whether a Court of law can grant post-award interest if the arbitral award is silent on post-award interest on the sum awarded. The Court of law may only grant post award interest as mentioned in Section 31(7)(b) of the Act<sup>7</sup>. In *Raveechee and Company v. Union of India*<sup>8</sup> Hon'ble Supreme Court held that an arbitrator has the power to award interest unless specifically barred from awarding it and the bar must be clear and specific. Also held that the liability to pay interest pendente lite arises because the claimant has been found entitled to the same and had been kept out from those dues due to the pendency of the arbitration. In *State of Haryana v. S.L. Arora*<sup>9</sup>, (2010) 3 SCC 690, the Court

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<sup>4</sup> *Government of India v. Vedanta & Ors*, AIR ONLINE 2020 SC 744

<sup>5</sup> *Ibid*

<sup>6</sup> Arbitration and Conciliation Act, 1996, 31(7) (a) & (b), No. 26, Acts of Parliament, 1996(India)

<sup>7</sup> Arbitration and Conciliation Act, 1996, 31(7)(b), No. 26, Acts of Parliament, 1996(India)

<sup>8</sup> *Raveechee and Company v. Union of India*, (2018) 7 SCC 664

<sup>9</sup> *State of Haryana v. S.L. Arora*, (2010) 3 SCC 690

held that, if the award is silent about interest, the person in whose favour the award is made will be entitled to interest at 18% per annum on the principal amount awarded, from the date of award till date of payment. The Hon'ble Supreme Court has reiterated in *Indian Railway Construction Company Ltd. V. M/s National Buildings Construction Corporation Ltd*<sup>10</sup>, that unless there is a specific bar under the contract, it is always open for the Arbitrator to award pendent-lite interest in view of Section 31(7) (a) of the Arbitration and Conciliation Act 1996.

a. Power of executing Court in determining the rate of interest

Where a foreign arbitral award is silent on the post- award interest, the question is whether Section 31(7) (b) of the Act 1996 applies. Right to claim interest may vary from country to country, where the award is sought to be enforced. There is prohibition of charging interest in Muslim countries where Shariat Law applies, the award of interest will be unenforceable due to public policy. In the question as to whether the Court which is enforcing the award is empowered to direct payment of post award interest, when the award does not contemplate the payment of any interest is discussed in *M/s International Nut Alliance LLC v. M/s John's Cashew C*<sup>11</sup>, where the Hon'ble High Court of Kerala made the payment of the award amount final and found there is no requirement of further orders in the execution petition. In *Jindal exports Ltd v. Furest day Lawson Ltd*<sup>12</sup>, Court pointed out that the executing court can't go behind the award and held that court does not have the power to award interest since it is only enforcing a foreign award. A similar and detailed observation has been made out in the constitutional bench of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc*<sup>13</sup> ('BALCO' for short), wherein it was held that Part I & Part II are exclusive of each other and hence Part I can't be made applicable to foreign seated arbitration even if the agreed upon the same. In *TransAsia Private Capital v. Gaurav Dawan*<sup>14</sup>, the Delhi High Court has rightly clarified that the Courts in India cannot determine the rights of party to the dispute direct application of the Indian law unless the parties failed to prove the applicability of foreign law to that effect. Hence section 31 (7) (b) can't be indirectly applied to the proceedings under Part II of the Act 1996 under the guise that is *lexi fori* when it comes to the interest in the arbitral award. The available remedy would be that the party who has been aggrieved by the foreign I

<sup>10</sup> Indian Railway Construction Company Ltd v. M/s National Buildings Construction Corporation Ltd, 2023, liveLaw (SC) 210

<sup>11</sup> M/s International Nut Alliance LLC v. M/s John's Cashew C, 2024:KER:31904

<sup>12</sup> Jindal exports Ltd v. Furest day Lawson Ltd, MANU/DE/3204/2009

<sup>13</sup> Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc, (2012) 9 SCC 552

<sup>14</sup> TransAsia Private Capital v. Gaurav Dawan, 2023:DHC:2336

award with respect to rate of interest/ non-granting of interest may challenge the same before the competent forum/authority within the period of limitation. From the above judgments and law of land, executing Court has no role in granting interest in the award that has been exclusively covered under Part II of the Act.

### **Conditions when the execution of foreign award may be refused**

A foreign award cannot be set aside by an enforcement Court in India. Executing Court can only refuse to enforce the same upon the grounds contemplated under Sec.48 of the Arbitration and Conciliation Act. Enforcement of foreign award may be refused, at the request of the party against whom it is invoked, only if the party furnishes the proof that it cannot enforced by reason of operation of law, terms of the agreement, decision of Arbitrator/ arbitral authority.\

#### a. Operation of law.

Foreign arbitral award can be refused to be enforced under operation of law of the executing Court where: the parties to the agreement is incapable under the law applicable to them, the agreement is invalid under the law applicable to them, if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case, award has been set aside/ suspended by a competent authority of the country under the law, that award has been made, enforcement of the award contrary to public policy of India, the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

#### b. Terms of the agreement

Where the composition of the arbitral authority was not in accordance with the agreement of the parties, arbitral procedure not in accordance with the agreement of the parties.

#### c. Decision of Arbitrator/ arbitral authority

Where the award contrary to or not falling within the terms of submission to arbitration, decision on matters beyond the scope of submission to arbitration.

#### Exception:

If the decision on matters submitted to arbitration is separable from those not so submitted, that part of the award which contains decision on matters that has submitted to arbitration may be

enforced. In *Avitel post studioz limited & Ors. v. HSBC pi holdings (mauritius) limited*<sup>15</sup> Court observed that there can be no difficulty in holding that the most basic notions of morality and justice under the concept of ‘public policy’ would include bias. Refusal of enforcement of foreign award should only be in a rare case where, non- adherence to International Standards is clearly demonstrable. In *Shri Lal Mahal Ltd. v. Progetto Grano Spa*<sup>16</sup>, the Supreme Court held that the wider meaning given to ‘public policy of India’ in the domestic sphere under Section 34(2)(b)(ii) would not apply where objection is raised to the enforcement of the Award under Section 48(2)(b) of the Indian Arbitration Act. This would indicate that the grounds for resisting enforcement of a foreign award are much narrower than the grounds available for challenging a domestic award under Section 34 of the Indian Arbitration Act.

### **Setting aside of foreign arbitral award**

Section 34 of the Arbitration and Conciliation Act 1996 deals with appeal against arbitral award passed by the Arbitral tribunal. Appeal under Section 34 of the Indian Act is not maintainable against the foreign award.

### **Conclusion**

Court of India has arrived to the conclusion in catena of judgments with respect to the power of the Executing Court in enforcing foreign arbitral award through narrow construction of the Act. Where the rate of interest has not been determined between the parties of foreign arbitral award Executing Court has neither power to grant the interest nor determine the rights of parties. Indubitably, a foreign arbitral award cannot be set aside by an enforcement Court in India. In fact, executing Court can refuse to enforce the foreign arbitral award under Section 48 of the Arbitration and Conciliation Act and the same must be construed narrowly. Under Section 47 of the Act, the foreign award shall be deemed to be a decree of that Court. The Act does not granted an exclusive power to executing Courts with respect to execution of foreign award.

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<sup>15</sup> *Avitel post studioz limited & Ors. v. HSBC pi holdings (mauritius) limited* AIRONLINE 2020 SC 691

<sup>16</sup> *Shri Lal Mahal Ltd v. Progetto Grano Spa*, AIRONLINE 2013 SC 191