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Crossroads of Compliance: A Cross-Jurisdictional Examination of Arbitral Award Enforcement
Challenges in Construction

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INTRODUCTION

Arbitration, as an alternative dispute resolution mechanism, has emerged as a powerful tool in resolving conflicts swiftly and efficiently. By bypassing the traditional court system, arbitration offers parties the flexibility to tailor their dispute resolution process, ensuring confidentiality, expertise, and finality in the outcome. In this article, we will delve into the complexities surrounding the enforcement of arbitral awards under Indian law and compare it with the English legal framework. Additionally, we will focus our research on the enforcement challenges faced specifically in the construction sector.

Arbitration plays a pivotal role in easing the burden on courts and reducing the backlog of cases. The [Indian Arbitration and Conciliation Act, 1996](#), governs arbitration in India and facilitates the recognition and enforcement of both domestic and foreign awards. However, despite these well-crafted laws, the enforcement of arbitral awards has been a subject of concern, particularly in the context of construction disputes.

[Section 36 of the Arbitration and Conciliation Act, 1996](#), deals with the enforcement of domestic awards in India. It outlines that an award shall be enforced once the time for challenging it under [Section 34](#) has expired. The [2015 amendment](#) introduced sub-clause (2), stipulating that an application to set aside the award shall not automatically stay its enforcement. This amendment was introduced to curb frivolous challenges to arbitral awards and expedite their enforcement.

However, the Indian arbitration landscape is not solely confined to domestic disputes. With the global nature of commerce, foreign arbitral awards play a significant role in resolving cross-border disputes. The enforcement of foreign awards in India is governed by the [New York](#)

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[Convention](#) and the [Geneva Convention](#), ensuring that foreign awards are treated with the same respect as domestic ones.

As we embark on this comparative analysis, we will closely examine the provisions of both Indian and English law governing enforcement to identify potential areas of improvement. By focusing on construction sector disputes, we aim to shed light on the unique challenges faced in this industry and how they affect the enforcement of arbitral awards. The construction sector, being a crucial driver of economic growth in India, requires an efficient dispute resolution mechanism to ensure smooth operations and attract foreign investment.

Through the analysis of Indian and English law, we aim to provide valuable insights into the enforcement regime in both jurisdictions. The New York Convention and the Geneva Convention serve as the backbone for enforcing foreign awards globally, and understanding their application in India and England will enable us to identify best practices and potential reforms to strengthen the arbitration ecosystem.

Moreover, we will explore the doctrine of public policy, which acts as a safeguard against enforcement when awards violate the principles of justice, morality, or fundamental policy of the country. By scrutinizing recent court judgments and their impact on the enforcement of arbitral awards, we will gain a comprehensive understanding of how public policy influences the arbitration landscape.

In conclusion, the author has attempted to offer a thorough examination of enforcement and challenges related to arbitral awards in both Indian and English law. By focusing on the construction sector, we will highlight the unique intricacies involved in enforcing awards in this critical industry. Our goal is to provide a comprehensive analysis that not only identifies shortcomings but also offers actionable recommendations to improve India's arbitration regime and ensure a robust and efficient resolution of disputes in the construction sector and beyond.

ENFORCEMENT OF AWARDS UNDER INDIAN LAW

The enforcement of arbitral awards under Indian law is governed by Section 36 of the Arbitration and Conciliation Act, 1996. According to Section 36, once an arbitral award is

passed, it becomes final and binding on the parties. However, before the award can be enforced, the time for making an application to set aside the award under Section 34 of the Act must have expired. In other words, the losing party must have exhausted all avenues for challenging the award before enforcement can be sought.

One significant amendment to Section 36 was made through the Arbitration and Conciliation (Amendment) Act, 2015. Prior to this amendment, the issuance of notice by the court on the application under Section 34 operated as an automatic stay on the enforcement of the award. This often resulted in delays and hindered the enforcement process. The 2015 amendment introduced sub-clause (2) to Section 36, which brought about a crucial change. It now states that the mere filing of an application to set aside the arbitral award under Section 34 does not automatically stay the enforcement of the award. The party seeking a stay on enforcement must make a separate application to the court, and the court may impose terms and conditions, such as ordering the deposit of amounts, before granting an order of stay. This amendment aims to curb the misuse of applications to set aside awards as a tactic to delay or avoid enforcement.

The 2015 amendment has been instrumental in expediting the enforcement process and ensuring that awards are enforced in a timely manner. It discourages parties from making frivolous applications to set aside awards, as they can no longer automatically stay the enforcement process. By requiring a separate application for stay and providing for court-imposed conditions, the amendment seeks to strike a balance between protecting the rights of the parties and promoting the finality of arbitral awards.

It is important to note that the enforcement of foreign awards is governed by different provisions under the Act. Chapter I of Part II (Sections 44-52) deals with the enforcement of foreign awards under the New York Convention, while Chapter II of Part II (Sections 53-60) deals with foreign awards under the Geneva Convention. The Act distinguishes between domestic and foreign awards, and different procedures apply to their enforcement.

COMPARATIVE ANALYSIS: ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Indian Law: The New York Convention and Geneva Convention

Under Indian law, foreign arbitral awards can be enforced under the New York Convention or the Geneva Convention, depending on the country from which the award originates.

The New York Convention, which India ratified in 1960, applies to awards made in countries that are also signatories to the Convention. The conditions for enforcement include a valid arbitration agreement and the award being considered commercial under Indian law. India has declared several countries as reciprocating territories for the purpose of the Convention.

The Geneva Convention applies to foreign awards made after July 28, 1924, and is applicable when the award arises from disputes considered commercial under Indian law and involves parties subject to the jurisdiction of different contracting states.

Enforcement of Foreign Awards under English Law

Both India and England are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, they differ in their approach to the enforcement of foreign arbitral awards.

In India, enforcement of foreign awards is governed by Part II of the Arbitration and Conciliation Act, which adopts the New York Convention. The Act provides specific conditions for the enforcement of foreign awards, including that the country must be a signatory to the Convention, and the award must be made in a reciprocating territory notified by the Central Government.

In contrast to Indian law, the enforcement of arbitral awards in England is governed by the Arbitration Act 1996. Under English law, the courts adopt a pro-enforcement approach, promoting the finality and efficacy of arbitral awards. The grounds for refusing enforcement are limited, following the provisions of the New York Convention.

The English courts focus on the party's conduct during the arbitration process rather than delving into the merits of the dispute. This approach aligns with the international consensus of limiting judicial intervention in arbitration matters. As a result, English law is considered arbitration-friendly and encourages parties to seek arbitration as a dispute resolution mechanism. However, the use of anti-suit injunctions by English courts to restrain parties from pursuing parallel court

proceedings in foreign jurisdictions may create complications in enforcing foreign awards. These injunctions may be perceived as undermining the enforcement process and principles of comity.

CHALLENGES AND IMPROVEMENTS IN INDIAN LAW

Broad Interpretation of Public Policy Exception

The public policy exception, as articulated in Article V of the New York Convention, allows courts to refuse enforcement of awards that are contrary to the fundamental policy of the state. Indian courts have, at times, taken a broad interpretation of public policy, leading to potential challenges in enforcement. To improve this, Indian law could adopt a more restrained and consistent approach to interpreting public policy.

In [Renusagar Power Co. Ltd. v. General Electric Co.](#), the Supreme Court of India dealt with the interpretation of public policy in the context of foreign arbitrations. The court adopted a narrow approach, limiting the scope of public policy to fundamental policy of Indian law. The decision brought clarity to the enforcement regime and discouraged challenges on broad public policy grounds, which could delay enforcement. This case has positively influenced the pro-enforcement approach of Indian courts [¶66].

Further in [Venture Global Engineering v. Satyam Computer Services Pvt. Ltd.](#), the court held that an appellate court has no authority to adjudicate on the subject matter of the award and upheld the narrow interpretation of public policy as laid down in the Renusagar case. This decision reinforced the principle that courts should not re-evaluate the merits of the arbitral award during enforcement proceedings, thereby safeguarding the finality of the award [¶43-46].

Lack of Clarity on Arbitrability

Arbitrability concerns the suitability of a dispute for resolution through arbitration. Indian courts have occasionally delved into the merits of the dispute when deciding on arbitrability, leading to delays in enforcement. Clarifying and limiting the scope of arbitrability in Indian law could help streamline enforcement proceedings. For instance, in [National Agriculture Co-operative Marketing Federation of India v. Alimenta S.A.](#), a potential challenge in the enforcement of

foreign awards related to the application of Indian contract law principles, such as Section 32 of the Indian Contracts Act, 1872 was highlighted [¶44]. The Supreme Court, in this instance, went beyond the standard enforcement consideration and delved into the merits of the underlying contract. This may create uncertainty for parties seeking enforcement, as it blurs the line between enforcement and merits review.

Time-bound Enforcement Mechanism

India could consider introducing a time-bound mechanism for enforcing arbitral awards to expedite the process and enhance the efficiency of the arbitration system. This would further encourage parties to opt for arbitration as a dispute resolution method.

Delays in enforcing arbitral awards can significantly affect the construction sector's functioning, leading to financial burdens and project delays. To address this issue, expedited enforcement procedures should be introduced for construction disputes. The courts should prioritize hearing enforcement applications related to the construction sector, expediting the process and ensuring swift resolution of disputes.

Specialized Construction Arbitration Tribunals

One of the keyways to improve the enforcement of arbitral awards in the construction sector is to establish specialized arbitration tribunals with expertise in construction-related disputes. These specialized tribunals would have a deeper understanding of the technicalities and complexities involved in construction cases, leading to more informed decisions and faster resolution of disputes. Additionally, such specialized tribunals can create a pool of experienced arbitrators familiar with the construction industry, instilling confidence in parties to opt for arbitration.

Enforcement of Partial Awards

Construction projects often involve multiple phases and stages, each requiring different types of work. To facilitate smoother project execution, the enforcement of partial awards should be explicitly recognized in the Indian Arbitration Act. This will enable parties to seek enforcement

of awards related to specific phases of the project, allowing for a more efficient resolution of disputes and enabling continuous work on unaffected parts of the project.

Pro-enforcement Approach

A pro-enforcement approach by the courts is crucial for encouraging parties to opt for arbitration in the construction sector. Courts should refrain from excessive judicial intervention and adhere to the principle of minimal interference when enforcing arbitral awards. By respecting the finality and binding nature of awards, courts can bolster confidence in the arbitration process and foster a conducive environment for effective dispute resolution.

Harmonization of Laws

India could work towards harmonizing its domestic laws with international standards to create a more arbitration-friendly environment. This includes refining provisions related to public policy and adopting a pro-enforcement approach to foreign awards.

CONCLUSION

The enforcement of arbitral awards is crucial for maintaining the efficacy and credibility of the arbitration process. While Indian law has taken significant steps to improve the enforcement regime, there remain challenges in the broad interpretation of public policy and the lack of clarity on arbitrability. By refining these aspects and adopting a more pro-enforcement approach, India can enhance its arbitration system and attract more foreign parties to choose India as a seat for international commercial arbitrations, particularly in the construction sector. Harmonizing domestic laws with international standards will create a conducive environment for arbitration, further strengthening India's position as an arbitration-friendly jurisdiction.