CHAPTER 6

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDIA

6.1 Introduction

In international trade, arbitration, rather than litigation, is the preferred method of dispute resolution, since it is easier to enforce an arbitral award than a court decision, in a foreign State. From a practical point of view, this is because there are more multilateral conventions and bilateral treaties facilitating enforcement of foreign arbitral awards than there are for enforcement of court decisions. From a theoretical point of view, enforcement of arbitral awards is easier, because of the contractual nature of arbitration. An arbitral award is the consequence of a private dispute settlement procedure, while a court ruling represents the sovereignty of the State where they are issued. It is easier for a national court to enforce the consequence of a contractual agreement between two private parties, than a decision representing the sovereignty of a foreign State. Therefore, as seen, in the previous Chapters, the tendency in international convention and municipal laws is to facilitate enforcement of arbitral awards.

In this Chapter, it is examined to what extent Indian Law is facilitative of enforcement of foreign arbitral awards, so far as they are not covered by bilateral or multilateral treaties. As we have seen in the Chapter IV, the law of arbitration in India has gone through deep changes in recent decades. Regulations on enforcement of foreign awards have significantly improved in recent years. Previous Indian Law did not make any distinction between domestic and foreign awards, and no definition of a foreign arbitral award was made. Therefore, it was assumed that foreign awards were subject to retrial and challenge, and that the same legal procedure and scrutiny were applied to foreign awards as those applied to domestic awards. Present Indian Law, however, in some aspects, goes beyond the New York Convention, 1958 (the NYC, 1958) to facilitate enforcement of foreign awards. In this Chapter, after a brief review of the background to the issue of enforcing foreign arbitral awards in India, and legal developments in this regard, those parts of the
Arbitration Act, 1996 that address enforcement of foreign arbitral awards are examined. These parts of Indian Law apply to foreign arbitral awards that can be enforced under international conventions or bilateral treaties to which India is a party. Following an examination of general provisions of Indian Law regarding enforcement of foreign awards, grounds for non-enforcement of such awards are considered. Then, the competence of the court regarding foreign awards is discussed.

6.2 Background of Enforcing Foreign Arbitral Awards in India

The international commercial activities were in existence to the present era as well. Of course, its volume and participating units were limited. The advent of industrial revolution technical and mechanical utilization and information technology explosion have made the world very small in its reach and transactions have grown enormously between the different nations. Where there are voluminous and numerous transactions (both at international & domestic level), it is but natural that there shall be disputes as well. The settle these international commercial disputes speedy and satisfactorily, as per international norms, in India there were two separate Acts, namely:

a) The Arbitration (Protocol & Convention) Act, 1937: It was enacted as a result of Geneva Protocol (1923) & Geneva Convention, 1927 (the GC, 1927) under the auspices of League of Nations.

b) The Foreign Awards (Recognition & Enforcement) Act, 1961: It was enacted as a result of the NYC (1958), under the auspices of United Nations Organization

After the enactment of the Arbitration Act, 1996, the two aforesaid Act stand repealed, and with certain modifications, their close relevant provisions have been incorporated in Chapter I with heading ‘Enforcement of Certain Foreign Awards’ and ‘New York Convention Awards’ and Chapter II with heading “Geneva Convention Awards” respectively of Part II of the present Act, 1996.
However, the Supreme Court (SC) in *Thyssen Stahlunion GMBH v. Steel Authority of India*¹ has held that there is not much difference in the provisions of the Foreign Awards (Recognition & Enforcement) Act, 1961 and the Arbitration Act, 1996 regarding enforcement of the foreign award. The definition of ‘foreign award’ is also same in both the enactments. The only difference appears to be that while under the Foreign Awards (Recognition & Enforcement) Act, 1961 a decree follows, whereas under the present Arbitration Act, 1996, a foreign award is already stamped as the decree.

The Part II of the present Arbitration Act, 1996 contains in Chapter I the primary provisions of the NYC (1958) which deals and covers both arbitral agreement and awards, having foreign texture and in Chapter II, likewise, the provisions of the Geneva Convention, 1927 (the GC, 1927) are contained. Thus part II of the present Arbitration Act, 1996, regulates the awards made under the NYC (1958) in Chapter I or the GC (1927) in Chapter II for its enforcement.

Section 52 of the present Arbitration Act, 1996 provides that Chapter I of Part II excludes the application of Chapter II but Chapter II does not exclude the application of Chapter I. Excepting Section 52 (in Chapter I) of the Act, 1996, both the Chapters (Chapter I and Chapter II) consist of 8 Sections each dealing with same issue and wording of the Sections is also almost the same barring Section 47 of Chapter I and Section 57 of Chapter II which deal with the enforcement of foreign awards.

### 6.3 Definition of Foreign Award

A foreign award has been defined in Section 44 of the present Arbitration Act, 1996. It gives an understanding about the term of foreign awards as also the term Commercial ² in context of foreign award. Under this Section, the term ‘Foreign Award’ means an arbitral award made on or after the 11th day of October, 1960 on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India. The

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¹ AIR 1999 SC 3923, (Indian kanoon).
² Because it is necessary that the relationship should fall within the meaning of the word “Commercial” under the law in force in India.
first Act as to foreign awards was the Foreign Awards (Recognition & Enforcement) Act, 1961 and because the Arbitration Act, 1996 takes over the provisions of the Act, 1961, the Section provides that is necessary that foreign award was made on or after the 11\(^{th}\) day of October, 1960.

It is undoubtedly true that the origin of foreign awards comes from foreign arbitration. In the other word, the term ‘Foreign Award’ means the arbitral award made as a result of foreign arbitration which is not a domestic arbitration. It becomes necessary to understand the term ‘foreign arbitration’. The Calcutta High Court in Case *Serajuddin v. Michael Golodetz*,\(^3\) laid down the necessary conditions relating to term ‘foreign arbitration’ or essential elements of a foreign arbitration, resulting into the foreign arbitral award -these are as following points:-

a. Arbitration should have been held in foreign lands;
b. by foreign arbiter(s);
c. Arbitration by applying foreign laws;&
d. As a party foreign national is involved. In the instant case since the case was decided on the basis of American Arbitration Law, on foreign land involving a foreign party under a foreign arbitration, it was held to be a foreign arbitration.

To interpret the term ‘Foreign Award’, the SC in *N.T.P.C. v. Singer Co.*,\(^4\) observed that where in London an interim award was made which arose out of an arbitration agreement governed by the laws of India. It was held that such an arbitral award cannot be treated as a foreign award and it is purely a ‘Domestic Award’ because it was governed by the Indian laws both in respect of agreement and arbitration.

In 1994, just a year had passed since the SC ruling in aforesaid case, the Delhi High Court in *Gas Authority of India Ltd. v. Spie Capage S.A.*,\(^5\) examined in depth the historical developments which led to the NYC (1958) and GC (1927) and their result implementation under the two enactments i.e., The Arbitration (Protocol

\(^3\) AIR 1960 Cal.49, (Indian kanoon).
\(^4\) AIR 1993 SC 998, (Indian kanoon).
\(^5\) AIR 1994 Del.75, (Indian kanoon).

The definition of ‘Foreign Award’ for the purposes of the GC (1927) as contained in this Section differs from the foreign award as defined in Section 44 under the NYC (1958). The differences may be stated as follow:

<table>
<thead>
<tr>
<th>Section 44 of the New York Convention, 1958</th>
<th>Section 53 of the Geneva Convention, 1927</th>
</tr>
</thead>
<tbody>
<tr>
<td>The words ‘arising out of legal relationships, whether contractual or not’ as used in Section 44.</td>
<td>Section 53 failed to utilise these words, instead of this it use “relating to matters considered as commercial”.</td>
</tr>
<tr>
<td>The definition of ‘Foreign Award’ as given in Section 44 under the NYC (1958) begins with the non–obstante clause i.e., ‘under the context otherwise requires’.</td>
<td>But Section 53 is devoid of this beginning.</td>
</tr>
<tr>
<td>Section 44 insists that the agreement must be in writing</td>
<td>Section 53 simply talks of agreement simpliciter, omitting the words ‘in writing’.</td>
</tr>
</tbody>
</table>

Table 6.1: Differences between definitions of ‘Foreign Award’ in the New York Convention, 1958 and the Geneva Convention, 1927

6.3.1 Distinction between the Foreign Award and Domestic Award

A Foreign award as distinguished from domestic award is one which has any of following elements:

<table>
<thead>
<tr>
<th>No</th>
<th>Domestic Award</th>
<th>Foreign Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The parties should have their nexus of birth or business to Indian origin. Two Indians residing in a foreign State and carrying on their business in that State if agree to decide their disputes through arbitration regulated by Indian laws, the arbitral</td>
<td>One of the disputant parties is a national of foreign State. But there can be a situation where same Indian national sharing property and business in India and some foreign State have resorted to decide their Dispute through arbitration applying the foreign</td>
</tr>
</tbody>
</table>
award out of such arbitration agreement shall be treated as domestic even though it was given in foreign territory. law regarding their commercial transactions it was held to be a foreign award. The case of Harendra H. Mehta v. Mukesh H. Mehta, may be cited to illustrate the point further.

| 2 | The range of issue remains confined to Indian characteristics covering business and its cognate expressions within the limit of Indian territory. | The subject matter of arbitration agreement is international in character. That is, it deals with international commerce, trade or investment and the like. |
| 3 | The award is made in the territory of India, though an arbitral award given in a foreign State for the dispute of the two parties of Indian origin and nationality governed by the Indian law shall also be a domestic award. | The award is made in a foreign State. But in situation may be where in two foreign parties carrying on business in India agree to resolve their disputes through arbitration applying some nominated foreign law, it will be a foreign award out of such arbitration agreement, though given in the Indian territory. |
| 4 | The domestic award confines itself within the territory of India. | The party should belong to that State with which the element of reciprocity exists as per Notification in the Official Gazette published by the Indian Government. A State with which the element of reciprocity is non-existent, the award if any shall not be deal with under the Arbitration Act, 1996. |

Table 6.2: Distinction between the Foreign Award and Domestic Award

To illustrate the above distinction the decision of the Delhi High Court in Dorstener Maschine (Germany) v. Sand Plast India, is cited wherein against the

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6 AIR 1995 Arb.LR 282(Del), (Indian kanoon).
the enforcement of foreign arbitral award in Germany, an injunction was sought in India, the Delhi High Court refused to grant an injunction. The disputes between the disputants were referred for arbitration to Indo-German Chamber of Commerce. The arbitral tribunal consisted of two arbiters were appointed by each of the party. In arbitration process the counter claim of the Dorstener was rejected whereas the claim of Sand Plast was permitted. Since, Dorstener had no assets in territory of India; Sand Plast on receiving of the copy of the award initiated the proceedings regarding enforcement of the award in Germany. The respondent i.e., Dorstener opposed the enforcement of arbitral award and prayed for an ad interim injunction. The court while refusing to grant injunction held that in the view of the NYC (1958) the case being a foreign award and agreement had a foreign element involving international commerce and trade the German Company should not be permitted to restrain the Indian Company from enforcing the award in Germany by way of injunction as such. Hence, the NYC (1958) was applicable to the matter. It may be pointed out that the NYC (1958) deals with both, the arbitration awards and arbitration agreements.

After 4 years, in Harendra H. Mehta v. Mukesh H. Mehta, the SC has clarified the issue. In this particular case, two brothers having their joint business in India as well as USA. They also had properties in both States. When differences arose between them, they entered into an arbitration agreement at USA for the distribution of their all properties and business between them. The arbitral proceedings were held and award made in USA. The parties entered in to settlement during the pendency of arbitral proceedings and the arbitral award was made in terms of the said settlement. The issues on which the SC was deciding primarily were:-

I. The legal relation between the disputant.

II. The award came out of the settlement between the disputant hence it was not an arbitral award.

III. The award was not made a decree by the USA Federal Court.

IV. The arbitral award was not registered.

7 AIR 1999 SC 2054, (Indian kanoon).
The SC after considering all the issues decided that the award was a Foreign award, and *inter alia*, held that: *supra*.

I. The legal relationship of commercial nature under the Indian Law, though disputants were brothers and this fact did not take the award out of the purview of the present Act of 1996.

II. Though the award was made in terms of settlement between the parties, but still it was an award under the Act of 1996.

III. The Indian Courts cannot refuse the enforcement of this award on the ground that USA Federal Court had not issued a decree for the same because under the Arbitration Act, 1996 the award becomes directly enforceable without going to court for its decree.

IV. The registration of award is not compulsory and necessary for its enforcement under the present Act of 1996.

### 6.4 General Provisions

Indian Law recognizes applying foreign laws in arbitration, whether in procedural or substantive issues. As we have already seen, under the Arbitration Act, 1996, the disputant parties to an arbitration agreement are allowed to choose the law applicable to the issue of their disputes. They can subject their legal relationships to any monetary rule of law, including foreign laws, international convention, bilateral treaties or model-format contracts. *supra*.

The most important provisions of Indian Law regarding enforcement of foreign arbitral awards are Articles 44 and 49 of the Arbitration Act, 1996 taken in conjunction with each other. Under Article 49, foreign arbitral awards are enforced in the same way that foreign sentences and orders are enforced in India. This points to the adherence of the Indian legislator to the fundamental attitude that does not consider international arbitral awards as distinct from international judgments, and is, thus, not very much favourable to international arbitration, in terms of enforcement. In this regard, too, Indian Law follows the English legal pattern.

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*supra* Article 7 of the Arbitration Act, 1996.
Articles 44 of the Act of 1996 provides that orders and awards made in a foreign State may be granted leave to enforce in India on the same conditions that the concerned State enforces the orders and awards issued in the India. The above provisions show that there has to be a mutual policy of the enforceability of foreign awards between India and the relevant foreign State.

The arbitral award should have been given in that territory where on the basis of reciprocity the NYC (1958) is applicable. For territories to which the NYC (1958) is applicable, the government of India, in its official Gazette shall be declaring the names of States and territories where reciprocally the NYC (1958) will apply. The Foreign Awards (Recognition and Enforcement) Act, 1961 was passed which nearly 44 State territories were declared which had reciprocal acceptability of NYC (1958). The list so declared in 1961, still remains valid due to Section 85(2) (b) of the Arbitration Act, 1996. If an award is made in a country which is not a signatory of NYC (1958), then the provisions of the Section shall not be applicable to that award and that award shall not be treated as a foreign award under the present Act, 1996. The SC in Bhatia International v. Bulk Trading S.A., observed that awards in arbitration proceedings which take place in a non-convention country are not considered to be ‘foreign award’ under the arbitration Act, 1996. They would thus not be covered by Part II. It is an acceptable approach for all members of the NYC (1958). For instance, under English Arbitration Act, 1996, if an arbitral award is signed in a State which is a party to the NYC (1958), English Court can hear an

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10 As per C.A. arbitration quarterly, Vol. XVIII, No.3 October-December 1993 the following countries have reciprocal provisions in context to New York Convention, 1958:- Austria, Belgium, Botswana, Bulgaria, Cuba, Czechoslovak Socialist Republic, Chile, Denmark, Ecuador, Arab Republic of Egypt, Finland, France, Germany, Ghana, Greece, Hungary, Italy, Japan, Republic of Korea, Malagasy Republic, Mexico, Morocco, Nigeria, Netherlands, Norway, Philippines, Poland, Romania, Spain, Sweden, Switzerland, Syria Arab Republic, Thailand, Trinidad And Tobago, Tunisia, U.S.S.R., U.K., United Republic of Tanzania, U.S.A., Central African Republic, Kuwait, San Mario.

11 Section 85 of the Arbitration Act, 1996 reads as; “Repeal and savings.- (1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed. (2) Notwithstanding such repeal,-- (a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force; (b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.”

12 AIR 2002 SC 1432, (Indian kanoon).
appeal from the award if it was made under English law. In case *Hiscox v. Outhwaite* 13 the English Court has held that the disputants referred dispute arbitration in England on the basis of an agreement made under English law. The arbitration concluded in an award which was signed by the arbiter in Paris (France). The claimant appealed against the award for remission and for statement of further reasons.

But as against this, the GC (1927) requires that the parties to the award must belong two different signatory States, and then only the award may be recognized and enforced. In other word, if the award has been made in a country which is not signatory to the GC (1927) or if it is between persons who are not subject of jurisdiction of signatory State, it may not be recognized and enforced. The principle of reciprocity in enforcing foreign awards is a reflection of Article I (3) of the NYC (1958), where such a principle is emphasized. The principle is adopted by most countries but not all.

Thus, when seized of a foreign award, in order to enforce it, it must be established that the rendering country allows enforcement of awards made in India, and apply the same conditions that are applied to the enforcement of Indian awards in that State. In other words, it has to be proved that no more restrictive condition than those of Indian Law applies to the enforcement of an Indian award in the said State. A refusal of enforcement of Indian awards in that State leads to the denial of enforcement of awards rendered there in India. Also, stricter conditions for enforcement of Indian awards in a State than those applied in India triggers similar restrictions for enforcement of awards made in that State, if they are to be enforced in India. There are two serious difficulties, however, with this requirement. First, the Indian provision does not specify what the conditions referred to are. Second, there is no mention of on that the burden of proof for the existence of the reciprocity condition is: the requesting party or the Court. Such vagueness in the language of the Article can give rise to disputes over its interpretation. It has been argued that if Article 49 means that the Indian judge has to take into consideration exactly the same conditions for enforcing a foreign award in India that are applied by the courts at the seat of arbitration when they enforce awards made in India, this imposes a

13 1991(3)WLR 297 (HL) , (Indian kanoon).
difficult task on the judge. This is because it is difficult for a judge to know the conditions for enforcing a foreign award in another State. Furthermore, unless there is a precedent or specific provision of law in the other State, it is so difficult to prove that there is such a mutual policy. Imposing such a condition may result in non-enforcement of an arbitral award.

In principle, a local judge should refer to the law of the seat of arbitration to acquaint himself with provisions relating to the enforcement of foreign awards in that State. This is famous as legislative exchange. He should also refer to international conventions or treaties concluded between the country where the award is made and his own country. This is called diplomatic exchange. More importantly, some formal procedures followed by a State in enforcing another State’s awards are of little importance that neither are considered as an obstacle to the enforcement of these judgments and award in the first State, nor are necessary to be followed in the second country exactly accordingly, in order to meet the condition of reciprocity. It should be noted, moreover, that international conventions and treaties usually function for the purpose of relieving the courts of deciding on the conditions of reciprocity, as the conventions are reciprocal by their nature.\(^\text{14}\) It would have been better, if Indian Law had contained two different provisions regarding the enforcement of court rulings and arbitral awards. In that way, it would have been possible to address issues more relevant to enforcement of arbitral awards. For example, Article 44 can be interpreted as saying a foreign award may be enforced as if it was a domestic Court decision in India, if the issuing State treats awards made in India as if they were court decisions in that State. However, Indian Law could have been more explicit in this regard, in order to avoid any misinterpretation. Nevertheless, the principle of reciprocity expressed in Article 44 (b) of the Arbitration Act, 1996 significantly paves the way for the facilitation of enforcing foreign arbitral awards in India.

In general, under Indian law, if enforcement of a foreign award is sought in India, it is Indian Law that determines the enforcement procedure. This is in line with the general rule in has to international conventions on enforcement of awards.

according to which the law of the enforcing country is applicable to enforcement procedure.\textsuperscript{15} If no multilateral or bilateral treaty governs enforcement of a foreign award, its enforcement in India requires a court decision.

### 6.5 Grounds for Non-Enforcement of Foreign Arbitral Awards

The Arbitration Act, 1996 provides for certain grounds for refusing enforcement of foreign arbitral awards. In this respect, Indian Law generally follows the NYC (1958). Nevertheless, there are some significant differences that are discussed in the following Sections. The main difference is that while, under the Convention these grounds may, but not must, result in non-enforcement of a foreign award, under Indian law, they shall have such a legal impact. In other words, if there exists such a ground, the Convention provides judges with the discretion to or not to enforce the award, but Indian Law clearly prohibits them from enforcing such an arbitral award.

The Section 34 of Arbitration Act, 1996\textsuperscript{16} covered some of the grounds for said aside which are same with Section 48. This Section has been enacted on the

\textsuperscript{15} For instance, Article III, the New York Convention, 1958.

\textsuperscript{16}Section 34 of the Arbitration Act, 1996 reads as; “Application for setting aside arbitral award.- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). (2) An arbitral award may be set aside by the Court only if-- (a) the party making the application furnishes proof that--- (i) a party was under some incapacity, or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matter beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Past; or (b) the Court finds that----- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or (ii) the arbitral award is in conflict with the public policy of India.

Explanation. ---Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced of affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award, or, if a request had been made under section 33, from the date on which that request had been disposed of by the
basis of Article V of the NYC (1958) and also Section 7 of the Foreign Awards (Recognition & Enforcement) Act, 1961.

The Section 48 of the Arbitration Act, 1996 had an occasion to elaborate and lay down proof grounds for setting aside of award which are available in foreign awards. Briefly stated, these grounds are: -

a) If the arbitral agreement is not valid.
b) Due process of law has been violated.
c) Arbiter has exceeded his authority.
d) Irregularity in the composition of Arbitral Tribunal or arbitral proceedings.
e) Award being set aside or suspended in the country in which, or under the law which, that award was made.
f) Non-arbitrability of dispute.
g) Award being contrary to public policy.

Rest of the grounds which are same with Section 34 of the Arbitration Act, 1996 (which explained previous Chapter), new grounds of Section 48 of the Arbitration Act, 1996 have covered by researcher as fallow:

6.5.1 Not Being Issued by a Competent Body

Article 48(1) of the Arbitration Act, 1996 provides that a foreign award cannot be enforced, if it has not been issued by a competent judicial authority, according to the international jurisdiction rules of the country where it has been made. As we already know, under Article 49 of the Arbitration Act, 1996, the rules applying to foreign Court decisions also apply to foreign awards. It can be argued that the extension of the above rule to foreign arbitral awards means that such an award cannot be enforced in India, if it is not issued by a competent arbitration tribunal according to the law of the country where it is made. If this interpretation is
plausible, Indian Law is more restrictive of the NYC (1958) and most other internationally established rules, which do not explicitly refer to such a condition.

Some States (like Egypt\textsuperscript{17} or Bahrain\textsuperscript{18}, \textit{etc.}) go beyond the requirement that a foreign judgment or award may be enforced, if the issuing authority is competent according to the international jurisdiction rules set out at the seat of judgment. They also require that, if a foreign judgment is to be enforced in their territory, their domestic court must not have jurisdiction to hear the case, according to their own rules of private international law, which is considered as part of their public policy. In other words, joint jurisdiction between the issuing and enforcing countries results in non-enforcement of a foreign judgment. This is so, for instance, in the United Arab Emirates, the Dubai Court of Cassation ruled that if the Dubai Court has jurisdiction over a dispute; a judgment rendered by a foreign court on the dispute would not be regarded as \textit{res judicata}, and would not be enforced.\textsuperscript{19}

Although, like the NYC (1958),\textsuperscript{20} Indian Law explicitly consider the invalidity of arbitration agreement, the incapacity of the parties to conclude the arbitration agreement, the wrong composition of the tribunal or the excess of the jurisdiction of the tribunal, as grounds for refusing enforcement of a foreign arbitral award. As we have seen in Chapter V of this thesis.

Since the above provision of Indian Law does not directly address the issue of the jurisdiction of the rendering body, it does not deal with the possibility of an award being issued on a dispute which is partially within the jurisdiction of the tribunal. Under most legal systems, recognition and enforcement may be granted to those parts of the award in which the tribunal has acted within its jurisdiction, if such parts can be separated from the other parts. There is no reason not attribute the same view to the Indian law. The difficulties and ambiguities raised by the above provision of Indian Law once again indicate that it would have been better, if Indian

\begin{itemize}
\item \textsuperscript{17} Article 298(1) of the Egyptian Code of Civil and Commercial Procedure 13/1968.
\item \textsuperscript{18} Article 252 of the Bahrain Law No.12.
\item \textsuperscript{19} Danny Kabbani. \textit{“Enforcement of Foreign Judgments Relative to Project Finance in Islamic Countries"}, GCC Commercial Arbitration Centre Bulletin, issue 19 (June 2001) , 17
\item \textsuperscript{20} Articles V (1) (a) to V (1) (c), the New York Convention (1958).
\end{itemize}
Law had addressed foreign awards differently from foreign court judgments and orders.

6.5.2 Non-Compliance with Indian Law or a Court Decision

Article 48(1) (d) of Arbitration Act, 1996 provides that a foreign order and award that entails a breach of a rule of the laws practiced in India shall not be enforced. The problem with this provision is that it does not specify which types of rules cannot be breached by the award. It can be interpreted that they must not be against the ordinary law of India. This, however, goes beyond the internationally established rules and particularly the NYC (1958), which requires a foreign award not to be against the mandatory rules of law in the enforcing State. Indian Law even goes further, and requires that a foreign order and award the enforcement of which is sought in India must not contradict orders and award already issued in India. This implies the priority of an Indian court decision over a foreign judgment or award, in terms of their execution in India. Such a situation arises in the case of joint jurisdiction, when both the Indian and foreign courts have jurisdiction to hear a dispute. As seen before, the exclusive jurisdiction of a domestic court leads to non-enforcement of a foreign award, even if no domestic decision has yet been made. On the other hand, it can be said that, if the judgment is made by the Indian court lacking jurisdiction to hear the case, and the defendant did not make any objection to the competence of the court, the judgment is considered as if it were made by the court having jurisdiction. Such a judgment consequently has priority of enforcement over foreign sentences and awards regarding the same dispute. Nevertheless, in other cases of lack of jurisdiction or joint jurisdiction, there is no reason for the priority of a decision made by the Indian court over a foreign arbitration award.

Under the above situation of Indian Law, filing a lawsuit with the Indian court does not bar the enforcement of a foreign award, because enforcement of such an award may be barred only if a contradicting Indian court sentence has already been made. The provision does not also require denying enforcement of an award, if court proceedings on the same or a related subject pending in India have begun before the foreign arbitral proceedings. Under many legal systems, such as the English law, the losing party may request a stay of the order for enforcement, pending determination of any application to set aside the award before the
competent foreign authority.\textsuperscript{21} It may also be asked whether the Indian court would enforce the foreign award, if a court judgment has already been rendered, or court proceedings are pending in a third country. India may or may not have a contract with the latter country for enforcing Court judgments. India is under obligation to enforce court judgments rendered in countries with which it has a bilateral or multilateral treaty. India is a party to several international conventions for enforcement of foreign award.

6.5.3 Improper Summons and Legal Representation

The Orissa High Court in \textit{Orient Paper Mills v. Civil Judge},\textsuperscript{22} did not allow the summoning the chairman of arbitral tribunal as a witness. The application was made under Articles 226 & 227 of the (Indian) Constitution for a direction to the Civil Judge for issuing summons. The award was submitted by the tribunal. It rejected the claim with a full statement of reasons. The ground on which the Chairman was sought to be summoned was that the tribunal considered certain document behind the back of the party. The Court said that this ground, if established, would have enabled the party to get the remedy of setting aside. In the presence of such a crystal remedy, there was hardly any need for summoning the arbiter as a witness.\textsuperscript{23}

The Orissa High Court held that a foreign award can be enforced, only if both disputant parties have been summoned to appear and legally represented. This decision is a reflection of Article V (1) (b) of the NYC (1958).

Although Article 48(1) (b) of the Act, 1996 does not explicitly express equal treatment, fair hearing, full and proper opportunity for the parties to present their case and having access to the other party’s documents as conditions for the enforcement of a foreign award, it can be interpreted as to prohibiting most types of failure to comply with fairness in arbitration proceedings. For instance, the Arbitral

\textsuperscript{21} Section 103(2), English Arbitration Act, 1996, and David Altaras, “Enforcement of Foreign Award: Dardana Ltd v. Yukos OIL Co.”, \textit{Arbitration}, vol. 68, no. 3 (2002), 316. If the losing party seeks the adjournment of the enforcement proceedings pending the settlement of a foreign court decision, an order for security may be made by the enforcing court (\textit{Ibid.}, 317).

\textsuperscript{22} AIR 2003 (4) RAJ 479(Ori), (Indian kanoon).

\textsuperscript{23} \textit{Ibid.}
Tribunal’s refusal to hold a hearing requested by one of the disputant parties may be regarded as a violation of due process, and thus a ground for denying enforcement of the award. 24

6.5.4 Non-Arbitrability of the Dispute

Enforcement of an arbitral award may be refused if the court finds that the issue of the difference is not capable of settlement by arbitration under the law of India. Article 48(2) (a) of Arbitration Act, 1996 provides that the dispute about which a foreign award is made must be arbitrable under Indian Law. This is equivalent of Article V (2) (a) of the NYC (1958). As we have seen in chapter IV (Four) of this thesis, Article 2 of the present Act, 1996 implies that almost any dispute arising from legal relationships between private and public entities can be settled by arbitration. However, disputes that cannot be subject to reconciliation or compromise cannot be settled through arbitration.

Generally speaking, almost all subject-matters in dispute, not being of a criminal nature, may be referred to arbitration. Where the law has given jurisdiction to determine a particular matter to specified tribunals only, determination of that matter by other tribunals is excluded.

The SC in Union of India v. Popular Builders, 25 held that the existence of arbitrable dispute is a condition precedent for exercise of power by an arbiter. The SC in U.P.Rajkiya Nirman Nigam Ltd. v. Indure(P) Ltd., 26 has also emphasized that the arbitrability of a claim depends on the construction of the clause in the contract and on this point the finding of the arbiter is not conclusive and that ultimately it is the court that decides the controversy. That was the position under the repealed Arbitration Act, 1940. Section 16 of the Arbitration Act, 1996 empowers the arbiters to decide such question. The decision of the arbiter in this respect being appealable,

24 Sections 48(1) (b) of the Arbitration Act, 1996 (This is similar to Article V (1) (b), the New York Convention 1958) reads as “The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.”

25 AIR 2000 SC 1, (Indian kanoon).

26 AIR 1996 (2) SC 667, (Indian kanoon).
ultimately the matter goes for the decision of the court. The same effect was the decision of the SC in *Union of India v. G.S.Atwal &Co.*

6.5.5 Non-Enforceability of the Foreign Award in the Country Where It Is Made

Article 48(1)(e) of Arbitration Act, 1996 provides that a foreign arbitral award whose enforcement is sought in India has to be enforceable in the country where or under the law of which, it has been made. In other words, enforcement of foreign award may be refused if the award has not yet binding on the disputants, or has been set aside or suspended by a competent authority of the State in which that award was made. The SC in *Centrotrade Mineral & Metals Inc v. Hindustan Copper Ltd.*

has explained the phrase “the country…. under the law of which, it has been made” in Article 48(1) (e) of Arbitration Act, 1996, refers to the law of the State in which the arbitration has its seat rather than the sate whose law governs the substantive contracts. Under Article V (1) (e) of the NYC (1958), a foreign award may not be enforced, if it has not yet become binding on the disputant parties, or has been set aside or suspended in the country where it is made. The above Indian provision is probably intended to reflect the restriction expressed in the NYC (1958), as the requirement of enforceability entails, among other things, that an award has not been set aside or suspended, and is binding. However, Indian Law is similar with the Convention. Some States require the award to be binding, under the law at the seat of arbitration or under the applicable law, but Indian Law just requires it to be enforceable under the law at the seat of arbitration. This means that if the award is made in another country under the law of a third State, it cannot be enforced in India, unless it is enforceable in the State where it is made. This imposes an extra restriction on enforcement of foreign awards in India. The enforceability condition may amount to the need for double enforcement, at the seat of arbitration as well as in the enforcing State.

This is while it has been a main purpose of the NYC (1958) to abolish the need for obtaining leave to enforce twice, once in the State where it is made, and

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27 AIR 1996 (3) SC 568, (Indian kanoon).
then in the country where its enforcement is sought. Moreover, there are some legal regimes, including France and USA, whose law is more facilitative of arbitration than the NYC (1958) is. The national laws of these countries provide that an award defective under the law at the seat of arbitration or under the applicable law can still be enforced. For instance, in *Hilmarton Ltd. v. Omnium de traitement et de valorisation*, the French Court recognized an award set aside in Switzerland. The French legislator has gone as far as omitting setting aside as a ground for non-enforcement of an award, in the Amendment of the French Code of Procedure 1981. In the USA, in *Chromalloy Aeroservices Inc. v. Arab Republic of Egypt*, the Federal Court enforced awards set aside in Egypt. In instant case, unlike the Egyptian law, the US Federal Court enforced the award, since; the US Federal law of arbitration did not consider a proper implementation of the applicable law as a ground for vacation of an award. The court did so, drawing upon Article VII of the NYC (1958) on the more favourable regime of enforcement.

### 6.5.5.1 Non-binding Awards

The system of double ‘*exequatur*’ (leave for enforcement) has been dispensed with by the NYC (1958) which was not prevalent in the GC (1927), by using the word binding instead of final. That means the enforcement of NYC awards can be sought in another State without seeking leave for enforcement ‘*exequatur*’ from the State where the arbitral award was made. The expression binding implies that arbitral award is binding on the disputant parties and is effective so much so that it would no longer be open to ordinary means of recourse including appeal against the foreign award.

Under Article 48(1) (e) of Arbitration Act, 1996, a foreign award in order to be enforced in India must be binding according to the law of the State where or under the law of which, it is made. The SC of India in *O.N.G.C. v. Western Co of

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North America\textsuperscript{32} said that the foreign award can be said to have become ‘binding’ on the parties only when it has become enforceable and the enforceability must be determined as per the law applicable to the award.

This provision, too, reflects Article V Para (1) (e) of the NYC (1958). The difference, however, is that, under Article 1(2) (d) of the GC (1927), an award has to be final in order to be enforced, whereas the NYC (1958) provides that the award must merely be binding. This means that some types of interim awards, particularly conservatory measures, if they are considered to be binding, can be enforced under the Convention, but not under the GC (1927). Foreign awards that are not yet final may be revoked later, so their enforcement may create practical difficulties. Thus, requiring awards to be final, under the GC, puts an extra condition for enforcing foreign awards, compared to what is required by the NYC (1958). Then, a binding arbitral award is enforceable but it is not final as long as it is ‘open to means of recourse’. It is for this reason that the NYC (1958) avoided to use the term final (as is found in Article 1(2) (d) of the GC, 1927) in place of binding.\textsuperscript{33}

6.5.6 Awards Being against Public Policy

As we have seen, the expression ‘Public Policy’ is subject to interpretation from place to place and time to time as also to currently prevailing circumstances, the Arbitration Act, 1996 having not defined it.

Section 48 (2) (b) of the Act, 1996 empowers the Court to set aside the arbitral award made outside India if it violates Public Policy. Similar provision is contained in Section 34(2) (b) where the arbitral award is made in India. Under above Article, a foreign orders or award the enforcement of which is sought in India must not contain anything against Public Policy.

The legislature of India used of the words “if the Court finds that” in the Section makes it crystal that it is not necessary for the party to plead that the arbitral award violates Public Policy but the duty is cast on the court itself to see that the arbitral award is not in violation of Public Policy. In Renusagar Power Co. Ltd. v.

\textsuperscript{32} AIR 1987 SC 674,686,686, (Indian kanoon).

General Electric Co. Ltd., which arose under the Foreign Awards (Recognition & Enforcement) Act, 1961 which implemented the NYC (1958) of 1958 relating to recognition and enforcement of foreign arbitral awards, the SC inter-alia observed: “In order to attract the bar of Public Policy, the enforcement or the award must involve something more than mere violation of the law of India. The enforcement of a foreign award would be contrary to Public Policy if it is contrary to:

a) Fundamental policy of Indian Law;
b) The interests of India;&
c) Justice and morality.”

After 9 years, the SC in Oil & National Gas Corporation Ltd. v. SAW Pipes Ltd., has observed that the term “Public Policy” does not admit a precise definition. For the purpose of Sections 34 & 48, the phrase “Public Policy” has to be given a wider connotation and the award could be set aside if it is;

a) Fundamental policy of Indian Law;
b) The interests of India;
c) Justice and morality;
d) Is patently illegal; or
e) It is so unfair and unreasonable that it shocks the conscience of the Court.

The Bombay High Court in Open Sea Maritime Inc. v. R. Pyarelal International Pvt. Ltd., observed that wherein the enforcement of foreign award, is objected on the ground that suit was filed by the petitioners in Bombay High Court on original said. This was in respect of the same issue which was referred to for the arbitration. Notice in respect of the said suit was also given to the arbiter. Hence the petitioners could not have preceded with the arbitral proceedings. It was held that it amounted to fraud and hence the enforcement of the foreign award would be contrary to the public policy of India. It is violation of Section 48 (2) (b) of the Arbitration Act, 1996. This decision was approved by the SC in Phulchand Exports Ltd. v. OOO Patriot.

34 AIR 1994 SC 860, (Indian kanoon).
35 Ibid.
36 AIR 2003 SC 2629, (Indian kanoon).
37 AIR 1999(2) Arb. LR 383(Bom.), (Indian kanoon).
38 AIR 2011(4) Arb.LR 108(SC), (Indian kanoon).
Likewise, The SC rejected the contention that enforcement of foreign arbitral award made in Ukraine would be against Public Policy as the arbiter was an employee of one the disputant parties and, therefore, would not be independent in case Transoccan Shipping Agency v. Black Sea Shipping.\(^\text{39}\) It may, however, be stated that the phrase Public Policy has been interpreted differently by courts depending on whether the arbitral award is made by international or domestic arbitration tribunal.\(^\text{40}\)

An important feature of the *Renusagar Power Co.*\(^\text{41}\) *and Oil & National Gas Corporation Ltd.* Cases are that the SC emphasizes the rules of morality and conduct as separate from Public Policy. Under most other national laws, on the other hand, Public Policy is taken as including the rules of morality. The NYC (1958) provides for the non-enforcement of awards, if they contravene Public Policy of the enforcing country, without specifying ethical rules.\(^\text{43}\) The serious problem with the above Indian provision is that no clear distinction is made between Domestic and International Public Policy. Moreover, it is not clear whether the Indian court, when considering enforcement of a foreign award, takes into account International Public Policy or otherwise. For instance, may a breach of a sanction regime imposed by the UN result in the non-enforcement of an award made outside India.

More importantly, the above Case of the SC does not specify which kinds of moral rules must be complied with. Are awards assessed against fundamental moral rules or moral rules in general? Also, it is not clear whether internationally accepted moral standards are the criteria for refusing enforcement of foreign awards or moral standards prevalent in Indian society. Indian society, as a traditional Hindu & Muslim society, has moral standards many of which do not correspond with the moral values accepted in the other States particularly Secular West. Although Indian Law does not explicitly refer to Hinduism or Islamic teachings as standards of morality, such teachings are embedded in Indian culture.

\(^{39}\) AIR 1998(2) SCC 281, (Indian kanoon).

\(^{40}\) N.V.Paranjape, 2011,op.cit., 263.


\(^{42}\) *Oil & National Gas Corporation Ltd. v. SAW Pipes Ltd.*, AIR 2003 SC 2629, (Indian kanoon).

\(^{43}\) Article V (2) (b), the New York Convention (1958).
Unfortunately, so far there has not been sufficient case law to clarify the above ambiguous and complex issues in Indian law, and it is expected that when such questions arise in the context of a legal case, there will not be an easy solution. Such ambiguities might dissuade foreign parties from recourse to arbitration to settle their prospective disputes with Indian parties. Probably, it would have been safer if the phrase “rules of morality” were not in the Indian legal system, in order to avoid any controversy over its interpretation. It is heartening to note that the Arbitration (Amendment) Bill, 2003 seeks to define the term Public Policy so as to give it an exact meaning. 44

6.6 Competence of the Court

6.6.1 Not Considering the Merit of the Case

Like India, most legal regimes do not permit a substantive review of foreign arbitral awards. However, as discussed before, under Indian Arbitration Act, 1996, a foreign arbitral award have not been reviewed on the basis of its merits, or more probably its proceedings might have been reviewed, in order to ensure that procedural requirements, mandatory rules of Indian law, public policy and good morals were observed. The Delhi High Court in Ludwing Wunscha & Co. v. Raunaq International 45 has held that Section 46 of the Arbitration Act, 1996 provides that a foreign award cannot be challenged on merits, be final, conclusive and binding for all purpose, expert the circumstances set out in Section 48 of the Arbitration Act, 1996 in which enforcement thereof will be refused. Domestic courts cannot set aside or annul a foreign award. The Court has only jurisdiction to decide whether the foreign award is enforceable or not.

The point is that from a strictly legal perspective, there was no text of law or any international convention prohibiting the Indian Court from examining the issue of the dispute. Nevertheless, in practice, the court recognized and granted leave to enforce awards made outside India, even if they were made in favour of the foreign party, without reviewing the subject-matter of the dispute.

44 N.V. Paranjape. 2011, op.cit., 263.
45 AIR 1983 Del. 247, (Indian kanoon).
The various grounds available for challenge of the arbitral award do not postulate a challenge to the award on merits. This is so, because the exhaustive list of grounds enumerated in the Section does not include a mistake in fact or law committed by the arbiter. Moreover, the enforcing judge is confined to verify the justification of the objections on the basis of the specified grounds and to weigh the violation of public policy of his State. It is also because the principles of ICA do not allow judicial interference with the substance of arbitration by a State court.

The SC in Renusagar Power Co. Ltd. v. General Electric Co. Ltd., 46 observed that in enforcement proceedings of a foreign arbitral award, the scope of enquiry before the court in which award is sought to be enforced is limited to the conditions mentioned in Section 48. This Section does not make provision which enables a party to the said proceedings to challenge the award on merits. Thus, it is crystal that before a foreign arbitral award is enforced the provisions of Sections 44 and 47 of the present Arbitration Act, 1996 are required to be fulfilled.

Recent Indian laws are more explicit that Indian courts are not competent for the substantive review of foreign judgments and awards. The Arbitration Act, 1996 does not include issues of fact and law in the list of grounds for declining enforcement of such awards. However, there are some provisions of Indian Law that might be interpreted as authorizing Indian courts to investigate some of types of substantive matters of fact with regard to foreign awards. For instance, under Article 48 (2) (b) (Explanation) of the Arbitration Act, 1996, a foreign orders and award cannot be enforced in India, if it is based on fraud or corruption.

6.6.2 Ordering Interim Measures

Indian judicial systems, even before the present Arbitration Act, 1996, have been ready to order interim or conservatory measures in disputes referred to domestic not international arbitration. For granting of interim measures by a Court in context to foreign parties of an arbitral agreement, the question of jurisdiction of the Court arises. The question of whether Article 2(2) the Arbitration Act, 1996 stripped Indian Courts’ jurisdiction to issue interim measures in ICA held outside India was decided in the seminal case of Olex Focas Pvt. Ltd. & Others v. Skoda

46 AIR 1994 SC 860, (Indian kanoon).
The Delhi High Court vacated the ex parte interim injunction. Another authority to the same effect, in *Marriott International Inc & Others v. Ansal Hotels Ltd.*, arbitration was under the NYC (1958) at a place outside India, the Delhi High Court refused to issue any interim order in such a matter. This decision was not approved by the SC in *Bhatia International v. Bulk Trading S.A.*

In instant case, the three Judges Bench of the SC attempted to resolve the ambiguity of Article 2(2) of the Arbitration Act, 1996 by taking the bold view that despite its contrary wording, the entire Part I of the Act, 1996 was also applicable to ICA held outside India, thereby indisputably going against the conceptual and architectural demarcations established by the Arbitration Act, 1996 between foreign and domestic arbitrations. To uphold its holding, the Court reasoned that it was necessary to determine whether the language of the Arbitration Act, 1996 was a very plain and unambiguous as to admit only one interpretation. One may however question what ambiguity exactly lies in “Scope; this Part shall apply where the place of arbitration is in India.” Yet, finding that the language was uncertain and ambiguous, the Court engaged in a lengthy discussion about the purpose of the Arbitration Act, 1996, reasoning that “the conventional way of interpreting a statute is to seek the intention of its makers.” What appears to be the driving force behind the Court’s decision is its belief that adhering to the plain language of the Arbitration Act, 1996 would culminate in untenable results. Thus, the *Bhatia* judgment rendered Part I—meant to deal with domestic arbitration in India—applicable to arbitrations located outside India.

Although the intention of the Court may have been to assist arbitration by rectifying the anomaly between the ML and the Arbitration Act, 1996, it may have

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47 AIR 2000 DLI 161, (Indian kanoon).
49 AIR 2002(4) SCC 105, (Indian kanoon).
50 AIR 2002(4) SCC 110, (Indian kanoon); providing that courts in India would have jurisdiction even in respect of an international commercial arbitration because an ouster of jurisdiction cannot be implied, it has to be express.
51 Ibid., 108.
52 Article 2(2) of the Arbitration Act, 1996.
54 Ibid.,107-08 (wherein the Court listed undesirable consequences of not expanding the scope of Part I, e.g., stating that it would mean that there is no law in India governing such arbitrations).
gone too far in expanding the scope of Part II by making Part I applicable to arbitration outside the territory of India.\textsuperscript{55} The decision of the Court is in sharp contrast to the ML (1985) considering that the ML (1985) itself does not contemplate granting such broad powers to national courts.\textsuperscript{56}

While the Bhatia decision has been hailed for attempting to assist ICA in interpreting the 1996 Act according to the NYC (1958) and the ML (1985), others have criticized it for overreaching and judicial “law-making.”\textsuperscript{57} Extending the powers of Indian courts to ICAs held outside India also opened up the possibility of challenging foreign-rendered awards in Indian courts. Thus, the Bhatia judgment may have inadvertently vested Indian courts with powers beyond those envisioned by the drafters of the ML (1985), and which could potentially be adversely utilized against arbitration.

The Bhatia decision has been clearly described as “well-intentioned” but “seriously flawed,” and “manifestly erroneous”\textsuperscript{58} because of its failure to read Part I of the Arbitration Act, 1996 —applicable to arbitrations seated in India—separate from Part II of the Act, 1996, which deals exclusively with arbitrations seated outside India. This view has been reiterated by SC in Venture Global Eng. v. Satyam Computer Services.\textsuperscript{59}

In doing so, the court failed to follow the letter of the law and instead relied on its own conception of the 1996 Act’s intent.\textsuperscript{60} It is arguable whether the Court’s understanding of the “spirit of the Act” is in line with the relevant legislative purpose of rendering arbitration more efficient-including limiting judicial interference.

\textsuperscript{55} Especially considering that the Model Law itself does not contemplate granting such broad powers to national courts.

\textsuperscript{56} Article 5 of the ML, which limits the courts’ involvement in international arbitration.


\textsuperscript{58}\textit{Ibid}.

\textsuperscript{59} AIR 2008 SC 1061, (Indian kanoon).

\textsuperscript{60} \textit{Ibid}.
6.7 The Procedure for Enforcement of a Foreign Award

Section 49 of the Arbitration Act, 1996 confers the status of decree on foreign arbitral award as a result of which it becomes executable by its own force. This deeming provision has been incorporated in this Section with a view to ensuring smooth and speedy execution of recognized and unobjectionable foreign awards. In other word, this Section empowers the foreign award to be executed as Decree of the Court if the Court is satisfied that the award in question is recognizable and enforceable under the Act, 1996.

Section 49 of the Arbitration Act, 1996 provides that when the Court not just of opinion but also satisfied that an award can be enforced by the Court, the foreign arbitral award shall be deemed to be a decree of the Court. In this respect context, the SC in Koch Navigation Inc. v. M/s. H.P.C.L.\(^6\) held that the foreign award has to be executed as it is and there is no scope for addition to, or subtraction from, the award. It means enforcement of a foreign award is to be carried out in accordance with its contents without any change in this context.

In Fuerst Day Lawson v. Jindal Export Ltd.,\(^6\) the SC has observed that the provisions of Sections 46 to 49 of the present Arbitration Act, 1996, read together make it crystal that no separate proceedings are necessary for the enforcement of foreign award. The Court can decide the enforceability of the award to make it a decree or rule of the Court and also take up its enforcement in the same proceedings instead of two separate proceedings.

It may be reiterated that even in case of domestic award, the Arbitration Act, 1996equates it to a decree of the Court enforceable by its own force without the necessity of award being filed in the competent Court for execution as a decree. There is no right of appeal against the recording of satisfaction by the Court, under Section 49 of the Act, 1996.

It has to be stated that the procedure for enforcement of awards under the GC of 1937, the NYC (1958) and Section 49 of present Arbitration Act, 1996 is much

\(^6\) AIR 1989 SC 2198, (Indian kanoon).
\(^6\) AIR 2001 SC 2293, (Indian kanoon).
the same. Any person who is interested in enforcing a foreign award may apply in writing to any Court having jurisdiction over the subject matter of the award. The Court for this purpose would be principal Civil Court of original jurisdiction in a District and High court exercising original civil jurisdiction.\(^{63}\) Alongwith the award and the agreement on which it is based, sufficient evidence showing that the award is a foreign award should also be filed by the party applying for the enforcement of the arbitral award. The arbitral award becomes a decree of the Court on Court being satisfied that it is a foreign award enforceable under the law. There is no provision in the Arbitration Act, 1996 for issue of notice to the affected party before Court makes it a decree.

In *M/s Kochi Navigation Co. v. M/s Hindustan Petroleum Corporation Ltd.*,\(^{64}\) the Apex Court has observed that the meaning of the foreign award should be interpreted in the light of the NYC (1958) and it’s implementing legislation in India. The arbitral award has to be executed as it is. The only ground on which it may be modified is its ambiguity.

As we have seen, under Article 49 of the Act, 1996, foreign award may be enforced in India in the same way that the concerned country enforces the orders and award made in India. We have already seen that under Article III of the NYC (1958), a State where the enforcement of an award is sought must enforce the award according to its local law, without imposing more onerous conditions or higher fees than are required in the enforcement of its own domestic awards. India has joined the Convention. Therefore, if another State enforces foreign awards, including those made in India, in the same way that it enforces its domestic awards, awards made in that country are enforced in India as if they were awards made in India. As a matter of law, most countries, particularly those joined the NYC (1958), treat foreign awards as if they were domestic awards. If this is so, the procedure for the enforcement of domestic award would also be applicable to the enforcement of foreign awards in India. Similar situation exists in the English Law, where the procedure for executing enforcement orders of an award, whether domestic or

\(^{63}\) Section 2 (e) of the Arbitration Act, 1996.

\(^{64}\) AIR 1989 SC 2198, (Indian kanoon).
foreign, is the same as that of Court judgments, for which the execution department of the court is responsible.

As such where enforcement proceedings of a foreign award as a decree fail to give result, order of High Court or the SC may be sought and in failure of this order, the remedy of contempt of court may be availed of as a solution.

6.8 Appealable Orders

Under Sub-section (2) of Section 50 of the Arbitration Act, 1996, the provision has been made for appeals confining it to refusal certain orders made context to:-

a) Referral of dispute to arbitration under Section 45.

b) Enforcement of foreign award under Section 48 of the Arbitration Act, 1996.

This Sub-section enumerates two circumstances referred to under Section 45 and 48 when an appeal shall lie against those orders and under Sub-section (2) of Section 50 the Arbitration Act, 1996, there is no provision for a second appeal but the Section does not preclude the right of the disputants to appeal to the SC (as guaranteed by the Indian constitution) against the order passed by appellant Court.

The main question in this regard is whether an appeal against an order of Single Judge of High Court under Section 45 of the Act, 1996 refusing to refer disputants to arbitration would lie to Division Bench of that High Court? The High Court of Calcutta in State of West Bengal v. M/s Gourangalal Chatterjee, held that no appeal shall lie to double bench against the order of Single Judge Bench, on this issue. But the High Court of Bombay had taken a contrary view in this regard in its decision in Vanita Khanolkar v. Pragna M. Pai, observed that such an appeal is permissible relying upon Clause 15 of Letters Patent applicable to High Court of Bombay.

Due to conflicting decisions of the Calcutta High Court and High Court of Bombay, the SC in Orma Impex Pvt. Ltd v. M/s Nissai Asb Pvt. Ltd., thought it

65 AIR 1993(3) SC 1, (Indian kanoon).
66 AIR 1198 SC 424, (Indian kanoon).
67 AIR 1999SC2871, (Indian kanoon).
appropriate to direct this special leave petition to be placed before its three Judge Bench. In instant case, the SC constituted a three Judge Bench which was to determinate the Delhi High Court Single Judge decision refusing the referral of the subject matter to arbitration under Section 45 of the present Arbitration Act, 1996 and not allowing appeal against such order to double bench of the same High Court. The SC held that appeal to double bench should have been allowing and the Delhi High Court failed to take notice of Section 10 of the Delhi High Court Act, 1996 and Clause 10 of Letters Patent applicable to High Court of Delhi.

The SC regretted that in above case because the intent appeal before the SC was against the order of Single Judge of the Delhi High Court wherein the High Court had taken a view that no further appeal would lie under Section 50 of the Act, 1996 against order made under Section 45 of the Act refusing to refer disputants to arbitration. It learned Single Judge had not taken notice of Section 10 of the Delhi High Court Act, 1996, and Clause 10 of Letters Patent applicable to High Court of Delhi.

Just after three years, in M/s. I.T.I. Ltd. v. Siemens Public Communications Network Ltd., the SC held that even though no second appeal shall lie from the order of the appellate Court passed under Section 37 of the Arbitration Act, 1996, but a revision petition under Section 115 of the Civil Procedure Code, 1908 can be filed against such orders. On the analogy of the above case, it may be said that under Section of the Act, also, a revision petition against a reverse order of the appeal may be preferred.

The SC in Sumitomo Corporation v. CDC Financial Services (Mauritius) Ltd. & Others, held that Section 50 of the Arbitration Act, 1996 provides for appeal

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68 Section 10 in the Delhi High Court Act, 1966 reads as: “Powers of Judges.(1) Where a single Judge of the High Court of Delhi exercises ordinary original civil jurisdiction conferred by sub-section (2) of section 5 on that Court, an appeal shall lie from the judgment of the single Judge to a Division Court of that High Court.(2) Subject to the provisions of sub- section (1), the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and Division Courts of the High Court of Punjab and with respect to all matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the High Court of Delhi.” See more details in: "Section 10 in the Delhi High Court Act, 1966 (2013), <http://www.indiankanoon.org/doc/1617497/>, accessed date on (10/09/2013).

69 AIR 2002 SC 2308, (Indian kanoon).

70 AIR 2008 SC 1594, (Indian kanoon).
against appealable orders and the forum to which such appeal would lie will be the ‘court authorized by law to hear appeal from such order’. It is crystal from the provision contained in Section 37 of the Arbitration Act, 1996 which provides that appeal would lie to the Court which hears the appeal and not the Court which exercises original jurisdiction if the issue had been a suit as provided in the explanation to Section 47 or Section 2(c) of the Arbitration Act, 1996.

6.9 Chapter II Not to Apply in Chapter I of Part II of the Act, 1996

It has already been stated that Chapter I and Chapter II of part II of the Arbitration Act, 1996 relate to foreign award made under the NYC (1958) and the GC (1927) respectively. Section 52 of the present Arbitration Act, 1996, which is based on Article VII (2) of the NYC (1958) and Section 10 of the Foreign Awards (Recognition & Enforcement) Act, 1961, statutorily excludes the application of succeeding Chapter I relating the NYC (1958) awards to foreign awards to which the GC (1927) i.e., Chapter II of Part II of the present Arbitration Act, 1996 applies. Then, the foreign awards which shall be governed by the GC, 1927 provisions shall be regulated by Chapter I and shall not be permitted to be intermingled by the provisions of the NYC (1958) contained in Chapter I of Part II of the present Act, 1996.

The NYC (1958) in Article VII (2) strongly emphasized that the Geneva Protocol of 1923 and the GC of 1927 shall come to an end to have effect between contracting State to extent, as they become bound by the NYC (1958). Practically, most of the countries have signed the NYC (1958). Normally, the NYC (1958) awards are enforceable in India because it becomes a party of this Convention on 13 July 1960. To avoid ambiguities and difficulties, a State like India which is signatory of both the Conventions, must adopt and practice under the NYC (1958) only.

6.10 Conclusion

As we have seen in this Chapter, it was assumed that, under earlier Indian Law (the Arbitration Act, 1940), foreign awards were open to retrial and challenge.

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71 Section 50(1) (b) of the Arbitration Act, 1996.
This was because, in previous Indian Laws, there were no rules and regulations on enforcement of award rendered outside India. Nevertheless, the case examined in this Chapter showed that Indian legal authorities tended to grant leave to enforce such arbitral awards. Recent legal developments have shown the intention of the Indian legislature to move significantly towards recognition of foreign arbitration and enforcement of foreign arbitral awards. There has been a serious attempt to catch up with advanced legal systems in the world, and to enact internationally recognized regulations and standards for facilitating enforcement of foreign awards. The Arbitration Act, 1996, in particular, has made a significant contribution in this regard. Recourse to foreign arbitration is permitted under present Act, while it explicitly allows enforcement of foreign arbitral awards. The Decree does not require considering the merit of a foreign award that is sought to be enforced in India, and enforces them on the same conditions that Indian awards are enforced at the seat of arbitration. But contrary, under provisions of the Civil Procedure Code, 1908, foreign judgment can be held valid and conclusive if it decided on merits. Despite being a big step towards facilitation of enforcement of foreign arbitral awards, the present Act, 1996, in some aspects, is more restrictive than the NYC (1958). For instance, under Indian Law, non-compliance with the rules of morality leads to the denial of enforcement of an award, but the Convention does not contain such provision that is susceptible to interpretation and controversy.

An important problem with Indian Law, and specifically the Arbitration Act, 1996, is that, regarding enforcement, it treats foreign arbitral awards and foreign court decisions similarly. Hence, some features of foreign sentences, such as enforceability, are required from foreign awards. The condition of enforceability of an arbitral award at the seat of arbitration may be interpreted as the need for double enforcement of an award, what the NYC (1958) is deliberately intended to avoid. Moreover, because of not making a distinction between foreign awards and court decisions, issues particular to foreign awards are not properly addressed in Indian Law. Consequently, facilities reserved for enforcing foreign awards in most advanced legal systems are not provided for under Indian Law.

In a nutshell, it can be argued that Indian legal system has significantly moved towards creating a facilitative environment for enforcing foreign arbitral
awards. Nevertheless, some improvements are necessary to bring India in line with advanced legal regimes in the world and to provide for the needs of international arbitration. The first step, in this regard, should be enacting legislation directly addressing foreign arbitration as distinct from foreign court decisions and orders.