Enforcement of US and Canadian Judgments and Arbitral Awards in India

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US and Canadian judgments and arbitral awards may be enforced in India. In brief, while India has a number of legal commitments for the recognition and enforcement of foreign judgments and awards, speedy and effective enforcement is not always possible. In order to enforce a US or Canadian judgment in India, a plaintiff must file a separate suit on the judgment – often a protracted process. Moreover, Indian courts have exhibited a willingness to review foreign courts' conclusions of law in some circumstances. Two recent Supreme Court decisions suggest that the same may be true with respect to arbitrators' conclusions of law, despite India's commitments under the New York Convention.[2]

We will address each of these findings in more detail. After a brief introduction to India's judicial system in Part I, Part II will discuss how US and Canadian Judgments are enforced by Indian courts. The enforcement of US and Canadian arbitral awards will be addressed in Part III. Each Part will examine the relevant international conventions and domestic laws, the procedural requirements for enforcement, and the applicable legal standards, as they have been interpreted by Indian courts. In addition, each part includes tips for increasing the likelihood that a judgment or award will be enforced in India.

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[2] This research in this Memorandum is based on a search of the following reference materials and research databases: Foreign Judgments: India (publication), Indlaw (subscription database for Indian cases and statutes, similar to Westlaw), IndianCourts (public online database containing judgments of the Supreme Court and High Courts), Kluwer Arbitration, Westlaw, JSTOR, HeinOnline. The research reflects a review of a number of primary and secondary sources, including statutes, court judgments, treatises, law review articles, and scholarly commentary.

Part I. Introduction to India's Judicial System[3]

India is a quasi-federal union of States, whose judiciary and legal institutions are heavily influenced by the British common law system. As in Britain, precedent is the cornerstone of Indian jurisprudence. Thus, the decisions of higher courts are binding on all lower courts in their jurisdiction. The ultimate source of legal precedent is India's Supreme Court, which issues binding decisions for all subordinate tribunals. The Supreme Court is also the definitive source of Constitutional interpretation. In addition to its appellate jurisdiction, the Supreme Court has original jurisdiction in a number of disputes, including disputes between the Government of India and any of the Indian States.

Below the Supreme Court are India's High Courts, some of which have jurisdiction over more than one State. The subordinate courts are divided into civil and criminal tribunals. The highest level of civil tribunal is the District Court, which administers justice at the district level. Below it are the Courts of Civil Judges (Junior and Senior division). On the criminal side, the Court of Sessions hears appeals from courts of Judicial Magistrates and Chief Judicial Magistrates.

Part II: Enforcement of Judgments

I. Sources of Law & Background

India has not ratified any multilateral conventions on the recognition and enforcement of foreign judgments. Nor has it signed any bilateral treaties to this effect with the United States or Canada. Thus, foreign judgments are enforced solely according to the terms of Indian domestic law, namely the Indian Code of Civil Procedure of 1908 ("CPC").[4] The CPC is a federal law and

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[3] *See generally* ARBITRATION LAW HANDBOOK 431 (Ben Horn and Roger Hopkins eds., 2007) (2007); V. Ramakrishnan, *Features – Guide to Indian Laws*, LLRX, Sept. 17, 2001, http://www.llrx.com/node/1092 (last visited June 7, 2010).

[4] INDIA CODE CIV. PROC. § 2(6) (defining foreign judgment as "a judgment of a foreign court."); *id.* § (2)(5) (defining foreign court as a court "situated outside India and not established or continued by the authority of the [Indian] Central Government.")

applies to all Indian States, with the exception of the State of Jammu and Kashmir, which has a separate statute with similar provisions.

2. Procedure for Enforcing US and Canadian Judgments.

US and Canadian judgments are not directly enforceable in Indian courts.[5] Instead, a party seeking enforcement must institute a fresh suit on the judgment and establish that the judgment is conclusive under the terms of section 13 of the CPC.[6] The suit must be brought in the lowest court of competent jurisdiction[7] within three years from the date on which the foreign court issued the judgment.[8]

In order to bring a claim for the enforcement of a foreign award, the enforcing party must submit a duly authenticated copy of the following documents: (1) the legal claim; (2) the written statement of the defense, if any; and (3) the judgment and decree of the foreign court.[9] It is not necessary to produce copies of the evidence presented at the foreign trial. However, the plaintiff must file a power of attorney with the plaintiff's signature.

Tip 1: Properly Authenticated Documents. All documents submitted to the Indian court must be authenticated by a Notary Public appointed by the US or Canadian Government, respectively. The documents should bear an endorsement that they have been sworn before the Notary Public, as well as the Notarial Seal and signature. While duly authenticated copies of the original documents are acceptable, faxed documents are not. All documents must be in English, the official language of Indian courts.

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[5] *But see id.* § 44(A) (providing for direct enforcement for judgments issued by the Superior Courts of any "reciprocating territory" upon production of a certified copy of the Court's decree and a notification in the Official Gazette). As of 2009, the United States, but not Canada, has been notified in the Official Gazette. Philipp Ritz, *Pitfalls to Avoid When Drafting Arbitration Clauses in India-Related Contracts* 27 ASA BULLETIN 717, 719-20 (2009).

[6] *See infra* Part (3)(ii) for a discussion of the § 13 exceptions.

[7] Lalit Bhasin, Foreign Judgments: India ¶ 24 (June 1994) (hereinafter "For.Judg.")

[8] Limitation Act, No. 36 of 1963, India Code (1963), *available at* http://indiacode.nic.in/.

[9] FOR.JUDG at ¶ 4.

Certain types of foreign judgments entail additional procedural requirements.[10] For example, if the judgment is against the Indian Government or public officer, the judgment is only enforceable after the Secretary of the government or the government officer has received a 2-months' written notice.[11]

In addition, a creditor located outside of India, who seeks to collect a money judgments payable in a foreign currency, must follow the following procedure: (1) the application submitted before the Indian court must specify the value of the foreign judgment in Indian rupees, since Indian courts will only grant decrees in terms of Indian rupees; and (2) the creditor must obtain the approval of the Reserve Bank of India ("RBI") to transmit the right amount of foreign currency outside of India.[12] In most cases, the RBI grants permission for the transfer of funds.[13] However, there may be delay or difficulty in recovering the full judgment amount in cases where the foreign judgment contains an interest rate that is much higher than the permitted rate under RBI Regulations.[14]

Finally, if the plaintiff is a company, it must provide proof that the person who instituted the suit in the foreign court was authorized to do so, either by a resolution of the Board of Directors or by virtue of his or her position in the company.[15]

While the duration of enforcement proceedings ultimately depends on the particular court and circumstances surrounding the enforcement application, legal proceedings in Indian courts are generally quite lengthy. If the action is unopposed and the documents are in order, an

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[10] Including, for example, a notification requirement in the Official Gazette. Note, however, that a procedural reservation may be overcome by having the award be treated as a domestic one and enforced under the Indian Code of Civil Procedure in the same manner as if it were a decree of the court. Philipp Ritz, *Pitfalls to Avoid When Drafting Arbitration Clauses in India-Related Contracts* 27 ASA BULLETIN 717, 720-21 (2009)

[11] *Id.* at ¶ 2.2(i).

[12] *Id.* at ¶ 3.

[13] *Id.* at ¶ 3(a)

[14] Id.

[15] *Id* .at ¶ 4(a).

enforcement proceeding may take six months to a year.[16] Since many enforcement proceedings are opposed by the judgment debtor, however, their duration will be longer than one year.

3. The Legal Standard for Recognition and Enforcement of Foreign Judgments

A US or Canadian judgment will be enforceable in Indian courts provided that (1) it is a final judgment between the same parties,[17] and (2) it does not fall within one of the six enumerated categories of non-conclusive judgments.[18] If both conditions are satisfied, Indian courts will have no power to reopen or review the judgment on questions of law or fact. This section will explore these requirements in more detail.

i. Final Judgment between the same parties

Under the terms of section 13, a judgment will be enforceable only between the same parties as in the original proceeding.[19] Moreover, in order to be conclusive between these parties, the judgment must be final. Thus, an interim order will not fall under the terms of section 13.[20] The same holds true for judgments which are subject to a pending appeal.[21] Finally, if the defendant has instituted parallel proceedings which are still pending in another court, the defendant may apply for a stay of the execution of the foreign judgment.[22] On the other hand, the following categories of judgments are enforceable in Indian courts:[23]

(a) Money judgments (including fiscal judgments)

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[16] *Id* .at ¶ 17.

[17] India Code Civ. Proc. § 13.

[18] *Id.* §§ 13(a)-(f).

[19] *Id.* § 13 ("A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title.")

[20] FOR.JUDG. at ¶ 2.2(h).

[21] *Id* .at ¶ 9(b).

[22] *Id* .at ¶ 9(a).

[23] *Id* .at ¶ 2.2.

(b) Specific performance

(c) Injunctions, subject to the conditions laid down in Order XXXIX CPC which are, briefly, that the property is in danger of being damaged or alienated or wrongfully sold in execution of a decree

(d) [Foreign arbitral awards (see section III below for a detailed discussion)]

(e) Personal status (divorce, matrimonial, inheritance, adoption, insolvency)

(f) A judgment which is, in itself, recognition of a previous foreign judgment.

Judgments in each of the foregoing categories will be conclusive on an Indian court only provided that the judgment does not fall within one of the section 13 exceptions, discussed below.

ii. Section 13 Exceptions

Even if a US or Canadian judgment complies with the conditions in the first paragraph of section 13, an Indian court may find that the judgment is not conclusive and therefore not enforceable where: (a) it has not been pronounced by a court of competent jurisdiction; (b) it has not been given on the merits of the case; (c) it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in such cases in which such law is applicable; (d) the proceedings in which the judgment was obtained are opposed to natural justice; (e) it has been obtained by fraud; or (f) it sustains a claim founded on a breach of any law in force in India.[24]

The remainder of this section reviews the major trends in Indian jurisprudence with respect to these six elements.

[24] India Code Civ. Proc. § 13.

(a) Court of Competent Jurisdiction

In order to be conclusive between the parties, a foreign judgment must be issued by a court of competent jurisdiction. In Indian courts, a certified copy of a foreign judgment is enough to create a presumption that the court pronouncing the judgment had competent jurisdiction. However, if the copy of a decree is not properly certified, it will not be enough to give rise to the presumption.

Tip 2: US and Canadian plaintiffs should ensure that the copy of the judgment and all accompanying documents are properly certified by a representative of the central government in order to give rise to the section 14 presumption that the court issuing the judgment had competent jurisdiction.

Even when the parties submit a properly certified copy of the decree, the section 14 presumption can be overcome.[25] Indian courts generally look to the laws of the foreign state to determine if the presumption for competent jurisdiction is sustained. In some instances, courts also rely on a number of principles of international law.

For example, Indian courts have held that a foreign court could never have jurisdiction over immovable property in India.[26] In addition, the defendant must be subject to the jurisdiction of the foreign court, either by virtue of his residency at the time the proceeding commenced, or as a result of an explicit or implicit agreement to submit to the foreign court's jurisdiction.[27] Indian courts have found that a non-resident defendant did not submit to a foreign court's jurisdiction in the following cases:

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[25] *See e.g.*, Church of South Indiatrust Ass'n v. Telugu Church Council A.I.R. 1996 S.C. 1002; *see also* FOR.JUDG. at ¶ 11(a).

[26] FOR.JUDG. at ¶ 11(b)

[27] *See e.g.*, Gurdyal Sigh v. Rajah of Faridkot (1894) L. R. 21 I. A. 171 (holding that foreign court had no jurisdiction based on a mere personal claim against defendant, where the defendant neither resided in the foreign state nor was domiciled there at the time when the suit was filed).

- where the defendant employed a pleader in a suit in a foreign court but did not give the pleader any instructions;
- where the power of attorney authorizing an agent to defend suits had come to an end;
- where the defendant's appearance was made under duress.[28]

(b) Judgment on the Merits of the Case

Indian courts will recognize a foreign judgment as conclusive only where the judgment addresses the merits of the case. Indian courts have found that a judgment was 'on the merits,' where the foreign court has "applied its mind" to the facts of the case and examined the points of controversy between the parties.[29] Indian courts have considered a number of factors to determine if a court has "applied its mind" to the facts of a case, including: (1) whether the judgment itself says that it is on the merits (2) the rules of the foreign court (3) whether one or both parties had submitted material before the court when the decree was passed and (4) the manner in which the decree was passed.[30] The burden of proof is on the party claiming that a judgment is not on the merits, but the Indian Supreme Court has specifically stated that it will "never expect impossible proofs."[31]

Indian courts have found that a judgment was not 'on the merits' if it was entered "in default," merely as a result of a procedural circumstance, such as the expiration of a statute of limitations or the failure of the defendant to appear.[32] At the same time, a judgment on the merits does not necessarily require a full trial. To the contrary, Indian courts have held that even an *ex*

[28] FOR.JUDG. at ¶ 11(d)

[29] *See e.g.,* Int'l Woollen Mills v. Standard Wool, A.I.R. 2001 S.C. 2134.

[30] Int'l Woolen Mills, *supra* note 27.

[31] Id.

[32] Id.

parte judgment can be a judgment on the merits if the court bases its decision on the evidence presented by the plaintiff.[33]

Tip 3: Plaintiffs in US and Canadian courts, who hope to enforce the resulting judgment in India, should not request summary judgment, even where a procedural defect would allow them to do so. Instead, whenever possible, plaintiffs should introduce arguments and evidence on the merits, even where the defendant has not entered an appearance to defend.

(c) Foreign Judgment against Indian or International Law

A foreign judgment will not be considered conclusive where it is based on an incorrect view of international law or fails to account for applicable Indian law. For example, Indian courts have recognized a principle of international law that the parties to a contract should be bound by the jurisdiction clause to which they have agreed.[34] Thus, if a US or Canadian court hears a case in contravention of the parties' choice of jurisdiction, the resulting judgment will not be enforceable in Indian courts. Another international principle recognized by Indian courts is that foreign courts have no jurisdiction to adjudicate on title to immoveable property situated in another country.[35]

(d) Proceedings opposed to natural justice

Where an Indian court deems that a foreign proceeding was opposed to natural justice, it will refuse to enforce the resulting judgment.[36] This requirement relates to irregularities in procedure, not the merits of the case. Thus, if the minimum requirements of the judicial process

[33] *See e.g.,* Navin Khilnani v. Mashreq Bank PSC, (2008) 146 DLT 134, *available at* http://www.Indlaw.com at 2007 INDLAW DEL 1942 (subscription needed, last visited June 7, 2010).

[34] A. B. C. Laminart v A. P. Agencies, A.I.R. 1989 S.C. 1239.

[35] Ct. A. Ct. Nachiappa Chettiar v. Ct. A. Ct. Subramaniam Chettiar, A.I.R. 1960 S.C. 307.

[36] FOR.JUDG. at ¶ 11(e)(i)-(ii).

are met, an Indian court cannot refuse to enforce a foreign award merely because of an error of law.

Indian courts have found that proceedings were contrary to natural justice where the judge was biased, or where the parties did not receive reasonable notice, proper representation, or an adequate opportunity to present their case. With regard to the notice requirement, Indian courts will accept the method of service recognized by a foreign court, even if that method would not be sufficient in a local action.[37] However, Indian courts insist on strict proof of the service of process and do not recognize contractual waiver of the right to service.[38]

Tip 4: US and Canadian plaintiffs hoping to enforce a judgment in India must ensure that their service of process complies with their country's civil procedure rules, even if the other party has previously waived its right to service.

(e) Judgment obtained by fraud

A judgment will not be enforceable under Indian law if it was obtained as a result of fraud perpetrated either by the prevailing party or by the court pronouncing the judgment.[39] Fraud may be raised as a defense to enforcing a foreign judgment, even where it could have been raised as a claim at the time of the trial. Indian courts have held that a mere concealment of facts is not sufficient to constitute fraud and avoid a foreign judgment. Instead, fraud consists of misrepresentations designed and intended to mislead.[40]

(f) Judgment founded on a breach of any law in force in India

This exception merely states that Indian courts will not enforce a foreign judgment where the resulting action would violate Indian law. Thus, for example, any foreign judgment for a

[37] FOR.JUDG. at ¶ 13.

[38] FOR.JUDG. at ¶ 12(a).

[39] FOR.JUDG. at ¶ (8)(c).

[40] Id.

gaming debt or on a claim which is barred under Indian statute of limitations will not be enforceable.[41]

Part III: Enforcement of Arbitral Awards

1. Sources of Law & Background

India has a number of domestic and international commitments for the enforcement of foreign arbitral awards. On the international plane, India has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention"),[42] subject to the reciprocity and commerciality reservations.[43] India also recently signed a Foreign Investment Protection and Promotion Agreement with Canada, which contains commitments to settle disputes through arbitration.[44]

Domestically, India's commitment to encouraging arbitration is embodied in the Indian Constitution itself.[45] In addition, the provisions of the New York Convention are given effect in

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[41] Raghvendra Singh Raghuvanshi, *Legality of Foreign Judgments*, *available at* http://www.legalservicesindia.com/articles/fore.htm (last visited June 7, 2010).

[42] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, 330 U.N.T.S. 38. India acceded to the Convention on 13 July 1960.

[43] *Id.* at § I(3). India has made a commitment to recognize and enforce arbitral awards "made *only* in the territory of another Contracting State," (emphasis added) and only to disputes arising out of legal relationships, which are considered commercial under Indian law. *Id.*

[44] Foreign Investment Protection and Promotion Agreement, Can.-India, June 16,2007. While India has not yet signed a BIT with the United States, Indian commerce and industry minister Kamal Nath has said that the two countries are trying to conclude an investment protection agreement by the end of 2008. *See* India-US investment protection pact likely by year-end: Nath, Financial Express, Wed Feb 20, 2008, *available at* http://www.financialexpress.com/news/IndiaUS-investment-protection-pact-likely-by-yearend-Nath/275173/ (last visited June 7, 2010). As of June, 2010, a BIT between the United States and India had not yet been signed.

[45] INDIA CONST. art. 51("The State shall endeavour to encourage settlement of international disputes by arbitration.")

the 1996 Arbitration and Conciliation Act ("1996 Act" or "Act").[46] If there is any inconsistency between the Convention and the Act, the latter will prevail.[47]

While India's legal commitments may suggest a significant openness towards international arbitration, Indian courts have historically exhibited suspicion towards foreign arbitral awards and a strong pro-litigation bias.[48] Some observers attribute this trend to a notion shared by developing countries that "arbitration is a foreign judicial institution imposed upon them."[49] Another reason for the mistrust of Indian courts for arbitration is the suspicion aroused by arbitral awards in which the arbitrators do not set out their reasoning.[50] As Nairman has observed, "[t]o regard any decision as final and binding where no reasons are disclosed is anathema to Indian jurisprudence, and non-speaking awards have always excited judicial suspicion."[51]

Tip 1: Request reasoned awards. Parties seeking to enforce arbitral awards in India should require arbitrators to issue fully reasoned awards. Ideally, such a requirement should be included in the arbitration agreement itself.

2. Procedure for Enforcing an Arbitral Award

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[46] Arbitration and Conciliation Act, No. 2 of 1996, India Code (1996), *available at* http://indiacode.nic.in/ (repealing and replacing the Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961, India Code (1961), *available at* http://indiacode.nic.in/.) Since most of the provisions of the 1996 Act with respect to the enforcement of arbitral awards parallel those of the 1961 Act, Indian courts continue to rely on precedent interpreting the earlier act; *see generally* Surveying a Decade.

[47] V.S. Deshapande, Enforcement of Foreign Awards in India, U.K., and U.S.A., 4 J. INT'L ARB. 41, 45 (1987).

[48] F.S. Nariman, *Finality in India: the Impossible Dream*, 10 ARB. INT'L 373, 374; *see also* Promod Nair, *Surveying a Decade of the 'New' Law of Arbitration in India*, 23 ARB. INT'L 698, 698 (explaining that Indian courts intervene at different stages in the arbitral process, and the Indian Supreme Court "enjoys a mixed track record in the appropriateness of getting involved when it perhaps should have not.")

[49] Nariman, *supra* note 45, at 373 (quoting Judge Keba Mbaye, former President of the International Court of Justice: "As everybody knows, arbitration is seldom freely agreed to by developing countries. It is often included in contracts of adhesion the signature of which is essential to the survival of these countries.")

[50] *Id.* at 375.

[51] *Id.* ("Indian lawyers have been accustomed to look for hidden deficiencies in awards and arbitration agreements, and our judges have not been reluctant to find them.")

A party seeking to enforce a foreign award in India must file an application to the "principal Civil Court of original jurisdiction in a district … having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit."[52] The principal Civil Court is the District Court in all States except Madras, Mumbai, Calcutta and Delhi, where the appropriate court for seeking execution of arbitral awards is the High Court.[53] The Supreme Court of India has held that, in this context, 'subject matter' refers to the cause of action and the relief for the dispute which has led to the arbitral award.

The party seeking enforcement must produce the following documents: (1) the award; (2) the arbitration agreement; and (3) such evidence as may be necessary to prove that the award is a foreign award.[54] The relevant documents must be submitted either in original or must be duly authenticated according to the laws of the country where the award was rendered.

Tip 2: Properly authenticated documents. A properly authenticated copy of an arbitration agreement generally must be certified by a Notary Public empowered to certify documents in the country of origin, and counter-signed by the Indian Consul with the seal of the Consulate at the place where the original arbitration agreement is signed or is located.

A court order refusing to enforce an award is subject to appeal, which must be made to the Court authorized to hear appeals from such an order. If the order is entered by a District Court, the appeal should be brought before the High Court in the State in which the District Court is located. If the order is made by a High Court, the appeal should be made to the Supreme Court of India.[55]

Since a foreign arbitral award may be subject to up to three levels of judicial review in India, it is important to take note of the legal standards used by Indian courts in determining

[52] 1996 Act, *supra* note 43, § 47. *See* New Horizons for Alternative Dispute Resolution in India, 25.

[53] See V. Raghavan, New Horizons for Alternative Dispute Resolution in India: the New Arbitration Law of 1996 13(4) J INT'L ARB 5, 25.

[54] Id.

[55] International Handbook on Commercial Arbitration 46 (J. Paulsson, ed., 2000).

whether a foreign award is enforceable. The section below reviews the legal standards and how they have been applied by Indian courts.

3. The Legal Standard for Recognition and Enforcement of Arbitral Awards

Part II, Chapter I of the 1996 Act sets out the provisions governing the enforcement of US and Canadian arbitral awards in India. Under the terms of this Act, which closely mirror those of the New York Convention, India will recognize as enforceable (i) any foreign award, as that term is defined in the Act (ii) which is not subject to any of the seven grounds for non-enforcement in section 13. Once the Indian court is satisfied that a foreign award is enforceable, the award becomes a decree of that court and, as such, may be used by the parties as a defense, set-off, or otherwise in any legal proceeding in India.[56] The sections below examine in more detail the factors Indian courts consider to determine if an award is enforceable.

i. Foreign Award

The definition of 'foreign award' in the 1996 Act incorporates India's two reservations under the New York Convention.[57] An arbitral award will be a 'foreign award' for the purposes of the Act if it (1) settles differences arising out of relationships considered as commercial under the law in force in India;[58] (2) is made in pursuance of an agreement in writing to which the New York Convention applies;[59] and (3) is made in a state which has been notified in the Official Gazette as a state with reciprocal provisions.[60]

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[56] Id.

[57] 1996 Act, *supra* note 43, at § 44.

[58] The relationships may be contractual or not. *Id.*

[59] Indian courts have held that Part II, Chapter I of the 1996 Act does not apply to awards made in countries which are not party to the New York Convention. Ramji Dayawala & Sons v. Invest Import, A.I.R 1981 S.C. 2085, 2101.

[60] India has supplemented the New York Convention's reciprocity reservation with a requirement of government notification.

While 'commercial' is not defined in the 1996 Act itself, Indian courts have adopted a broad interpretation of the term.[61] The Supreme Court of India has held that a broad and inclusive definition is consistent with the goal of promoting international trade by providing for the speedy settlement of disputes through arbitration.[62] Thus, 'commercial relationship' refers to all economic activity, "in contradistinction to matrimonial, family, cultural, social or political relationship."[63]

Tip 3: Enforcing non-convention awards. An award rendered abroad to which the New York Convention does not apply will not be governed by the provisions of the 1996 Act. Such an award may still be enforceable, however, under the common-law grounds of justice, equity, and good conscience. The party seeking enforcement will have to bring a separate suit for enforcement of a civil right. The arbitral award will only furnish a cause of action, however, if it has become final under the law of the country where it was awarded. The Supreme Court of India has held that an award was not final where the law of the country in which it was rendered required that a judgment be obtained on the basis of the award before granting it finality. As a general matter, where the New York Convention does not apply, Indian courts have been reluctant to concede jurisdiction of a claim arising under domestic law to a foreign or international tribunal.

ii. Grounds for Non-Enforcement

Even where a foreign arbitral award meets the conditions discussed above, Indian courts may refuse to enforce the award on the basis of one of the seven grounds enumerated in section 48 (Conditions for Enforcement of Foreign Awards). The language of this section mirrors that of the New York Convention. First, enforcement of a foreign award may be refused at the request of the party against whom it is invoked in the following cases:

[61] *See e.g.*, European Grain and Shipping v. Bombay Extractions, 1983 A.I.R. Bom 36; India v. Motor Vessel M/V Hoegh Orchid 1983 A.I.R. Guj 34.

[62] *See* R.M. Inv. and Trading. v. Boeing, 1994 A.I.R. S.C. 1136.

[63] Mehta v. Mehta A.I.R. 1999 S.C. 2054, 2061 (holding that the division of assets between family members qualifies as a dispute of a commercial nature).

(a) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement was not valid;[64]

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(c) the award deals with issues outside of the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties,[65] or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[66]

The Indian courts may also refuse to enforce an arbitral award in two additional cases:

(a) if the subject-matter of the dispute is not capable of settlement by arbitration under the law of India;[67] or

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[64] There is a presumption that by choosing a particular country as the seat of the arbitration, the parties intended the award to be governed by the laws of that country. However, that presumption may be overcome by evidence of an agreement to the contrary. Deshapande, *supra* note 44, at 44.

[65] 1996 Act, *supra* note 43, at § 48 (providing that Indian courts may refuse to enforce a foreign arbitral award where that award has not yet become binding on the parties.) In order to be considered binding, an award does not have to be final. Thus section 48(1)(e) does not impose a system of double exequatur (the requirement that an ward must be enforced by the courts of the seat of arbitration before it can be recognized as enforceable anywhere else). Double exequatur was required under the Geneva Convention, the predecessor to the New York Convention.

[66] 1996 Act, *supra* note 43, at §§ 48(1)(a)-(e).

[67] *Id.* at §§ 48(2)(a)-(b). The 1996 Act provides that parties may refer to arbitration those disputes that have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. § 7(1). In fact, even tort claims are arbitrable under Indian law, provided that the claim "arises out of" or is "related to" the contract. Renusagar Power Co. v. General Electric Co. (1984) 4 S.C.C. 679. The Supreme Court has elaborated that a claim will be arbitrable whenever there is "a sufficiently close connection between the claim and the transaction under the contract." *Id.*

(b) if the enforcement of the award would be contrary to the public policy of India.

Collectively, these seven non-enforcement grounds are intended to be exhaustive. At least in theory, therefore, Indian courts may not review the merits of arbitral awards. However, some recent Supreme Court decisions have extended the scope of the public policy exception to such an extent that it has turned into a de facto review on the merits

Awards Contrary to the Public Policy of India

Until recently, Indian courts interpreted the 'public policy' exception in a restrictive manner, requiring a showing of more than a mere violation of Indian law.[68] However, that changed with the 2003 Supreme Court's decision in *ONGC v. Saw Pipes*, where the Court adopted a very broad interpretation of 'public policy.'[69] In the context of an application to set aside Indian awards under section 34, the Court found that an award which is contrary to the substantive provisions of Indian law would be 'patently illegal' and therefore contrary to 'public policy.'[70] In other words, an award could be set aside on the basis of an error of law.

The relevant case-law suggests that certain types of disputes are non-arbitrable, including "disputes pertaining to taxation, matrimonial disputes, bankruptcy and insolvency cases, appointment of guardians, disputes relating to testamentary and intestate succession, matters concerning criminal offenses, matters pertaining to public law or welfare legislation." Promod, *supra* note 45, at 706. In addition, courts have deemed disputes non-arbitrable where a statute confers exclusive jurisdiction over the issue to specified courts. *Id.* For example, "matters pertaining to the validity and revocation of patents under the Patnet Act of 1970; matters regarding infringement and rectification of trade marks under the Trademark Act 1999; infringement of copyright under the Copyright Act 1957; matters relating to the amalgamation and takeover of companies and so on." *Id.* Finally, claims based on contracts that are contrary to public policy within the meaning of section 23 of the Indian Contract Act are also non-arbitrable. No. 9 of 1872, India Code (1872), *available at* http://indiacode.nic.in/.

[68] Renusagar Power Co. v. General Electric Co., 1994 (Supp) 1 S.C.C. 644 (holding that public policy violation entails more than the violation of Indian law; instead, enforcement of the award must be contrary to (i) a fundamental policy of Indian law; (ii) the interests of India; or (iii) justice or morality.)

[69] (2003) 5 S.C.C. 705. (equating public policy with 'patent illegality;' explaining that "in a case where the validity of an award is challenged, there is no necessity of giving a narrower meaning to the term 'public policy of India;'" on the contrary, a wider meaning is appropriate." *Id.*

[70] *Id.*

As many scholars have observed, this new rule essentially gives losing parties to an arbitration the right to a full-fledged appeal on the merits in Indian courts.[71] Since *Saw Pipes* deals with an application to set aside a domestic award under section 34, however, it still remains to be seen whether this rule will extend to the refusal to enforce foreign arbitral awards under section 48. In January 2008, the Supreme Court moved closer in that direction by holding that *Saw Pipes* applies not only to domestic arbitral awards, but also to foreign awards, in the context of an application to set aside an award under section 34.[72] The Court has yet to address whether this holding will also extend to refusals to enforce a foreign award under section 48. The *Saw Pipes* judgment itself suggested that this may not be the case, when it held that "the concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage would be limited."[73] Thus, a final award may be subject to a narrower interpretation of public policy, perhaps closer to international public policy[74]

In April 2010, the Indian Law Ministry released a proposal of ten amendments to the Arbitration Act for commentary. The proposals would reverse the decision made in *Saw Pipes* and another criticized Indian case, *Venture Global Engineering v Satyam Computer Service Limited*, a 2008 case that read the Arbitration Act as giving Indian courts the power to set aside awards issued outside of India. Under the proposed amendments, public policy would return to a narrower, pre-*Saw Pipes* understanding, allowing courts to overturn awards based on public policy "only if it is contrary to fundamental policy of India, the interests of India or justice or morality."[75]

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[71] *See e.g.,* Promod, *supra* note 45, at 731.

[72] Venture Global Eng'g v. Satyam Computer Serv., 2008 (1) CTC 348, 2008 (3) AllMR 416, *available at* http://www.Indlaw.com (subscription needed, last visited June 12, 2008).

[73] *See supra*, note 67.

[74] In the international sense, the contours of public policy are quite narrow; the term refers to "some moral, social or economic principle so sacrosanct … as to require its maintenance at all costs and without exception." *Id.*

[75] Alison Ross, *India seeks comment on amended arbitration act*, GLOBAL ARBITRATION REV., April 28, 2010, ¶ 5, http://www.globalarbitrationreview.com/news/article/28348/india-seeks-comment-amended-arbitration-act/ (last visited June 8, 2010).

Furthermore, the proposals would limit an Indian court's ability to overturn arbitration awards to only those awarded in India.[76]

Tip 4: Enforcement in third countries may not prevent intervention from Indian courts. Seeking enforcement in another country will not necessarily shield a foreign award from the review of Indian courts, where the award has an "intimate and close nexus to India." In such a case, the judgment-debtor will have a right to challenge the award for violating the public policy of India under section 34 and request that the award be set aside. The Indian Supreme Court found a violation of public policy where an effort to enforce an arbitral award in Michigan was evidence of the plaintiff's intention to evade the legal and regulatory scrutiny to which the transaction would have been subject had it been enforced in India.

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The foregoing discussion suggests a number of conclusions with respect to the enforcement of US and Canadian judgments and arbitral awards in Indian courts. In general, India has made a number of legal commitments to recognize and enforce both foreign judgments and awards. Under India's Code of Civil Procedure, final judgments will be conclusive between the same parties, provided that they do not fall within a set of limited exceptions. The 1996 Arbitration and Conciliation Act codifies the provisions of the New York Convention and ensures that foreign arbitral awards will be enforced, subject only to the limited non-enforcement grounds in article V of the Convention.

Despite these promising legal commitments, however, US and Canadian plaintiffs may still encounter a number of problems in seeking to enforce judgments or arbitral awards from their countries. The enforcement of a foreign judgment in India is often a very lengthy process, because it requires a separate suit on the judgment. Moreover, even though a foreign judgment may only be challenged on a limited number of grounds – most of which are interpreted narrowly – Indian courts have the authority to review the foreign court's interpretation of international and Indian law, and may overturn any judgment founded on a breach of any law in force in India. This may turn the enforcement proceedings into a *de facto* appeal on the merits before an Indian court.

[76] *Id.* ¶8.

Similar problems exist with respect to enforcing foreign arbitral awards. On the one hand, Indian courts have adopted a broad and inclusive interpretation of 'foreign award,' thus extending the protections of the New York Convention to a larger number of arbitral awards. On the other hand, two Supreme Court decisions suggest that courts may use the 'public policy' exception to effectively review the arbitrators' interpretation of the law. Ultimately, while the 1996 Act's main objective was to liberalize India's arbitration regime and minimize judicial intervention in arbitrations, this goal has not yet been achieved.