

# Enforcement of Foreign Awards in India: Overview and Recent Developments

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## Introduction

In recent times, the legislative amendments, as well as the pro-arbitration approach adopted by the judiciary, has led to enforcement of nearly all foreign awards in India. The ability to enforce a foreign seated arbitral award is an important facet towards improving the contract enforcement regime in any country. Most of the high-value India related disputes are resolved by way of international arbitration, and hence an expedient and sustainable enforcement regime is likely to boost investors' confidence. In continuation of our earlier piece on the "New Age Arbitration Reforms in India", we have focused on the enforcement aspect, which becomes highly critical once the award is delivered.

India is a signatory to the New York Convention<sup>1</sup>. Resultantly, if a party receives a binding award from a country which is a signatory to the New York Convention and the award is made in a territory which has been notified as a convention country by India, the award would then be enforceable in India. Till date, only fifty countries have been notified by the Indian Government as reciprocating countries.

## Enforcement Procedure

In India, the enforcement of a foreign award is a two-stage process which is initiated by filing an execution petition, and the national court would determine whether the foreign award adhered to the requirements of the India Arbitration Act<sup>2</sup>. Once an award is found to be enforceable, it is executed like a decree of that court.

A party enforcing a foreign award does not have the right to challenge, but only has the right to resist enforcement of an award. However, post the 2015 legislative amendments to the Indian Arbitration Act, the grounds for refusing enforcement and setting aside an award have been made substantially similar, as have also been held by the Supreme Court in *HRD Corporation v. GAIL (India) Ltd.*, 2018 (12) SCC 471.



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## Grounds:

Enforcement of a foreign award can be refused where: (a) there have been procedural irregularity, such as failure to provide appropriate notice, award contains decisions on issues which were beyond the scope of the arbitration, the arbitral tribunal was not constituted in accordance with agreement of the parties, the parties to the arbitration agreement were under some incapacity or the said agreement is invalid under the law applicable to the parties etc., (b) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that was made; (c) the subject matter of the dispute is not capable being settled through arbitration; and (d) enforcement of award would be contrary to public policy.

The Indian Supreme Court in *Renusagar Power Plant Co Ltd. v. General Electric Co.*, (1994) Supp (1) SCC 644 held that a foreign award is contrary to public policy if it is contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. The scope of these terms has now been examined by the Supreme Court in *ONGC v. Western Geco* (2014) 9 SCC 263 and *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49. Only in the rarest of rare cases, a foreign award is successfully refused enforcement – otherwise, the general rule is always in favour of enforcement.

## Recent Ruling:

However, recently, in an unprecedented move, the Delhi High Court has refused enforcement of a foreign award passed under the Arbitration Rules of Combined Edible Nut Trade Association (CENTA). The award suffered from procedural irregularities as reasons had not been provided.

The Delhi High Court observed that in the enforcement of a foreign award, the court could not supplant reasons by considering the claims and defence of the parties on merits.

In the arbitral award under challenge, the Arbitrator had lifted the corporate veil and consolidated the proceedings although the claim arose under distinct contracts and against different respondents. More importantly, the arbitrator did not provide any reasoning for lifting the corporate veil or consolidating the proceedings. The Court observed that perusal of the Award did not seem to suggest that the Arbitrator was alive to the issue whether such claims against different contracts can be consolidated as one, nor was there any determination on whether joint and several liabilities can be fastened on various respondents without lifting the corporate veil, and consequently the award rendered was in the nature of a non-speaking award.

The Court also observed that there is no material or any pleadings to suggest lifting of the corporate veil or fastening of joint and several liabilities on some of the respondents – and in the absence of such material, the Court held that even prima facie joint and several liabilities could not be fastened on some of the Respondents. The Court relied on the earlier rulings and held that a corporate veil can be pierced only in rare and exceptional case like where the corporate façade is used for improper purpose, for perpetuating fraud or for circumventing a statute, and an abuse of corporate form is the bare minimum pre-condition that must be met before the corporate entity can be disregarded.

## Trend but not a norm:

Although the foreign award was refused enforcement in this case, one can clearly see the procedural lapse by the Arbitrator in not determining key issues referred for determination with reasons. Although the Indian Courts are receptive to foreign awards, but that is not an absolute rule, severe procedural lapse and absence of due process can undoubtedly lead to a foreign award being refused enforcement.

<sup>1</sup>Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Please see <https://www.uncitral.org/pdf/english/texts/arbitration/NY-convention/New-York-Convention-E.pdf>  
<sup>2</sup>Arbitration and Conciliation Act, 1996. Please see <http://legislative.gov.in/sites/default/files/A1996-26.pdf> (accessed on 6 June 2019)