

Research Articles

August 24, 2023

RECIPROCITY REQUIREMENT FOR ENFORCEMENT: A ROADBLOCK IN EASE OF DOING BUSINESS?

The Central Government, in June 2023, constituted an expert committee chaired by former law secretary, Mr. T K Vishwanathan for recommending reforms in the arbitration landscape in India. The terms of reference of the expert panel include evaluation and analysis of the extant arbitration ecosystem and recommendations for a more effective and efficient system catering to the requirements of the stakeholders. The need for arbitration reforms is well-timed with the increase in cross-border transactions resulting in a parallel rise in cross-border disputes.

One issue which often misses the shot in India's pro-arbitration reforms is - the reciprocity requirement for recognizing and enforcing foreign awards in India.

RECIPROCITY REQUIREMENTS: AN OVERVIEW

Getting a favourable award is only half a battle won – especially in case of recalcitrant debtors. Even with a favourable award or judgment, a party may be subjected to further uncertainties and delays before actually getting the amounts due.

An arbitral award may be rendered in the jurisdiction of either party to the dispute or a neutral territory but sought to be enforced in a jurisdiction where the assets of the debtor lie. Enforcement of foreign awards in India is governed by Part II of the Arbitration and Conciliation Act 1996.

As a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also as the "New York Convention" which applies to the recognition and enforcement of foreign arbitral awards – India has declared the following reservations for recognizing and enforcing foreign awards in India: (i) India will apply the New York Convention to the recognition and enforcement of awards made only in the territory of a State, party to the New York Convention; (ii) India will apply the New York Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of India.

In addition to the above, enforcement of a foreign award in India is contingent on the reciprocal arrangement between India and the country where the award is rendered, i.e., whether the territory is a "reciprocal territory" or not. A country would be recognized as a "reciprocal territory" only if it has been declared by the Central Government, by notification in the Official Gazette, to be a 'reciprocating territory' for the purposes of execution of foreign awards. Thus, even if there is a bilateral agreement between India and the foreign country for enforcement of awards, it would not be a reciprocating territory if the corresponding notification has not been published in India. This has also been confirmed by the Ministry of Law and Justice in their response to information sought under the Right to Information Act 2005. A similar position has also been maintained by Indian courts.

About 50 countries have been notified as "reciprocating territories" for the purpose of execution of foreign awards in India. The last country to be notified as a reciprocating territory for enforcement of foreign awards was Mauritius way back in 2015. Prior to this, China was notified as a reciprocating territory for enforcement of awards in India in 2012.

The requirement for publication of a territory as "reciprocating" is present even in case of execution of foreign judgments – as per the Code of Civil Procedure 1908. Only about 13 territories world-wide have been notified as 'reciprocating territories' for the purposes of execution of foreign judgments in India.

The absence of reciprocity may dilute the resultant award/decreed passed in such jurisdictions, considering the party seeking execution would not be able to avail the procedures for direct enforcement available under Indian law. In such cases, they are compelled to resort to alternatives which may be untested under law.

Without an effective and certain enforcement regime, parties would be disincentivized from bringing the foreign award/judgment to India. Parties would be further crippled if they're unable to enforce in other jurisdictions especially if the debtor does not possess assets outside India.

Several nations irrespective of having strong business relations with India have not been notified as "reciprocal territories" by the Central Government. In certain cases, a country may be a "reciprocating territory" for the purposes of enforcement of awards but not for execution of judgments from such jurisdictions. This is applicable in case of several nations having trade relations with India including USA, Germany, Australia, China and Japan.

Meanwhile, there are territories which have been notified as 'reciprocating' for the purpose of execution of judgments but not for the purpose of enforcement of foreign awards from such territories.

THE CURIOUS CASE OF UAE

India and UAE entered into the 'Agreement on Juridical and Judicial Cooperation in Civil and Commercial Matters for the Service of Summons, Judicial Documents, Commissions, Execution of Judgements and Arbitral Awards' on 25

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October 1999. However, UAE was formally notified as a "reciprocating territory" for the purpose of execution of judgments from UAE courts only on 17 January 2020.

Peculiarly, the notification for declaring UAE as a 'reciprocating territory' for the enforcement of awards seated in UAE in India is yet to be published. Therefore, the awards from UAE cannot be directly enforced in India.

REMOVING BOTTLENECKS IN THE TOOLS FOR ENFORCEMENT

The reason for non-publication of the notifications for enabling the reciprocal arrangement is unknown. Be that as it may, while trading nations are aligned for stronger business relations with India, this gap of "non-reciprocity" without the relevant notification being published is a potential snag in an effective enforcement mechanism. Needless to say, contract enforcement bears the brunt of absence of smooth and effective tools for enforcing awards and judgments.

A certain and consistent enforcement framework would extend the much-needed commercial security for parties in cross-border transactions.

While reciprocity principles are rooted in the principle of co-operation and international comity among nations, the time may have come for India to now re-look the need for an added layer of publication of notifications for reciprocity – even for countries that are signatories to the New York Convention.

In the interim, there is a compelling need to identify countries and initiate dialogues for extending the reciprocity treatment followed by publication of notifications in the Official Gazette. These steps would remove technical and legal bottlenecks which directly or indirectly impede the smooth flow of the river of international commerce - bolstering the ease of doing business in India.

The recently constituted expert panel on arbitration reforms may be the messiah for such vital reforms which would fuel India's march towards a conducive environment for dispute resolution and contract enforcement.

- Shweta Sahu and Vyapak Desai

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