

# **ENFORCEMENT OF ARBITRAL AWARDS – DIFFCULTIES EXPERIENCED**

By

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1. In India, arbitration proceedings and the enforcement of arbitral awards – domestic and foreign - are governed by the Arbitration and Conciliation Act 1996 ('the Act' or 'the 1996 Act'). The 1996 Act is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The enactment of the Act was a reflection of the Indian legislature's objective of ensuring speedy disposal of cases as well as to encourage arbitral tribunals to get parties to settle disputes through the use of mediation and conciliation.
2. In dealing with the enforceability of awards under the Arbitration & Conciliation Act, 1996, we would primarily be concerned with two different classes of awards - (a) awards considered as "domestic awards" under Part I of the Act and (b) awards which are "foreign awards" under the Part II of the Act.
3. An Arbitral Award is the decision rendered by the Arbitral Tribunal which finally determines the issues submitted to it. Section 35 of the Arbitration and Conciliation Act 1996 states that an arbitral award shall be final and binding on the parties and persons claiming under them. Thus an arbitral award becomes immediately enforceable unless challenged under Section 34.

4. Section 36-Chapter VIII of the Act provides for enforcement of domestic awards. Under the new dispensation in the Arbitration and Conciliation Act 1996, the procedure under the 1940 Act has been substituted by the simple procedure of giving effect to the award as a decree. Section 36 of the 1996 Act provides as under:

**Sec.36 Enforcement :**

*Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as it were a decree of the court.*

5. Thus, when the period for filing objections has expired or objections have been rejected, the award can be enforced under the Civil Procedure Code (CPC) in the same manner as if it were a decree passed by a court of law. Section 36 declares that an arbitral award has the force of the decree, though in fact it is not a decree.
6. An ex parte Award passed by an Arbitral Tribunal under Section 28 of the Act is also enforceable under Sec. 36. Even a settlement reached by the parties under Section 30 of the Act can be enforceable under Sec. 36 of the Act as if it is a Decree of the Court.
7. Further, Section 74 of the 1996 Act makes the settlement agreement reached by the parties under conciliation process have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal under Section 30.
8. Madras High Court in a recent case " *N.Poongodi Vs. Tata Finance Ltd.* [ 2005 (3) Arb. LR 423 Madras ] has laid down categorically that once an arbitral award has become final and binding upon the person or persons claiming under and bound by the award, the said award is impressed with the character of a decree and can be enforced under the Code of Civil Procedure 1908 in the same manner as if it were a decree of the Court.

9. This new provision under the 1996 Act interestingly, to some extent, restores the position that existed before the Arbitration Act 1940 (the 1940 Act). Under Section 16 of the Arbitration Act 1899 (which was repealed by the 1940 Act), the award was enforceable like a decree.
10. Earlier under the Arbitration Act 1940, an award had to be filed in the court for making it a Rule of Court. Objections from the parties were invited where no objections were filed or were sustained, the court would pass a judgment in terms of the award and then it was converted into a decree for enforcement. The procedure for converting an award into a decree was time consuming and more often than not took years.
11. **Checklist to be considered before enforcement of an Arbitration Award --**

A) Whether the Award is a valid Award ?

- The enforceability of an Award will depend on the validity of the Award. An Award has to be valid before it is to be enforced.
- An Award has to be made as provided u/s.31 of the Arbitration and Conciliation Act, 1996. it has to be in writing and signed by the Members of the Arbitral Tribunal (if more than one arbitrator, signature of the majority will suffice provided reason for the omitted signature are stated.)
- The Award should state the reasons upon which the Award is based. This is not needed if the parties agreed to otherwise or the Award is as per settlement u/s. 30 of the Act.
- The Award has to state the date and place and is to be delivered to the parties.

B) Whether the time period of challenge of the Award is over?

- Section 34 provides for the manner of challenge of the arbitral Award. The time period for the challenge is

the expiry of 3 Months from the date of receipt of the Award (and a further period of 30 days on sufficient cause being shown for condonation of delay ) If that period expires the award holder can apply for enforcement of the Award as a decree of the Court. But as long as this period has not elapsed, enforcement is not possible.

C) What happens when there is a challenge under Sec.34 of the Act

- The award can be enforced as a decree only when the application under Sec. 34 of the Act challenging the award has been disposed off. The award can not be enforced during its pendency.

12. Institution of Execution Petition

For execution of an Arbitral Award, the procedure as laid down in the Order XXI of Civil Procedure Code 1908 (CPC) has to be followed. Order XXI of the CPC lays down the detailed procedure for enforcement of decrees. It is pertinent to note that Order XXI CPC is the longest order in the schedule to the CPC consisting of 106 Rules.

13. All proceedings in execution are commenced by an Application for Execution (R.10). The execution of a decree against property of the judgment debtor can be under two heads :-

- Attachment of Property and
- Sale of Property of the judgment debtor (JD)
- **Attachment of Property** : 'Attachable property' belonging to a judgment debtor may be divided into two classes : (i) moveable and (ii) immovable property. If the property is immovable, the attachment is to be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and prohibiting all other persons from taking any benefit from such a transfer or charge. The order must be proclaimed at some place or on adjacent to the property and a

copy of the order is to be affixed on a conspicuous part of the property, and then upon a conspicuous part of the Court house (O.XXI R.54). Where an attachment has been made, any private transfer of property attached whether it be movable or immovable, is void as against all claims enforceable under the attachment (S.64). If during the pendency of the attachment, the judgment debtor satisfies the Decree through the Court the attachment will be deemed to be withdrawn. (O.XXI R. 55). Otherwise the Court will order the property to be sold (O.21 Rule 64).

- **Sale of attached property :**

Order XXI lays down a detailed procedure for sale of attached property whether movable or immovable. If the property attached is moveable property, which is subject to speedy and natural decay, it may be sold at once (R.43). Every sale in execution of a Decree should be conducted by an officer of the Court except where the property to be sold is a negotiable instrument or a share in a corporation which the Court may order to be sold through a broker (O.XXI R.76).

14. Where an enforcement of an Arbitral Award is sought under Order XXI CPC by a decree holder the legal position as to objections to it is clear. At the stage of execution of the Arbitral Award, there can be no challenge as to validity of the Arbitral Award. The Hon'ble Supreme Court in *Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rahman* [ (1970) 1 SCC 670 ] held that the court executing the decree can not go beyond the decree and between the parties or their representatives it must take the decree according to its tenor and can not entertain any objection that the decree was incorrect in Law or in facts. This principle was affirmed in case of *Bhawarlal Bhandari Vs. Universal Heavy Mechanical Lifting Enterprises* [ 1999 1 SCC 558 ]. Further, in case *State Bank of India Vs. INDEXPOR Registered and Ors.* [ 1992 3 SCC 159 ] it was held that the executing court can not go beyond the decree and the only ground of challenge is on the ground of jurisdiction. Thus, once a party has failed in its challenge to the award u/s 34 of the Act, the grounds given in the said Sec.34 would not be available to the party challenging the executing petition.

15. **Difficulties experienced :**

Main difficulties which a party experiences while seeking enforcement of an Arbitral Award are :

- An Arbitral Award under the 1996 Act can not be enforced as a Decree till the period of challenge under Sec.34(3) is over or the objections filed have been dismissed. It is a common practice that whenever an Arbitral Award is made, the party adversely affected by it files a petition u/s 34 of the Act in the Court and the Court issues notice. Then, till the time this objection petition is dismissed the said award can not be enforced. Given the delays in our judicial system, it almost takes years for the Objection Petition to be disposed off and till such time the party having the arbitral award in its favour remains in limbo. Thus, the laudable objective behind doing away of legal proceedings to make the arbitral award a Rule of Court under the 1940 Act by introducing Sec.36 in the 1996 Act has been diluted to a great extent.

With a view to get over this difficulty in enforcement of Arbitral Awards, it is proposed to make some amendments in Sec.36 in the Arbitration & Conciliation (Amendment) Bill 2003 [ which is under consideration of the Government ]. It is proposed to provide for, inter alia, that mere filing objection petition under Sec.34 will not operate as stay of the award and the court may grant stay of the operation of the award subject to imposition of such conditions as it may deem fit to impose and the power to impose conditions include the power to grant interim measures not only against the parties to the award but also against the third parties in order to protect the interest of the party in whose favour the award is passed. The proposed Sec.36 is extracted below :

*"36. (1) Where the time for making an application to set aside the arbitral award under sub-section (1) of section 34 has expired, then, subject to the provisions of sub-sections (2) to (4), the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court.*

*(2) Where an application is filed in the Court under sub-section (1) of section 34 to set aside an arbitral award, the filing of such an application shall not by itself operate as a stay of the award unless, upon a separate application made for that purpose, the Court grants stay of the operation of the award in*

*accordance with the provisions of sub-section (3).*

*(3) Upon filing of the separate application under sub-section (2) for stay of the operation of the award, the Court may, without prejudice to any action it may take under sub-section (1) of section 37C and subject to such conditions as it may deem fit to impose, grant stay of the operation of the arbitral award for reasons in brief to be recorded in writing:*

*Provided that the Court shall, while considering the grant of stay, keep the grounds for setting aside the award in mind.*

*(4) The power to impose conditions referred to in sub-section (3) includes the power to grant interim measures not only against the parties to the award or in respect of the property which is the subject-matter of the award but also to issue ad interim measures against third parties or in respect of property which is not the subject-matter of the award, in so far as it is necessary to protect the interests of the party in whose favour the award is passed.*

*(5) The ad interim measures granted under sub-section (4) may be confirmed, modified or vacated, as the case may be, by the Court subject to such conditions, if any, as it may, after hearing the affected parties, deem fit."*

- The Execution procedure laid down in Order XXI of CPC is lengthy, complex and time consuming and almost a never ending story.
- By the time the stage of filing execution comes, the party against whom the award had come, cleverly disposes off its assets so as to defeat the execution proceedings. Unless a party has taken interim orders u/s 9 of the Act against disposal of assets etc. there are good chances that by the time execution application is filed, the JD would have practically spirited away all its assets.

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