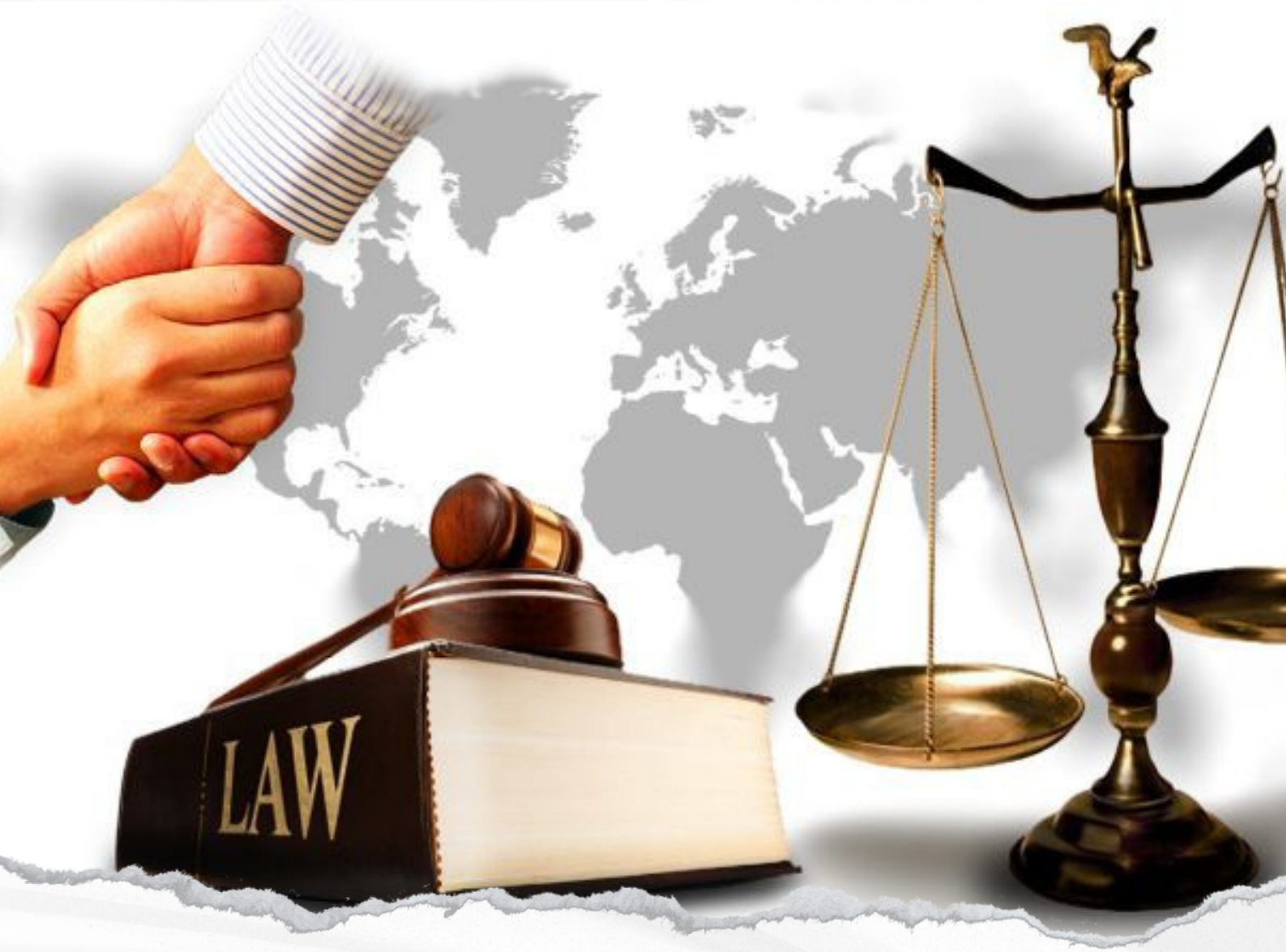
YNZ GROUP

Judgement Update:
India's Foreign Awards Mandate



Wednesday Wisdom
05-07-2023

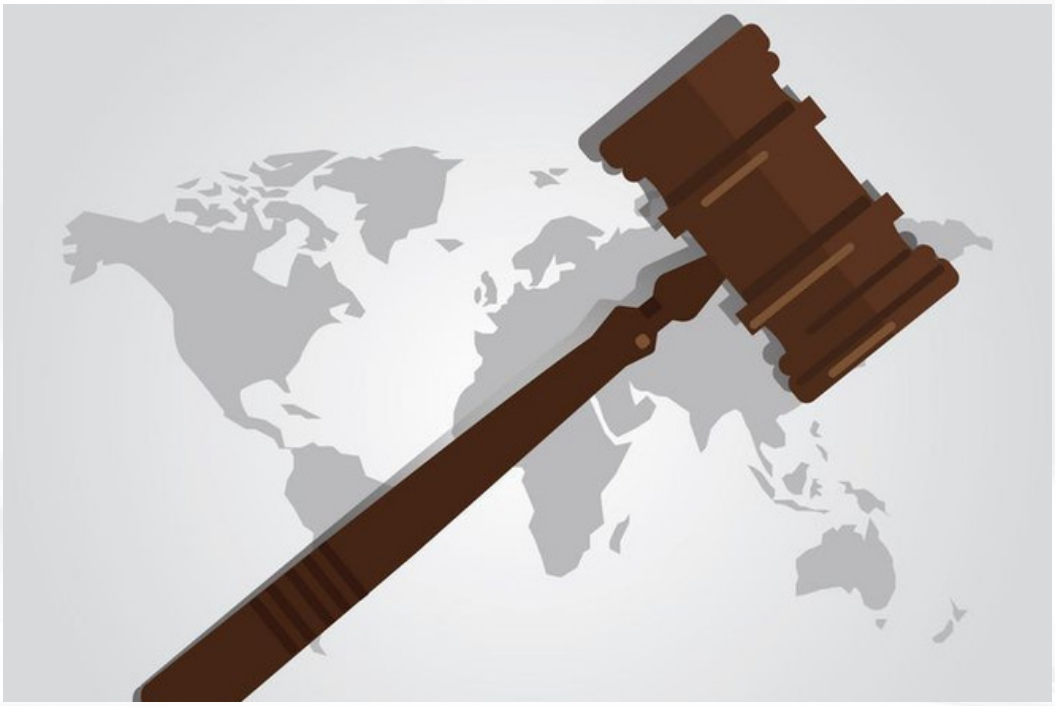
Judgement Update[1]: With advancement in international trade and business, there has been an encouraging trend towards reducing the constraints imposed by legal boundaries. Parties are required to agree to a common venue for dispute resolution, which may necessarily imply that one party must agree to a foreign venue for dispute resolution.

Once the litigation or arbitration is concluded in the foreign country, any action for enforcement of such foreign arbitration award has to be brought in the home country, or where the Defendant resides.

Foreign arbitration awards are recognized in India under the Arbitration & Conciliation Act, 1996 (Act) under Part II and Part III and are enforceable as a decree subject to the compliance of conditions, procedure and timelines as per the Act. Essentially to ensure that the award may be enforced in India, the Parties should ensure that :

- there should be a binding arbitration agreement which has been agreed to amongst the parties;
- The arbitration award is properly passed from a country which is a signatory to the New York Convention or the Geneva Convention;
- 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;
- The arbitration process and procedure is in compliance with the conditions of the Act like availability of original award, availability of original arbitration agreement etc.

Courts have generally shown an inclination to enforce foreign arbitration awards that have been duly passed. Two recent judgements of Delhi High Court and Bombay High Court respectively elucidate the same:



[1]The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

JUDGEMENT : NUOVOPIGNONE INTERNATIONAL SRL ..... Decree Holder versus CARGO MOTORS PRIVATE LIMITED & Another [2]

This judgment presented some interesting arguments by the Respondents who wanted to wriggle themselves out of a consent arbitration award by contending that the consent awards are not recognized under Part II of the Act and thus not enforceable as a foreign award. The respondents also adopted other contentions about the award being an outcome of economic duress and thus being contrary to the public policy of India.

Facts:

The dispute revolved around an Equipment Purchase Agreement (EPA) executed between the parties for the sale of Steam Turbine Generator Package for a consideration of 6.7 million Euros which roughly translates to INR 60 crores. The first respondent had executed a Parent Company Guarantee in favour of the petitioner and stood in the position of a guarantor for the second respondent which was its subsidiary. The EPA is stated to have been amended to include additional services to be provided by the petitioner to respondent no. 2 for a further consideration of approximately INR 9.52 crores.

Disputes arose due to non-payment and the arbitration clause was invoked by one of the parties.

	➢ 22nd November 2019: Request for arbitration received by ICC International Court of Arbitration;
	➢ 15th February 2020: Respondent acknowledged the arbitration request;
	➢ 17th April 2020: Sole arbitrator appointed;
	➢
	➢ 13th August 2020: Settlement award executed amongst the parties;
	➢ 17th August 2020: Arbitral Tribunal was informed that the matter was settled amongst the Parties;
	➢ 20th August 2020: Drafting and circulation of consent award;
	➢ September 2020: Both parties provided their comments to the draft consent award;
	➢ Foreign arbitration award passed on 5th October 2020.

The settlement award also recorded that: Each party has participated in the drafting and negotiation of this Settlement Agreement. Accordingly, this Settlement Agreement shall be deemed to have been drafted jointly by the Parties which mutually declare that the contractual provisions represent in all expression of their true will.

Thereafter, the Respondents did not adhere to the terms of the Settlement Agreement and thus the petition was filed for enforcement of the same before the Delhi High Court.

[2] O.M.P.(EFA)(COMM.) 11/2021

Contentions

A. Amongst other contentions, the Respondents contended that:

- the New York Convention pertains to recognition and enforcement of awards "arising out of **differences between persons**"
- since the New York Convention does not contemplate awards rendered upon settlement, the enforcement action would not sustain.

B. The argument also revolved around the definition in Section 44 which defines "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

C. The respondents argued that during the formation of the New York Convention, Germany and Austria had specifically mooted that the award should include settlement award. Since this request for the expansion of the terms of the New York Convention to include arbitral settlements never came to be specifically incorporated, consent awards must be understood as falling beyond the ambit of the New York Convention.

Judgement :

While rejecting this contention, the Court recorded that a consent award is not specifically excluded. While it may be true that the suggestions mooted by the Federal Republic of Germany and Austria did not ultimately translate into specific provisions in the Convention, this circumstance is wholly insignificant.
The Court went to draw parallels from various other international statues like Rule 33 of ICC Rules, Arbitration Act 1996 of United Kingdom, UNCITRAL Model Law of International Commercial Arbitration, Article 26 of Rules framed by London Court of International Arbitration, International Convention on the Settlement of Investment Disputes, Singapore International Arbitration Centre and various other resources like Indian Arbitration and Conciliation Act, 1996 (Section 30) and categorically held that:

The Court, consequently, comes to the firm conclusion that the argument of a consent award not falling within the scope of the Convention merits rejection. There clearly appears to be unanimity across jurisdictions to accept the possibility of awards being rendered based upon a settlement that may be arrived at between the parties.

This pro arbitration approach is indeed laudable and aids the parties in resolving their commercial disputes faster, which is the true purpose of arbitration.

Another recent judgement by Bombay High Cour is worth noting.

HSBC PI Holdings (Mauritius) Limited (previously named HPEIF Holdings 1 Limited) ... Petitioner
vs.
Avitel Post Studioz Limited and others ... Respondents[3] passed on 25th April 2023

This was a highly contested matter amongst the parties, and they indulged in multiple litigations with each other. Dispute arose around a Share Subscription Agreement dated 21st April 2011 executed between HSBC and the Respondents whereby HSBC made an equity investment of about US$ 60 million in exchange of 7.8% shareholding in respondent No.1.
Respondent No.1 Avitel Post Studioz Limited is a company incorporated under the laws of India and it was the parent company of Avitel Group. It held the entire issued share capital of Avitel Holdings Limited, which in turn, held entire issued share capital of Avitel Post Studioz FZ LLC. Respondent No.2 is the founder of Avitel Post Studioz Limited, being its Chairman and Director, while Respondent Nos.3 and 4 are his sons, who are directors of Respondent No.1.

A Share Subscription Agreement dated 21st April 2011, was executed between the Petitioner and Respondent No.1 for the equity investment. Thereafter, it was claimed that the Respondents indulged in misconduct, and it was found out by the Petitioner through an independent investigator[4] that:
a) there were serious mis-management issues and the said Avitel Post Studioz FZ LLC had shut down and it was not operating.
b) the monies invested by HSBC were siphoned out of the Avitel Group through payments made to fake suppliers and/or service suppliers, allegedly owned by them.

Arbitration was invoked before Singapore International Arbitration Centre (SIAC) on 11th May 2012 and on 27th September 2014, the final award was passed. The Hon'ble tribunal[5] rendered its final award and directed the Respondents to pay to the Petitioner amount of US$ 60 million as damages for fraudulent misrepresentations and other adverse findings against the Respondents.

When HSBC sought to enforce the award, the Respondents approached the Court alleging that the award had mentioned serious allegations of fraud and forgery etc. and thus, the dispute was not arbitrable, and the award was not enforceable.

The Court rejected the contention and gave detailed observations about arbitrability on fraud issues[6] and had directed them to deposit the amount. The Respondents failed to abide by the direction given by the Supreme Court to deposit the amount, a contempt proceeding was successfully initiated against them.

[3] Arbitration Petition 833 of 2015 before the Bombay High Court
[4]Price Waterhouse Cooper had resigned as auditor of the Avitel Post Studioz FZ LLC on 8th February 2012.
[5] Mr. Christopher Lau, SC, was the Chairman, while Justice F. I. Rebello (retired) and Dr. Michael Pryles were members of the arbitral tribunal.
[6] Civil Appeal No. 5145 of 2016, along with HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited Civil Appeal No. 5158 of 2016 with Civil Appeal No. 9820 of 2016

Ultimately, the Respondents surrendered and rendered an unconditional apology. However, the Hon'ble Supreme Court refused to accept the same and sentenced the Respondents to imprisonment.

On the parallel, the Respondents had filed a petition for rejection of the foreign award on the grounds that the award was vitiated due to the bias of the presiding arbitrator. Considering, the serious allegation of bias, on 9th September 2022, the Hon'ble Supreme Court expedited the hearing of this petition so that the issue of bias could be decided.
In this petition, the counsel appearing for Respondents submitted that the Chairman of the arbitral tribunal had not appropriately disclosed their connections and identity of interests with HSBC and thus the award was completely vitiated. It was emphasized that in the facts and circumstances of the present case, there was a duty of disclosure on the part of the said arbitrators about their alleged relationship with the Petitioner and due to failure on their part to disclose, the foreign award was rendered unenforceable.

The Court relied on the International Bar Association (IBA) guidelines and stated that the IBA guidelines specify that the arbitrator ought to be an independent and an impartial arbitrator. The arbitrator also has a responsibility of certain mandatory disclosures as per the factors listed in red list, waivable red list, orange list and green list[7]. However, it is also mentioned that excessive disclosure may unnecessarily undermine the confidence of parties in the process of arbitration itself.

The actual bias was alleged on multiple grounds like the arbitrator was a director in companies which were affiliates of HSBC group and had thick business relationships with the Petitioner. The Court did not find any material on record to support such contentions.
It was found that the circumstances alleged by the Respondents were not covered in any of the lists and thus, the court applied the test of reasonability and not the test of subjectivity, as claimed by Respondents.

IBA Guidelines on Conflicts of Interest in International Arbitration Adopted by resolution of the IBA Council on Thursday 23 October 2014 IBA Guidelines on Conflict of Interest NOv 2014 TEXT PAGES.indd (ibanet.org)

The Court specifically held:

But, if the individual case that comes up for consideration before the Court, throws up a situation, which may not fit into the said lists, it would be appropriate to apply the test of a reasonable third person[8], as contemplated under Article 12(2) of the UNCITRAL Model Law. The party insisting upon such duty of disclosure in an individual case, cannot be permitted to submit that the fact situation may not be covered under any of the three lists and yet, the Court must adopt the subjective approach of disclosure. In such a situation, the Court will have to apply the reasonable third person test, to examine as to whether such duty of disclosure on the part of the arbitrator could be insisted upon, in the facts and circumstances of the case and in this regard, clause 2(b) of the IBA guidelines assumes significance.

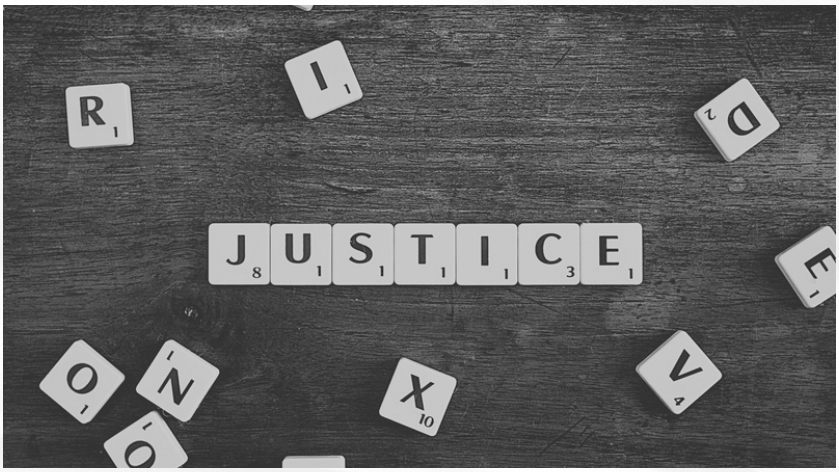
The said clause indicates that the Court must examine from the point of view of a reasonable third person, having knowledge of the relevant facts, as to whether justifiable doubts arise about impartiality or independence of the arbitrator.

The counsel for HSBC had dealt with each of the allegation of bias raised by the Respondents and established the independence of the arbitrators. The Court found relevance in the counter arguments and specifically the point that HSBC and its group of companies, being global players in the financial world, would obviously be having business interactions with different entities.

The allegations of bias failed to pass the reasonable third person test.

The Court also specifically observed "pro-enforcement bias"[9] in the New York Convention, which had been specifically adopted in Section 48 of the Arbitration Act and reiterated that the scope of Court for resisting enforcement of a foreign award, was watertight and that no ground outside the specified provisions could be even looked at.

The petition was rejected, and the Court directed the enforcement of the award through its detailed judgement.



[7] Our earlier article here, _____ specifically examines the interpretation of the word reasonable from a legal angle.

[8] Vijay Karia & others v/s. Prysmian Cavi E Sistemi SRL & others : CIVIL APPEAL NO. 1544 OF 2020 : Supreme Court of India.

Pro-enforcement bias would be construed to state that the burden of proof on parties seeking enforcement has now been placed on parties objecting to enforcement and not the other way around; in the guise of public policy of the country involved, foreign awards cannot be set aside by second guessing the arbitrator's interpretation of the agreement of the parties;

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