ENFORCEMENT OF ARBITRATION AWARDS IN INDIA

by Sumeet Kachwaha*

A. Introduction

A jurisdiction's credibility as an arbitration friendly one rests primarily on the efficiency and efficacy of its award enforcement regime.

This article examines the award enforcement regime in India.

B. The 'Old' Law

Prior to January 1996, the law of enforcement of arbitration awards in India was spread between three enactments. Enforcement of domestic awards was dealt with under a 1940 Act.[1] Enforcement of foreign awards was divided between two statutes — a 1937 Act[2] to give effect to the Geneva Convention[3] awards and a 1961 Act[4] to give effect to the New York Convention[5] awards.

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1 *Ie* the Arbitration Act, 1940 (No 10 of 1940) ('the 1940 Act').

2 *Ie* the Arbitration (Protocol & Convention) Act 1937 (No 6 of 1937) ('the 1937 Act').

3 *Ie* the Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927) ('the Geneva Convention'). India became a signatory to this Convention on 23 October 1937 (one amongst six Asian nations to become a signatory).

4 *Ie* the Foreign Awards (Recognition & Enforcement) Act 1961 (No 45 of 1961) ('1961 Act').

5 *Ie* the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ('the New York Convention'). India became a signatory to this Convention on 13 July 1960.

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As the Geneva Convention became virtually otiose (by reason of Art VII of the New York Convention), enforcement of foreign awards, for all practical purposes, came under the 1961 Act and domestic awards came under the 1940 Act. The enforcement regime between these two statutes was, however, quite distinct. The 1961 Act confined challenge to an arbitral award only on the limited grounds permitted under the New York Convention. The scope of challenge to domestic awards under the 1940 Act was much wider. This Act permitted judicial scrutiny, *inter alia*, on the ground that the arbitrator had 'misconducted' himself or the proceedings[6] — an expression which came to be widely interpreted and awards were interfered with, *inter alia*, on the ground of fundamental errors of law apparent on the face of the record. However, even under this wide judicial scrutiny regime, courts restrained themselves and interfered only when the error was grave and the judicial conscience was shocked. It may be worthwhile to cite a couple of illustrative cases.

In the case of *State of Rajasthan v Puri Construction Co Ltd*,[7] the Supreme Court held:

> over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the courts have disfavoured interference with arbitration award on account of error of law and fact on the score of mis-appreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. This court has held that the court does not sit in appeal over the award and review the reasons. The court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous.

In the case of *State of UP v Allied Constructions*,[8] the court held:

> the arbitrator is a judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering (see *UP SEB v Searsole Chemicals Ltd* (2001) 3 SCC 397 and *Ispat Engg & Foundry Works v Steel Authority of India Ltd* (2001) 6 SCC 347).

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6 The 1940 Act, s 30(a).
7 (1994) 6 SCC 485.
8 (2003) 7 SCC 396.

The article has belaboured somewhat on the 'old' law since, thanks to a 2003 Supreme Court judgment (which shall be elaborated upon below), the 'new' law on the subject has begun to resemble the 'old' law.

C. The New Regime

In January 1996, India enacted a new Arbitration Act.[9] This Act repealed all the three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act).[10] The new Act has two significant parts. Part I provides for any arbitration conducted in India and enforcement of awards thereunder. Part II provides for enforcement of foreign awards. Any arbitration conducted in India or enforcement of award thereunder (whether domestic or international) is governed by Part I, while enforcement of any foreign award to which the New York Convention or the Geneva Convention applies, is governed by Part II of the Act.

D. Domestic Awards

1. *Grounds for Setting Aside Awards*

Part I of the 1996 Act is modelled on the UNCITRAL Model Law[11] and the UNCITRAL Arbitration Rules[12] with few departures. The relevant provisions are briefly outlined below.

Section 13 of the 1996 Act, corresponding to Art 13 of the Model Law, provides for challenge to an arbitrator on the ground of lack of independence or impartiality or lack of qualification. In the first instance, a challenge is to be made before the arbitral tribunal itself.[13] If the challenge is rejected, the tribunal shall continue with the arbitral proceedings and make an award.[14] Section 13(5) of the 1996 Act provides that where the tribunal overrules a challenge and proceeds with the arbitration, the party challenging the arbitrator may make an application for setting aside the arbitral award under s 34 of the 1996 Act (corresponding to Art 34 of the Model Law). Hence, approach to a court is only at the post-award stage. This is a departure from the Model Law which

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9 *Ie* the Arbitration & Conciliation Act 1996 (No 26 of 1996) ('the 1996 Act').

10 The 1996 Act, s 85.

11 *Ie* the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, General Assembly Resolution 40/72, adopted on 11 December 1985 ('the Model Law').

12 Arbitration Rules of the United Nations Commission on International Trade Law ('UNCITRAL'), General Assembly Resolution 31/98, adopted on 15 December 1976 ('the UNCITRAL Arbitration Rules').

13 The 1996 Act, s 13(2).

14 The 1996 Act, s 13(4).

provides for an approach to the court within 30 days of the arbitral tribunal rejecting the challenge.[15]

The second departure from the Model Law (relevant to enforcement) is to be found in s 16 of the 1996 Act (corresponding to Art 16 of the Model Law). Section 16 incorporates the competence-competence principle and enables the arbitral tribunal to rule on its jurisdiction, including with respect to the existence or validity of the arbitration agreement. If the arbitral tribunal rejects any objection to its jurisdiction, or to the existence or validity of the arbitration agreement, it shall continue with the arbitral proceedings and make an award.[16] Section 16(6) of the 1996 Act provides that a party aggrieved by such award may make an application for setting aside the same in accordance with s 34. Article 16 of the Model Law, in contrast, provides that where the arbitral tribunal overrules any objection to its jurisdiction, the party aggrieved with such decision may approach the court for resolution within 30 days. The Indian Act permits approach to the court only at the award stage (and not during the pendency of the arbitration proceedings).

Hence, ss 13(5) and 16(6) of the 1996 Act furnish two additional grounds for challenge of an arbitral award (over and above the ones stipulated in s 34 of the 1996 Act referred to below).

Section 34 of the 1996 Act contains the main grounds for setting aside the award. It is based on Art 34 of the Model Law and, like Art 34, states that the grounds contained therein are the 'only' grounds on which an award may be set aside. However, in the Indian context the word 'only' prefixing the grounds is a bit of a misnomer as two additional grounds have been created by the Act itself as mentioned above. Besides, another ground is to be found in an 'Explanation' to the public policy ground in s 34. The same reads as follows:

> [I]t is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award is induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

Section 75 referred to above is part of the conciliation scheme under the Act and states that the conciliator and parties shall keep confidential all matters relating to the conciliation proceedings. Section 81 prohibits any reference in arbitral or judicial proceedings to views, suggestions, admissions or proposals, *etc*. made by parties during conciliation proceedings.

Save for the exception, referred to above, s 34 of the 1996 Act is a faithful reproduction of Art 34 of the Model Law.

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15 The Model Law, Art 13(3).

16 The 1996 Act, s 16(5).

2. *New Ground for Challenge to Award Through Judge-made Law*

To the above-mentioned legislatively stipulated grounds, came to be added a new 'judge-made' ground. This came about in the Supreme Court decision of *Oil and Natural Gas Corp v Saw Pipes Ltd*.[17] The issue here was whether an award could be set aside on the ground that the arbitral tribunal had incorrectly applied the law of liquidated damages to the case. The question turned around the scope of s 34 of the 1996 Act (which on a plain reading does not permit a challenge on merits).

The Supreme Court in *Saw Pipes* came to the conclusion that the impugned award was legally flawed in so far as it allowed liquidated damages on an incorrect view of the law. In the process it held, that an award can also be challenged on the ground that it contravenes 'the provisions of the Act (*ie* Arbitration Act) or any other substantive law governing the parties or is against the terms of the contract'. Further, the judgment expanded the concept of public policy to add that the award would be contrary to public policy if it is 'patently illegal'.

The Supreme Court in *Saw Pipes* confined the expansion of public policy to domestic awards alone as an earlier larger Bench decision of the court in the case of *Renu Sagar Power Co v General Electrical Corp*[18] had construed narrowly this ground as limited to 'fundamental policy of Indian law'.[19]

The *Saw Pipes* judgment has come in for some sharp criticism from several quarters.[20] Read literally, the judgment sets the clock back to the old position where an award could be challenged on merits and indeed renders the court (testing enforceability of an award) as a court of appeal. Some judicial decisions have tried to reign in the effect of *Saw Pipes*. One instance of this is the Supreme Court decision in the case of *McDermott International Inc v Burn Standard Co Ltd*,[21] where the court somewhat read down *Saw Pipes*. It held:

> The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged

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17 2003 (5) SCC 705 ('*Saw Pipes*').

18 1994 Supp (1) SCC 644 ('*Renu Sagar*').

19 However, see *infra*, pp 74–80 under the section headed 'F — Enforcement of Foreign Awards'. A recent decision of the Supreme Court in the case of *Venture Global Engineering v Satyam Computer Services* CA No 309 of 2008 (10 January 2008) ('*Venture Global*') has held that the wider interpretation of 'public policy' would apply to foreign awards as well.

20 See, for instance, the chapter entitled 'Judicial Supervision and Intervention' by Mr Fali S Nariman in Asia's Leading Arbitrators' *Guide to International Arbitration* JurisNet, LLC 2007 at p 353.

21 2006 (11) SCC 181 at 208.

> in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct the errors of arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

Commenting on *Saw Pipes* the court held:[22]

> We are not unmindful that the decision of this court in *ONGC* had invited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. It is only for a larger Bench to consider the correctness or otherwise of the said decision. The said decision is binding on us. The said decision has been followed in a large number of cases.

A few High Court decisions have also sought to narrowly read *Saw Pipes* on the ground that a literal construction of the judgment would expand judicial review beyond all limitations contained not only under the 1996 Act but even under the old regime. These High Court decisions have (rightly) held that one judgment of the Supreme Court cannot render naught the entire law on the subject. The High Court of Bombay in the case of *Indian Oil Corp Ltd v Langkawi Shipping Ltd*[23] held that to accept a literal construction on *Saw Pipes*:

> would be to radically alter the statutorily and judicially circumscribed limits to the court's jurisdiction to interfere with arbitration awards. It would indeed confer a First Appellate Court's power on a court exercising jurisdiction under s 34 of the 1996 Act. There is nothing in the 1996 Act which indicates such an intention on the part of the legislature. That the intention is to the contrary is clear, *inter alia*, from the Arbitration and Conciliation Bill 1995 which preceded the 1996 Act which stated as one of its main objectives the need 'to minimize the supervisory role of Courts in the Arbitral process …'
>
> In the circumstances, the aforesaid principles laid down consistently by the Supreme Court and the various High Courts cannot be said to be no longer good law in view of the 1996 Act. Nor can it be said that the observations of the Supreme Court in *Oil and Natural Gas Corp v Saw Pipes Ltd* (*supra*), have expressly or impliedly rendered the aforesaid judgments and the principles contained therein no longer good law in view of the 1996 Act. The principles apply with equal force under the 1996 Act.[24]

The High Court of Gauhati following the above Bombay High Court decision held:

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22 *Id* at 211.
23 2004 (3) Arb LR 568.
24 *Ibid* at 573 and 574.

> The observations of the Apex Court in *ONGC v Saw Pipes*, *supra*, did not expressly or impliedly render the *ratio decidendi* on the issue contained in a plethora of judgments and the laid down principles therein *non est*. On a due consideration of the entire gamut of the provisions of the Act and the precedential law, we unhesitantly subscribe to the view expressed in *IOC Ltd*, *supra*. The decision in *Saw Pipes*, *supra*, does not depart from the judicially evolved precepts bearing on the authority and jurisdiction of an arbitrator in determining a dispute referred to him, the norms and measures to be applied for assessment of damages and the scope of court's interference with his findings … The above decision does not intend, according to our construction, to efface the time-tested legal propositions and judicial tenets on arbitration and thus ought not to be construed away from the well-established trend set by a string of decisions preceding the same.[25]

The *Saw Pipes* judgment has quite rightly been criticised. To begin with it is contrary to the plain language of the 1996 Act and indeed also the spirit of the law. Its expanded judicial review is especially unsuitable in the Indian context where courts are overwhelmed with backlog. In such a scenario, to permit a challenge on merits would considerably delay the enforcement proceedings. A majority of parties opting for arbitration do so to avoid court delays and legal niceties. To engage them back into the same system at the enforcement stage would be ironic. An unfortunate side effect of this decision is that it has become a ground for parties to shift the venue of arbitration outside India (lest an arbitration in India renders the award more vulnerable or judicial review delay enforcement).

3. *Miscellaneous and Procedural Aspects*

a. *Steps for Enforcement*

One of the declared objectives of the 1996 Act is that every final award: 'is enforced in the same manner as if it were a decree of the Court'.[26] Hence, the scheme of the Act is that it is up to the losing party to object to the award and petition the court for setting it aside. The winning party has to make no procedural move. If the objections to the award are not sustained (or if there are no objections within the time allowed) the award itself becomes enforceable as if it were a decree of the court.[27] It would be noticed that the Indian law has thus fundamentally departed from the Model Law in this regard. The Model Law requires an application for enforcement (Art 35) and the grounds on which enforcement of an award may be refused are as set forth in Art 36

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25 *Daelim Industrial Co v Numaligarh Refinery Ltd* Arbitration Appeal No 1 of 2002 (24 August 2006).

26 Statement of Objects and Reasons to the 1996 Act, para 4(vii).

27 The 1996 Act, s 36.

thereof. This has been departed from under the Indian regime as stated above with the result, that in so far as domestic awards are concerned, if there is no application to set aside an award under s 34 (or if the objections if made have been rejected), the award can straightaway be executed as a decree of the court.

b. *The Relevant Court*

As India is a large jurisdiction, identification of the relevant court is important. For the purposes of the 1996 Act, 'court' means the Principal Civil Court having original jurisdiction to decide the question forming the subject matter of the arbitration, if the same were a subject matter of a suit.[28] The aggrieved party can thus bring its application to set aside the award before the court where the successful party has its office or where the cause of action in whole or in part arose or where the arbitration took place.

c. *Time Limit*

Any application for setting aside the award must be made within three months from receipt of the same. This period can be extended by the court by a further period of 30 days on sufficient cause being shown — 'but not thereafter'.[29]

The Supreme Court has clarified in the case of *Union of India v Tecco Trichy Engineers & Contractors*,[30] the date from which the aforesaid limitation shall begin to run. This was The court here was concerned with a situation where the award was despatched to the General Manager, Railways (Union of India) as he had referred the matter to arbitration. However, the entire arbitration was conducted by the Chief Engineer. The Union of India contended that as the award had not been despatched to the concerned relevant person (the Chief Engineer) there was some delay in raising of objections. Under the circumstances the Supreme Court held that for large organisations like governments, time would count from the date the award was received by the relevant person. It held:

> We cannot be oblivious of the fact of impersonal approach in the government departments and organisations like railways. In the very nature of the working of government departments a decision is not taken unless the papers have reached the person concerned and then an approval, if required, of the competent authority or official above has been obtained. All this could not have taken place unless the Chief Engineer had received the copy of the award when only the

28 The 1996 Act, s 2(1)(e).
29 The 1996 Act, s 34(3).
30 2005 (4) SCC 239.

delivery of the award within the meaning of sub-s (5) of s 31 shall be deemed to have taken place.

d. *Stamping/Registration Requirements*

The 1996 Act does not talk of stamping or registration of an award. However, stamping is required under the provisions of the Indian Stamp Act 1899. Section 35 of the said Act states the documents which are required to be stamped, if inadequately stamped (or not stamped) will not be admissible in evidence 'for any purpose'. Further they are liable to be impounded and subjected to penal duties. Though the Indian Stamp Act is a Central Legislation, various states have prescribed their own schedule of applicable stamp duties. Hence stamp duties vary from state to state.

e. *Registration Requirements*

This again is not provided for under the 1996 Act. The Registration Act 1908 provides that if any non-testamentary document 'purports or operates to create, declare, assign limit or extinguish …, any title, right or interest' in any immovable property, the same is required to be registered and if it is not, it is invalid.[31] Hence, if an award purports to impact any immovable property it is required to be registered. Registration fees again vary from state to state.

The effect of non-stamping or non-registration of an award came to be considered by the Supreme Court of India in the case of *M Anasuya Devi v Manik Reddy*.[32] The court held that s 34 of the 1996 Act permits an award to be set aside 'only' on the grounds enumerated therein and non-stamping or non-registration of an award is not one of them. Accordingly, an award cannot be set aside on the ground that it is non-stamped/improperly stamped or unregistered. However, if it is not, it may become relevant at the stage where it is sought to be executed as a decree. Hence, the Supreme Court deferred the issue of non-stamping or non-registration to the execution stage. Since registration fees can be quite substantial, the decision affords relief to the winning party to first overcome the objections to the award stage (s 34) and then pay the fees.

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31 The 1996 Act, ss 17 and 49.

32 2003 (8) SCC 565.

E. Enforcement Statistics of Domestic Awards

One may now examine the enforcement statistics, including grounds of challenge (and the fate thereof). Based on reported cases, the statistics are as follows:

High Court (Domestic Awards)

Sl No	*Grounds*	*Total No of Challenges*	*Allowed*	*Rejected*	*Modified*
1	Jurisdiction	246 43.53%	43 17.47%	197 80.08%	6 2.43%
2	Public policy	151 26.72%	25 16.55%	112 74.17%	14 9.27%
3	Limitation	77 13.62%	9 11.68%	66 85.71%	2 2.59%
4	Violation of natural justice	37 6.54%	8 21.62%	24 64.86%	5 13.51%
5	Bias	22 3.89%	1 4.54%	21 95.45%	-
6	Non-appreciation of facts/evidence	14 2.47%	1 7.14%	13 92.85%	-
7	Not a reasoned award or no grounds	9	-	9	-
8	Not signed/stamped	3	-	3	-
9	Not a party	1	1	-	-
10	Non-application of mind	1	1	-	-
11	Wrongful rejection of defence (filing beyond time)	1	-	-	1
12	No arbitration agreement	1	1	-	-
13	Typographical error	1	-	1	-
14	Withdrawn (challenge not pursued)	1	-	1	-
	Total	**565** (1996 to Sept 2007)	**94** (16.63%)	**443** (78.41%)	**28** (4.96%)

Supreme Court (Domestic Awards)

Sl No	*Grounds*	*Total No of Challenges*	*Allowed*	*Rejected*	*Modified*
1	Jurisdiction	11 68.75%	2 12.5%	7 43.75%	2 12.5%
2	Public policy	2 12.5%	1 50%	1 50%	-
3	Limitation	1 6.25%	1 100%	-	-
4	Non-appreciation of facts/evidence	2 12.5%	-	1 50%	1 50%
	Total	**16** (1996 to Sept 2007)	**5** (31.25%)	**8** (50%)	**3** (18.75%)

F. Enforcement of Foreign Awards

We may now come to enforcement of foreign awards. This is covered by Part II of the 1996 Act, though due to a recent Supreme Court decision[33] (discussed further below) the distinction between the grounds and procedures in Part I and Part II has got blurred.

The provisions of Part II of the Act give effect to the New York Convention and the Geneva Convention. India is not a party to the ICSID Convention,[34] nor indeed to any other convention or treaty pertaining to enforcement of foreign awards. Since the Geneva Convention provisions are now basically otiose, this article discusses only provisions dealing with enforcement of New York Convention awards.

1. *Conditions for Enforcement*

a. *Foreign Award Defined*

In order to be considered as a foreign award (for the purposes of the Act), the same must fulfil two requirements. First it must deal with differences arising out of a legal relationship (whether contractual or not) considered as commercial under the laws in force in India. The expression 'commercial relationship' has been very widely interpreted by Indian courts. The Supreme

33 *Venture Global*, *supra*, n 19.

34 Ie the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington, 18 March 1965) ('the ICSID Convention' or 'the Washington Convention').

Court in the case of *RM Investments Trading Co Pvt Ltd v Boeing Co & Anor*,[35] while construing the expression 'commercial relationship', held:

> The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not …

The second requirement is more significant and that is that the country where the award has been issued must be a country notified by the Indian government to be a country to which the New York Convention applies.[36] Only a few countries have been notified so far and only awards rendered therein are recognised as foreign awards and enforceable as such in India. The countries which have been notified are:

> Austria, Belgium, Botswana, Bulgaria, Central African Republic, Chile, Cuba, Czechoslovak Socialist Republic, Denmark, Ecuador, Arab Republic of Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, Italy, Japan, Kuwait, Republic of Korea, Malagasy Republic, Mexico, Morocco, Nigeria, The Netherlands, Norway, Philippines, Poland, Romania, San Marino, Spain, Sweden, Switzerland, Syrian, Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania, and United States of America.

An interesting issue came up before the Supreme Court as to what would happen in a case where a country has been notified but subsequently it divides or disintegrates into separate political entities. This came up for consideration in the case of *Transocean Shipping Agency Pvt Ltd v Black Sea Shipping & Ors*.[37] Here the venue of arbitration was Ukraine which was then a part of the USSR — a country recognised and notified by the Government of India as one to which the New York Convention would apply. However, by the time disputes arose between the parties the USSR had disintegrated and the dispute came to be arbitrated in Ukraine (which was not notified). The question arose whether an award rendered in Ukraine would be enforceable in India notwithstanding the fact that it was not a notified country. Both the High Court of Bombay (where the matter came up initially) and the Supreme Court of India in appeal, held that the creation of a new political entity would not make any difference to the enforceability of the award rendered in a territory which was initially a part of a notified territory. On this basis the court recognised and upheld the award. This decision is of considerable significance as it expands the lists of countries notified by the government by bringing in a host of new political

35 1994 (4) SCC 541.
36 The 1996 Act, s 44(b).
37 1998 (2) SCC 281.

entities and giving them recognition in their new avatar also. At another level the judgment demonstrates the willingness of Indian courts to overcome technicalities and lean in favour of enforcement.

2. *Comparison with Domestic Enforcement Regime*

There are two fundamental differences between enforcement of a foreign award and a domestic award. As noted above, a domestic award does not require any application for enforcement. Once objections (if any) are rejected, the award is by itself capable of execution as a decree. A foreign award, however, is required to go through an enforcement procedure. The party seeking enforcement has to make an application for the said purpose. Once the court is satisfied that the foreign award is enforceable, the award becomes a decree of the court and executable as such.

The other difference between the domestic and foreign regime is that (unlike for domestic awards) there is no provision to set aside a foreign award. In relation to a foreign award, the Indian courts may only enforce it or refuse to enforce it — they cannot set it aside. This 'lacuna' was sought to be plugged by the Supreme Court in the recent decision of *Venture Global*[38] (discussed further below) where the court held that it is permissible to set aside a foreign award in India applying the provisions of s 34 of Part I of the Act.

3. *Conditions for Enforcement*

The conditions for enforcement of a foreign award are as per the New York Convention. The only addition being an 'Explanation' to the ground of public policy which states that an award shall be deemed to be in conflict with the public policy of India if it was induced or affected by fraud or corruption.[39]

Indian courts have narrowly construed the ground of public policy in relation to foreign awards (unlike domestic awards where *Saw Pipes*[40] has construed it widely). In *Renu Sagar*,[41] the Supreme Court construed the expression 'public policy' in relation to foreign awards as follows:

> This would mean that 'public policy' in s 7(1)(b)(ii) has been used in narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India … Applying the said criteria it must be held that the enforcement of a foreign award would

38 *Supra*, n 19.
39 The 1996 Act, s 48(2).
40 *Supra*, n 17.
41 *Supra*, n 18.

be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

4. *Judicially Created New Procedure and New Ground for Challenge to Foreign Award*

As noticed above, there is no statutory provision to set aside a foreign award under the 1996 Act. Foreign awards may be set aside or suspended in the country in which or under the laws of which the award was made[42] but there is no provision to set aside a foreign award in India. This fundamental distinction between a foreign and a domestic award has been obliterated by the Supreme Court in the recent case of *Venture Global*.[43] Here, the Supreme Court was concerned with a situation where a foreign award rendered in London under the Rules of the London Court of International Arbitration ('LCIA') was sought to be enforced by the successful party (an Indian company) in the District Court, Michigan, United States of America ('USA'). The dispute arose out of a joint venture agreement between the parties. The respondent alleged that the appellant had committed an 'event of default' under the shareholders agreement and as per the said agreement it exercised its option to purchase the appellant's shares in the joint venture company at book value. The sole arbitrator appointed by the LCIA allowed the claim and directed the appellant to transfer its shares to the respondent. The respondent sought to enforce this award in the USA.[44] The appellant filed a civil suit in an Indian district court seeking to set aside the award. The district court, followed by the High Court, on appeal, dismissed the suit holding that there was no such procedure envisaged under Indian law. However, the Supreme Court on appeal, extending its earlier decision in the case of *Bhatia International v Bulk Trading*,[45] held that even though there was no provision in Part II of the 1996 Act providing for challenge to a foreign award, a petition to set aside the same would lie under s 34 Part I of the 1996 Act (*ie* it applied the domestic award

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42 The 1996 Act, s 48(1)(e), corresponding to Art V(e) of the New York Convention.

43 *Supra*, n 19.

44 A somewhat strange move considering that the shares were in an Indian company and various Indian regulatory steps and authorities would be involved for transfer of shares. The respondent's move was perhaps influenced by the fact that the governing law under the agreement was the law of the State of Michigan and the appellant was situated in the USA. The respondent thus attempted to bypass the natural forum (India) hoping to enforce the award through the contempt of court mechanism of the United States courts. This did not go well with the Indian Supreme Court.

45 2002 (4) SCC 105.

provisions to foreign awards). The court held that the property in question (shares in an Indian company) are situated in India and necessarily Indian law would need to be followed to execute the award. In such a situation the award must be validated on the touchstone of public policy of India and the Indian public policy cannot be given a go by through the device of the award being enforced on foreign shores. Going further the court held that a challenge to a foreign award in India would have to meet the expanded scope of public policy as laid down in *Saw Pipes*[46] (*ie* meet a challenge on merits contending that the award is 'patently illegal').

The *Venture Global* case[47] is far reaching as it creates a new procedure and a new ground for challenge to a foreign award (not envisaged under the 1996 Act). The new procedure is that a person seeking to enforce a foreign award has not only to file an application for enforcement under s 48 of the 1996 Act, it has to meet an application under s 34 of the 1996 Act seeking to set aside the award. The new ground is that not only must the award pass the New York Convention grounds incorporated in s 48, it must pass the expanded 'public policy' ground created under s 34 of the 1996 Act. In practice, the statutorily enacted procedure for enforcement of a foreign award would be rendered superfluous till the application for setting aside the same (under s 34) is decided. The statutorily envisaged (narrow) public policy grounds for challenge to an award would also be rendered meaningless as the award would have to meet the expanded 'public policy' test (and virtually have to meet a challenge to the award on merits) before it can be enforced. The *Venture Global* case thus largely renders superfluous the statutorily envisaged mechanism for enforcement of foreign awards and replaces it with judge-made law. Moreover, in so far as the judgment permits a challenge to a foreign award on the expanded interpretation of public policy it is *per incuriam*, as a larger, three Bench decision, in the case of *Renu Sagar*[48] holds to the contrary. Further *Saw Pipes*[49] (on which *Venture Global* relies for this proposition) had clearly confined its expanded interpretation of public policy to domestic awards alone lest it fall foul of the *Renu Sagar* case (which had interpreted the expression narrowly). The Supreme Court in *Venture Global* did not notice this self-created limitation in *Saw Pipes*, nor did it notice the narrow interpretation of public policy in *Renu Sagar* and therefore the application of the expanded interpretation of public policy to foreign awards is *per incuriam*.

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46 *Supra*, n 17.
47 *Supra*, n 19.
48 *Supra*, n 18.
49 *Supra*, n 17.

Be that as it may, till the decision is clarified or modified, it has clearly muddied the waters and the enforcement mechanism for foreign awards has become clumsy, uncertain and inefficient.

5. *Procedural Requirements*

A party applying for enforcement of a foreign award is required to produce before the court:

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
(b) the original agreement for arbitration or a duly certified copy thereof; and
(c) such evidence as may be necessary to prove that the award is a foreign award.[50]

a. *Relevant Court*

The Indian Supreme Court has accepted the principle that enforcement proceedings can be brought wherever the property of the losing party may be situated. This was in the case of *Brace Transport Corp of Monrovia v Orient Middle East Lines Ltd*.[51] The court here quoted a passage from Redfern and Hunter on *Law and Practice of International Commercial Arbitration*,[52] *inter alia*, as follows:

> A party seeking to enforce an award in an international commercial arbitration may have a choice of country in which to do so; as it is some times expressed, the party may be able to go forum shopping. This depends upon the location of the assets of the losing party. Since the purpose of enforcement proceedings is to try to ensure compliance with an award by the legal attachment or seizure of the defaulting party's assets, legal proceedings of some kind are necessary to obtain title to the assets seized or their proceeds of sale. These legal proceedings must be taken in the state or states in which the property or other assets of the losing party are located.

b. *Time Limit*

The 1996 Act does not prescribe any time limit within which a foreign award must be applied to be enforced. However, various High Courts have held that

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50 The 1996 Act, s 47(1).
51 1995 Supp (2) SCC 280.
52 First Ed, 1986, Sweet & Maxwell.

the period of limitation would be governed by the residual provision under the Limitation Act 1963 (No 36 of 1963), *ie* the period would be three years from the date when the right to apply for enforcement accrues. The High Court of Bombay has held that the right to apply would accrue when the award is received by the applicant.[53]

6. *Post-enforcement Formalities*

The Supreme Court has held that once the court determines that a foreign award is enforceable it can straightaway be executed as a decree. In other words, no other application is required to convert the judgment into a decree. This was so held in the case of *Fuerst Day Lawson Ltd v Jindal Exports Ltd*,[54] where the court stated:

> Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court / decree again. If the object and purpose can be served in the same proceedings, in our view, there is no need to take two separate proceedings resulting in multiplicity of litigation. It is also clear from objectives contained in para 4 of the Statement of Objects and Reasons, ss 47 to 49 and Scheme of the Act that every final arbitral awards is to be enforced as if it were a decree of the court … In our opinion, for enforcement of foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make rule of the court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the court enforcing a foreign award can deal with the entire matter.

One interesting feature of enforcement of a foreign award is that there is no statutory appeal provided against any decision of the court rejecting objections to the award. An appeal shall lie only if the court holds the award to be non-enforceable. Hence a decision upholding the award cannot be appealed against. However, a discretionary appeal would lie to the Supreme Court of India under Art 136 of the Constitution of India. Such appeals are entertained only if the court feels that they raise a question of fundamental importance or public interest.

G. Enforcement Statistics of Foreign Awards

Lastly, one may examine the enforcement statistics (including grounds for challenge) in relation to foreign awards. Here one would notice that the

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53 2007 (1) RAJ 339 (Bom), AIR 1986 Gujarat 62.

54 2001 (6) SCC 356.

courts have distinctly leaned in favour of enforcement and save for a lone case, foreign awards have invariably been upheld and enforced. The statistics (on the basis of reported cases) are as follows:

High Court and Supreme Court (1996 to September 2007)
(Foreign Awards)

SI No	*Grounds*	*Total No of Challenges*	*Allowed*	*Rejected*	*Modified*
1	Jurisdiction	5 29.41%	-	5	
2	Public policy	3 17.64%		2	1
3	Technical grounds (petition to be made under s 48 not under s 34)	3 17.64%	-	3	
4	Requirement of separate execution proceedings	2	-	2	
5	No grounds or reasons in award	1	-	1	
6	Petition filed for winding up on the basis of foreign award	1	-	1	
7	No arbitration agreement	1	1	-	
8	1996 Act does not apply	1	-	1	

The breakdown of challenges Institution-wise is as follows:

SI No	*Institutions*	*Total No of Challenges*	*Allowed*	*Rejected*	*Modified*
1	*Ad hoc*	10	-	10	
2	ICC	2	-	1	1
3	LCIA	2	-	2	
4	IGPA (International General Produce Association)	1	-	1	
5	ICA	1	-	1	
6	Korean Commercial Arbitration Board	1	1	-	-
	Total	**17**	**1** 5.88%	**15** 88.23%	**1** 5.88%

H. Conclusion

Viewed in its totality, India does not come across as a jurisdiction which carries an anti-arbitration bias or more significantly which carries an anti-

foreigner bias. The figures show that notwithstanding the interventionist instincts and expanded judicial review, Indian courts do restrain themselves from interfering with arbitral awards.

Judged on this touchstone, India qualifies as an arbitration-friendly jurisdiction.