Enforcement Challenges for International Consumer Disputes Resolved through ADR in India

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Abstract

India is presently in a fast track mode to promote itself as an international dispute resolution and commerce hub. With growing number of international consumers from India and Indian suppliers catering to international consumers, there is need to create a robust alternative dispute resolution (ADR) mechanism for international consumer disputes. This is especially important owing to the distinct characteristics of consumer disputes: low claim value, high volumes and requirement for speedy settlement for effective grievance redressal. Presently, the Indian laws do not provide for ADR mechanism for consumer disputes which is slated to change with the Consumer Protection Bill, 2015. Further, there is also a lack of enforcement mechanism for international settlement agreements. Since Arbitration and Conciliation Act, 1996 coupled with the New York Convention only cater to commercial disputes and the Indian Consumer Protection Act, 1986 excludes purchases made for commercial purposes, the enforcement of arbitral awards in international consumer matters becomes a grey area which has not come up for review before a court in India yet. Most consumer matters are resolved through mediation in India by court annexed mediation centres under Section 89 of Code of Civil Procedure, 1908. A strong mechanism coupled with online dispute resolution mode shall go a long way in projecting India as a strong international consumer market.

Introduction

It has been scientifically proven that regardless of varied culture, history, climatic conditions and physical attributes, the neuroscience behind our decision making

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remains the same throughout the world.[1] This also leads to similar perception bias for human beings around the world. Philosophically put, it reminds us that no matter how much more evolved we think we are as compared to other humans around the world, in the end we are all made of the same pith and substance and, of the same flawed perceptions. The history of mistakes repeat themselves in one form or the other. Same is the case with the problems with enforcement of foreign awards, judgments and mediated settlement agreements in international consumer disputes.

The enforcement proceedings of a foreign award, judgment or mediated settlement agreement are marred by a defined set of problems internationally. The most common question raised in all enforcement proceedings internationally is on the breach of natural justice or public policy of the jurisdiction.[2] The second common hurdle is the process of enforcement which may be technical, expensive and time consuming in varying proportions. Other common hurdles are questions raised on the competence of the tribunal or foreign jurisdiction, non-arbitrability of the subject matter of the dispute and the validity of agreements based on which the award, judgment or settlement is made. India as an enforcement jurisdiction is not different in this regard.

Present Framework in India

Consumer disputes in India are not a different subset from other civil disputes when it comes to enforcement of international awards and settlement agreements. Presently, India does not have a defined alternative dispute resolution framework for resolution of domestic or international consumer disputes. On the domestic front, the Consumer Protection Bill, 2015 which is slated to replace the present Consumer Protection Act, 1986 provides for mediation of consumer disputes. But the Bill in its present draft does not have extra territorial jurisdiction and shall not effectively cover international consumer disputes. The present Consumer Protection Act, 1986 does not have provisions for alternative dispute resolution for consumer disputes *per se*. However, in the author's experience, many court annexed mediation centres across India undertake mediation of consumer matters for speedy resolution. This entire framework, however, does not foresee resolution of international consumer disputes which has become a real possibility with increasing online consumerism in India.

1 Nicholas Wright and Karim Sadjadpour, *The Neuroscience Guide to Negotiations with Iran*, The Atlantic (January 2014), *available at:* https://www.theatlantic.com/international/archive/2014/01/the-neuroscience-guide-to-negotiations-with-iran/282963/.

2 The public policy exception is almost universal. It is found at Article 34(b)(ii) of the UNCITRAL Model Law that expressly provides that an arbitral award may be set aside if it contravenes public policy. It is also found under Article V(2)(b), the New York Convention.

EU Model for International Consumer Disputes

Perhaps the best example for a seamless international consumer market and resultant dispute resolution model is the European Union. With the creation of European Union, twenty-eight countries of Europe created an open market for free movement of goods, services and individuals with a unified currency to boost inter-country trade. With good foresight, the European Union adopted directives and regulations on alternative dispute resolution for inter country consumer disputes[3] and online dispute resolution ("ODR") for inter country consumer disputes[4] to allow consumers and traders to resolve their disputes without going to court in an easy, fast and inexpensive way. As per the directive, each country is required to incorporate within its legislative framework provisions for resolution of inter country consumer disputes as per the tenets of the directive. Although the directive deals with conflict of laws situations, the directive itself does not specifically provide for ease in enforcement proceedings. Hence, it is again up to each Member State of the European Union to ease enforcement through its domestic laws.

Foreign Awards

Generally speaking, enforcement of foreign awards is comparatively easier than enforcement of foreign court judgments and mediation settlement agreements. India is a signatory to the New York Convention and the Geneva Convention. The Arbitration and Conciliation Act, 1996 recognises awards under these conventions and has made separate provision for their enforcement.[5]

The hurdles facing enforcement proceedings may seem primarily judicial at first but are in fact legislative as well as judicial. The definition of a foreign award under the New York Convention is restricted to an award which is considered commercial as per the laws of India. Hence, there are difficulties in enforcement of arbitral awards which shall not be considered commercial[6] in nature including international consumer disputes. This is more so in the context of the definition of a 'consumer' under Consumer Protection Act, 1986 which logically excludes any person who

3 Directive 2013/11/EU of May 21, 2013, on alternative dispute resolution for consumer disputes.

4 Regulation (EU) No 524/2013 of May 21, 2013 on online dispute resolution for consumer disputes.

5 Part II of the Arbitration and Conciliation Act, 1996 deals with the enforcement of foreign awards. While Chapter I provides for enforcement of awards under the New York Convention, Chapter II provides for enforcement of awards under the Geneva Convention.

6 Sec. 44, Arbitration and Conciliation Act, 1996.

purchases goods for commercial purposes from the definition of a consumer.[7] Since we are yet to see an international consumer arbitral award being challenged before a court of law in India or facing difficulty in enforcement, we are yet to know how the court may react to such an argument. Another such impediment is the enforcement of *ex parte* awards which shall not be allowed if it is proved that the party was not provided proper notice of the arbitration proceedings.

These problems are more legislative and the hands of the judiciary are tied regardless of their receptiveness. As was aptly summarised by Roscoe Pound, "*If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it…Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.*"[8]

Another impediment is that of the 'unruly horse' of public policy. But this impediment was contributed in equal measure by the judiciary as well as the legislature of India. Before 2015, the term 'public policy' was given widest import possible while considering the enforcement of foreign as well as domestic awards in India. Foreign awards enforced before 2015 could be set aside for being patently illegal as per laws of India[9] or even for failing on the Wednesbury Principle.[10] In making such a judgement, the court would require an inquisition into the facts or merits of the dispute which would be nugatory to the purpose of enforcement. It was observed with time that the ground of an award being patently illegal was also given wide interpretation and misused to stall enforcement.

However, in recent times, making India a desirable international forum for dispute resolution has become an important priority of the Indian government. India is in the race of replicating the international commercial dispute jurisdiction model adopted by Singapore, Hong Kong, London and International Chamber of Commerce, Paris. The Law Commission of India was given the task of identifying the pitfalls in the arbitration law of India and a consequent amendment was introduced in 2015 to tame the unruly horse of public policy and plug other loopholes in domestic and international commercial arbitration of India.[11]

7 Sec. 2(d), Consumer Protection Act, 1986.

8 Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice (Presented at the annual convention of the American Bar Association in 1906).

9 Oil and Natural Gas Corporation Ltd. v. Saw Pipes, 2003 (5) SCC 705.

10 Which entails an investigation into the action of an authority and whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account and if in doing so, they came to a conclusion so unreasonable that no reasonable authority could ever have come to it.

11 The Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) with retrospective effect from 23 October, 2015.

After the amendment has come into effect, the definition of public policy of India has been given a narrow interpretation to restrict judicial scrutiny and intervention. Now, a foreign award cannot be set aside for being 'patently illegal' to the laws of India owing to express exclusion. A foreign award can be refused enforcement on the grounds of public policy only in the following limited cases:

a) Award induced or affected by fraud or corruption;

b) Violation of the confidentiality principles of a conciliation proceedings;

c) Contravention with the fundamental policy of Indian Law, or

d) Conflict with the most basic notions of morality and justice.

It is heartening to see judgments of various judicial forums during this period of reform reflect the intention of the legislature to restrict judicial intervention in enforcement proceedings. The courts of India are now of the opinion that once parties have chosen a foreign law and jurisdiction to govern their contract, the domestic court shall not go into the merits of the matter or entertain objections as to the competence of the arbitration tribunal, validity of arbitration agreement or consideration of procedural defects in the foreign arbitration (such as admissibility of evidence).[12]

There are, of course, certain regulatory compliance requirements which should be kept in mind before commencing enforcement proceedings. Recently, the Reserve Bank of India (foreign exchange regulator in India) questioned the enforcement of the arbitration award between the Japanese Docomo group and Indian Tata group on the grounds that the arbitration award was in violation of the foreign exchange law of India.[13] However, the judiciary played Zeus in the dispute by requesting Reserve Bank of India to provide the regulations which shall restrict the transfer of settlement amount from Tata to Docomo and based on the response of the regulator, has cleared the path for enforcement of the arbitration award and payment of settlement amount to Docomo.[14] Compliance with foreign exchange laws and anti-trust laws of India during enforcement remain a major checkpoint. Obtaining an expert opinion

12 POL India Projects Limited v. Aurelia Reederei Eugen Friederich GmbH and Others, Arbitration Petition No. 76 of 2012 (High Court of Bombay); AirconBeibars FZE v. Heligo Charters Pvt Ltd., Commercial Arbitration Petition (L) No. 208 of 2017.

13 Foreign Exchange Management Act, 1999.

14 NTT Docomo Inc. v. Tata Sons Ltd. O.M.P (EFA)(COMM.) and IAs 14897/2016, 2585/2017 (High Court of Delhi).

on regulatory compliance requirements of India especially foreign remittance requirements and acquisition of immovable property before commencing enforcement proceedings is advisable.[15]

Mediated Settlement Agreements

The jurisprudence on the enforcement of mediated settlement agreements is comparatively less developed in India.

India is presently at a nascent stage of development when it comes to mediation. Although the movement for mediation in India is catching pace, the jurisdiction shall take a few years more to incorporate internationally accepted practices into its jurisprudence. However, when it comes to mediation, all is not lost. Mediation is an accepted form of alternative dispute resolution and a first resort dispute resolution mechanism. It is gaining wide acceptance in case of commercial disputes and is provided for as a dispute resolution mechanism under Section 442 of Indian Companies Act, 2013. For other forms of domestic civil mediation including mediation of consumer disputes, Section 89 of the Code of Civil Procedure provides for reference of matters to mediation and the settlement agreement has the force of a decree of a court in India.

However, there is no separate law governing enforcement of foreign mediation settlements in India. Hence, a mediated settlement agreement is required to be enforced as any other agreement in India. The non-receptiveness of these proceedings is aptly captured in the Doing Business in India 2017 ranking of World Bank which places India at 172 rank among 180 countries in the ease of enforcement of contracts. If a foreign mediation requires terms of settlement to be enforced in India, it may be a good idea to conduct the mediation where the parties deem fit but execute the settlement agreement in India. This way, the parties can enforce the mediation settlement agreement with the force of a court decree in the courts of India through a shorter route.

The problem of pendency of cases in the Indian courts adds to the problem of enforcement. With the Judge-Population Ratio of 18 Judges per million as on December 31, 2015, the Indian judiciary is under-staffed in comparison with other

15 For example, foreign citizens are not allowed to acquire immovable property in India. Remittance of amounts for particular purposes requires prior approval of Reserve Bank of India. Stringent prohibitions exist in relation to remittance to jurisdictions which are not Financial Action Task Force (FATF) compliant.

countries.[16] The 2013-2015 statistics show that the judicial system is able to tackle the flow of fresh cases. In 2013, the institution was 1.86 crore with the disposal of 1.87 crore cases. In 2014 the institution stood at 1.92 crore and disposal at 1.93 crore cases and in 2015 the figure of institution was 1.90 crore while disposal was 1.83 crore. Over the last three years period, the pendency has remained at 2.68 crores, 2.64 crores, and 2.74 crore cases respectively. In contrast to these figures, the Indian subordinate judiciary has a sanctioned judicial workforce of merely 20,558 officers and a working strength of 16,176 officers. Keeping these figures in mind, it is simple arithmetic to conclude that the existing judicial officers are not sufficient to keep pace with the existing situation. Measures are underway to establish special courts for commercial matters and segregate commercial disputes for resolution through arbitration or mediation first to reduce the fresh flow of cases into an already burdened judiciary.[17]

However, the existing pendency in Indian courts is so vast that it is bound to affect the time required in other matters which have no recourse except the courts of India such as enforcement proceedings for foreign awards, foreign judgments and mediated settlement agreements. Consequently, the enforcement proceedings of mediated settlement agreements may take as long as five to seven years. Again, India is in a turbo mode of policy and legal changes. This average time for enforcement of contracts and foreign judgments is expected to come down in a few months for commercial disputes owing to the recent establishment of commercial courts in India.[18] Similarly, in consumer disputes, the enactment of Consumer Protection Bill, 2015 will provide recourse to mediation in domestic consumer matters at least. Going back to Roscoe Pound, these are impediments which cannot be directly attributed to the receptiveness of courts in enforcement proceedings. These are matters of policy, resource availability, planning and processes.

Although the neuroscience of decision making is universal across the world, the way problems are perceived and dealt with are different in different jurisdictions.

16 The U.S. Judiciary, at the state trial courts level alone, in 2011, had a Judge Population Ratio of approximately 102 per million. Australia, in 2012, commanded a Judge Population Ratio of approximately 48 judges per million. England and Wales, in 2015, had a Judge Population Ratio of 56 Judges per million. China, which compares best to India in terms of population with 1,360 Million population in 2013, had nearly 2,00,000 Judges in 2011, commanding a Judge Population Ratio of 147 Judges per million.

17 Subordinate Courts of India: A Report on Access to Justice 2016, Centre for Research and Planning, Supreme Court of India, *available at* http://supremecourtofindia.nic.in/Subordinate%20Court%20of%20India.pdf .

18 Under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

When it comes to inconvenience, Indians are a patient lot. They tend to wait till the problem is out of hand before expressing their discomfort much like a frog in boiling water. They also have a difficulty to say 'No'. As a corollary, they devise different leeway and temporary arrangements to deal with their problems so much so that Indians have a word which defines this '*Jugaad*'.

The *Jugaad* to the slow pace of judicial process in India is the efficiency of its interim orders. The judiciary is very receptive in allowing foreign judgment debtors obtain list of assets for enforcement and placing stay on creation of encumbrance or sale of such assets. The charge of the judgment debtor shall be second to any existing charge on the property. The process of collection of information and obtaining interim stay can be completed by a judgment debtor in a duration of one to six months.

However, this method of temporary fixes does not present a solution to consumer disputes where claims are much smaller and stakes are low. Consumers opting to buy goods from an international source generally consider their investment lost if the product/ services delivered are not of optimum quality or fit for purpose. Similarly, Indian manufacturers and retailers who cater to international consumers may end up getting sued in other countries without an effective ADR mechanism. This may be manageable for big conglomerates but it will mean death of a start-up or small and medium enterprise (SME). To come true on the Start-up India and Make in India campaigns, it is important to give legislative legitimacy to alternative dispute resolution mechanisms in international consumer disputes.

Cross Cultural Implications

Apart from the vanilla hurdles discussed above which are a problem with enforcement of foreign awards, decrees and agreements all over the world, it is important to discuss the cross-cultural hurdles which one should be aware of while commencing enforcement proceedings in any foreign jurisdiction.

India is a high context country where hierarchy is of prime importance. This is emphasised most in the bar and bench of the Indian courts. Psychologically, once any person has been given the power to decide for others, supervise on procedure and audit errors, it is difficult to change the perception and approach. There are various cases where merits of matters decided by foreign jurisdiction have been analysed or faulty interpretation of foreign law taken. To reverse these errors, the litigant enters the vicious circle of appeal which continues over various layers of the judiciary. In some unfortunate cases, where the party against whom enforcement

proceedings were initiated tastes blood of erroneous success, matters may go till the highest court of appeal until no recourse for further delay in enforcement is available.

Regardless of procedural, legislative and cultural issues, India is moving in the direction of development and making the most of available commercial opportunities. India in its bid to become an international jurisdiction of dispute resolution and manufacturing activities is streamlining its laws and judicial processes at a fast rate. If the speed of reform continues, India will become one of the convenient jurisdictions for enforcement of foreign awards, decrees and settlement agreements in time to come.

Online Dispute Resolution and the Way Ahead

When talking of international consumer disputes, it is important to put in a good word for online dispute resolution. In a country like India with a population of 1.3 billion implementation and process form two thirds of the action required for impact. Consumer disputes have the distinct characteristics of low claim, high volume and requirement of speedy conclusion for actual grievance redressal. Especially in international consumer disputes where the service provider and consumer belong to two different jurisdictions, if parties can login to an online dispute resolution forum and resolve their dispute with the assistance of a third-party neutral, the objectives of low cost and speedy disposal are adequately met. When it comes to online consumer dispute resolution, various projects are coming up in India. But India is still in a nascent stage.

With growing consumerism and number of businesses catering to international consumers, it is important for India to develop a robust ADR and ODR mechanism for resolution of international consumer disputes. This is well explained in the EU directive on ADR for consumer disputes which India should pay heed to:

> *"The disparities in ADR coverage, quality and awareness in Member States constitute a barrier to the internal market and are among the reasons why many consumers abstain from shopping across borders and why they lack confidence that potential disputes with traders can be resolved in an easy, fast and inexpensive way. For the same reasons, traders might abstain from selling to consumers in other Member States where there is no sufficient access to high-quality ADR procedures. Furthermore, traders established in a Member State where high-quality ADR procedures are not sufficiently available are put at a competitive disadvantage with regard to traders that*

have access to such procedures and can thus resolve consumer disputes faster and more cheaply. In order for consumers to exploit fully the potential of the internal market, ADR should be available for all types of domestic and cross-border disputes covered by this Directive, ADR procedures should comply with consistent quality requirements that apply throughout the Union, and consumers and traders should be aware of the existence of such procedures."

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