

# Dispute

October 12, 2020

## LIMITATION PERIOD FOR ENFORCEMENT OF FOREIGN AWARDS IN INDIA

- The period of limitation for filing a petition for enforcement of a foreign award is three years from the date the right to apply accrues.
- Enforcement court can only refuse enforcement of a foreign award and cannot set aside a foreign award.
- A party can file an application for condonation of delay for an enforcement petition of a foreign award.
- The amendment made to Section 48 of the Arbitration & Conciliation Act, 1996 from 2015 are prospective.

### INTRODUCTION

The Supreme Court in the case of *Government Of India ("GOI") v. Vedanta Limited*,<sup>1</sup> ("**Vedanta**") recently upheld the enforcement a foreign arbitral award in that the enforcement petition was filed within 3 years from the date when the right to apply accrued. The Supreme Court, interpreting the Limitation Act, 1936 ("**Limitation Act**"), held that an application of enforcement of a foreign arbitral award can be filed up to a period of 3 years from when the right to apply accrues.

### BACKGROUND

A production sharing contract ("**PSC**") was executed between the parties and Oil and Natural Gas Corporation Limited ("**ONGC**") on October 28, 1994 for the development of the Ravva Oil and Gas Field ("**Field**"). Disputes arose between the parties with respect to recovery of development costs, which were referred to arbitration seated in Malaysia. The arbitral tribunal delivered its award on January 18, 2011 ("**Award**"), which required the GOI to pay an amount of USD 278.87 million to Vedanta. Pursuant to the Award, in April 2011, Vedanta made certain adjustments with respect to recovery of the development costs, and these adjustments were accepted by the GOI.

The GOI challenged the Award before the Seat Courts at Kuala Lumpur on three principal grounds, **a)** the Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; **b)** the Award contains decisions on matters beyond the scope of the submission to arbitration; and **c)** the Award is in conflict with public policy. The challenge was rejected by both, the Malaysian High Court and Malaysian Court of Appeal. An application for Leave to Appeal before the Malaysian Federal Court was also rejected by order dated May 17, 2016.

On July 10, 2014, the GOI issued a notice to Vedanta, raising a demand of US \$ 77 million towards the Government's share of Profit Petroleum under the PSC and to show cause as to why oil marketing companies to whom the product extracted from the Field was sold, should not directly pay the GOI towards recovery of its share of profit petroleum with interest, which was alleged to be underpaid.

In October 2014, the Vedanta filed an enforcement petition under Sections 47<sup>2</sup> and 49<sup>3</sup> of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") before the Delhi High Court, along with an application for condonation of delay. On the other hand, the GOI raised objections to the enforcement of the Award under Section 48<sup>4</sup> of the Arbitration Act contending, that the enforcement petition was filed beyond the period of limitation, the enforcement of the Award was contrary to the public policy of India, and contained decisions on matters beyond the scope of the submission to arbitration.

The Delhi High Court rejected the objections to the Enforcement Petition, *vide* judgment dated February 19, 2020,<sup>5</sup> allowed the application for condonation of delay filed by the Vedanta, and directed the enforcement of the Award. The Delhi High Court had also held that the limitation for filing an enforcement petition arising out of a foreign award is twelve years as foreign arbitral award attains the status of a decree after it clears the tests of 'access' and 'recognition' contemplated under the Arbitration Act ("**Impugned Judgment**"). Aggrieved by the Impugned Judgment, the Government filed the appeal before the Supreme Court.

Our analysis of the Delhi High Court's ruling can be accessed [here](#).

### PART A - LIMITATION FOR FILING AN APPLICATION FOR ENFORCEMENT OF A FOREIGN AWARD UNDER SECTION 47 OF THE ARBITRATION ACT

1. The Supreme Court observed the conflicting stands taken by various High Courts and proceeded to settle the issue.<sup>6</sup>
2. The Supreme Court relied on a Report of the General Assembly of the United Nations Commission on International Trade Law,<sup>7</sup> and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**New York Convention**")<sup>8</sup> to conclude that recognition and enforcement of arbitral awards should be done

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- in accordance with the rules of procedure of the State where the award is to be enforced.<sup>9</sup>
- Supreme Court noted that Section 43 of the Limitation Act, 1963 states that it shall apply to arbitrations, as it applied to proceedings in court. It then noted that Limitation Act does not contain any specific provision for enforcement of foreign award. It then took into account Article 136 (which provides a limitation period of 12 years for execution of a decree) and Article 137 (which is a residuary provision providing a limitation period of 3 years). The Supreme Court relied on its judgment in *Bank of Baroda v. Kotak Mahindra Bank* where it had observed that Article 136 of the Limitation Act is not applicable to foreign decrees.<sup>10</sup> (Our analysis of the Supreme Court's ruling can be accessed [here](#)) The Supreme Court then noted that a legal fiction created in law is only for a specific purpose that it is created. Accordingly, under Section 49 of the Arbitration Act,<sup>11</sup> a foreign award is deemed to be a decree of 'that court' for the limited purpose of enforcement and otherwise it is not a decree of an Indian court. Accordingly, for the purposes of the Limitation Act, the application for enforcement of the foreign award would be governed by the residuary provision i.e. Article 137. Hence, the limitation period is three years from when the right to apply accrues.<sup>12</sup>
  - The court further held that a party can file an application under Section 5 for condonation of delay, if required in the facts and circumstances of the case.<sup>13</sup> The bar contained in Section 5 of the Limitation Act against condonation of delay excludes an application filed under any of the provisions of Order XXI of the CPC.<sup>14</sup> The Supreme Court held that this bar would not be applicable to an enforcement petition filed under the Arbitration Act, 1996. In the instant case, the Supreme Court held that there were sufficient grounds to condone the delay in filing the enforcement/execution petition on account of lack of clarity with respect to the period of limitation for enforcement of a foreign award.<sup>15</sup>

## PART B - SCHEME OF THE ARBITRATION ACT FOR ENFORCEMENT OF NEW YORK CONVENTION AWARDS

- The Supreme Court observed that a foreign award is not a decree by itself, which is executable as such under Section 49 of the Act. A foreign award is enforced as a deemed decree of the Indian Court only after it has been adjudicated upon in a petition filed under Section 47, and the objections raised under Section 48 by the party which is resisting enforcement of the award.<sup>16</sup>
- Relying on *Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*,<sup>17</sup> and *LMJ International Ltd. v. Sleepwell Industries*,<sup>18</sup> the Supreme Court stated that the legislative intent insists that the maintainability of an enforcement petition and the adjudication of the objections filed therein are required to be decided in a common proceeding.
- The Supreme Court held that the enforcement court cannot set aside a foreign award because the power to set aside a foreign award vests only with the court at the seat of arbitration.<sup>19</sup> Relying on a series of judgments from various jurisdictions,<sup>20</sup> the Supreme Court also stressed on the discretion available with the enforcement court to enforce the award even if one or more grounds under Section 48 are made out. Lastly, it also held that the grounds put forth in Section 48 are exhaustive.

## PART C - WHETHER THE MALAYSIAN COURTS WERE JUSTIFIED IN APPLYING THE MALAYSIAN LAW OF PUBLIC POLICY WHILE DECIDING THE CHALLENGE TO THE FOREIGN AWARD

- The Supreme Court noted that the enforcement of an award is a subsequent and distinct proceeding from the setting aside proceedings at the seat and thereby an enforcement court cannot sit in appeal over the findings of the seat court. The courts before which the foreign award is brought for recognition and enforcement would exercise 'secondary' or 'enforcement' jurisdiction over the award, to determine the recognition and enforceability of the award in that jurisdiction.<sup>21</sup>
- The Supreme Court analysed the four types of laws applicable to international arbitration<sup>22</sup> and concluded that the Malaysian Courts being the seat courts were justified in applying the Malaysian Act to the public policy challenge raised by the Government of India. However, in an enforcement petition, the enforcement courts *can* examine the challenge to the foreign award without being constrained by the findings of the Seat Court, even if the findings were based on Indian law.<sup>23</sup>

## PART D - WHETHER THE FOREIGN AWARD IS IN CONFLICT WITH THE PUBLIC POLICY OF INDIA

- The Supreme Court relied on a series of judgments which have set out the framework for adjudication of an enforcement petition.<sup>24</sup> Section 48 was amended in 2015 to provide that an enforcement court cannot delve into the merits of the dispute in an enforcement petition ("**2015 Amendment**").<sup>25</sup> Since the agreements were entered into prior to the amendment of 2015, the Court proceeded to decide the issue on the basis of the unamended Section 48. The Supreme Court observed that the 2015 Amendment cannot have a retrospective effect as the amendment had substantially altered the position of law. The Supreme Court held that when a clarification is brought by way of an amendment which substantially changes the earlier position of law, such clarification cannot have a retrospective effect.<sup>26</sup>
- The Supreme Court held that an enforcement court, exercising jurisdiction under Section 48, cannot re-assess or re-appreciate the evidence led in the arbitration. An enforcement court cannot refuse enforcement by taking a different interpretation of the terms of the contract. Thereby, in the present case, the Supreme Court concluded that the enforcement of the foreign award in favour of the Vedantas did not contravene the public policy of India.<sup>27</sup>

## COMMENT

A settled position on the period of limitation applicable of enforcement of a foreign award provides reliability to the arbitration regime in the country. Parties to a cross border dispute will now be in a favourable position in that they are aware of the settled legal position on the time period within which an enforcement petition for a foreign award is to be filed.

The Supreme Court's judgment does not provide clarity on the status of pending enforcement applications which were filed after 3 years from when the right accrued, by relying on the earlier judgments which had held that the limitation period for filing such applications is 12 years. However, one can deduce that Courts may be open to condoning the delay in such circumstances by applying Section 5 of the Limitation Act.

It is also worth noting that the Supreme Court did not delve into the aspect of when the right to apply accrues in the enforcement of a foreign award. It is likely that 'accrual of the right to apply' will be subject of further scrutiny by the judiciary considering that such right to apply could accrue differently depending on the seat of arbitration.

**(Special thanks to Adimesh Lochan for his contribution)**

– Bhavana Sunder, Ashish Kabra & Vyapak Desai

You can direct your queries or comments to the authors

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<sup>1</sup> Civil Appeal No. 3185 of 2020 (Arising out of SLP (Civil) No.7172 of 2020).

<sup>2</sup> 47. Evidence -

(1) *The party applying for the enforcement of a foreign award shall, at the time of the application, 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.*

(2) *If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India..."*

<sup>3</sup> 49. Enforcement of foreign awards –

*Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court."*

<sup>4</sup> 48. Conditions for enforcement of foreign awards -

(1) *Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—*

(a) *the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

(b) *the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

(c) *the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or*

(d) *the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*

(e) *the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*

(2) *Enforcement of an arbitral award may also be refused if the Court finds that—*

(a) *the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or*

(b) *the enforcement of the award would be contrary to the public policy of India.*

*Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.*

*Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]..."*

<sup>5</sup> O.M.P.(EFA)(Comm.) 15/2016 & I.A. Nos. 20459/2014 & 3558/2015 : MANU/DE/0506/2020.

<sup>6</sup> Noy Vallesina Engineering Spa v Jindal Drugs Limited, 2006 (3) Arb LR 510; Louis Dreyfous Commodities Suisse v Sakuma Exports Limited, (2015) 6 Bom CR 258; Imax Corporation v E-City Entertainment (I) Pvt. Limited, (2020) 1 AIR Bom 82; M/s. Compania Naviera 'SODNOC' v Bharat Refineries Limited, (2008) 1 Arb LR 344; Cairn India Limited v Union of India, 2020 SCC Online SC 324 (Impugned Judgment).

<sup>7</sup> 41st Session dated June 16 - July 03, 2008.

<sup>8</sup> Article III, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, UN Doc A/CN.9/656/Add.1.

<sup>9</sup> Page 29 of the judgment.

<sup>10</sup> Bank of Baroda v. Kotak Mahindra Bank, (2020) SCC OnLine 324.

<sup>11</sup> Enforcement of foreign awards – Where the court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that court.

<sup>12</sup> Page 34 of the judgment.

<sup>13</sup> Page 35 of the judgment.

<sup>14</sup> 5. Extension of prescribed period in certain cases: Any appeal or any application, **other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908)**, may be admitted after the prescribed period ...

<sup>15</sup> *Id.*

<sup>16</sup> Page 36 of the judgment.

<sup>17</sup> (2001) 6 SCC 356.

<sup>18</sup> (2019) 5 SCC 302.

<sup>19</sup> Page 40 of the judgment.

<sup>20</sup> China Nanhai Oil Joint Service Corp v Gee Tai Holdings Co. Ltd., Yearbook Commercial Arbitration, XX-1995, 671, 677; Westacre Investments Inc. v Jugoimport-SDRP Holding Co. Ltd. [1999] APP. L.R. 05/12; Paklito Investment Ltd. v Klockner East Asia) Yearbook Commercial Arbitration XIX (1994) pp.664-674 (Hong Kong No.6); Nanjing Cereals, Oils & Foodstuffs Import & Export Corporation v Luckmate Commodities Trading Ltd.) Yearbook Commercial Arbitration XXI (1996) pp. 542-545 (Hong Kong No.9)

<sup>21</sup> Page 49 of the judgment.

<sup>22</sup> (i) Substantive Law determining the rights and obligations of the parties, (ii) Law governing the Arbitration Agreement, (iii) Curial Law (determined by the Seat of Arbitration) and (iv) *lex fori*, which governs the proceedings for recognition and enforcement of the award in other jurisdictions.

<sup>23</sup> Page 51 of the judgment.

<sup>24</sup> Shri Lal Mahal Ltd. v. Progetto Grano SPA, (2014) 2 SCC 433; Renuagar Power Co. v General Electric Co., 1994 Supp (1) SCC 644.

<sup>25</sup> Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) dated December 31, 2015 w.e.f. October 23, 2015.

<sup>26</sup> Page 58 of the judgment.

<sup>27</sup> Page 65 of the judgment.

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