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ARBITRABILITY AND SOVEREIGN IMMUNITY: OBSTACLES TO ENFORCING FOREIGN ARBITRAL AWARDS IN INDIA

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ABSTRACT

The enforcement of foreign arbitral awards in India faces unique challenges, particularly due to arbitrability restrictions and sovereign immunity claims. While India has embraced international arbitration frameworks through the New York Convention (1958) and the Arbitration and Conciliation Act, 1996, practical hurdles remain. Disputes involving public policy concerns, statutory protections, insolvency, and criminal matters are often deemed non-arbitrable, limiting the scope of arbitration. Additionally, state-owned enterprises (SOEs) and government bodies frequently invoke sovereign immunity to resist enforcement of foreign arbitral awards, complicating dispute resolution for foreign investors.

This paper explores how Indian courts and legislative developments have shaped arbitration enforcement. It also provides a comparative analysis of arbitration practices in India, UK, and France, highlighting how these jurisdictions have successfully balanced state sovereignty with arbitration enforcement.

INTRODUCTION

Arbitration is often seen as the smoother, more efficient alternative to courtroom battles, especially when it comes to International Commercial disputes. Businesses prefer arbitration because it's confidential, flexible, and ideally free from excessive legal formalities. But what happens when enforcing an arbitration award becomes more complicated than the dispute itself?

In India, two major legal hurdles stand in the way of enforcing foreign arbitral awards: arbitrability and sovereign immunity. Simply put, arbitrability determines whether a dispute can even be settled through arbitration, while sovereign immunity allows governments and state-owned entities to escape enforcement by claiming legal protection. These issues often make arbitration less predictable, creating frustration for foreign investors and businesses who expect a seamless enforcement process. What legal principles determine the arbitrability of disputes under Indian law, and how do they compare to international standards?

This paper explores how Indian courts, legislative policies, and international best practices shape the enforcement of foreign arbitral awards. By diving into landmark cases, judicial trends, and legal reforms, we aim to understand why arbitration enforcement in India remains complex and what can be done to make the system more reliable for global commerce.

ARBITRATION IN INDIA: WHERE IT WORKS AND WHERE IT DOESN'T

Arbitration is designed to offer a quicker, more flexible alternative to traditional court proceedings, but not every dispute can or should be handled outside the judicial system. In India, arbitrability refers to the types of cases that can legally be settled through arbitration, while others remain strictly within the jurisdiction of courts.

Generally, disputes involving private rights such as commercial contracts, business agreements, and financial matters are considered arbitrable. In **Vidya Drolia v. Durga Trading Corporation (2020)**¹ the Supreme Court introduced a four-part test to determine arbitrability, reinforcing that contractual and financial dispute between private parties are arbitrable unless barred by statute.

However, when cases touch on public policy, fundamental rights, or statutory protections, courts may determine that they cannot be decided through arbitration. A likely reason for this is the absence of an express provision in the Arbitration and Conciliation Act, 1996. **Section 2(3)**² of the act provides that "**certain disputes may not be submitted to arbitration**". Further, **Sections 34(2)(b)**³ and **48(2)**⁴ provide for setting aside and refusal to enforce an arbitral award if "**the subject-matter of the dispute is not capable of settlement by arbitration under the law**"⁵.

Arbitration cannot be used to resolve crimes, as they require prosecution by the state. In **Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011)**⁶, the Supreme Court of India clarified the distinction between arbitrable and non-arbitrable disputes. A key passage from the judgment states: "Generally and traditionally, all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals."⁷

SOVEREIGN IMMUNITY AND ITS IMPACT ON ARBITRATION ENFORCEMENT

When one of the parties is a government or a state-owned entity often making it difficult to enforce arbitration awards against government bodies. Governments frequently enter contracts with private companies for trade, infrastructure, or international investments, and they often agree to arbitration clauses to resolve any disputes that arise. However, when an arbitral tribunal rules against a state entity, enforcing that decision can become complicated. Governments may

¹ *Vidya Drolia & Ors. Vs. Durga Trading Corporation*, (2020) 11 S.C.R. 1001

² Arbitration and Conciliation Act, 1996 §2(3)

³ Arbitration and Conciliation Act, 1996 §34 (2)(b)

⁴ Arbitration and Conciliation Act, 1996 §48(2)

⁵ Available at: <https://www.livelaw.in/law-firms/articles/supreme-court-clarifies-arbitrable-indian-law-168218>

⁶ *Booz-Allen & Hamilton Inc vs Sbi Home Finance Ltd. & Ors*, AIR 2011 SC 2507

⁷ Available at: <https://indiankanoon.org/doc/188958994/>

invoke sovereign immunity as a defense, arguing that they cannot be sued or held accountable under arbitration due to their unique legal status.

Some jurisdictions, like France and the UK, have adopted a restrictive approach to sovereign immunity, ensuring that state entities cannot use immunity as a defense in commercial disputes:

1. **United Kingdom** – The **State Immunity Act (1978)**⁸ clearly distinguishes between sovereign acts (*acta jure imperii*) and commercial acts (*acta jure gestionis*). If a state engages in commercial activities, it cannot claim immunity from arbitration enforcement.
2. **France** – French courts have consistently ruled that state-owned enterprises (SOEs) involved in commercial transactions must comply with arbitration awards. The French approach ensures that governments cannot escape liability simply by invoking sovereign immunity.
3. **India**- India allows broad immunity claims, making enforcement of foreign arbitral awards more unpredictable. How does the doctrine of sovereign immunity affect the enforcement of foreign arbitral awards against state entities in India? Sovereign immunity is a legal doctrine that protects the government from being sued without its consent.

In India, this principle is embedded in **Article 300 Constitution**⁹, which governs the rights and liabilities of the government in legal proceedings. Some of the important aspects are:

- i. **No Separate Legislation on Sovereign Immunity** – Unlike the UK and the US, India does not have a dedicated law governing foreign state immunity. Instead, **Section 86 of Civil Procedure Code**¹⁰ requires government approval before suing a foreign state, making enforcement more complex. In **Harbhajan Singh Dhalla v. Union of India (1986)**¹¹ The Supreme Court ruled that sovereign immunity cannot be used arbitrarily to deny justice, emphasizing that foreign states may be sued in India if they engage in

⁸ State Immunity Act 1978 c. 33

⁹ INDIA CONST. art. 300

¹⁰ Code of Civil Procedure, 1908 § 86

¹¹ *Harbhajan Singh Dhalla vs Union of India*, AIR 1987 SCR (1) 114

commercial transactions. The judgment reinforced the idea that sovereign immunity should not be absolute, particularly in cases involving private commercial dealings.¹²

- ii. **Judicial Interpretations Vary** – Indian courts have inconsistently applied sovereign immunity principles, sometimes allowing enforcement and other times blocking it based on public policy concerns. **Ethiopian Airlines v. Ganesh Narain Saboo**¹³, have restricted sovereign immunity in commercial matters, others have upheld broad immunity claims, creating uncertainty for foreign investors.

CHALLENGES IN IMPLEMENTATION OF FOREIGN AWARDS IN INDIAN LEGAL FRAMEWORK

India has made strides in aligning its arbitration laws with global standards, particularly through the **Arbitration and Conciliation Act**¹⁴ which incorporates the **New York Convention**¹⁵ and the **Geneva Convention**¹⁶. However, enforcing foreign arbitral awards under Indian law remains complex and unpredictable due to various legal, procedural, and institutional challenges.

Despite legislative efforts and judicial reforms, enforcement of foreign arbitral awards in India remains challenging due to public policy interpretations, judicial intervention, sovereign immunity claims, inconsistent legal interpretations, and procedural inefficiencies. Strengthening enforcement mechanisms through clearer regulations, faster dispute resolution processes, and uniform judicial standards can help make India a more arbitration-friendly jurisdiction. What has been the role of Indian courts in interpreting and applying sovereign immunity in the context of arbitration enforcement?

Indian courts have often invoked "public policy" as a ground to refuse enforcement, sometimes expanding its scope beyond international standards. **Venture Global Engineering v. Satyam**

¹² Available at: <https://www.casemine.com/judgement/in/5609ac22e4b014971140e20d>

¹³ *Ethiopian Airlines v. Ganesh Narain Saboo*, AIR 2011 SC 3495

¹⁴ Arbitration and Conciliation Act, 1996

¹⁵ New York Convention, 1958

¹⁶ Geneva Convention, 1949

Computer Services Ltd.¹⁷ In this the Supreme Court allowed a challenge to a foreign award under **Section 34 of the Arbitration and Conciliation**¹⁸, contradicting international principles of minimal intervention.

The Sovereign Immunity Claims by Government Entities such as State-owned enterprises (SOEs) and government bodies, often resist enforcement, claiming sovereign immunity under **Article 300**¹⁹ or **Section 86 of the CPC**²⁰.

The inconsistent legal interpretations across courts, different High Courts may adopt conflicting approaches, leading to uncertainty for foreign investors. In **Penn Racquet Sports v. Mayor International Ltd.**²¹ the case demonstrated varying court interpretations of foreign award enforcement, affecting investor confidence. This decision reinforced the principle of minimal interference by Indian courts. To what extent does India's public policy exception serve as a barrier to recognizing and enforcing foreign arbitral awards?

Restrictions on Arbitrability by the legislation, not all disputes can be arbitrated in India. Matters involving insolvency, family law, criminal offenses, and statutory rights are often deemed non-arbitrable. **Booz Allen & Hamilton v. SBI Home Finance Ltd.**²² – Established the limits of arbitrability, ruling that certain disputes must be resolved through courts, not arbitration.

RECENT LEGISLATIVE AND JUDICIAL DEVELOPMENTS

India has taken significant steps toward improving arbitration enforcement through both legislative amendments and judicial rulings. The **Arbitration and Conciliation (Amendment) Act, 2021**²³ introduced stricter regulations to limit excessive judicial interference in international commercial arbitration and refined procedural aspects related to arbitrator appointments. Additionally, the Supreme Court's ruling in **Vijay Karia v. Prysmian Cavi e Sistemi S.R.L**

¹⁷ *Venture Global Engineering v. Satyam Computer Services Ltd.* AIR 2010 SUPREME COURT 3371

¹⁸ Supra 3

¹⁹ Supra 9

²⁰ Supra 10

²¹ *Penn Racquet Sports v. Mayor International Ltd.*, (2011) 122 DRJ 117

²² Supra 6

²³ Arbitration and Conciliation (Amendment) Act, 2021

(2020)²⁴ reinforced India's commitment to enforcing foreign arbitral awards by clarifying that public policy objections should be narrowly interpreted, in line with international standards under the New York Convention.

A crucial judicial development in **Vedanta Ltd. v. Government of India (2020)**²⁵ addressed sovereign immunity concerns in arbitration, particularly in Bilateral Investment Treaty (BIT) disputes, demonstrating the evolving landscape of arbitration enforcement against state entities. Another noteworthy ruling in **NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. (2023)**²⁶ clarified arbitration agreements' validity, strengthening India's pro-arbitration stance. This ruling significantly impacts arbitration in India, ensuring that technical defects like inadequate stamping do not automatically invalidate arbitration agreements, thereby promoting arbitration-friendly jurisprudence.

CONCLUSION

India's arbitration framework has made notable advancements, yet arbitrability restrictions and sovereign immunity claims remain significant roadblocks to enforcing foreign arbitral awards. While India has adopted international standards practical challenges persist, often delaying or complicating enforcement.

The limitations on arbitrability, define the boundaries of disputes that can be arbitrated. Matters involving insolvency, public policy, and statutory protections frequently fall outside arbitration's scope, leading to intervention by Indian courts. Meanwhile, sovereign immunity continues to be invoked by government entities resisting award enforcement.

Suggestions & Analysis

India faces several challenges in enforcing foreign arbitral awards, despite adopting international frameworks like the New York Convention and the Arbitration and Conciliation Act, 1996. Key obstacles include broad interpretations of public policy, excessive judicial intervention, and

²⁴ Vijay Karia vs Prysmian Cavi E Sistemi Srl AIR 2020 SUPREME COURT 1807

²⁵ Government Of India vs Vedanta Limited AIR 2020 SUPREME COURT 4550

²⁶ NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. (2023) 9 S.C.R. 285

sovereign immunity claims by state entities. Courts often expand the scope of public policy objections, delaying enforcement. Additionally, government bodies frequently invoke sovereign immunity, complicating enforcement in commercial disputes.

To overcome these challenges, India should restrict public policy exceptions, minimize court interference, and clearly define limits on sovereign immunity in arbitration. Establishing specialized arbitration benches, ensuring uniform legal interpretation, and integrating principles from Article 10 of the UN Convention on Jurisdictional Immunities can help create consistency in enforcement. Speeding up procedural reforms, such as fast-track arbitration, would further enhance India's arbitration-friendly reputation.

By refining enforcement mechanisms, India can boost investor confidence and establish itself as a global arbitration hub, ensuring that foreign arbitral awards are recognized and enforced efficiently while maintaining legal certainty.

What legal principles determine the arbitrability of disputes under Indian law, and how do they compare to international standards?

Arbitrability refers to whether a dispute can be resolved through arbitration rather than litigation. In India, the Supreme Court has established a four-fold test in *Vidya Drolia v. Durga Trading Corporation* to determine arbitrability: Disputes must be capable of adjudication and settlement by arbitration. Arbitration should not be expressly barred by law. The dispute should not involve rights in rem (rights against the world at large). The dispute should not be inherently non-arbitrable due to public policy concerns

How does the doctrine of sovereign immunity affect the enforcement of foreign arbitral awards against state entities in India?

Sovereign immunity protects states from being sued without their consent. In India, foreign states can invoke sovereign immunity under **Section 86 of the Code of Civil Procedure, 1908**, which requires prior consent from the Central Government for enforcement of arbitral awards against a foreign state. However, Indian courts have increasingly adopted a restrictive immunity approach, distinguishing between sovereign acts (*acta jure imperii*) and commercial acts (*acta*

jure gestionis). If a foreign state engages in a commercial transaction, it may not be able to claim immunity against enforcement.

What has been the role of Indian courts in interpreting and applying sovereign immunity in the context of arbitration enforcement?

Indian courts have generally favored arbitration and enforcement of awards, even against sovereign states. The Delhi High Court has ruled that sovereign immunity cannot be used to stall enforcement of arbitral awards arising from commercial transactions. Courts have emphasized that an arbitration agreement constitutes an implied waiver of sovereign immunity, preventing states from resisting enforcement. However, enforcement against state assets remains challenging due to immunity from execution.

To what extent does India's public policy exception serve as a barrier to recognizing and enforcing foreign arbitral awards?

India's public policy exception is a major hurdle in enforcing foreign arbitral awards. The Supreme Court has interpreted public policy narrowly in *Renusagar Power Co. Ltd. v. General Electric Co.*, limiting it to: Fundamental principles of Indian law. Interests of India. Justice and morality. However, in *ONGC v. Saw Pipes Ltd.*, the court expanded the scope to include patent illegality, leading to increased judicial intervention. The 2015 amendment to the Arbitration and Conciliation Act sought to restrict this exception, ensuring that foreign awards are only set aside if they violate fundamental public policy