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CONTOURS OF REASONED ARBITRAL AWARD

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ABSTRACT

According to Lord Clarke ―Successful international commerce depends upon the enforcement of contracts, the enforcement of arbitration awards and the enforcement of judgments.1 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, generally known as the New York Convention of 1958 (hereinafter referred to as the Convention) was created mainly to ensure enforcement foreign arbitral awards. The Convention ―is the foundation on which the whole of the edifice of international arbitration rests. Without the Convention the process could have no effective existence.2 One of the main achievements of the Convention is, to unify the standards with regard to the enforcement of foreign arbitral awards. It is important that the Contracting States exhibit uniformity in applying them. Not doing so creates uncertainty which is not in the interest of international arbitration and consequently international trade and commerce. This is because, ―Only uniform interpretation allows one to predict the chances of success of an application for recognition and enforcement, which in turn furthers certainty in cross- border contracts and reduces transaction costs.3 The problem with the Convention is that some of its provisions are indeterminate and cryptic, which makes it ―(i) unreliable, (ii) unpredictable, and (iii) inconsistent.4 The present study has selected five areas of concern in relation to the enforcement of foreign awards where the Contracting States lack uniformity.

Introduction

According to Lord Clarke ―Successful international commerce depends upon the enforcement of contracts, the enforcement of arbitration awards and the enforcement of

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judgments.[2] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, generally known as the New York Convention of 1958 (hereinafter referred to as the Convention) was created mainly to ensure enforcement foreign arbitral awards. The Convention ―is the foundation on which the whole of the edifice of international arbitration rests. Without the Convention the process could have no effective existence.[3]

One of the main achievements of the Convention is, to unify the standards with regard to the enforcement of foreign arbitral awards. It is important that the Contracting States exhibit uniformity in applying them. Not doing so creates uncertainty which is not in the interest of international arbitration and consequently international trade and commerce. This is because,
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The problem with the Convention is that some of its provisions are indeterminate and cryptic, which makes it — (i) unreliable, (ii) unpredictable, and (iii) inconsistent.[4] The present study has selected five areas of concern in relation to the enforcement of foreign awards where theContracting States lack uniformity.

The first, issue where uniformity is lacking is as to what is an arbitral award. The Convention only states as to when an award is to be regarded a foreign award but omits to define as to what constitutes an award within the meaning of the Convention. This allows the Contracting States to apply their idiosyncratic understanding on such an elemental issue. Also the Convention does not specify the categories of awards which shall receive its protection. The practice of the Contracting States varies on this issue. Furthermore, the Convention is ambiguous about the enforcement of annulled awards and diametrically opposite approaches exist in this regard. Similarly the application of the doctrine of public policy and sovereign immunity as grounds for refusing enforcement of foreign arbitral

[2] *TaurasPetroleumLtdvStateOilMarketingCooftheMinistryofOil,RepublicofIraq*[2017]UKSC64;2017WL0479177 9para 54.

[3] MichaelKerr,‗ConcordandConflictinInternationalArbitration‘(1997)13ArbitrationInternational121,127.

[4] GaryBorn, *InternationalCommercialArbitration*,vol1 (3rd edn, WoltersKluwer 2022)104.

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awards have raised their own concerns.

STAEMENT OF PROBLEM

The States, party to the New York Convention differ onmany crucial aspects of the Convention, with regard to the enforcement of foreignarbitralawards. This reduces the efficacy of international commercial arbitration as a dispute resolution mechanism, which in turn is bound to have repercussion on the growth of international trade andcommerce.

1.1.CENTRAL ARGUMENT

Uniform enforcement of foreign arbitral awards is one of themain objectives of the New York Convention of 1958. In practice, this objective, however, doesnot appear to have been successfully realized, given the fact that the Convention neither definesas to what is an award nor specifies the type of arbitral awards that come within its scope, apartfrom differences in practice among States in respect of denying enforcement on various grounds,for example, on grounds of public policy, annulment of an award in the country of its origin orsovereignimmunity.[5]

1.2.OBJECTIVES OF THE RESEARCH

The overarching objective of the present study is tofurther one of the mainaims of the Convention, which is uniform and consistent application of its provisions concerning the enforcement of foreign arbitral awards.

The specific objectives are:

- To develop a unified approach as to what is an arbitral award and the type of arbitralawards enforceableunder theConvention.
- To further uniformity, in the practices of the Contracting States with regard to the application of the doctrine of public policy, when invoked to refuse enforcement of foreign arbitral awards.
- To develop a unified approach in relation to the enforcement of awards annulled in their country of origin.

[5]MarkiePaulson, *TheNewYorkConventioninAction*(WoltersKluwer2016)xxii.

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- To develop uniformity, in the application of the doctrine of sovereign immunity among the Contracting States, when invoked to refuse enforcement of foreign arbitral awards.
- To facilitate India in achieving the goal of becoming an attractive place for international commercial arbitration like England and France, by adopting the best practices standards with respect to the enforcement of foreign arbitral awards.

1.3. SCOPE OF THE STUDY:

The scope of the present study can be viewed in three ways: (i) the field it covers, (ii) the issues it deals with and (iii) the jurisdictions it covers.

It is made clear at the outset that this study does not cover awards passed in investment arbitration and is concerned with enforcement of awards passed in commercial disputes only. The issues selected in the present work are about the concept of an arbitral award, (ii) the type of arbitral awards, (iii) the application of the public policy doctrine, (iv) the enforcement of awards annulled in the country of their origin and lastly (v) the application of the defence of sovereign immunity at the time of enforcement of an arbitral award. They are selected because of their crucial significance and these are the areas where major differences persist among the Contracting States even after six decades of the Convention, has come into existence.

The jurisdictions covered here are England, France and India. The reason for selecting them isthat they encompass a range of backgrounds. Thus England and India both view the seat ofarbitration as a place of immense juridical significance while France considers it to be of no legal importance. India is a Model Law jurisdiction, England, declined to adopt it however, its law isinfluenced by it and France has neither adopted the Model Law nor is inspired or influenced byit.[6] In addition to that while England and France are regarded as hub of international arbitration and are home to the leading arbitration centers like LCIA and ICC respectively, India is finding it difficult to contain even domestic parties from choosing another country as seat of arbitration. Also they cover both major legal systems of the world i.e. the civil law and the common law.

RESEARCH QUESTIONS

[6] Marie-Laure Cartier, Alexandre Meyniel and Yann Schneller, _International Arbitration Law and RegulationsFrance2022

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This thesis analyses the practices of the countries selected herewith regard to the following questions in order to formulate a unified approach with regard to them**:**

- What is an arbitral award?
- What type of arbitral awards are regarded as proper awards?
- How is the public policy doctrine applied in the Contracting States selected here, whenraised to refuse enforcement of a foreign arbitral award?
- Whether and under what circumstances an award annulled in its country of origin isenforceable under the Convention?
- How is the doctrine of sovereign immunity applied in the given countries to refuseenforcement of a foreign arbitral award?

1.4.RESEARCH METHODOLOGY

This work follows the comparative method of research and among the different sub sets of the comparative method it follows the functional method. This method is about identifying a legal problem shared by the legal systems selected forcomparison and focusing on their treatment by them in order to find out a solution.

WHY COMPARATIVE METHOD: There is no doubt that one of the objectives of the Convention is to promote uniformity in its application. The only question is how to achieve that?

In the past suggestions have been made to create a protocol[15] supplementing the Convention, toprovide clarity and consistency in the areas where it is lacking. This suggestion is fraught with many problems. First, negotiation and acceptance of a protocol to the Convention would take alot of time. Second, all States parties to the Convention may not decide to become parties to the protocoloncеitis negotiated. In which case, the problem of lack of uniformity would persist.

The other suggestion has been to create a ―judicial authority concerned with the interpretation of the provisions of the New York Convention and their equal application. As that too does not seem to be happening, a realist approach which ven den Berg recommends is to do a comparative study of the decisions given by various courts with respect to the enforcement of the Convention awards. ―This approach has as objective to

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formulate one possibly acceptable interpretation on the basis of a comparison of the court decisions given in respect of the Convention, which interpretation could be followed by the courts in the Contracting States. Such studies will be only at academic level and can have merely persuasive value. Nevertheless, it is effective since it relies upon consensus building rather than imposition.

Furthermore, Eeberle states, we need to realise that ―inhabiting only our own legal system can be distorting.[7] The advantage of comparative method is that it ―offers us avenues by which to access other, foreign patterns of thought[8] which can illuminate the working of our own legalorder. All these reasons justify adoption of comparative method to further the cause of achievinguniformitywith regardtotheenforcement of foreign arbitralawards under the Convention.

Reasoning is mandatory

Under the Arbitration Act, the arbitral tribunal is required to give a reasoned award setting out what, in their view of the evidence, did or did not happen. The award should explain the decision and how the arbitral tribunal reached its decision. This is essential because it is the disclosure of reasons that effectively demonstrate that the arbitral tribunal had applied its mind. In *State Bank of India v. Ram Das and others*, the Andhra Pradesh High Court had held that vague and general observations cannot be concluded to be reasons in the award. The court ruled that the minimum requirement of law is that (a) the award itself should disclose as to what are the documents taken into consideration, and (b) which is the document upon which reliance is placed in reaching the conclusion. In *Union of India v. Royal Construction*, the Calcutta High Court laid down that the reasons in an award may be short, but they must have such connection with the conclusions reached by the arbitrator as to show that the arbitrator has not acted unreasonably.

In *P.C. Sharma and Another v. Delhi Development Authority,* the Delhi High Court held that an arbitrator is not expected to write a judgment like a judge but has only to state as to how he has come to the finding arrived at by him. A similar view was also taken in *Delhi*

[7] UNDocA/ CN.9/127

[8]Edward J. Eberle, ‗The Methodology of Comparative Law' (2011) 16 Roger William University Law Review 51,56.

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Development Authority v. Uppal Engineering Construction Co. where the Court held that so long as the arbitral tribunal was mindful of the contention raised by the parties and had considered the same while passing the award, it cannot be said that there is absence of reasons in the award. In *The Chief Engineer / Metropolitan Transport Project (Railways), Southern Railway and Another v. Progressive-Aliens,* the Madras High Court held that an arbitral award need not be elaborate like a judgment, and that it must be proper, intelligible, and adequate.

When reasons are dispensed with by parties

Under the provisions of the Arbitration Act, it is stipulated that an arbitral award should state the reasons on which it is based, unless the parties have explicitly agreed otherwise, or the award is an agreed term between the parties. The requirement to provide reasons can only be waived by the parties themselves, as held by the Calcutta High Court in the case of *Inspiration Cloths and U v. Yash Traders*. Consequently, the rules of an arbitral body cannot exempt an arbitrator from the obligation to provide reasons, unless the parties have explicitly accepted such rules.

When the parties have mutually agreed that the award does not need to contain any reasons, it becomes impermissible to challenge the award on the grounds of it being unreasoned. The Bombay High Court, in the case of *Mutta International v. Nandnandan Silk Mills Pvt. Ltd.,* dismissed a challenge to an unreasoned arbitral award since the parties had agreed that no reasons need to be provided for the award. The court emphasized that such an unreasoned award falls within the framework of the Arbitration Act and is therefore valid. Similarly, in the case of *Gujarat Industrial Devp. Corpn. v. S.R. Parmar & Co.,* the court rejected a challenge to an unreasoned arbitral award based on the fact that the arbitration agreement itself granted the tribunal the liberty not to state reasons in the award.

It is pertinent to mention the Supreme Court judgment in *Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises* where the court's jurisdiction to set aside an unreasoned award was addressed. The Supreme Court held that in the case of a non-speaking award, the court's jurisdiction is limited. The award can only be set aside if the arbitrator has exceeded his jurisdiction. In situations where no reasons are given by the

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arbitrator, the court cannot speculate on the factors that influenced the arbitrator's conclusion. Even if the arbitrator has made an error of fact or law in reaching the decision on the disputed question submitted for adjudication, the court cannot interfere.

Upon examining the decisions of Indian courts, it is clear that there is no rigid framework for assessing the adequacy of reasons in an arbitral award. Instead, the sufficiency of reasons is evaluated on a case-by-case basis, considering the specific requirements of each case. Indian courts generally avoid subjecting an arbitrator's reasoning to stringent scrutiny and are hesitant to set aside awards unless there is evidence of arbitrariness or a failure to provide satisfactory reasons, except when the parties have expressly waived the requirement. This approach reflects the recognition of party autonomy, which asserts that the arbitral tribunal's decision should be final and not subject to judicial review.

Though parties can waive the requirement for a reasoned award, there are compelling reasons why they may choose not to do so. Firstly, a reasoned award promotes transparency and justifiability by providing a clear explanation of the arbitrator's decision-making process. Secondly, a reasoned award is crucial for appellate or judicial review in jurisdictions where such review is available. It allows the reviewing body to assess the correctness of the arbitrator's legal analysis and reasoning. Without reasons, the scope and effectiveness of any potential review may be limited.

While parties may have valid reasons to waive the requirement for a reasoned award in certain circumstances, it is important for them to carefully consider the potential benefits of retaining this right. Factors such as fairness, transparency, and the overall efficacy of the arbitration process should be considered before deciding to waive the right to a reasoned award.

There are four different approaches about the law applicable to decide whether a decision is an award at the place of enforcement is concerned: autonomous interpretation of the Convention,the *lex fori*, the *lex loci arbitri*, and combination of *lex fori*and *lex arbitri* both.

A. AutonomousApproach

According to this approach since the New York Convention is an international treaty as stated above, it shall be interpreted according to the general principles of treaty

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interpretation in view of its object and spirit. These are to be found in Article 31 of the Vienna Convention on the Laws of Treaties. Liebscher classifies them as: grammatical interpretation (wording), systematic interpretation (context), teleological interpretation (object and purpose), and historical interpretation (legislative history). He further says that ―The paramount principle of interpretation is the observance of bona fide, i.e. that a treaty is to be interpreted in good faith. In respect of method of interpretation, the emphasis must be laid on the ordinary meaning of its wording in its context and on treaty‘s object and purpose. The problem is that despite adopting the above mentioned rules there cannot be uniformity about the term arbitral award. But at this stage our concern is uniform rules of interpretation only and not uniform standards of application. The idea is that uniformity in rules of interpretation will reduce the non- uniformity in the application of the Convention.

But even the supporters of this approach do not eliminate completely the role of national legal orders in this respect. Thus, Di Pietro who strongly supports the idea of interpreting the New York Convention according to the rules of interpretation laid down in the Vienna Convention on the Laws of Treaties, accepts that such an approach, ―should not automatically rule out any reference to the relevant domestic law(s)[9].

Poudret and Besson also prefer the autonomous approach but they too concede an important role for national laws at the same time. Ehle argues in the similar vein, according to whom, ―The most sensible approach is the one whereby the national courts classify arbitral awards according to the lex arbitri while verifying the outcome is in compliance with an autonomous interpretation under the convention‖. The difference is that in the approach adopted by Poudret and Besson the autonomous content of the Convention plays the pivotal role while according to Ehle lex arbitri performs that job. Therefore the national legal systems will keep on playing an important role in determining what constitutes an award within the meaning of the Convention.

B. The *Lex Arbitri*

Howsoever profoundly and poetically we may pitch for delocalised or transnational

[9]Christoph Liebscher, ‗Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Preliminary Remarks‘ in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (CH Beck 2012) 21.

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character of international arbitration, the predominant reality is that an arbitral award is considered to be rooted in the legal order of the seat of arbitration. Hence a decision cannot be considered an award under the Convention if it cannot be considered so according to the law of its place of origin. The idea of a- national award is only a theoretical possibility.[10] Therefore the courts at the place of enforcement need to test the nature of the decision according to the lex arbitri which invariably is the law of the seat.

This however should not mean a blind adherence but a reasonable deference to the law of the seat. If the law of the seat gives such a meaning to the term award which would clearly defeat the object and spirit of the Convention, then the court at the place of enforcement should not pay deference to it.

C. The Lex Fori

There is a strain of thought which believes in transnational legal order of international arbitration and considers the seat of arbitration inconsequential. According to this approach only the lex fori is relevant for determining as to whether a decision is an award. Fouchard Gaillard and Goldman, the leading French commentary on International Arbitration clearly postulates this view. According to it, the absence of the definition of the term award in the Convention leaves the courts of each contracting state to define it according to their own law.

Double Barrel Test

The last approach in this respect can be classified as double barrel approach, since it requires a decision to qualify the test under the lex arbitri as well as the lex fori. However, the scholars proposing this approach suggest to adopt a comparative outlook, and not a parochial approach. In myopinion the court at the place of enforcement should first see whether the decision is an award under the lex arbitri, because of the predominance of the seat theory, and then under the lex fori, but the lexfori should be interpreted in the light of the object and spirit of the New York Convention. However if the issue has been dealt by the court at the seat then the court at the place of enforcement should defer to that decision. At the same time if the law at the seat has a very parochial approach about the

[10]Jan Paulson, ‗Arbitration Unbound: Award Detached From the Law of its Country of Origin' (1981) 30 ICLQ 358.

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concept of award which clearly undermines the international character of the Convention the court at the place of enforcement should discard it. A complete autonomous approach —without recourse to national law though ideal is not very real. The reason being that the national legal systems will keep on playing an important role in supplying the flesh and blood to the skeleton of the notion of award under the Convention.

D. Approaches Adopted by England France and India

Now we shall proceed to see the approaches adopted by England, France and India in this respect before we attempt to cull out a conceptual definition of the term award in the said jurisdictions. As the seat theory is very deeply entrenched in the English and Indian law,[11] an award is considered to be rooted in the legal order of the seat of the arbitration hence it is necessary that in order to be enforced as a Convention award a decision must be considered so according to the law of the seat.[12] But this would be the first stage. In order to be enforceable it should qualifythe test under the law of the forum which will have the final say.

1.5.TYPES OF ARBITRAL AWARD

1.5.1. Final Award

A final award is the ultimate destination of any arbitration proceeding, since no arbitration can be complete without it. According to Gary Born a final award —refers to the last award in an arbitration, which disposes of all (or all remaining) claims and terminates the tribunals mandate. [13] This is the most common meaning of a final award.[14] A final award is the most prominent and important among all the different types of awards. It brings the arbitration proceedings to an end. A final award qualifies as a Convention award among all the three jurisdictions discussed here.

1.5.2. PartialAward

A partial award is an award with respect to some part of the dispute, however, the

[11] *NavieraAmazonicaPeruanaSAvCompaniaInternationaldeSegurosdalPeru*,YBCommXIII(1988)156, 159.

[12] Christoph Liebscher, ‗Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Preliminary Remarks' in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards - Commentary* (CH Beck 2012) 20.

[13] GaryBorn,*InternationalCommercialArbitration*,vol3(3rdedn,WoltersKluwer2021)3261.

[14] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 9.18;

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determination of that part is final. Consequently a tribunal‘s authority with respect to the decided matter comes to an end. This is the understanding of a partial award in all the three jurisdictions compared here.

Although English law does not use the term partial award, there is hardly any doubt that the 1996 Act recognizes partial awards. Accordingly in *Charles M Wille and Co. Ltd. v Ocean Laser Shipping*,[15] the court held that a final determination of a part of the dispute is termed as a partial award.

The French law too does not refer to partial awards, but the very definition of an award developed by the French courts includes partial awards also as according to them an award is a decision by an arbitral tribunal which determines wholly or partially the dispute referred to it.[16]

There is no mention of the term partial award in the Indian Arbitration and Conciliation Act 1996. The Act uses a confusing term instead i.e.―interim award. Interestingly what is meant by interim award under Indian law is what is generally understood to be a partial award. Thus in *McDermot International* the arbitrator had passed an award with respect to some of the claims and termed the same as a partial award. It was challenged before the Court on the ground that a partial award cannot be passed under the 1996 Act as a partial award is not envisaged under the Act.

Rejecting the argument the Court held that the terms partial award and interim award are interchangeable and stated that―some arbitrators instead and in place of using the expression―interim award use the expression ―partial award. Further, the Court made it clear that a decision to partake the character of an award must be a final determination of the issue. Thus an interim award contemplated under the Act is not one which can be changed by the tribunal subsequently. It is actually a ―final award at the interim stage.

1.5.3. InterimAward

[15][1999]1Lloyd‘sRep225.

[16]*McDermottInternationalIncvBurnStandardCLtd*MANU/SC/8176/2006.

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Interim award is quite a confusing category of award.[17] In one sense it is used to refer to an award passed at an interim stage of the proceedings and thus is interchangeable with partial award. The Indian arbitration Act uses the term in this sense.

On the other hand it is most commonly used to denote a decision which is temporary in nature. This is quite problematic because generallyan award is considered to be a final determination of an issue and if a decision is temporary that shall not qualify to be regarded an award. Nevertheless, English lawhas carved out an exception to this general rule and recognises interim awards as genuine awards. However, the term used to describe such awards is ―provisional award.[18]

Under French law finality is a characteristic feature of an award as per the definition of award developed by French courts. Hence a decision which is provisional or temporary in nature cannot qualify as an award in France. Moreover an award under French law has res judicata effect. A provisional decision cannot have such an effect. The Indian position with regard to interim awards is similar to the French position.

1.5.4. Award Concerning Jurisdiction

English Law categorically provides for awards on jurisdiction and such awards are recognized under French law as well. Although Indian law does not empower arbitration tribunal to pass a preliminary award on jurisdiction but a decision on the issue by the tribunal can be challenged along with the final award on merit under Section 34 of the 1996 Act. However, a negativeruling on jurisdiction that the tribunal lacks jurisdiction is not regarded as an award but merelyan order and can be challenged under Section 37 of the Indian Arbitration and Conciliation Act, 1996, which provides for appeals from certain orders.

1.5.5. Default Award

If a recalcitrant party does not participate in arbitration proceedings that would not mean an end of it. In such a situation the tribunal is allowed to proceed and pass an award. Such an award is called a default award. Default awards are allowed under Section 41 of the

[17] GaryBorn,*InternationalCommercialArbitration*,vol3(3rdedn,WoltersKluwer2021)3268.

[18] *SocieteSardisudvSocieteTechnip*[1994]RevArb391;*GroupAntoineTabetvRepubliqueduCongo*[2102]RevArb88.

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1996 Arbitration Act in England and Section 25 of the Arbitration Act, 1996 (India). Although French law does not mention default awards specifically, according to the learned authors of Fouchard Gaillard and Goldman such an award can be passed in France as a matter of general principles which govern the default proceedings and allow an arbitration tribunal to pass a default award.[19]

1.5.6. ConsentAward

One of the advantages of arbitration is that the parties can reach upon a settlement agreement.[20] But there is always a danger lurking that the agreement may not be honoured. To avoid this and at the same time encourage settlement, modern legislations allow transforming a settlement agreement into an award if the tribunal does not have any objections. Such an award is known by various names like, agreed award, award by consent, award on agreed terms or a consent award. Is such an arrangement an award within the meaning of the Convention? The situation is not clear as the Convention is silent on the issue.

If a consent award can be considered a normal award despite its peculiarities the Convention shall be applicable to it. It is beyond any controversy that an award is a decision byan arbitration tribunal. The implication is that in a consent award the arbitrator does not decide the matter. The settlement is reached upon by the parties. The arbitrator does not exercise the jurisdictional mandate but— simply endorses the agreement of the parties.[21] If such a decision can been forced as an award under the Convention then on what ground an expert determination can be refused to be enforced as a Convention award?

Van den Berg is of the opinion that New York Convention would be applicable to consent awards provided the same is considered an award at the seat of arbitration. On the other hand the learned authors of Fouchard, Gaillard and Goldman disagree with this proposition as they opine in favour of an autonomous interpretation of the Convention. This is

[19] *SocieteSardisudvSocieteTechnip*[1994]RevArb391;*GroupAntoineTabetvRepubliqueduCongo*[2102]RevArb88.

[20] EmmanuelGaillardandJohnSavage(eds)*Fouchard,GaillardandGoldmanonInternationalArbitration*, (Kluwer Law International 1999) para 1224.

[21] EmmanuelGaillardandJohnSavage(eds)*Fouchard,GaillardandGoldmanonInternationalArbitration*, (Kluwer Law International 1999) 746.

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surprising to an extent because according to the same work the question if a decision is an award or not would depend upon the law of place of enforcement not the Convention.

The trend is in favour of recognising a consent award as a proper award. Thus the UNCITRAL Model law expressly empowers an arbitration tribunal to pass a consent award and gives it the status and effect of an award on the substance of the dispute. It is opined that even if a national legislation is silent on the issue the tribunal has an inherent power to make a consent award on account of the general power to adopt conciliatory techniques to settle the dispute. This may be useful in relation to France since the French law is silent about consent awards. On the other hand both India and England expressly recognise consent awards and both give them the status and effect of an award on the merits of a dispute.[22]

According to Section 51 of the English Arbitration Act 1996 parties can opt for a settlement during the arbitration proceedings and if they want they can request the tribunal to record the settlement in the form of an award. However, the tribunal retains the power to refuse to oblige if it has objections. Most importantly Clause 3 of Section 51 provides that the award on agreed terms shall have the status and effect of an award on the merits of the case.

Though Part III of the 1996 act which deals with the enforcement of the Convention awards is silent about their enforcement, nevertheless there is ―no doubt as to the possibility of enforcing an award by consent in England. There is no mention of consent awards in the French Civil Procedure Code.[23] Furthermore, the Cour de Cassation has refused to grant them the status of a genuine award because they are not adjudicatory in nature. The leading French commentary Fouchard, Gaillard and Goldman too is reluctant to regard them as proper awards because of the lack of the adjudicating character.

However, this position applies to domestic awards only. As far as foreign consent awards and international consent awards are concerned they are enforceable in France. A relevant

[22] YaraslauKryvoiandDmitryDavydenko_ConsentAwardsinInternationalArbitration:FromSettlementto Enforcement‘ (2015) 40 Brooklyn Journal of International Law 827, 852.
[23] YaraslauKryvoiandDmitryDavydenko_ConsentAwardsinInternationalArbitration:FromSettlementto Enforcement‘ (2015) 40 Brooklyn Journal of International Law 827, 836.

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case in point is *Société Dansk Eternit Fabrik 1994 c Société Copernit& C SpA*,[24] where a consent awardpassedbytheICC wasenforcedbytheCourtofAppeal. Furthermore,in *VivaChemical* the Court of First Instance at Paris granted an order for the enforcement of a consent award, which was subsequently annulled by the Court of Appeal because the award was vitiated by fraud. If consent awards were not enforceable in France the Court of Appeal would haveannulled the impugned order on that ground, without probing allegations of fraud.

The concept of a consent award is recognised under Indian law and referred to as award on agreedterms.AccordingtoSection30(4)oftheIndianArbitrationandConciliationAct, 1996, such an award ―shall have the same status and effect as any other arbitral award in the substanceof the dispute‖. Aconsent award isverymuch enforceable under the Convention in the Country. Thus, in *Harendra H Mehta v Mukesh H Mehta*[25] an award passed in the US on the terms agreed upon by the parties was enforced by the Court. It was argued by the petitioner‘s counsel that such a decision is not an award because once the parties took the matter into their own hands the arbitrator was ―prevented from acting judicially and giving any decision whatsoever affectingthe rights of the parties. Such a decision cannot be regarded as an award since in such a situation an arbitrator is a mere ―rubber stamp.

CONCLUSION

The New York Convention of 1958 is ‒one of the most important pieces of international legislation ever.[26] One of its main purposes is to unify the law governing the enforcement offoreign arbitral awards. Notwithstanding that, there are certain areas of crucial significance,where divergent approaches persist even after six decades of its having come into existence. It iscorrect that absolute uniform application of a convention ratified by as many as 171 countriesis a dream which perhaps may never be realized but continuous efforts to achieve the same willkeep the differences at least within manageable bounds. The present work has been pursued withthat aim.

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[24]Courd'appeld'Angers,16September2008,07/01636.

[25]*HarendraHMehtaetal.,vMukeshHMehtaetal.,*YBComm(2000)XXV721,725.

[26] Christoph Liebscher, _Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June1958 Preliminary Remarks‘ in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement ofForeign ArbitralAwards–Commentary*(CH Beck2012)16.

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This chapter summarises the findings of the study and make certain recommendations with a view to further the cause of uniform application of the law governing the enforcement of foreign arbitral awards in the Contracting States. The study finds that there is substantial lack of uniformity with respect to the enforcement of foreign arbitral awards among the States discussed here.

To begin with, due to the absence of a proper definition of the term award in the Convention, any dispute as to whether a decision is an award within the scope of the Convention depends upon the understanding of the term by the courts at the place of enforcement. A comparative study of the law and practices of England, France and India reveals differences in the practice of these countries in determining as to what is an award and the type of awards that come within thescope of the Convention.

There is no definition of the term award provided in the statutory or under common law inEngland. The notion of the award which emerges from judicial decisions in England is highlyamorphous. English courts have immense liberty in characterising a decision as an award andhave at times regarded a decision so on the basis of intention of the tribunal[27] and even theperception of the parties.[28] Under English law a final determination on a substantive right orliability is more likely to be regarded as an award. However, a decision which is provisional in nature or a decision on a procedural issue too can be regarded as an award although in these cases it is less likely that they will be recognised as an award. French statutory law too doesnot give any definition of award 'but French courts have developed a very precise definition ofas to what is an award. The French understanding of award is that it is a final determination ofdispute whether on merits, jurisdiction or procedure. The element of finality is important becauseunderFrench law anaward has res judicata effect.

Although unlike England and France, Indian Arbitration Act provides a definition of the term award, but such a generalised definition as provided in the Act that ―an arbitral award‖ includes an interim award‖[912] does not serve to help uniform interpretation and effective implementation of the Convention. A conceptual understanding of the term

[27] *ExmarBVvNationalIranianTankerCo*(The–TradeFortitude‖)[1992]1Lloyd'sRep169.
[28] *Michael Wilson and Partners Limited v John Forster Emmott* [2008] EWCH 2684 (Comm); *ZCCM InvestmentHoldingsPLCv KansanshiHoldingsPLCandAnor*[2019]EWHC1285(Comm)para 40.

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_award‘ developed on the basis of decisions given by Indian courts informs us that a final decision on merit or a positive ruling on jurisdiction alone can be regarded as an award in India.

Despite the above mentioned differences, it is necessary and desirable to harmonise the law of different countries in defining an award‘ for the purposes of enforcement under the Convention. There are many aspects of the term award on which there is a convergence of the views amongall the three States discussed here. All of them regard a final decision on the merit of the dispute as an award and consider it to have the res judicata effect. Furthermore, France and England both regard decisions on procedural issues also as proper awards provided the determination is final. India differs on this count and excludes decisions on procedural issues from the ambit of an award. It needs to change that understanding and should align its approach with that of the approach followed in France and England. On the other hand England needs to shun the controversial concept of provisional awards.

Two factors are essential to regard a decision of an arbitration tribunal as award. They are- finality and the judicious nature of the decision. Only decisions which meet these parameters shall be regarded as awards. Consequently, emergency awards cannot be regarded as awards. An attempt to enforce decisions of emergency arbitration tribunals under the Convention would pose difficulties for the process of achieving a precise definition of the term award in the national laws
dealing with arbitration. In the opinion of the present author, instead of aiming to enforce the said decisions under the Convention it would be better to include a provision similar to Article 17 H of the UNCITRAL Model Law in the domestic legislations which would permit direct enforcement of decisions passed by emergency arbitration tribunals seated abroad.

As far as consent awards are concerned, they should be recognised as proper awards, since arbitration tribunal can refuse to accept the settlement terms proposed by the parries and to approve them in the form of an award it applies its mind judiciously. Additionally, reconciliation is integral to arbitration, which also justifies recognising them as proper awards.

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The status of different types of award in the countries analysed here is as follows:

Types of Award	England	France	India
Final Award	Yes	Yes	Yes
Partial Award	Yes	Yes	Yes (but uses the term interim award)
Interim (Temporary) Award	Yes (but uses the term provisional award)	No	No
Jurisdictional Award	Yes	Yes	Only a positive ruling on Jurisdiction
Default Award	Yes	Yes	Yes
Consent Award	Yes	Likely	Yes
Emergency Award	Likely	No	No

The study finds that the public policy ground is a highly controversial ground. It is the ground which is invoked most frequently. The content of public policy is bound to vary among the Contacting States but what is expected is that enforcement would be refused only if it ―would violate the forum state‘s most basic notions of morality and justice‖. The study finds that all the three jurisdictions discussed here agree on that standard in principle.

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