

GAR CHALLENGING AND ENFORCING ARBITRATION AWARDS 2020

India

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Applicable requirements as to form of arbitral awards

1 Must an award take any particular form (eg, in writing, signed, dated, place, the need for reasons, delivery)?

Section 31 of the Arbitration and Conciliation Act 1996 (the Arbitration Act) provides, inter alia, that an arbitral award shall be made in writing and be signed by the members of the arbitral tribunal. In this respect, section 31(2) also clarifies that in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated. After the award is made, a signed copy is required to be delivered to each party.

Section 31 also provides that the arbitral award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given, or the award is an arbitral award on agreed terms under section 30 (Settlement).

Additionally, the award is required to state the date and place of arbitration as determined in accordance with section 20 (Place of Arbitration) and the award shall be deemed to have been made at that place.

Applicable procedural law for recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Section 33 of the Arbitration Act provides that a party, with notice to the other party, may within 30 days of receipt of the arbitral award (unless another time limit has been agreed by the parties) request the arbitral tribunal to correct any computation errors, any clerical or typographical errors, or any other errors of a similar nature occurring in the award. Additionally, if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request made by a party to be justified, then it is required to make the correction or give the interpretation within 30 days of receipt of the request and any such interpretation shall form part of the arbitral award. The arbitral tribunal may also correct any errors of the types referred to above on its own initiative within 30 days of the date of the award.

Section 33 also provides that a party may request the arbitral tribunal, with notice to the other party and within 30 days of receipt of the award, to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award, unless it is otherwise agreed by the parties. The arbitral tribunal is then required to make the additional arbitral award within 60 days of receipt of the request, if it considers the request to be justified.

If necessary, the arbitral tribunal may also extend the time limit within which it shall make a correction, give an interpretation or make an additional award. The provisions of section 31 (Form and contents of arbitral award) shall apply to a correction or interpretation of the arbitral award or to an additional award made under section 33.

Applicable procedural law for recognition and enforcement of arbitral awards

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

For the first two questions please refer to responses to question 13 and 15.

As for the difference between appeals and applications for set-aside, the first recourse available to a party against a domestic arbitral award would be to file an application for setting aside the award under section 34 of the Arbitration Act. Thereafter, an appeal may lie under section 37 of the Act from an order setting aside or refusing to set aside an arbitral award under section 34. Significantly, no second appeal lies from an order passed in appeal under section 37; however, nothing prevents a party from approaching the Supreme Court by way of a Special Leave Petition under article 136 of the Constitution of India.

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The Arbitration Act is the applicable legislation for the recognition and enforcement of an arbitral award in India.

India is a party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (Geneva Convention) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). India is also signatory to bilateral investment treaties. Typically, these bilateral investment treaties contain a dispute resolution clause. However, India is not a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under article I(3) of the Convention?

India is one of the original signatories to the New York Convention and ratified the Convention on 13 July 1960. India has made the following reservations to its applicability as per section 44 of the Arbitration Act.

India will enforce an award as per the Convention only if it was made in the territory of another contracting state. Section 44 of the Arbitration Act states the names of 48 countries to which the Convention will apply, which are states that have made reciprocal provisions for the recognition and enforcement of awards made in India. This data is available to the public.

Further, India will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered 'commercial' under Indian law.

Recognition proceedings

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

In the case of a foreign seated award, the concerned High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award will have jurisdiction over an application for enforcement in terms of section 47 read with section 49 of the Arbitration Act.

In the case of a domestic award, the principal Civil Court of original jurisdiction in a district and the High Court in cases where the High Court exercises ordinary original civil jurisdiction, would have jurisdiction to hear an application for enforcement of the award under section 36 read with section 2(1)(e)(i) of the Arbitration Act.

In accordance with section 10 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015, in the case of an international commercial arbitration, all applications or appeals arising out of such arbitration are to be heard and disposed off by the Commercial Division of the High Court (where such Commercial Division has been constituted in such a High Court).

In the case of an arbitration other than an international commercial arbitration, in case the principal court of original jurisdiction is a district court, all applications or appeals arising out of such arbitration are to be heard and disposed of by the Commercial Court, where constituted. Further, in case where the High Court has original pecuniary jurisdiction to entertain disputes over a particular pecuniary threshold, all applications or appeals arising out of such arbitration are to be heard and disposed off by the Commercial Division where such Commercial Division has been constituted in such a High Court.

Note that the Commercial Division of the High Court and Commercial Court in the District Court consist of judges who have experience in dealing with commercial disputes.

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

An award holder must file its application for the enforcement of foreign/domestic arbitral awards before the competent court in whose jurisdiction the assets of the award debtor are located (*Executive Engineer v Atlanta Limited*, 2014, 11 SCC 619; *Tata International Ltd v Trisuns Chemical Industry Ltd*, 2001, SCC Online Bom 905; *Wireless Developers Inc v India Games Limited*, 2012, SCC Online Bom 115). Where the assets of the judgment debtor are located in the territorial jurisdiction of more than one court, the award holder can file execution petitions simultaneously in all such courts (*Bulk Trading SA v Dalmia Cement (Bharat) Limited* 2005 SCC Online Del 1389; *Cholamandalam Investment and Finance Co Ltd v CEC Ltd and Anr*, 1995, SCC Online Del 240).

As a matter of practice, the applicant generally does file a list of assets held by the judgment debtor along with the enforcement petition (or states reasons as to why it believes that the assets of the judgment debtor are located within the territorial jurisdiction of the court where the execution proceedings are filed). Where the award holder is unable to identify the assets of the judgment debtor, the award holder may make an application to the court requesting a disclosure of the assets held by the award debtor under provisions analogous to Order XXI Rule 41 of the Code of Civil Procedure 1908 (CPC).

8 Are the recognition proceedings in your jurisdiction adversarial or ex parte?

India follows the adversarial system. The courts in India will proceed ex parte only if the defendant fails to enter appearance despite being served with proper notice of court proceedings.

9 What documentation is required to obtain the recognition of an arbitral award?

In the case of a foreign award, section 47(1) of the Arbitration Act provides that a party applying for the enforcement of an award shall, at the time of the application, produce before the court the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; the original agreement for arbitration or a duly certified copy thereof; and such evidence as may be necessary to prove that the award is a foreign award. For example, in *Hugo Neu Corporation v. Lloyds Steel Industries*, 2009, SCC Online Bom 785, an affidavit was filed by the attorney appearing on behalf of the petitioner after the original award and other documents were destroyed.

In so far as a domestic award is concerned, the original copy of the award must be filed in court. Indian courts have held that in the case of a domestic award, if the original award is not filed in court, a certified copy may be filed with an endorsement regarding whether the original award is duly stamped (and stating the value of the stamp duty paid) and specifying whether the original award is duly registered (*Union of India v M/S Gala Constructions*, 2015, SCC Online MP 5908).

10 If the required documentation is drafted in another language than the official language of your jurisdiction, is it necessary to submit a translation together with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

Under section 47(2) of the Arbitration Act, if any award or agreement sought to be produced under sub-section (1) of section 47 is in a foreign language, then the party seeking to enforce the award will have to produce a translation of the award into English, certified as correct, by a diplomatic or consular agent of the country to which that party belongs.

Alternatively, the award may also be certified as correct in such other manner as may be sufficient according to the law in force in India. In this regard, a translated copy of the award must be certified as correct by a notary appointed under the Notaries Act 1952. Further, the translation certified by the notary could be a translation of the award made by either the notary himself or herself, or any other person, but verified by the notary as correct (*KTC Korea Company Limited v Hobb International Pvt Ltd*, 2004, SCC Online Cal 179).

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

A foreign award requires neither any registration nor any stamping, but can be enforced as a decree of the court (*M/s Shriram EPC Limited v. Rioglass Solar SA* (AIR 2018 SC 4539); *Naval Gent Maritime Limited v Shivnath Rai Harnarain (I) Limited*, 2009, SCC Online Del 2961; *Vitol SA v Bhatia International Limited*, 2014, SCC Online Bom 1058).

Under section 35 of the Indian Stamp Act 1899, a domestic award that is unstamped, or is insufficiently stamped, is inadmissible for any purpose. As per section 17 of the Registration Act 1908, an award, if it affects immovable property in the manner stated therein, would require compulsory registration, and will be invalid if it is not registered (*Rajinder Parshad Sharma v Ashok Sharma and Ors*, 2008, SCC Online Del 1317).

The court fees required to be paid in any judicial proceeding are prescribed by the Courts Fees Act 1870. However, various states have amended court fee rates by state amendments to the Court Fees Act 1870 or in their own Court Fees Act. Thus, the court fees payable will vary, depending on the court in which the execution proceedings are filed.

12 Do courts recognise and enforce partial or interim awards?

The definition under section 2(1)(c) of the Arbitration Act of 'arbitral award' includes an interim award; thus, any interim or partial award can be enforced under section 36 (domestic award) and section 47 (foreign award) of the Arbitration Act. However, it is relevant to note that for the purposes of recognition and enforcement under Indian law, the finality of the award is the

determining factor. To be enforceable, the interim or partial award must finally determine the issues or claims covered by it. If the nature of the award is such that it is intended to have effect only if the final award is not delivered, then such an award will not be enforceable (National Thermal Power Corporation Ltd (NTPC) v Siemens Aktiengesellschaft 12, 2005, DLT 36).

Further, under section 17 of the Act, which is applicable to domestic seated arbitrations, interim measures of protection may be passed by an arbitral tribunal during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced. By virtue of recent amendments to Section 17 of the Arbitration and Conciliation (Amendment) Act 2015 (the Amendment Act), the arbitral tribunal has the same power for making orders under section 17 of the Act as the court has for the purpose of, and in relation to, any proceedings before it under section 9, and any such order passed by the arbitral tribunal is enforceable under the CPC, in the same manner as an order of the court.

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under article V of the Convention?

The grounds on which an award may be refused recognition under the Arbitration Act are similar to the grounds provided under article V of the Convention. Thus, the grounds for refusing recognition and enforcement of a foreign award under section 48(1) of the Arbitration Act are as follows:

- the parties to the agreement 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;
- the party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- 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;
- 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
- 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.

Further, under section 48(2) of the Arbitration Act, enforcement of a foreign award may also be refused if the court finds that:

- the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
- the enforcement of the award would be contrary to the public policy of India.

In this regard, recent amendments to the Arbitration Act have clarified that an award is in conflict with the public policy of India, only in the following circumstances:

- the making of the award was induced or affected by fraud or corruption or was in violation of section 75 (Confidentiality) or section 81 (Admissibility of evidence);
- it is in contravention with the fundamental policy of Indian law; or
- it is in conflict with the most basic notions of morality or justice.

Under section 34(2) of the Arbitration Act, the grounds for challenging a domestic award are similar to those for challenging a foreign award. However, an additional ground for challenging a domestic award is where the award is vitiated by patent illegality appearing on the face of the award (section 34 (2A) of the Arbitration Act).

14 What is the effect of a decision recognising the award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Once the executing court is satisfied that an award is recognisable or enforceable, the award is deemed to be a decree of that court as per the provisions of section 36 (domestic award) and section 49 of the Arbitration Act (foreign award). It may then be enforced under the relevant provisions of the CPC relating to execution of a decree.

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

Under section 50 of the Arbitration Act, an appeal lies against a decision refusing to recognise or enforce a foreign award to the High Court concerned. It may be noted that insofar as a domestic award is concerned, the courts can pass an order setting aside

a domestic award under section 34 of the Arbitration Act. If a challenge is made to the award under section 34 of the Arbitration Act and that challenge is allowed or dismissed, an appeal lies against such a decision under section 37 of the Arbitration Act.

No second appeal lies from an order passed under sections 50 and 37 of the Arbitration Act. The aforementioned provisions do not take away the right of the parties to prefer a Special Leave Petition to the Supreme Court under article 136 of the Constitution of India and the same would be maintainable.

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

The Arbitration Act was amended by way of the Amendment Act, which came into force on 23 October 2015. In so far as domestic awards are concerned, prior to the Amendment Act coming into force, there was a deemed stay on the execution of an award once an application under section 34 of the Arbitration Act was moved by the award debtor, challenging the award, within the prescribed period of limitation. However, since the Amendment Act has come into force, there is no deemed stay on the execution of the award and the award debtor must file a separate application under section 34 of the Arbitration Act for a stay of operation of the award and the court can grant the same, subject to any conditions it may deem fit. The Supreme Court has clarified that all cases in which an application under section 34 is filed after the Amendment Act came into force, and an application for stay is made under section 36 of said Act, shall be governed by the amended sections 34 and 36 (*Board of Control for Cricket in India v Kochi Cricket Pv. Ltd*, 2018, 6 SCC 287) (BCCI)

By way of the 2019 Amendment Act, section 87 was inserted into the Arbitration Act, which nullified the above interpretation of the Supreme Court in BCCI in respect of the retrospective operation of the amended provisions of section 36 of the Arbitration Act. Subsequently, the insertion of section 87 was challenged before the Supreme Court in *Hindustan Construction Company v Union of India* (2019 SCC OnLine 1520), wherein the insertion of section 87 was held to be unconstitutional and hence was struck down. Thus, the position of law has reverted back to that laid down by the Supreme Court in BCCI.

Under section 34(5), while filing an application for setting aside an award, a party is required to issue prior notice to the other party. However, in the case of *State of Bihar v Bihar Rajya Bhumi Vikas Bank Samiti* (AIR 2018 SC 3862), the Supreme Court has clarified that the prior notice requirement is only a direction and therefore not mandatory.

As a matter of law, if the award is for payment of money, while considering the application for grant of stay of the operation of the award, the courts may grant a stay of enforcement proceedings only after considering whether similar conditions for grant of stay of a money decree under the provisions of the CPC have been satisfied. Ordinarily, execution of a money decree is not stayed since the satisfaction of a money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party (*Sihor Nagar Palika Bureau v Bhabhlubhai Virabhai and Co*, 2005, 4 SCC 1). Nevertheless, the courts may stay the operation of an award in appropriate cases and may consider the following factors while staying enforcement:

- that substantial loss may result to the party applying for stay of execution unless the order is made;
- that the application seeking a stay of operation of the award has been made without unreasonable delay; and
- that security has been given by the applicant for due performance of the award.

In so far as a foreign award is concerned, as per section 48(3) of the Arbitration Act, the court may adjourn a decision on enforcement of an award if an application for setting aside or suspending the award has been made to a competent authority of the country under the law of which the award has been made.

Indian courts have held that section 48(1)(e) of the Arbitration Act (which stipulates that enforcement of an award may be refused if an 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 is made) read with section 48(3) of the Arbitration Act makes it clear that the 'competent authority' in section 48(3) is the authority of the country of origin, where the award has been made, and not the executing court in India.

Courts in India have held that it may be reasonable to adjourn enforcement proceedings if a challenge has been made by an award debtor in the country where the award has been made (*Naval Gent Maritime Limited v. Shivnath Rai Harnarain (I) Limited* (2009) SCC Online Del 2961). However, courts may direct a deposit of security while the execution proceedings are kept in abeyance.

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Under section 34 (domestic award) and section 48 (foreign award) of the Arbitration Act, a court may order the award debtor to give suitable security pending the outcome of the annulment proceedings.

While considering directing an award debtor to post security, the courts are required to satisfy themselves that the deposit of security by the award debtor is essential and adequate to safeguard the interests of the award holder (*Steel Authority of India Limited v AMCI PTY Limited* (2011) SCC Online Del 3689). Factors such as financial condition of the award debtor and the likelihood of the award debtor disposing off his or her assets prior to payment of the award may be relevant considerations in this regard (*CV Rao v Strategic Port Investment* (2014) SCC Online Del 444; *Aditya Birla Finance Limited v Carnet Elias Fernandes* (2014) SCC Online Bom 4774).

The courts may either direct the award debtor to deposit a sum equivalent to the sum awarded to the award holder in court, or may direct the award debtor to furnish a bank guarantee of equivalent amount and keep the same alive until the execution proceedings are pending before the court. Alternatively, the court may direct the award debtor to earmark assets that may be used for satisfaction of the award and prohibit the award debtor from creating any third-party rights over the same.

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? In case the award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Under section 48 of the Arbitration Act, the court cannot enforce an award that is not binding on the parties. Indian courts have held that the award becomes binding between the parties if it was not challenged by the award debtor in the country where the award was passed and hence became executable. Thus, in case the award has been fully or partly set aside at the seat of arbitration, the award would not be binding on the parties to the extent of the same having been set aside and consequently would be unenforceable. Further, in light of section 48(3) of the Arbitration Act, Indian courts are likely to await the outcome of the proceedings where the award has been challenged before the courts of the seat of arbitration and proceed with enforcement only thereafter.

Service

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

The procedure applicable for service of extrajudicial and judicial documents to a defendant in Indian jurisdiction is, inter alia, governed by the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (Hague Convention), which has been signed by India. However, India has expressed reservations on article 10 of the Hague Convention and has objected to the following modes of service:

- sending judicial documents, by postal channels, directly to persons abroad;
- effecting service of judicial documents directly through the judicial officers, officials or other competent persons of the state of destination by judicial officers, officials or other competent persons of the state of origin;
- effecting service of judicial documents directly through the judicial officers, officials or other competent persons of the state of destination by any person interested in a judicial proceeding.

Therefore, the only process permitted by India for a valid service of judicial or extra-judicial documents under the Hague Convention is through the means of transmission set out in article 5 of the Hague Convention (ie, through the designated Central Authority). The designated Central Authority for service in India is the Ministry of Law and Justice.

Additionally, the CPC, under section 29(c), lays down the procedure in connection with the service of foreign summons and other processes issued by any other civil or revenue court outside India. These summons and other processes may be sent to courts in the territory of India to which the CPC extends and can be served as if they were summons issued by those courts. India has also entered into mutual legal assistance treaties in civil and commercial matters with certain countries for reciprocal arrangements for service of summons under section 29(c) of the CPC; execution of civil decrees under section 44A of the CPC;

issuing letters of request under section 77 of the CPC; taking of evidence under section 78 of the CPC; and enforcement of arbitral awards under section 44(b) of the Arbitration Act.

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The service of extrajudicial and judicial documents outside the Indian territory may be done in accordance with the provisions of Hague Convention, provided that the receiving country is a signatory of the Hague Convention. Alternatively, the provisions under the law of the country where the receiving party resides may apply.

Additionally, Order V of the CPC is applicable for service of summons. Further, Rule 25 of Order V of the CPC provides that if a defendant resides out of India and the defendant does not even have an agent in India empowered to accept service, summons shall be addressed at the place where the defendant resides. The summons shall be sent to the defendant by registered post or by such courier service as may be approved by the High Court or by fax or by email as approved by the rules of the concerned High Court. In addition to the provisions of the CPC, the service of judicial documents is also regulated by rules of various High Courts across India.

Identification of assets

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Although there is no publicly available database dedicated particularly to identification of assets of a company, one may access the financial statements (including balance sheets) of companies from the public documents portal on the website of the Ministry of Corporate Affairs (www.mca.gov.in).

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Since an arbitral award is enforced as a decree of the court, provisions of CPC would be applicable at the stage of enforcement of the award. Order XXI Rule 41(2) of CPC contemplates that when a decree for payment of money has remained unsatisfied for a period of 30 days, the court may order the officers of the judgment debtor company to disclose its assets by furnishing an affidavit stating the particulars of the assets of the judgment debtor. The decree holder will have to make an application in the execution proceedings before the court in this regard. Courts have held that such an application can be filed even before presentation of the execution petition. In such cases, the decree holder can apply under Rule 41 of Order XXI of the CPC to retrieve details of the judgment debtor's assets that are known only by the judgment debtor.

Enforcement proceedings

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Yes, interim measures are available against assets. If the agreement contains an arbitration clause, then interim measures of protection may be sought by a party under sections 9 and 17 in respect of any of the following matters:

- the preservation, interim custody or sale of any goods that are the subject matter of the arbitration agreement;
- securing the amount in dispute in the arbitration;
- the detention, preservation or inspection of any property or thing that is the subject matter of the dispute in arbitration;
- an interim injunction or the appointment of a receiver;
- another interim measure of protection as may appear to the court to be just and convenient.

These orders can then be enforced as per the provisions of the CPC.

In respect of sovereign states, India does not have a separate legislation on sovereign immunity, unlike the United States and the United Kingdom. Although India is a signatory to the Convention on the Jurisdictional Immunities of the States and their Property (ie, the UN Convention), it is yet to come into force in India.

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings ex parte?

In the execution of an award, an application may be made to the court under provisions analogous to Order XXI, Rule 12 (movable property) or Rule 13 (immovable property) of the CPC for interim measures against assets belonging to the judgment debtor. In this regard, once a party moves such an application, the court may issue ad interim orders or interim orders in respect of the assets located within its jurisdiction. It will also issue notice to the decree debtor of the execution proceedings being filed. If the decree debtor does not attend, the execution proceedings may be proceeded ex parte.

Additionally, as discussed in question 23, interim measures of protection are available against the assets of an award debtor under sections 9 and 17 of the Arbitration Act, before or during arbitral proceedings, or at any time after the making of the arbitral award, but before it is enforced.

25 What is the procedure for interim measures against immovable property within your jurisdiction?

As per Order XXI Rule 13 of the CPC, when an application is made for the attachment of any immovable property belonging to the judgment debtor, it must contain a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers. The application should also include a specification of the judgment debtor's share or interest in such property to the best of the belief of the applicant, and so far as he or she has been able to ascertain the same.

Further, as discussed in question 23, under sections 9 and 17 of the Arbitration Act, a party may apply to a competent court for an interim measure of protection in respect of immovable property by way of the preservation, interim custody or sale of immovable property; the detention, preservation or inspection of any immovable property; an interim injunction or the appointment of a receiver in respect of any immovable property; and any other interim measure of protection as may appear to the court to be just and convenient.

26 What is the procedure for interim measures against movable property within your jurisdiction?

As per the provisions of Order XXI Rule 12 of the CPC, an application may be made to the executing court for attachment of any moveable property belonging to the judgment debtor (but not in possession of the judgment debtor) along with an inventory of the property, containing a reasonably accurate description of the same.

Further, as discussed in question 23, under sections 9 and 17 of the Arbitration Act, a party may apply to a court for an interim measure of protection in respect of movable property by way of the preservation, interim custody or sale of any movable property; the detention, preservation or inspection of any movable property; an interim injunction or the appointment of a receiver in respect of any movable property; and any other interim measure of protection as may appear to the court to be just and convenient.

27 What is the procedure for interim measures against intangible property within your jurisdiction?

For the purposes of obtaining interim measures against intangible property, the provisions under Order XXI Rule 46, 47, 48 and 48-A of the CPC may be applied which provide the procedure for attachment of intangible moveable property. These provisions include attachment of debt, share, share in moveables, salary or allowances of government servants or of railway employees or of employees of the local authority and salary or allowances of private employees. These attachments can be made by the executing court by issuing prohibitory orders against persons holding such assets.

Further, as discussed in question 23, a party may apply to a court for an interim measure of protection in respect of intangible property under sections 9 and 17 of the Arbitration Act.

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings ex parte?

On an application made by the decree holder in the execution proceedings, the court may require the judgment debtor to make a disclosure of its assets and investments, after which it may issue prohibitory orders. The decree holder is required to obtain prior authorisation of the court before attaching the assets of the judgment debtor. Proceedings for attachment of assets are not ex parte, unless the judgment debtor fails to enter appearance after proper service.

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

To effect an attachment of immovable property, it is, among other measures, necessary to obtain an order prohibiting the judgment debtor from transferring, alienating or charging the property in any way.

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

If the property to be attached is moveable property in the possession of the judgment debtor, the attachment is made by actual seizure and the attaching officer keeps the property in his or her own custody or in the custody of one of his or her subordinates.

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

For the purposes of obtaining interim measures against intangible property, the provisions under Order XXI Rule 46, 47, 48 and 48-A of the CPC may be applied, which provide for the procedure of attachment of intangible movable property. These provisions include attachment of debt, share, share in movables, salary or allowances of government servants or of railway employees or of employees of the local authority and salary or allowances of private employees. These attachments can be made by the executing court by issuing prohibitory orders against persons holding such assets.

Enforcement against foreign states

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no specific rules governing recognition and enforcement of arbitral awards against sovereign states. Although section 86 of the CPC which governs the issue of foreign state immunity contemplates prior consent of the central government before instituting a suit in any court of law against a foreign state, such enforcement proceedings are not barred. In relation to execution of an arbitral award, courts in India have given the word “suit” a narrow interpretation and have held that passing a “judgment and decree on arbitration award” does not commence with a plaint or a petition in the nature of a plaint (*Nawab Usmanali Khan v Sagarmal* AIR 1965 SC 1798). Therefore, the execution proceedings in respect of an arbitral award cannot be regarded as a suit for the purposes of section 86 of the CPC. In *Ethiopian Airlines v Ganesh Narain Saboo* (2011) 8 SCC 539, the Supreme Court of India has held that sovereign immunity to a foreign state cannot apply to commercial transactions and that the contracting party should be held liable for its contractual and commercial activities and obligations.

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

There is no specific procedure for service of extrajudicial and judicial documents to a foreign state. However, as stated above, the service of extrajudicial and judicial documents outside the Indian territory may be done in accordance with the provisions of Hague Convention provided that the receiving country is a signatory of the Hague Convention. Alternatively, the provisions under the law of the country where the receiving party resides may apply.

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Assets belonging to a foreign state are not absolutely immune from enforcement in India. Under section 86 of CPC, a foreign state can be sued in suit proceedings, subject to the condition that consent of the central government has been obtained, duly certified in writing by the Secretary to that government. Sub-section (3) of section 86 of CPC specifically requires the consent of the central government for the execution of a decree against the property of any foreign state. An entity will qualify as a “foreign state” depending upon the nature of its constitution and the extent of “control” the government exercises on that entity.

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

As discussed in question 34, the assets of a foreign state are not absolutely immune from enforcement in India. Any immunity, may be waived by a foreign state either expressly or impliedly. The Indian courts have upheld that waiver is effective where the sovereign itself invokes the jurisdiction as a plaintiff or where it appears as a defendant without objection and fights the case on its merits. As an example, in *Ethiopian Airlines v Ganesh Narin Saboo* AIR 2011 SC 3495, the Indian Supreme Court held that in effect, by entering into the Warsaw Convention, Ethiopia had expressly waived its airline's right to immunity in cases relating to aircraft carriers.



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Sanjeev K Kapoor is a partner in the litigation department of Khaitan & Co Sanjeev, through rich and diverse practice of over 19 years, has gained invaluable experience in constitutional law, general trade and commercial laws, arbitration as well as laws relating to environment, energy, infrastructure and mining. Sanjeev is a registered advocate on record with the Supreme Court of India since 2003.

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