Frequently Asked Questions

Regarding

Options Available

To

Holder of a Decree / Award

from a Foreign Court / Arbitration Tribunal

against an Indian Company

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Notes:

Anil Chawla Law Associates LLP is registered with limited liability and bears LLPIN AAA-8450.

This Guide is an academic exercise. It does not offer any advice or suggestion to any individual or firm or company.

In this Guide, at some places Companies Act, 1956 is referred to while at some other places, Companies Act, 2013 is referred to. In general, whenever the relevant provision of Companies Act, 2013 has not yet been made effective, we have referred to the older Act. Government of India is constantly making parts of the new law effective replacing the corresponding parts of the old law. Please check the position as on date or consult a legal practitioner or company secretary.

PART A

Frequently Asked Questions

regarding

Options Available to Holder of a Decree from a Foreign Court against an Indian Company

A1 Is a decree from a foreign court valid in India? What conditions are necessary for a decree from a foreign court to be valid in India?

Yes, a decree from foreign court is valid in India. The decree has to satisfy the following conditions for it to be acceptable in India:

a) The decree should have been passed by a court having jurisdiction on the matter. It is presumed that the foreign court is competent and has jurisdiction unless the contrary is proved before a court in India.

b) The decree should have been given on the merits of the case. A summary judgment passed without looking at the facts of the case is not valid.

c) On the face of it the decree should not be against international law or against Indian law to the extent applicable.

d) The decree should not be opposed to natural justice. For example, a decree passed without giving any opportunity of being heard to the defendant will be against natural justice and will hence not be valid in India.

e) The decree should not support a claim which is based on breach of a law applicable in India. For example, a decree issued against a

claim based on a contract to supply narcotic drugs will not be valid in India since narcotic drugs are illegal in India.

The above is based on sections 13 and 14 of Civil Procedure Code, 1908 of India. Relevant extracts of the sections are as follows:

Section 13 - When foreign judgment not conclusive

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except --

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the me rits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of1[India] in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud ;

(f) where it sustains a claim founded on a breach of any law in force in 1[India].

Section 14 - Presumption as to foreign judgments

The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

A2 Can all decrees which are valid as per section 13 and 14 of Civil Procedure Code be executed in India?

No, even though a decree passed by a foreign court is valid, it can be executed in India only if it is passed by a court of a 'reciprocating country'. A reciprocating country is one which is so notified by Government of India. Generally speaking, countries which recognize decrees from Indian courts are notified as reciprocating countries.

The relevant section of Civil Procedure Code is as follows:

[1] **[44A. Execution of decrees passed by Courts in reciprocating territory**

(1) Where a certified copy of a decree of any of the superior Courts of [2] [***] any reciprocating territory has been filed in a District Court, the decree may be executed in [3] [India] as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

[4] [Explanation 1.--"Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and "superior Courts", with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2.--"Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment]].

A3 Which countries have been notified as reciprocating countries by Government of India?

The Government of India has notified 11 territories as Reciprocating countries for India. The notified countries are as follows:

1. United Kingdom
2. Aden
3. Fiji
4. Republic of Singapore
5. Federation of Malaysia
6. Trinidad and Tobago
7. New Zealand, the Cooks Islands (including Niue) and the Trust Territories of Western Somao
8. Hong Kong
9. Papua and New Guinea
10. Bangladesh
11. United Arab Emirates

A4 Our company is holding a decree against an Indian company issued from a court in Singapore which is a reciprocating country for India. What will be the procedure for our company to execute the decree in India?

Your company can file a suit for execution in the district court of the district where the Indian company's registered office is located. For filing the suit, a copy of the decree duly certified by the Singapore court will be needed. With the certified copy of the decree in hand, you should approach an advocate practicing in the relevant district court for filing the execution suit.

A5 You are saying that a decree issued by court of a non-reciprocating country is valid in India even though it cannot be executed in India. What does such validity mean when the decree is non-executable?

A decree which is valid but non-executable in India still has legal force. Holder of such a decree may file a suit on the basis of the decree. As contrasted with an execution suit for an executable decree (where the Indian court has no power to examine the facts underlying the issue of decree), the court in such a case will examine the decree and give a decision.

A key difference between an executable decree from a reciprocating country and a non-executable decree from a non-reciprocating country is that the former can be executed directly and the court has no power to examine the underlying facts. In the case of latter, the court has an open field.

Typically, a holder of a decree from a non-reciprocating country should file a suit in an Indian court either on the basis of the decree or on the basis of original cause of action or both. The Indian court will issue a fresh decree which can be executed in India.

Relevant extract from the decision of Bombay High Court in Marine Geotechnics LLC vs. Coastal Marine Construction & Engineering Ltd. (MANU/MH/0267/2014) is as follows:

> 20. Armed with a decree of a court in a non-reciprocating foreign territory, what must a party do in India? His option is to file, in a domestic Indian court of competent jurisdiction, a suit on that foreign decree, or on the original, underlying cause of action, or both. [11] He cannot simply execute such a foreign decree. He can only execute the resultant domestic decree. To obtain that decree, he must show that the foreign decree, if he sues on it, satisfies the tests of Section 13. If the decree is, on the other hand, of a court in a reciprocating territory, then he can straightaway put it into execution, following the procedure under section 44A and Order XXI, Rule 22 of the CPC. At that time, the judgment-debtor can resist the decree-holder by raising any of the grounds under Section 13. If he does not, or fails in his attempt, the decree will be executed as if it were a decree passed by a competent court in India.

A6 We are holding a decree from a non-reciprocating foreign country against an Indian company ordering the Indian company to pay USD 5 million to us. Other than filing a suit on the basis of the decree, what is the other option available to us?

The other option is to file for winding up of the Indian company. Under section 433 of Companies Act, 1956 a company may be wound up if it is unable to pay its debts (Relevant section of Companies Act, 2013 is section 271, which has not yet been made applicable).

The amount of USD 5 million ordered to be paid as per the foreign decree will be a debt of the Indian company if the decree is valid in India even though the decree is non-executable.

Most important issue, hence, will be the validity of the foreign decree in India. As mentioned earlier, validity will be decided as per section 13 of Civil Procedure Code (CPC). The decision about validity can be taken only by a court which will decide whether any of the exceptions of section 13 of CPC are applicable.

Relevant extract from Marine Geotechnics LLC vs. Coastal Marine Construction & Engineering Ltd. (MANU/MH/0267/2014) is as follows:

> It is not every debt that can form the foundation of a winding up petition: a petition will not, for instance, be admitted or allowed on a time-barred debt. It is for the petitioning-creditor to show that the debt on which the petition is brought is due and payable on the date of the petition. [14] A 'debt due' is a sum now payable, in praesenti. [15] Clearly, that must mean a sum payable now in India, according to Indian law. If a foreign decree of a non-reciprocating territory needs to be made a rule of an Indian court to become an enforceable debt, I cannot see how, without passing through the filter of Section 13 of the CPC at least on a minimal, prima-facie enquiry, it can possibly form the foundation of a winding up petition.

The test of section 13 CPC is hence a necessary one. Either the test can be applied by the High Court as part of deciding on the Winding Up petition or it can be a separate case. Often High Courts in India have examined the foreign decree from the viewpoint of section 13 CPC as part of winding up petitions.

A7 What is the procedure to initiate action for winding up of an Indian company on the ground of "unable to pay debt"?

First step – the decree holder has to serve a notice to the Indian Company for payment of the amount due under decree. The notice should mention the following:

a) That this is a Notice under section 433 of Companies Act, 1956;

b) The sum payable on receipt of the Notice;

c) Requiring the Indian Company to pay the sum payable:

d) Sum is payable within three weeks of the receipt of the Notice.

The Notice should be sent to the Registered Office of the Indian company.

On receipt of the Notice, Indian company has three options:

i) Dispute the demanded amount; OR

ii) Pay as demanded; OR

iii) To arrive at some sort of compromise with the Creditor.

If the Indian Company disputes the amount or refuses to pay or refuses to reply to the Notice, the Decree Holder can present a winding up petition against the Indian Company on the ground of inability of the Company to pay its debts.

Winding up petition has to be filed in the high court of the state where the registered office of the Indian Company is situated.

For presenting a winding up proceeding, it is advisable to engage a local advocate working in the High Court where the petition is to be filed.

A8 Can the procedure for 'winding up' be initiated simultaneously with steps for execution of the foreign decree?

In case of reciprocating country, the answer is yes. Winding up procedure can be initiated along with steps for execution of decree in case of a decree from a reciprocating country.

In case of a non-reciprocating country, there cannot be execution of the foreign decree without examination of the decree. If the holder decides to file a suit on the basis of the original cause of action and not the decree, the debt is not established on the basis of the decree. On the other hand, if the holder files suit on the basis of the decree (or both the decree and the original cause of action), the option to proceed for winding up is open to the holder. Both the suit for execution and the petition for winding up will apply the test of section 13 on the decree. To sum up, in case of non-reciprocating country the two processes can be simultaneous if the suit is on the basis of the decree (and not on the basis of original cause of action) and when the foreign decree passes the test of section 13 of CPC.

A9 What is the time limit for filing a fresh suit on the basis of a foreign decree in India?

Time limit for filing a suit is a complex issue. Generally speaking, it is fair to assume that **the time limit is three years** from the date of the decree. But, it is necessary to examine each specific case before giving the final word on the matter.

Some relevant illustrative items from the Schedule of Limitation Act, 1963 are as follows:

59.	To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.
62.	To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.	Twelve years	When the money sued for becomes due.
101.	Upon a judgment including a foreign judgment, or a recognisance.	Three years	The date of the judgment or recognisance.

A10 If the period of limitation for presentation of a suit based upon a foreign decree as provided under Indian law has lapsed, can the amount due from the Indian party be recovered?

If a person satisfies the court that he had sufficient reason for not coming to the court within the period of limitation, the court may condone the delay. Relevant section of Limitation Act, 1963 reads as follows:

Section 5 - Extension of prescribed period in certain cases

Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.--The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

A11 We are a Hong Kong-based company, a reciprocating country for India. We hold a judgment against an Indian Company. It is passed by the Court of Hong Kong. The Indian Company was sent summons by the Hong Kong Court. They received the summons but did not attend the proceedings. Can such a decree be executed against the Indian Company?

As discussed above, if the foreign decree violates the provisions of Section 13 of CPC, the decree cannot be enforced in India.

Section 13 of CPC provides that the foreign judgment should be given on the merits of the case for it to be valid. An ex parte judgment (a judgment where the defendant has not attended the proceedings) does not necessarily fail the test of section 13. The foreign judgment will have to be studied to check whether the foreign court has delivered the judgment on the basis of merits or has done it blindly.

In other words, ex parte is not a disqualification by itself. However, if the judgment has been passed against the defendant on the ground of his being absent without considering the merits, the judgment will fail the test of section 13.

To sum up, an ex parte judgment made by a foreign court after considering facts of the case is enforceable.

A12 We (a foreign company) hold a decree against an Indian company passed by a court of Malaysia, a reciprocating country for India ordering the Indian Company to pay MYR 2 million. Despite several notices the Indian Company has failed to pay. The Indian Company has written to us expressing its inability to pay the decreed amount immediately. We feel that winding up the Indian company will not serve our interests. We shall like to take over the Indian company. Is there a provision under Indian laws by which we can take over the Indian Company?

Chapter XIX of The Companies Act, 2013 of India deals with taking over of a company by creditors.

Section 253 of the Companies Act 2013 provides opportunity to secured creditors of a company (creditors with a benefit of security interest over assets of the debtor) to apply to tribunal for declaration of a company as sick company (one which is unable to pay its debts). A company declared sick can be taken over by its creditors as part of revival and rehabilitation of the company.

Relevant extract of part of section 253 is as follows:

> **253.** (*1*) Where on a demand by the secured creditors of a company representing fifty per cent. or more of its outstanding amount of debt, the company has failed to pay the debt within a period of thirty days of the service of the notice of demand or to secure or compound it to the reasonable satisfaction of the creditors, any secured creditor may file an application to the Tribunal in the prescribed manner along with the relevant evidence for such default, non-repayment or failure to offer security or compound it, for a determination that the company be declared as a sick company.

The key words in the above sub-section are "secured creditors of a company representing fifty per cent or more of its outstanding amount of debt". Hence, the two issue to be determined are – (a) whether the amount owed to you by the Indian company is more than half of the total amount outstanding by the company to all its creditors and (b) whether the amount owed to you is secured.

The foreign decree that you are holding against the Indian Company does not make you a secured creditor since the amount decreed is not supported by any security over the assets of the Company. Our suggestion will be to try to create a security by way of hypothecation or mortgage on the assets of the company. Since the company is on talking terms with you, please make an effort to convince them to execute an agreement which gives you rights over the assets of the Indian company. This way you can move into the category of secured creditor.

After moving into the category of secured creditor, if the amount due to you is more than fifty per cent of the amount of outstanding by the company, you may move the tribunal under section 253 on your own. In case the amount owed to you is less than half of the outstanding amount of the company, you may join hands with other creditors.

A13 ABC Ltd. is Indian subsidiary of a foreign company, say XYZ Ltd. Can a foreign decree against ABC Ltd. from a court of reciprocating country, be executed against XYZ Ltd. in case ABC Ltd. does not have sufficient funds to pay the decreed amount?

Generally speaking the answer to your question is, NO. A company is a separate legal entity and the shareholders of the company cannot be held liable for the acts of the company. However, in special circumstances, the corporate veil can be pierced and the parent company / shareholders can be held liable for the actions of the subsidiary.

Courts in UK, USA and India have accepted the following six principles in connection with the piercing of the corporate veil:

i) Ownership and control of a company are not enough to justify piercing the corporate veil.

ii) The court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of justice;

iii) The corporate veil can be pierced only if there is some impropriety;

iv) The impropriety in question must be linked to the use of the company structure to avoid or conceal liability;

v) To justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or façade to conceal their wrongdoing; and

vi) Company must be a 'façade' even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions.

Even after taking care of the above six principles, a court will pierce the corporate veil only so far as it was necessary for the purpose of providing a

remedy for the particular wrong which those controlling the company had done.

In essence, the doctrine of piercing the veil allows the Court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, it is well accepted that this principle should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing veil must be such that would seek to remedy a wrong done by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case.

(Ref. for the above – Oil and Natural Gas Corporation vs. M/s Jindal Drilling and Industries Ltd., Bombay High court, decided on 28 April 2015 (MANU/MH/0735/2015); United States vs. Bestfoods [141 L Ed 2d 43: 524 US 51 (1998)], US Supreme Court, MANU/USSC/0074/1998; Ben Hashem v. Ali Shayif, [2008] EWHC 2380 (Fam))

In your question, the key issue would be the law of the home country of XYZ Ltd. In some countries (not in UK, USA and India) parent company or shareholders having a higher responsibility towards their subsidiary. In such a case you may have the option of proceeding against XYZ Ltd. in the country of that company without going through Indian courts against ABC Ltd.

It may be mentioned here that, exceptions aside, it is not possible to proceed against XYZ Ltd. for recovering moneys decreed to be recovered from ABC Ltd. However, when some element of criminality is involved, it may be possible to proceed against the parent for wrong done by the subsidiary.

A14 We are a Bank having our head office in Dubai with its branches in India, a reciprocating country. We hold a decree from the court of Dubai against an Indian Company on account of failure to pay the amount borrowed. Does a Bank have any other option to recover the decreed amount apart from filing execution suit in Indian Courts.?

Banks in India have another platform (besides filing civil suit in a court) for recovery of amounts due to them by Indian borrowers. Recovery of debts due to Banks and Financial Institutions Act, 1993 (Act 51 of 1993) (RDB Act) has set up Debt Recovery Tribunals for recovery of outstanding amounts by Banks.

Since your bank has branches in India, it can be assumed that the Bank is a Bank as defined under section 2(d) of the RDB Act. Your bank can thus file an application in prescribed form to the Debt Recovery Tribunal having jurisdiction of the area where the registered office of the Company is situated.

The relevant section of the RDB Act reads as follows:-

"Section 17. Jurisdiction, powers and authority of Tribunals. -- (1) A tribunal shall exercise, on and from the appointed day the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

It is advisable to engage a local advocate having experience of handling cases in Debt Recovery Tribunals for filing the application and for pursuing the matter.

A15 We are a Company located in United States (US), a non-reciprocating country for India. A suit was initiated by us in an Indian Court based upon the decree passed by the court of US. The judgement given by the US Court was an ex-parte judgement. The Indian court decided that the judgment of the US Court fails to pass the test under Section 13 of CPC. Can a suit on the basis of original cause of action be instituted in India?

Yes, you can initiate a suit in an Indian court on the original cause of action if the limitation period has not expired. Limitation period is prescribed under The Limitation Act, 1963.

It may be mentioned here that if the foreign decree is not recognized by Indian courts, the decree-holder has an opportunity to seek justice by filing a suit in the Indian Courts upon the original cause of action. However, this issue is often complex; and each case will have to be examined and carefully studied before taking a view in the matter. On one hand is the principle that one court must respect the judgment of the other court and not subject a defendant to multiple court cases for the same cause of action. On the other hand, when foreign court's judgment is not enforceable for whatever reasons, it will be a denial of justice to the petitioner to merge cause of action with the invalid decree and refuse to entertain a petition based on original cause of action.

The complexity of the matter can be seen from the following extract from the judgment passed by High Court of Bombay in Intesa Sanpaola S.P.A. vs. Videocon Industries Limited (MANU/MH/2108/2013):-

> 70. No divergent views have been expressed upon this question. No doubt, the English doctrine of merger has been consistently held in English not in England not to apply to a foreign judgment with the result that despite the fact that a plaintiff has obtained a foreign judgment he may nevertheless sue in an English court upon the original cause of action instead upon the judgment. When he sues upon the original cause of action, no doubt, the court within whose jurisdiction the cause of action arose would be entitled to entertain the suit. But, if on the other hand, he chooses to sue upon the judgment, he cannot found jurisdiction for the institution of the suit on the basis of the original cause of action because once he chooses to rest himself on the judgment obtained by him in a foreign court, the original cause of action will have no relevance whatsoever even though it may not have merged in that judgment.

40. The Apex court in Badat (MANU/SC/0011/1963 : AIR 1964 SC 538) case referred to the English doctrine of merger and made a distinction on a suit based on a decree and the original cause of action. The Apex court held that once a party sues upon the original cause of action, the court within whose jurisdiction the cause of action arose would be entitled to entertain the suit, however if it chooses to sue upon the decree, it cannot proceed on the basis of the original cause of action.

PART B

Frequently Asked Questions

regarding

Options Available to Holder of a Award from a Foreign Arbitral Tribunal against an Indian Company

B1 Is a foreign arbitral award valid in India? What conditions are necessary for a foreign arbitral award to be valid in India?

Yes foreign award is valid in India and binding upon the persons between whom it is made. The foreign award has to satisfy the following conditions as provided under Section 44 of the Arbitration and Conciliation Act, 1996 to be acceptable in India:-

i) The legal relationship between the parties must be commercial;

ii) There must be an agreement providing for arbitration between the parties; and

iii) The award must be made in a convention country

A convention country is one which has been notified by the government of India as such and to which the New York Convention applies.

New York Convention is an agreement between countries for the recognition and enforcement of foreign awards made in the signatory country.

The relevant section of the Arbitration and Conciliation Act, 1996 is as follows:-

ARBITRATION AND CONCILIATION ACT, 1996

Section 44 - Definition

In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

B2. Can all valid foreign arbitral awards be executed in India?

Any foreign award which passes the test as provided under Section 44 of the Arbitration and Conciliation Act, 1996 (the Act) is considered to be valid as per Indian law and is eligible for being executed by Indian Courts subject to satisfaction of the appropriate Court.

Once the court is satisfied that the award fulfills the conditions as laid down in the Act, the award is deemed to be a decree of the Court and can be put into execution directly

B3. Which countries are convention countries for recognition of arbitral awards?

A list of the countries that have accepted the New York Convention is given on the following website:

http://www.newyorkconvention.org/countries

B4. We are a Company based in Singapore (a convention country) holding a foreign arbitral award against an Indian Company. We seek to enforce the arbitral award. How will the award be executed against the Indian Company?

The first step towards enforcement of a foreign arbitral award is filing an application in the Court of the area where the assets of the person against whom the award is sought are situated or where such person ordinarily resides.

The application must be accompanied with the following:-

i) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

ii) the original agreement for arbitration or a duly certified copy thereof; and

iii) such evidence as may be necessary to prove that the award is a foreign award

The following extract from the Act deserves attention as it makes the foreign award binding and enforceable:

ARBITRATION AND CONCILIATION ACT, 1996

Section 46 - When foreign award binding

Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

B5. When can enforcement of a foreign award be refused by an Indian court even though the award is issued by an Arbitration Panel in a convention country?

There can be various reasons for refusal to enforce a foreign award even though it is from a convention country. Some of the reasons for the refusal are as follows:

a) The award is on a matter which is not commercial under the laws of India.

b) The arbitration agreement entered between the parties is invalid under the law of the country where it was made.

c) The parties to the arbitration were under some incapacity while entering into the agreement.

d) The defendant was not given notice of the appointment of arbitrator or was unable to present his case.

e) The matter sought does not fall within the scope of submission to the arbitration.

f) The composition of the arbitral tribunal was not in accordance with the agreement.

g) The award was suspended by competent authority of the country where it was made.

h) The subject matter of arbitration is not capable of settlement under the Indian law.

i) The enforcement of the award would be opposed to public policy of India.

Relevant extract from the Act is as follows:

ARBITRATION AND CONCILIATION ACT, 1996

Section 48 - Conditions for enforcement of foreign awards

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

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

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

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

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

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

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

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

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

Explanation.--Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the

making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also , on the application of the party claiming enforcement of the award, order the other party to give suitable security.

B.6 We are a foreign company located at Thailand, a convention country. We hold a foreign award against an Indian Company ordering the Indian Company to pay THB 3 million. Can we opt for filing a winding up petition against the Indian Company, even though execution petition for the award has been filed in the appropriate Court?

Theoretically, it appears that a 'winding up' petition can be filed even while the process for execution of the foreign arbitration award is in progress. However, courts in India have taken a different view. It is advised that the process of execution of the foreign arbitration award should be completed before filing a petition for winding up of the company against whom the award is sought to be enforced.

Judicial view in the matter is that protracting litigation should be avoided. It has also been held that a court considering winding up should not take up the job of arbitration court and apply its mind on section 47 and 48 of the Act.

Relevant extract from judgment in Vinayak Oils and Fats Private Limited versus Andre (Cayman Islands) Trading, decided on 23 July 2004 by Calcutta High Court (MANU/WB/0344/2004) is as follows:-

27.3. In my view I have a complete discretion either to admit the winding up petition or to relegate parties to avail the prescribed mode available in law. I feel that learned single Judge of the Delhi High Courts rightly refused admission of the winding up proceeding

27.4. In this regard I would be relying on the apex Court decision in the case of M/s. Fuerest Day Lawson Ltd. (supra) where the apex Court relied upon the objects and reasons of the 1996 Act and observed that the procedure must be minimized as far as practicable. If I encourage winding up proceeding on the basis of a foreign award it might lead to protracting litigation. Moreover, it would be a dangerous proposition to venture adjudication of the disputes under sections 47 and 48 on a prima facie view sitting in winding up Court.

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