

Limitation period for enforcement of Foreign Award

About 5 months ago, when a two judges' bench of Hon'ble Supreme Court of India ("SC") decided the issue regarding the limitation period for execution of a foreign decree, the most debated question was as to whether the said law would apply equally qua the limitation period for enforcement of a foreign award. The apex court has now put to rest even the issue concerning the period of limitation for execution of a foreign award by a judgment of three judges' bench in the case of *Government of India v. Vedanta Ltd. & Others*¹.

In the matter of Bank of Baroda Vs. Kotak Mahindra Bank², the apex court had held that period of limitation for execution of foreign decree would be governed as per law prevalent in the cause country (the foreign country where the decree was passed) and not as per the law prevailing in the forum country (country where foreign decree is sought to be enforced i.e. India). It was held that Article 136³ of the Limitation Act, 1963 is not attracted in the matter of execution of a foreign decree and issue concerning execution of foreign decree, if any, is covered only under Article 137⁴ of the Limitation Act.



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¹ Civil Appeal No. 3185 of 2020 arising out of S.L.P. (Civil) No. 7172 of 2020.

² Civil Appeal No. 2175 of 2020 decided on 17.03.2020.

³ Article 136 of the Limitation Act, 1963-

<u>Description of suit</u>	<u>Period of limitation</u>	<u>Time from which period begins to run</u>
136. For the execution of any decree (other than a decree granting a mandatory injunction) an order of any civil court.	Twelve years	When] the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

⁴ Article 137 of the Limitation Act, 1963 –

<u>Description of suit</u>	<u>Period of Limitation</u>	<u>Time from which period begins to run</u>
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Even in Vedanta's case, the apex court has held that the period of limitation for execution of a foreign award would be three years from the date when the right to apply accrues as provided under Article 137, and not by Article 136, of the Limitation Act. The SC further held that since execution of foreign award is not applied for under the provisions of Civil Procedure Code, 1908 ("**CPC**"), the bar under Section 5 of Limitation Act⁵ would not apply to the proceeding for enforcement of foreign award. Accordingly, the SC held that in the matter of execution of a foreign award an application for condonation of delay can be filed under Section 5 of Limitation Act.

Few crucial aspects of the case, till the matter reached the SC, are as under:

- (i) The Production Sharing Contract dated 28.10.1994 ("**PSC**") executed between the parties provided that the agreement shall be governed and interpreted in accordance with the laws in India.
- (ii) The venue of arbitration shall be Kuala Lumpur, Malaysia. In this case, venue was regarded as seat of arbitration.
- (iii) The Arbitration Agreement shall be governed by laws of England.
- (iv) On 18.08.2008 disputes between the parties were referred to a three members arbitral tribunal, which published the Award on 18.01.2011. In the award the Tribunal essentially held that:
 - (a) Claimant / Vedanta was bound by the cap provided under Article 15.5(b) of the PSC on the Base Development cost incurred up to and including the year 1999/2000. Therefore, Claimant was not entitled to recover the Base Development Cost of USD 220,737,381.
 - (b) However, the Claimant /Vedanta shall be entitled to recover from the Cost Petroleum, the Base Development Cost of USD 278,871,668 incurred from the contract year 2000/2001 until 2008/2009
 - (c) The amount of cap under Article 15.5(b) of the PSC may be increased thereafter pursuant to Article 15.5(e)(iii) of the PSC and/or as the parties may agree.
- (v) On 29.04.2011 Claimant /Vedanta addressed a letter to Government of India thereby submitting revised costs recovery account statements as per the Award giving due credit to the Government of India for the excess Base Development Costs of USD 22,307,381.
- (vi) Government of India's petition under Section 37 of the Malaysian Arbitration Act, 2005 for challenging the award was dismissed by the Malaysian High Court vide order dated 30.08.2012.
- (vii) Government of India unsuccessfully filed appeal before the Malaysian Court of Appeal, which also met the similar fate and was dismissed on 27.06.2014.
- (viii) On 10.07.2014, Government of India issued a show cause notice raising a demand of USD 77 Million towards government's share of profit under PSC.

137. Any other application for Three years
which no period of limitation is
provided elsewhere in this
division.

When the right to apply accrues.

⁵ Section 5 of Limitation Act, 1963:- *Extension of prescribed period in certain cases.- Any appeal or any application, other than an application under any of the provisions of the Order XXI of the Code of Civil Procedure, 1908 (5 of 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."*

- (ix) On 21.07.2014, Government of India filed an application for leave to appeal before Malaysian Federal Court, which was rejected vide order dated 17.05.2016.
- (x) On 14.10.2014, Respondent filed a petition for enforcement under Sections 47 read with 49 of the Arbitration and Conciliation Act, 1996 ("**Indian Arbitration Act**") before the Delhi High Court, along with an application for condonation of delay. The Government filed an Application under Section 48 of the Indian Arbitration Act, resisting the enforcement of the Award before the Delhi High Court.
- (xi) Vide order dated 19.02.2020 the Delhi High Court allowed application for condonation of delay and also directed for an enforcement of the Award holding that the application for enforcement of foreign award would be governed by the limitation period of 12 years under Article 136 of the Limitation Act.

Proceeding before, and decision of, the SC

In the aforesaid background, the matter reached before the SC by way of Special Leave Petition filed by Government of India against the order dated 19.02.2020 passed by the Hon'ble Delhi High Court. The SC allowed enforcement of the foreign award and held as under:

- The issue of limitation for enforcement of foreign award being procedural in nature, is subject to *lex fori* i.e. the law of the forum (State) where the foreign award is sought to be enforced. (i.e. *India in this case*).
- Neither Indian Arbitration Act nor Limitation Act contains any specific provision for enforcement of a foreign award.
- Article 136 of the Limitation Act shall apply to the execution of decree of a civil court in India and not to the execution of a foreign decree. The legal fiction under Section 49 of the Indian Arbitration Act is for the limited purpose of enforcement the foreign award i.e. treating the foreign award to be a decree of "that court" (i.e. high court) which means the high court which adjudicated upon the petition filed under Section 47 and 49 of the Indian Arbitration Act. Accordingly, Article 136 of the Limitation Act would not apply to enforcement/execution of a foreign award. Enforcement of a foreign award as a deemed decree of the concerned high court would be covered by the residuary provision i.e. Article 137 of the Limitation Act.
- Therefore, as per Article 137 of the Limitation Act, a petition for enforcement of a foreign award can be filed within three years from the date "*when the right to apply accrues*".
- Application seeking enforcement of a foreign award under Section 47 of the Indian Arbitration Act is a substantive petition filed under the said Act and is not an application under any of the provisions of Order XXI of the CPC. The application is filed before the appropriate high court for enforcement, which would take recourse to the provisions of Order XXI of the CPC only for the purpose of execution of the foreign award as a deemed decree. The bar contained in Section 5 of Limitation Act would not be attracted in the case of execution of a foreign award. Consequently, a party seeking enforcement of a foreign award will also be entitled to file an application under Section 5 for condonation of delay, if so required in the facts and circumstances of the case.
- Petition for enforcement of the foreign award was filed within the period of limitation prescribed by Article 137 of the Limitation Act. In any event, there are sufficient grounds to condone the delay, if any, in filing the execution petition.
- The enforcement court cannot set aside a foreign award, it may refuse enforcement of a foreign award if the ground contained in Section 48 of the Indian Arbitration Act are made out.
- There are four types of laws applicable in International Commercial Arbitration and the court proceedings arising therefrom:

- (a) Law governing substantive rights and obligations of the parties in the underlying commercial contract.
 - (b) Law governing the arbitration agreement, which would determine the validity and extent of the arbitration agreement, limits of party autonomy, the jurisdiction of the tribunal, etc.
 - (c) The curial law of the arbitration is determined by the seat of arbitration. The curial law governs the procedure of arbitration, the commencement of the arbitration, appointment of arbitrator in exercise of the default power by the court, grant of provisional measures, collection of evidence, hearings, and challenge to the award. The courts at the seat of arbitration exercise supervisory or primary jurisdiction over the arbitral proceedings. However, if the parties have made an express and effective choice of a different *lex arbitri*, in such cases the role of the courts at the seat will be limited to those matters which are specified to be internationally mandatory and of a non-derogable nature.
 - (d) The *lex fori* governs the proceedings for recognition and enforcement of the award in other jurisdictions.
- Applying the aforesaid principles of law, the Malaysian Court, being the seat court, was justified in applying the Malaysian Act to the public policy challenge raised by the Government of India. The enforcement court would examine the challenge to the award on the ground available under Section 48 of the Indian Arbitration Act without being constrained by the finding of the Malaysian Court.
 - Government of India has failed to make out any case of violation of procedural due process in the conduct of arbitration proceedings. Government of India has also failed to show as to how the award was in conflict with the basic notion of justice or in violation of substantive public policy of India.

Conclusion

With the aforesaid two judgments of the SC, the law as it stands today is that a decree passed by civil court in India as well as a domestic award can be enforced under Article 136 of the Limitation Act, within 12 years from the date of decree or the domestic award, as the case may be. However, the position with respect to enforcement of foreign decree and foreign award, can be summarised as under:

Limitation for enforcement of foreign decree (<i>Bank of Baroda Judgement, supra</i>)	Limitation for enforcement of foreign award (<i>Vedanta Ltd. judgement, supra</i>)
Article 137 of the Limitation Act would apply in the matter of enforcement of a foreign decree.	Article 137 of the Limitation Act would apply in the matter of enforcement of foreign award.
Right to apply for enforcement of foreign decree accrues from the date of passing of the foreign decree.	Right to apply for enforcement of foreign award would depend on when the award becomes final and binding as per the curial law/the law applicable at the seat of arbitration. <i>In Vedanta judgment, the SC did not delve upon the aspect of when the right to apply accrues in the matter of enforcement of foreign award.</i>

<p>The period of limitation for filing of execution of foreign decree depends on the following two scenarios:</p> <p>(a) Period of limitation for execution of a foreign decree would be the one provided in the country where such decree is passed i.e. the cause country. Once that period is over, application for enforcement of such decree can neither be made in the cause country nor in forum country (i.e. India). However, within the period provided for execution of the decree in the cause country, the decree holder can seek enforcement thereof either in the cause country or the forum country, depending on the facts and circumstances of each case.</p> <p>(b) Where a decree holder takes steps in aid of execution of the decree in the cause country, Application for execution of foreign decree can be filed in India within 3 years from the finalisation of execution proceedings in the cause country.</p>	<p>Application for execution of foreign award is to be made within three years from the date when the award becomes final and binding in accordance with the law prevailing at the country of seat of the arbitration.</p>
<p>No application for condonation of delay can be filed under Section 5 of the Limitation Act, while seeking execution of a foreign decree.</p>	<p>Application for condonation of delay can be filed while seeking execution of a foreign award.</p>

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