

# GUIDE TO ARBITRATIONS AND APPEALS

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## INTRODUCTION

This paper is published for guidance only. It is not exhaustive but outlines the procedures to be followed under the Federation's Rules of Arbitration and Appeal and the Arbitration Act 1996. It is designed to help those involved in arbitrations and appeals whether as a party to a dispute, an arbitrator or a Board of Appeal member. It should be read in conjunction with the Rules of Arbitration and Appeal. Arbitration and Appeal Procedures are governed by those Rules of Arbitration and Appeal in force at the time the contract was entered into. This Guide addresses the Federation's primary arbitration services, that of the Two-Tier system (as per FOSFA Contract Terms - Arbitration Clause) but many of its points are applicable as appropriate to the alternative Small Claims Single Tier Rules of Arbitration and the Rules of Arbitration for Brokerage Commission and Interest.

Where the words "FOSFA International", "FOSFA" or "the Federation" appear in this Guide, they shall read as meaning the "Federation of Oils, Seeds and Fats Associations Limited".

The Federation's system of arbitrations and appeals is based on the standard Domicile and Arbitration Clauses incorporated in every FOSFA International form of contract. They read:

"DOMICILE: This contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respect by English law. Any dispute arising out of or in connection therewith shall be submitted to arbitration in accordance with the Rules of the Federation. The serving of proceedings upon any party by sending same to their last known address together with leaving a copy of such proceedings at the offices of the Federation shall be deemed good service, rule of law or equity to the contrary notwithstanding."

"ARBITRATION: Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Associations Limited in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant.

Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrator/s, or Board of Appeal (as the case may be) in accordance with the Rules of Arbitration and Appeal of the Federation and it is hereby expressly agreed and declared that the obtaining of any award from the arbitrators, or Board of Appeal (as the case may be), shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute."

In disputes under a FOSFA International form of contract the Rules of Arbitration and Appeal of the Federation are paramount. The parties, the arbitrators and members of Boards of Appeal are deemed to know and must abide by the Rules. If the Rules do not cover any particular matter then, generally speaking, it is governed by the Arbitration Act and by the English common law of arbitration as embodied in precedents established by judgements of the Court handed down in previous cases.

## ARBITRATIONS

### THE PARTIES - THEIR RIGHTS AND DUTIES

Each party to a dispute on a contract subject to the Federation's Rules has the right to claim arbitration and has the duty to do so instead of starting legal proceedings.

A party claims arbitration by simultaneously giving notice to the other party and to the Federation of its claim for arbitration with the name of the arbitrator appointed by it and the nature of the dispute. The party must do so within the strict time limits laid down in Rule 1(a) for claims of quality and/or condition (90 days) and in Rule 1(b) for all other claims (one year). Failure to do so may result in its claim being time-barred. In all cases, the claimant should send a copy of the contract out of which the dispute arose to the Federation.

The other party must appoint an arbitrator and notify such name to the claimant and to the Federation within the strict time limit (specified in Rule 1(c)) of 30 consecutive days, failing which the claimant may apply to the Federation to appoint an arbitrator under the terms of Rule 2(d) for which a charge will be made.



Each party has the right to appoint an arbitrator of its choice who is a Trading, Full Broker or Full Non-Trading Member of the Federation or a nominated representative of a Trading, Full Broker or Full Non-Trading Member and subject to an age limit of 75 if still active in the trade or two years after retirement whichever comes first (Rule 2(b)), provided that the arbitrator is eligible to accept appointment and does so. The Federation will appoint a third arbitrator who will act as chair of the tribunal (Rule 2(e)). Alternatively the parties may agree on the appointment of a sole arbitrator. No person wholly or principally engaged in private legal practice shall be eligible to act as an arbitrator.

The party claiming arbitration will be required to lodge a deposit with the Federation on account of the fees, costs and expenses. Such amount is set by the Council of the Federation and published. A time is set out in the Rules as to when the deposit is to be received (Rule 1(f)).

The party claiming arbitration must make a written submission, with supporting documents to the appointed arbitrator/s, the Federation and to the other party, within 30 consecutive days of the appointment of the respondent's arbitrator for claims on quality and/or condition (Rule 4(a)(i)) and without delay for all other claims (Rule 4(b)(i)).

The other party must submit its reply, with supporting evidence, to the claimant, the arbitrator/s and the Federation within 30 consecutive days for claims on quality and/or condition (Rule 4(a)(ii)) and without delay for other claims (Rule 4(b)(ii)). For a claim other than on quality and/or condition where the contract forms part of a string, separate awards will be issued for each set of contracting parties unless agreement to the arbitration being held between first Seller and last Buyer has been given in writing by all parties in the string (Rule 6(c)(ii)).

Arbitrators may call upon the claimant and or the respondent to make further deposit(s) (Rule 4(f)).

Parties have the right to attend any hearing scheduled to be held in the arbitration provided the arbitrator/s has been notified of the request/intention to do so, and at their absolute discretion. Each party has the right either to present their own case or to be represented at a hearing but may not have present or be represented by any member of the legal profession wholly or principally engaged in private legal practice (Rule 4(e)).

If any party to an arbitration considers that an arbitrator(s) is failing to exercise all reasonable despatch in entering on or proceeding with the arbitration, then that party may notify the Federation accordingly in writing. The Federation is empowered to require the arbitrator/s to explain their reasons for any delay in issuing an award and ultimately may be removed from the arbitration (Rule 4(h)). Formal complaints lodged by parties will be recorded and fully investigated under the authority of the Council of the Federation.

When the Federation notifies the parties that an award of arbitration is available on payment of the balance of fees etc, each party has the right to take up the award. More usually the claimant in the arbitration will take up the award, but both parties have the duty to do so. Where the deposit held exceeds the fees of the award then the Federation will issue the award and provide a refund of any balance to the original paying party. Each party, by engaging in arbitration, agrees to be liable to the Federation for payment of all fees and expenses of the arbitration (Preamble to the Rules).

Arbitrators are responsible for determining their own fees. Parties are advised to ask for details of fee rates and charges when giving consideration to making appointments.

There are occasions when arbitration is claimed in order to preserve time limits and it may not be possible to proceed with some of these or they may have been settled. Therefore, if neither the claimant nor the respondent has submitted any documentary evidence or submissions to the arbitrators with a copy to the other party within a period of one year from the date of appointment of the first named arbitrator, then the claim to arbitration shall be deemed to have lapsed (Rule 3). Any renewal must be made before the expiry of one year and can only be extended for a period of one year. Thereafter the claim is deemed lapsed.

## **ARBITRATORS - THEIR RIGHTS AND DUTIES**

Within the framework of the Rules and the law of England, arbitrators have the right to determine how the arbitration shall be conducted, to decide the time and place of any hearings, to call upon the parties for further information and or evidence and to make Orders for Direction.

Arbitrators have the right to be paid their reasonable fees, costs and expenses in respect of their award.

Before accepting appointment, arbitrators have the duty to satisfy themselves that they are eligible to act in the dispute and that:

- (a) They are a Trading, Full Broker or Full Non-Trading Member or a nominated representative of a Trading, Full Broker or Full Non-Trading Member (Rule 2(b));



- (b) They, (i), are not age 75 or over, (ii), have not been retired from active trade for more than two years (Rule 2(b)), and (iii) have at least ten years experience in the trade;
- (c) They, their company or firm, have no direct or indirect interest in the transaction in dispute;
- (d) They have not already advised or been consulted by one of the parties to the dispute in respect of the specific dispute;
- (e) They are not suspended as an arbitrator.

The arbitrator/s may, at their discretion, seek legal advice; any expenses incurred being a charge against the arbitration.

Before proceeding with an arbitration, arbitrators must satisfy themselves that they have jurisdiction, that is, that there is prima facie evidence of a contract between the parties and that the agreement to arbitrate is subject to the Federation's Rules of Arbitration and Appeal. If they find that they have no jurisdiction they shall issue an award to say so. If they do have jurisdiction they shall proceed to deal with the dispute before them (Rules 5(a), (b) and (c)).

Once arbitrators have been appointed their legal duty is to adjudicate jointly and impartially on the dispute between the parties and not to act as agents or advocates of either party. They must act fairly to both parties and must observe the generally accepted but not specifically defined "rules of natural justice". They must ensure that each party is aware of the claims made against it and is given the opportunity to reply to them. Whilst arbitrators are expected to use their general trade knowledge and skill, they may not use any particular knowledge relating to the case in dispute, unless it is first raised with both parties and each is given the opportunity to comment or make submissions on it. Furthermore, arbitrators may not decide issues in dispute on a basis not argued or relied on by the parties without first giving the parties an opportunity to make submissions thereon.

Each arbitrator has the right and duty to examine the documentary evidence supplied by both parties to the dispute. If one party puts in any additional evidence that has not been supplied to the other, then copies of this must be sent to the other arbitrators and to the other party as the case may be. Arbitrators may request additional documents from either party and should advise both parties of such a request.

If at any stage it becomes evident that an arbitrator, his/her company or firm has any interest, direct or indirect, in the transaction in dispute then he/she should withdraw as no longer eligible.

Arbitrators have the duty to ensure that the time limits applicable to arbitrations laid down in the Rules are observed, subject to their discretion to extend them in certain circumstances.

On request, arbitrators have the duty to keep the Federation informed of the progress of their arbitrations.

Once arbitrators are in agreement about their decision, or by a majority, they have the duty to submit to the Federation a draft award, incorporating their reasons, for processing and signing by the arbitrators.

The third arbitrator, appointed by the Federation, shall act as chair of the tribunal, and be responsible for the active progression of the case and monitor/record the performance of the case.

Under no circumstances may an arbitrator disclose the contents of, or the decisions within, an award.

Arbitrators shall comply with the Code of Practice for Arbitrators.

## THE FEDERATION – RIGHTS AND DUTIES

The Federation, through its staff, administers the system of arbitrations. It has the right to be paid by the parties the costs and any direct expenses of arbitration services provided. It also processes (collects and passes on) the fees and expenses of the arbitrators.

The Federation has the following duties laid upon it under the Rules and/or by the Council:

- (a) On application by the other party, to appoint an arbitrator on behalf of a party that fails to appoint its arbitrator (Rule 2(d));
- (b) To appoint a third arbitrator in each case except where the parties agree to a sole arbitrator;
- (c) To appoint substitute arbitrators in certain circumstances (Rule 4(h));
- (d) To monitor the progress of arbitrations but without undue interference and to bring to the attention of the Council any cases of undue delay;
- (e) To process the awards of arbitrators;
- (f) To charge the Federation's fees as approved by the Council; and
- (g) On receiving payment of the fees, to issue the awards and arrange payment of arbitrators' fees and expenses;
- (h) The Federation's staff may not disclose any information concerning an award except in relation to posting of defaulters and there only to appropriate committee or Council members or in circumstances of legal obligation.

## ARBITRATION PROCEDURES

All documents submitted by the parties to the dispute should have been exchanged between the arbitrators and the parties prior to any deliberations, meeting or hearing.

If parties and/or their representatives attend the arbitration they are entitled to present further written evidence and/or oral submissions and/or witnesses, but each may only do so or be examined in the presence of all and must withdraw while the arbitrators consider the merits of the case.

An arbitration hearing is conducted on the "adversarial" system whereby the parties or their representatives appear before the arbitrator/s to present their cases. The claimants first make their submissions, the defendants then have the right to reply, and finally the claimants have the right to comment on the defendants' reply if new arguments arise. The arbitrator/s may then ask questions to clarify any points of evidence. Any cross claim procedural issues will be determined by the arbitrator/s.

Where a party makes application for the attendance of a witness at an arbitration hearing, it is good practice that a written witness statement is produced timely and as part of the evidence exchanges. In this way the parties' representatives will be able, in turn, to examine and cross examine the witness, who will be required to make and record a solemn declaration of truthfulness before testimony is given.

If the procedure does not involve a hearing, the same investigation of the documentary submissions of the parties takes place, but in an informal and abbreviated manner.

Arbitrators must decide the case on the arguments and evidence put before them by the parties or their representatives, but they are entitled to use their own knowledge of the trade (including knowledge of trade customs) in deciding the case and reflected in their award. However, if arbitrators have knowledge of facts relating to the dispute before them which have not been submitted by the parties, they should reveal these facts and invite the parties to comment on them. Likewise, they should not decide any issue on a basis not argued or relied upon by the parties without first inviting the parties to make submissions thereon.

In cases where arbitration samples are provided to the Federation, the Federation may dispose of such samples 3 months after an arbitration award has been issued unless a specific request has been made to and acknowledged by the Federation or an appeal against the award has been lodged.

## ARBITRATION AWARDS (RULE 6)

Draft awards and any documentation submitted to the Federation by arbitrators must give all the necessary information, in particular the full and correct names and address of the parties to the arbitration, and full contract details.

The award must state the findings of fact and the reasons that lead to the decisions of the arbitrators. It must be expressed in plain English that allows no interpretation other than that intended and must deal with all matters that have been raised by the parties. The Council has instructed that the staff responsible for arbitrations services should scrutinise all arbitration awards to ensure that they comply with the Rules and the Arbitration Act and that they contain no inadvertent ambiguities or expressions that might not be immediately clear in meaning.

If appropriate, the award should state clearly the sum to be awarded as damages or allowance, and by whom and to whom it is to be paid. It should normally be in the currency of the contract. More important, it should give figures for delivered weights, contract and settlement prices etc, sufficient to enable the total amount of damages to be calculated. The award should normally provide for the payment of interest, but if the arbitrators decide otherwise, the reasons for their decision should be stated. Under the 1996 Arbitration Act interest should be awarded up to the date of payment and arbitrators are allowed to award compound interest in which case the "breaks" should be determined. Arbitrators must decide their fees, which should normally be based on the time spent on the case. Notice of fees, by whom they are to be paid and, if by both parties, in what proportions, should also be submitted to the Federation and be evident in the award.

## APPEALS

### THE PARTIES – THEIR RIGHTS AND DUTIES

Each party has the right to appeal to the Federation provided that:

- (a) Payment of the fees and expenses of the arbitration is received within 42 days of the award date (Rule 6(b));
- (b) Notice of appeal is received by the Federation not later than 12.00 noon London Time on the 28th consecutive day after the date of the award is despatched (Rule 7(a)). A copy of the notice should also be sent to the other party.



A deposit is required and must be received by the Federation within 7 consecutive days of the notice of appeal (Rule 7(b)). A cross appeal requires payment of a deposit within 7 days of such cross-appeal notice.

If a party withdraws its appeal against an award of arbitration, the other party has the right to appeal against that award in accordance with Rule 6, except that notice of appeal must be received by the Federation not later than 12.00 hours London Time on the 21st consecutive day after the date of the Federation's notice to that party of the withdrawal (Rule 10(b)).

Each party has the right to attend the appeal and to present its own case or to appoint an eligible representative to do so (Rule 9(a)).

However, parties to an appeal may not be represented by or have present at the hearing, counsel or solicitor or any member of the legal profession wholly or principally engaged in private legal practice unless, in response to a request for legal representation by either party, the Board of Appeal decides in its sole discretion that the case is of special importance.

Where a party makes application for the attendance of a witness at an appeal hearing, a written witness statement is required as part of the evidence exchanges. In this way the parties' representatives in turn, can examine/cross examine the witness, who shall make and record a solemn declaration of truthfulness at commencement of giving evidence.

Each party to the appeal has the right to take up the award by paying the fees, costs and expenses. Usually, the party that lodged the appeal will pay any balance due, but both parties have the duty to do so.

Each party, by engaging in an appeal, assumes the responsibility of being liable to the Federation for all fees, costs and expenses incurred in connection with the appeal.

## THE BOARD OF APPEAL - RIGHTS AND DUTIES

Under the law of England, an appeal is a second tier arbitration and the members of the Board of Appeal have the same rights and duties as arbitrators. They must act fairly to both parties and must observe the generally accepted but not specifically defined "rules of natural justice". They must ensure that each party is aware of the claims made against it and is given the opportunity to reply to them. Before the commencement of an appeal hearing, each member of the Board has the duty to ensure that he/she is eligible to act in the dispute and, in particular, that:

- (a) He/she, his/her company or firm, has no direct or indirect interest in the transaction in dispute;
- (b) He/she has not advised or been consulted by any of the parties to the dispute in respect of the specific dispute.

Before proceeding with the hearing, the Board of Appeal must be satisfied that it has jurisdiction to act in the dispute.

Once a date for an appeal hearing has been set, only the Board of Appeal has the power to grant postponement of the hearing. Only the Board of Appeal has the right to decide whether legal representation of the parties at the hearing shall be granted.

The Board of Appeal has the right to require from time-to-time further deposits to be made by any party to the appeal. Each member of the Board has the right to be paid his/her reasonable expenses for attending a hearing of the appeal and his/her reasonable fee in respect of the appeal award.

Appeal Board members shall comply with the Code of Practice for Arbitrators.

## THE FEDERATION - RIGHTS AND DUTIES

The Federation, through its staff, administers the appeals system and in particular has the duty:

- (a) To provide the necessary facilities for appeal;
- (b) To appoint a chair and the other members of Boards of Appeal;
- (c) To provide the Secretary to the Board of Appeal; and
- (d) To process and issue the awards of Boards of Appeal.

The Federation has the right to be paid its fees and any expenses for appeals by the parties and the duty to arrange payment of Board members' fees and expenses.

## APPEAL PROCEDURES

An appeal generally arises out of a first instance Arbitration Award and in that context entails a complete rehearing of a dispute. Neither the parties nor their representatives can assume that evidence or information produced at the arbitration is available to the Board.

On lodging an appeal, the appellants will be asked to provide to the Federation the original or a good quality copy of the contract which is the subject of dispute and to name their authorised representative for the hearing. The respondents will be notified by the Federation that an appeal has been lodged and will be asked to name their authorised representative. The appellant shall provide to the other party and to the Federation their Outline of the Reasons for Appeal, within 21 days of the lodging of the appeal (Rule 7(e)). If respondents wish to cross appeal, they too shall provide to the Federation their Outline of the Reasons for cross appeal, within 21 days of the lodging of their cross appeal (Rule 7(e)).

Any new evidence not submitted at the first-tier arbitration and/or any law cases on which the parties wish to rely must be given to the other party and/or their representative in good time prior to the hearing of the Appeal. Boards generally set out a programme for such exchange. Documents produced at a later stage can be rejected by the board and or lead to a request for a postponement and, if granted, then the costs of the postponement would usually be for the account of the party producing the late document(s), irrespective of the outcome of the Appeal. Submission of late documents is discouraged. Ideally if the parties and/or their representatives can agree on a joint bundle of documents to be presented to the Board this saves considerable time in the hearing of the Appeal, with the consequent cost saving for all concerned.

Either party may state its case orally. Either party may put in a written statement of its case without having a representative present (Rule 9). It is, however, more usual for the parties' authorised representatives to provide to each member of the Board a typed statement of their cases with supporting evidence and then to read out/rely upon their statements and indicate the relevant evidence.

The parties or their representatives must provide for the hearing of the appeal seven copies of any written statement and documentary evidence that they wish to submit, one for each Board member, one for the other party or its representative (new evidence to be exchanged as stated above) and one for the Secretary to the Board, to be retained by the Federation.

At the appointed time for the hearing, the Board is convened. Each board member will have considered the Award of Arbitration, the contract which is the subject of dispute and, if appropriate, the relevant FOSFA contract form in force at the date of the contract, together with the appellant's outline reasons of the case to be argued, and similar cross appeal outline reasons if applicable, which the Secretary of the Board will have provided to them in advance of the hearing. Boards will adopt documents only deliberations where the parties agree on such a process in writing; similar to first tier cases, but there is a strong likelihood that the board will meet to deliberate the case.

The chair of the Board of Appeal is in charge of proceedings. All comments by representatives and questions to representatives from Board members must be addressed to or through the chair.

Where there is to be an oral hearing the representatives of the parties are required to present argument and evidence to support it. They must not make any points not directly relevant to the case nor any unfounded assertions. Representatives must not be permitted to interrupt the other during their presentation. Either party may call witnesses to give oral evidence and any such witness may be questioned by the other party's representative and by the Board. A solemn declaration of truthfulness will be required, to be read out and signed by witnesses appearing before a board of appeal.

After the preliminary introductions etc, the board chair will invite the appellant's representative to present their case. The Board may then ask questions to clarify any points that have been made.

The Board chair will then invite the respondent's representative to present their case and to deal with any points made by the appellant's representative. Again, the Board may ask questions to clarify any points.

The Board will then invite the appellant's representative to answer and to submit evidence relating to any new points raised by the respondent's representative, but may not introduce any new arguments unless the Board and the respondent's representative agree that it may be introduced. The respondent's representative will be given the right to reply to any new argument. Cross appeal procedures will be determined by the board. The Board may ask final questions. Thereafter the hearing is brought to a formal close.

The Board must decide the case on the arguments and evidence put before it by the parties' representatives and should disregard any evidence which is not relevant to the particular appeal.

The Board is fully entitled to use its own knowledge of the trade (including knowledge of trade customs) in arriving at its award. But if the Board has some particular knowledge of the facts of the case before it, independent of any evidence put forward by the representatives of the parties, and they are going to rely on that, then that particular knowledge should be drawn to the attention of the representatives to enable them to make any comments upon it.

Likewise, the Board should not decide any issue on a basis not argued or relied upon by the parties without first inviting them to make submissions thereon.



## APPEAL AWARDS

The award must state the findings of facts and the reasons that lead to the decisions of the Board of Appeal. It must be expressed in plain English that allows no interpretation other than that intended and must deal with all matters that have been raised by the parties. The Council has instructed that the staff responsible for arbitration services should scrutinise all appeal awards to ensure that they comply with the Rules and the Arbitration Act and that they contain no inadvertent ambiguities or expressions that might not be immediately clear in meaning.

If appropriate, the award should state clearly the sum to be awarded as damages or allowance, and by whom and to whom it is to be paid. It should normally be in the currency of the contract. More important, it should give figures for delivered weights, contract and settlement prices etc, sufficient to enable a total amount of damages to be calculated.

Parties should be mindful to clearly state all their heads of claims, including costs, failing which the board may decline to so award to a successful party.

The award should normally provide for the payment of interest but if the Board decides otherwise, the reasons for their decision should be stated. Under the 1996 Arbitration Act interest should be awarded up to the date of payment and Boards are allowed to award compound interest in which case the "breaks" should be determined.

The Board of Appeal must decide their fees, which should normally be based on the time spent on the case.

## ENFORCEMENT OF ARBITRATION AND APPEAL AWARDS

If a party to an award notifies the Federation that the other party neglects or refuses to honour the award, the Council of the Federation may post on the Federation's notice Board and/or circularise to members in any way thought fit notification to that effect.

Just to be told of the possible consequences of its neglect or refusal is often enough to cause a party to honour the award. But if not, the party in whose favour the award is made may have to seek the assistance of the court in the country of the party against whom it is made for enforcement of the award. The law of the Federation's contracts and arbitrations is English law. For parties in England there is a fairly simple procedure for applying to the High Court to obtain a judgement for execution of the award.

However, almost all Federation awards involve one party, and often both, from a country other than England. A party seeking to have an award endorsed in a country other than England should take legal advice on the procedures that apply. In almost all cases there will be a requirement for an authenticated copy of the award. In this, the Federation is able to assist by providing notarised copies of awards, legalised as necessary for enforcement in the appropriate country, together with statement and/or affidavits sworn by Federation staff to

the effect that the necessary procedures under the Federation's Rules of Arbitration and Appeal have been complied with. A fee will arise for this service if a public notary is to be involved and a Federation administration fee may also be applied.

Different countries have different laws and procedures for enforcement of foreign awards. But there are two international conventions to which most countries of the world are parties. They are the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards and the New York Convention of 1958 of the Recognition and Enforcement of Foreign Arbitral Awards. Under the Geneva Convention each contracting country is required to recognise as binding and to enforce awards made in the territory of another contracting state, under certain conditions. The New York Convention applied to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. One practical improvement introduced by the New York Convention is that it has restricted the grounds on which the court of the country in which a foreign award is sought to be enforced can re-examine it. Also, the onus of proving that the award was not enforceable is placed on the defendant.