

Extending Frontiers of International Commercial Arbitration in India

I. Introduction

With the world community inclined towards India as a destination for foreign investment, there has been a rise of international commercial transactions involving India or Indian parties. This growing trend has spurred the growth of International Commercial Arbitration in India. Arbitration is the most preferred choice for dispute resolution in such transactions.

Recognizing this growing trend, there has been a visible pro-arbitration trend in the interpretation of Indian arbitration law by the Indian Judiciary. The article discusses the pro-arbitration rulings wherein the courts in India have mainly dealt with:

- i. The rights of the parties who have chosen a foreign seat of arbitration to apply for interim reliefs in India, subject to the exigencies of the disputes;
- ii. The enforceability of the orders passed by an arbitral tribunal;
- iii. The scope of public policy for the purpose of enforcement of a foreign award in India.
- iv. The issue regarding two Indian parties choosing a foreign seat of arbitration.

II. International Commercial Arbitration

The term International Commercial Arbitration (**ICA**) is defined under the Arbitration and Conciliation Act, 1996 (**the Act**) under section 2(I)(f) to mean an arbitration which relates to disputes which have arisen out of relationships which are commercial in nature, and where one of the parties is a foreign national, or a body corporate incorporated outside India or an association or body of persons whose central management and control is exercised abroad.

III. Applicability of Part I and Part II of the Act to ICA

Notably, the Act is divided into three parts: Part I and II relate to arbitration proceedings and Part III covers Conciliation. The outline of the scheme of Part I and Part II is as follows:

- The provisions of Part I (section 2 to section 43 of the Act) deal with the procedure to be followed for invocation of arbitration, conduct of the arbitration, procedure for setting aside the Award, appeals and execution of the award and other ancillary provisions, where the seat of arbitration is in India.
- Whereas the provisions of Part II (section 44 to section 60 of the Act) deal with provision, from referring the parties to ICA, to enforcement and execution of the foreign awards passed under the New York Convention or Geneva Convention where the seat of arbitration is outside India.

From the above it is clear that the applicability of Part I and Part II of the Act has its roots in the seat of arbitration as the seat of arbitration ultimately determines the court which has supervisory control over the arbitration. However, with passing of the Arbitration Amendment Act, 2015 (**Amendment Act**), the controversy with regards to applicability of Part I of the Act to ICA, has been put to rest. Now the Act specifically provides under the proviso to amended section 2(2) that subject to the contract between the parties, the provisions of Part I of the Act for interim relief (*section 9*), procedure to seek assistance of court for evidence (*section 27*) and provision for Appeal (*section 37*) will apply to ICA, even if the seat of arbitration is outside India provided that the award made or to be made in such place is enforceable and recognised under the provisions of Part II of the Act.

IV. Parties to a Foreign Seated Arbitration Can Seek Interim Reliefs In India

The extent and scope of proviso to the amended section 2(2) of the Act was recently discussed by the Bombay High Court in ***Aircon Belbars FZE V. Heligo Charters Pvt. Ltd.***

The Bombay High Court held that the proviso to the amended section 2(2) of the Act clearly confers rights upon the parties to an arbitration seated overseas, to approach Indian courts for interim reliefs. The Bombay High Court also held that in order to exclude the applicability of Part I, the terms of exclusionary agreement should be specific and that a general agreement providing for a venue and the seat of arbitration will not imply exclusion.

Aircon Belbars FZE (**Aircon**) approached the Bombay High Court by way of an urgent application under section 9 of the Act, seeking injunction against *Heligo Charters Pvt. Ltd. (Heligo)* from selling an asset in India.

Heligo contented that Aircon cannot approach the Bombay High Court as Part I was not applicable to foreign awards passed in an arbitration seated outside India. In any case, the applicability of Part I of the Act is excluded by the parties on the basis of an express agreement to the contrary. Rejecting this contention, the court held that if the amended section 2(2) and its proviso is read in such a way to suggest that, a general arbitration agreement which provides venue and law of arbitration in effect impliedly excludes the application of Part I of the Act, it would definitely render the section and proviso utterly otiose. Therefore, exclusion must be in specific words, saying that Part I (or some section of Part I) will not apply to the arbitration between parties.

The second submission made by Heligo was that even if there is no exclusionary agreement, Aircon still cannot invoke provisions of section 9 of the Act, in view of the specific words appearing in the proviso to amended section 2(2) of the Act i.e. "enforceable and recognized under Part II of the Act" in that way implying that until the foreign award is enforceable under section 48 of the Act, no interim reliefs can be granted by a court in favour of Aircon.

Notably, section 48 of the Act enumerates the conditions based on which a foreign award is required to be tested by a court in India in order to determine whether the foreign award is enforceable in India.

While rejecting the second submission of Heligo, the Bombay High Court observed that actually what the proviso to amended section 2(2) seeks to do is to make available a remedy or recourse under section 9 to the parties holding a foreign award, pending the process contemplated under section 48 of the Act is completed. The court further observed that the amendment ensures that a court in India can interfere, in order to protect an asset from being diverted or dissipated and to ensure that the holder of a foreign award has an asset to proceed against if the enforceability of the Award succeeds the test of section 48 of the Act. Whereas if the Award fails the tests of section 48 the protective order under section 9 will come to an end.

In view of the observations of Bombay High Court in *Aircon's case* and as per the provisions of section 9 it can be safely concluded that the parties to an arbitration seated outside India can apply for interim reliefs to a court in India (where such assets are situated), before the invocation of the arbitration, during the continuance of the arbitration proceeding and after the award is

passed till the award is executed, subject of course to the facts of the matter and subject to the provisions of Part I not being expressly excluded by the parties in the arbitration agreement.

V. Enforceability Of The Orders Passed By The Arbitral Tribunal

As a major pro-arbitration reform, the Amendment Act has substantially amended the provisions of section 17 of the Act, bringing the powers of the arbitral tribunal at par with that of the courts to grant interim measures. Taking the powers of the arbitral tribunal a notch up, now the amended section 17 in terms provides that any order of the arbitral tribunal passed under section 17 shall be deemed to be an order of the court and shall be enforceable as an order of the court. However, the provisions of the amended section 17 do not apply to arbitrations which were initiated prior to 23rd October 2015, i.e. when the amendment act came into force.

In this context, it is relevant to note that the Supreme Court of India has in ***Alka Chandewar Vs Shamshul Ishrar Khan***, has held that failure to comply with the orders of the arbitral tribunal passed under section 17 of the Act, will constitute contempt and the remedy of the aggrieved party would be to apply to the tribunal under section 27(5) of the Act, for making a representation to the court to mete out appropriate punishment to the defaulting party. By way of this judgment the Supreme Court has virtually given the statutory recognition and teeth to the orders passed by the arbitral tribunal.

Since the amended section 2(2) includes section 27 of the Act, therefore unless there is a contract to the contrary, by virtue of this judgment, it may be possible for the parties to an ICA to approach the

courts in India against the defaulting party after making a representation to the arbitral tribunal under section 27 of Act, in effect making the orders of the arbitral tribunal also effective in India.

VI. Scope Of Public Policy Under Section 48 For The Purpose Of Enforcement Of A Foreign Award In India.

In order to enforce the foreign award in India passed under the New York Convention it is necessary to seek enforcement of the award under section 48 of the Act. The section enumerates the conditions under which the enforcement of the foreign award may be refused by a court.

From a bare reading of section 48 of the Act, it can be inferred that the conditions to be fulfilled before enforcement of the award are to satisfy the court about the validity, legality and correctness of award, so that it can be executed as a decree in India. Enforcement of the award can be refused if the courts find that the subject matter of the award is not capable of settlement by arbitration law of India, or that the enforcement of award would be contrary to the public policy of India. The explanation further provides that the enforcement of the award can also be refused if the making of the award was induced by fraud or corruption.

More often than not, enforceability of a foreign award hinges on the interpretation of public policy of India, in this regard the Supreme Court of India in the judgment of ***Shri Lal Mahal Ltd. V. Progetto Grano*** has held that the "public policy of India", as appearing in section 48 of the Act has been used in a narrower sense and to attract the bar of public policy the enforcement of the award must involve something more than the violation of law of India. Since recognition and enforcement of foreign

awards is governed by the principles of private international law, the expression "public policy" must necessarily be construed in the sense the doctrine of public policy as applied in the field of private international law. Accordingly, the Supreme Court held that the enforcement of a foreign award would be refused under section 48 only if such enforcement would be contrary to:

- (i) fundamental policy of Indian law; or
- (ii) the interests of India; or
- (iii) justice or morality.

In *Shri Lal Mahal's Judgment* the Supreme Court has also held that section 48 of the Act, does not give an opportunity to the court to have a '**second look**' at the foreign award. The scope of inquiry under section 48 of the Act, does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of a IA do not lead necessarily to excuse an award from enforcement on the ground of public policy.

Thus, *Shri Lal Mahal's Judgment* has substantially reduced the interference of the courts in India while entertaining an application under section 48 of the act for enforcement of a foreign award thereby ensuring that such applications are not refused by the courts simply by invoking the plea of public policy of India.

VII. Can Two Indian Parties Choose A Foreign Seat Of Arbitration

Recently the Delhi High Court in the case of ***GMR Energy Limited Vs Doosan Power Systems India***

Private Limited, concluded that the two Indian parties can choose a foreign seat of arbitration and such clauses between two Indian parties are not in derogation of Indian law. Although there are no authoritative decisions of the Supreme Court which in terms decide this issue, after considering various other rulings of the Supreme Court which touch upon this issue, the Delhi High Court came to this conclusion.

Another important issue decided by the Delhi High Court in this judgment is that the Arbitral Tribunal has jurisdiction to pierce the corporate veil. Relying upon the doctrine of single economic unit, the Delhi High Court went on to hold that issues concerning alter ego can also fall within the jurisdiction of the arbitral tribunal.

In Conclusion

At this juncture, it is relevant to note that recently the Union Cabinet has approved the Arbitration and Conciliation (Amendment) Bill, 2018 for introduction in Parliament, to further amend the Act, in order to strengthen institutional arbitration in India, and addresses some other issues which were not addressed in the Amendment Act of 2015. In view of the above, it is evident that the Indian Parliament and Indian Judiciary have very well accepted the trend prevailing in the world community of promoting arbitration as a mechanism for resolution of commercial disputes, minimizing court interference in the arbitration process and making arbitration a cost effective and expeditious mode of dispute resolution.

The content of this article is intended to provide a general guide to the subject matter and should not be construed as legal