JUDICIAL INTERFERENCE IN AN ARBITRATION PROCEEDING – INTERNATIONAL POSITION

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Abstract-Arbitration has played a major role in resolving the disputes of the commercial and technical in nature and plays a prominent role as an alternative to formal settlement mechanism. The courts are kept away by the UNCITRAL Model law, but still some states have incorporated provisions for involvement in the arbitration proceedings at different stages. The paper analyzes different Arbitration Act in the international perspective with reference to judicial interference to reach a conclusion on how the model law is implemented in these countries.

Key words: Arbitration, Judicial Interference, Arbitration agreement, UNCITRAL

I. INTRODUCTION

The role of State Courts is critical as they provide essential support for the arbitral process. As Professor Jan Paulsson has noted, "the great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself".[1] Global convergence and harmonisation in international commercial arbitration are particularly evident in the area of judicial control of a foreign arbitral award. In most countries, the possibility to bring before a court an action for annulment of an arbitral award rendered abroad is excluded. On the other hand, the Supreme Court of India has over the years adopted a very aggressive nationalistic posture in deciding international arbitration disputes, and is an outlier in this arena. In cases involving foreign arbitral disputes, the Supreme Court has consistently revealed an alarming propensity to exercise authority in a manner contrary to the expectations of the business community.

Arbitration is private in nature, however parties still need courts to enforce the arbitration agreement and also enforce arbitral awards. The starting point for any discussion of the role of courts in arbitration proceedings is under the UNCITRAL Model Law on International Commercial Arbitration ("MAL") which most of the member states have adopted while enacting laws relating to international commercial arbitration as in India. Article 5 of the Model Law clearly provides that the Courts shall not intervene in matters governed by this law unless provided in this Law. However, as to Article 5, the *UNCITRAL Analytical Commentary on the Draft Model Law* states[2]:

"Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of the courts. It merely requires that any instance of court involvement be listed in the model law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision is to be expected seems beneficial to international commercial arbitration."

The Indian Law has also embraced the provision contained in Article 5 in the form of Section 5 of the Arbitration and Conciliation Act, 1996 which contains a non-obstante clause providing that *"Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part"*. Thus, the Indian Law has also recognized the principle of non-intervention by Courts in the arbitral process except where the Act allows the same.

The role of domestic courts, in particular the Indian national courts in international commercial arbitration can be studied based on the major concepts of international commercial arbitration contained in the various provisions of the Indian Act, without which the arbitral process cannot hold.

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[1] J Paulsson, *Arbitration in Three Dimensions,* LSE Legal Studies Working Paper No. 1 2.2010 <http://ssrn.com/abstract=1536093>) at 2

[2] *Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration*, XVI UNCITRAL Y.B. 104, 112, Article 5, 2 (1985).

II. THE ARBITRATION AGREEMENT

Domestic courts play a big role in reinforcing party autonomy by requiring them to refer disputes to arbitration where they have a valid arbitration agreement which has not been mutually abandoned. Where there is a valid arbitration agreement between the parties and one party goes to the court for litigation, if the other party invokes the valid arbitration agreement to the court, the court should stay any action brought before it if the matter is subject to the arbitration agreement. The domestic courts strongly encourage the resolution of disputes through arbitration thus promoting the growth of jurisprudence in international commercial arbitration.

In India, *Section 8* of the Act states that a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement shall refer the parties to arbitration. The only condition being that the party objecting to the court proceedings must do so no later than his first statement on the substance of the dispute. In the meanwhile, the arbitration proceedings may be commenced and continued with and an award rendered.

It is to be noted that Section 8 departs from the corresponding provision of the Model Law whereby a plea that that the arbitration agreement is 'null and void inoperative or incapable of being performed' cannot be taken up in the Courts. This departure made by the Indian law demonstrates the legislative intent to keep the courts out and let the arbitral stream flow unobstructed.

Arbitration is based on a valid agreement to arbitrate. Both the UNCITRAL Model Law and The New York Convention require that arbitration agreement be in writing and signed by the parties. This calls for two things from the courts. First, it must determine whether an arbitration agreement is valid and then whether to enforce it. The courts generally have developed a progressive approach in interpreting the validity of arbitration agreements. In determining the validity of arbitration clause, most domestic courts progressively look at the substance, rather than form, thereby enforcing parties' contractual intentions[3].

III. THE CONCEPT OF ARBITRABILITY

This concept relates to disputes that can be settled by arbitration, and normally depends on public policy of states. The courts role is to decide whether a dispute is arbitrable or not. In recent times, some courts have expanded the scope of arbitration to cover subjects like securities and antitrust law, which traditionally are regarded as public policy issues. It is obvious that the courts attitude has been influenced by the need to promote international trade as well as attaining some uniformity in international commercial arbitration. The US Supreme Court in particular holds the view that parties must be made to respect arbitral agreements whilst the issue of public policy is left to reviewing courts to consider, when it comes to enforcement of awards.

Kopetenz-Kompetenz: The doctrine of competence-competence is largely based on Article 16 of the UNCITRAL Model Law which provides that: "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause".[4]

The underpinning of the competence-competence principle is that the tribunal's competence to rule over its own competence is the basic power for the tribunal to work properly, even though the tribunal's decision on this issue might be varied or cancelled by the court. It is observed that if arbitrators could not determine questions as to their own jurisdiction, a recalcitrant respondent could easily frustrate the parties' agreement to have their dispute decided by arbitration or at least create considerable delay by merely contesting the existence or validity of the arbitration agreement in court. Further observation also shows that such a situation would seriously undermine arbitration as an effective means of private dispute resolution and deprive it of its attraction.[5]

By recognizing the powers of the arbitration tribunal to determine their own jurisdiction where the same is contested, domestic courts reduce on their levels of interference thus promoting international commercial arbitration.

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[3] Redfern and Hunter at page160.

[4] Clause (2) of Article (16) provides that plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator.

[5] Park William W, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz–Kompetenz- Has Crossed the Atlantic*?, Arbitration Intl, (1996) 137.

Appointment of Arbitrators: Section *11* deals with the appointment of the arbitrator by the court when one of the parties refuses to follow the provisions of the arbitration agreement regarding the conduct of the arbitration proceedings or when either the parties fail to appoint the arbitrator or the two appointed arbitrators fail to appoint a third arbitrator in the absence of an agreement.

The Hon'ble Indian Supreme court in the case of *SBP & Co. v. Patel Engg Ltd.*[6] has held that the power under Section 11 is a judicial power and the same can be reviewed under Article 136 of the Constitution of India. The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the judgment. These will be, his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators.

IV. CHALLENGES TO ARBITRATORS

Arbitrators are enjoined to be independent and impartial in the performance of their duties. Parties in arbitration therefore can challenge arbitrators who fail to observe this duty. The courts are normally called upon to set aside arbitral awards on grounds that the tribunal was partial or bias. The domestic courts serve as a check on arbitrators, thereby preserving the integrity and confidence in the arbitral process. Domestic courts generally, exercise this supervisory power on good grounds only. For example, courts will generally refuse to uphold a challenge on bias, when the grounds for the objection were known but were not taken promptly.

Conceptually there is a distinction between impartiality and independence. But under the English Arbitration Act 1996, only "impartiality" is a ground for challenging the appointment of arbitrator. The effect of this missing word is reflected in AT&T Corporation v. Saudi Cables Corp.[7] where the commercial court rejected a post-award challenge based upon the alleged lack of independence of the Chairman of an ICC Arbitral Tribunal who failed to disclose this status as a non-executive director of a competitor of the claimant that had completed with claimant successfully to obtain the multibillion dollar intentional contract. In another case based on New York Convention, the US district court enforced the award even though the arbitrator appointed by plaintiff had been its counsel in at least two other legal proceedings.[8] The court held that even though the public policy generally favoured "full disclosure of any possible interest or bias, the stronger public policy in favour of the international arbitration must prevail to enforce the award."[9]

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VII. DOMESTIC COURT ASSISTANCE IN TAKING EVIDENCE

Article 27 of the Model law provides that the arbitral tribunal or a party with the approval of the arbitral tribunal may request from competent domestic court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence. However, this provision applies only within the state of the seat of arbitration according. Section 27 of the Indian Act goes beyond the Model Law as it states that any person failing to attend in accordance with any order of the court or making any other default or refusing to give evidence or guilty of any contempt of the arbitral tribunal, shall be subject to like penalties and punishment as he may incur for like offences in suits tried before the court.

This provision applies only within the state of the seat of arbitration according to Article 1(2) of the Model Law. In fact, the Working Group drafting Article 27 felt that it might be useful to address judicial assistance in aid of foreign arbitrations. It attempted to adapt the international cooperation between states based on the principle of reciprocity to the structure of the Model Law. This attempt finally failed[10] and the Model Law consequently remained silent on this issue.

Article 27 of the Model Law therefore does not allow requests for judicial assistance from outside the place of arbitration. The scope of Article 27 of the Model Law and their equivalent provisions in the

[6] (2005) 8 SCC 618.
[7] Q.B. 1999
[8] *Fertilizer Corporation of India v. IDI Management Inc.*, 517 F Supp. 948.
[9] Ibid
[10] Holtzmann Howard M. & Neuhaus Joseph E., *A Guide to the UNCITRAL Model Law*, 1989, 737.

national arbitration laws remain narrow if domestic court's assistance is to be utilized in the promotion of international commercial arbitration.

Recognition and Enforcement of award by domestic court: The fact that arbitration is binding and final can only be affirmed by the courts. If a losing party fails to satisfy the award, the victorious party would invoke the powers of the court to enforce the award just like a court judgment. A party is also allowed to challenge an award on the ground of uncertainty or ambiguity as to its effect, or where a party is allowed to appeal to the court on a question of law arising out of the award. There is universal consensus supporting domestic courts role in recognizing and enforcing arbitral awards, without which arbitration will lack efficacy. Courts are generally inclined to enforce arbitral awards subject only to procedural errors and issues of public policy.

Setting aside of arbitral awards: Article 34 of the UNCITRAL Model Law provides the grounds for setting aside of arbitral awards by national courts. The grounds include:

1. Incapacity of the parties to the arbitration agreement;
2. Lack of proper notice as to the appointment of the arbitrator;
3. The award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement;
4. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
5. The subject-matter of the dispute is not capable of settlement by arbitration under the law of this state; or
6. The award is in conflict with the public policy of this state.

In the Indian scenario, courts have often been confronted with the issue of interpreting '*public policy'* for the purpose of setting aside of arbitral awards. A narrow interpretation was given to the term 'public policy' whereby if enforcement of a foreign award was to be considered as capable of violating public policy something more than contravention of the law of India was required. Enforcement of a foreign award could be refused only if it would be contrary to: (a) the fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality.[11]

However, this position has been altered whereby the Hon'ble Supreme Court has added an additional ground of "patent illegality" to the concept of public policy[12] , thus widening the scope of judicial review on the merits of the decision. 'Patently illegal' or 'blatant illegality' or 'error on the face of the record' has a few definitions, it can mean: an error of law that goes to the root of the matter; or a violation of the constitution or a statutory provision; or it may be inconsistent with common law.[13] This inclusion of an additional ground makes arbitration more susceptible to judicial review; defeating the very objective of arbitration as a dispute settlement procedure. This decision has been severely criticized as a careful analysis of the *1996 Act* shows that the two conditions for setting aside the award, contrary to the express provisions of the contract or substantive law, are already arguably available under ss 34(2)(a)(iv) and 34(2)(a)(v) respectively.72 Section 34(2)(a)(iv) relates to the setting aside of the arbitral award if it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration. Also, s 34(2)(a)(v) deals with the setting aside of the award if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. Therefore, to include illegalities under a new head of public policy is, arguably, unnecessary.

However, the Indian Apex Court[14] has recently narrowed down the scope of application of public policy ground in the context of challenging foreign arbitral awards. The Court has held that when setting aside foreign awards on the ground of public policy under Section 48(2)(b) , the narrow interpretation given in *Renu Sagar* is to be applied. Therefore, such a challenge to set aside foreign awards does not permit the Indian courts to revisit the merits of an award. In doing so, the Court overruled its previous decision in Phulchand[15] wherein the court had extended the wide meaning given to '*public policy'* for domestic awards to foreign awards as well.

[11] Renusagar Power Company Ltd v General Electric Company (1993) Indlaw SC 1441.
[12] *Oil and Natural Gas Corporation vs. Saw Pipes* (2003) 5 SCC 705.
[13] O P Malhotra and Indu Malhotra, *Law and Practice of Indian Arbitration and Conciliation*, 2006, LexisNexis 1175.
[14] *Shri Lal Mahal Limited v Progetto Grano Spa1 Supreme Court of India* (2013) Indlaw SC 413.
[15] *Phulchand Exports Limited v OOO Patriot* (2011) Indlaw SC 737.

VIII. INTERIM RELIEF

Arbitration is a forum for adjudication that is a departure away from courts and in fact, court interference has been considered a bane to its development. However, under arbitration procedural statutes and rules, courts not only have the power to grant interim measures but this power, in most cases, is wider than that of a Tribunal. Article 9 of the UNCITRAL Model Law dealing with arbitration agreements and interim measures granted by courts lays down as under: '*It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure*'

It appears that the scope for application of an interim measure under *Section 9* of the Indian Act is as wide as the scope under Article 9 of the UNCITRAL Model Law. Section 9 allows a party to seek those interim measure laid down under sub-clause (a) to (d) as well as 'any other measures' a court deems appropriate under sub-clause (e). Moreover, Section 9 does not limit the grant of interim measures to the subject matter of the dispute and secondly, sub-clause (e) grants courts the discretionary power to grant such interim measures as appears just and convenient.

One of the pertinent questions that arises under Section 9 is that of its applicability to foreign awards in light of the growing international commercial arbitration.. Section 2(2) of the Arbitration and Conciliation Act, 1996, contained in Part I of the Act, states that "This Part shall apply where the place of arbitration is in India." Article 1(2) of the UNCITRAL Model Law provides: "The provisions of this Law, except articles 8, 9, 35 and 36, apply *only* if the place of arbitration is in the territory of this State." In *Bhatia International v. Bulk Trading S A*[16] , the Supreme Court has held that Part I of the Arbitration Act, dealing with the power of could be applied to arbitration disputes with a foreign seat unless the parties specifically opted out of such an arrangement. However, the Hon'ble Indian Supreme Court in the landmark case of *BALCO v. Kaiser Aluminium*[17] has clearly in a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996, is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.

The Delhi High Court in *Olex focas Pvt. Ltd v. Skoda Export Co Ltd*.,[18] held that the Court have been vested with the jurisdiction and powers to grant interim relief in appropriate cases. This case was with regard to the protection and preservation of the disputed property.

Emergency Relief vis – a – vis Interim Relief in International Commercial Arbitration: International arbitration has significantly grown in prevalence in the last 50 years as commercial parties seek to minimise the potential uncertainties of local litigation procedures. However, when international parties seek to resolve a dispute through international arbitration, arbitrators and arbitral tribunals have, until recently, been hampered in providing the same level of emergency relief. Therefore, arbitral institutions in their attempts to improve the functioning and practical benefits of their rules, have started developing expedited or emergency procedures to assist parties in circumstances where they need urgent interim relief, before an arbitral tribunal has been formed.

Prior to the development of these procedures, parties would normally have to apply to national courts for emergency relief or await the constitution of the tribunal. Additionally, arbitration clauses in agreements governing international transactions often contained provisions allowing the parties to apply to courts for interim or preliminary relief.

Numerous institutions have now introduced provisions that provide for some form of emergency relief, either through the appointment of an emergency arbitrator (EA) or through the expedited formation of the tribunal. While approaches to emergency procedures vary to some extent from institution to institution, expedited formation of the tribunal and EA's has developed as common practical alternatives.

Emergency relief is sought for when the arbitral tribunal has not be constituted. The parties who have agreed to arbitrate at the arbitral institutions are given the opportunity to present their interim issues in front of an Emergency Arbitrator (EA) or apply for the speedy constitution of an arbitral tribunal. In 1990, the ICC launched its "Pre-Arbitral Referee Procedure", arguably the first attempt by a major institution to provide emergency relief prior to the constitution of a tribunal, setting out the procedure for obtaining urgent interim relief prior to the constitution of the arbitral tribunal. It is to be noted that the

[16] (2002) 4 SCC 105.
[17] (2012) 9 SCC 552.
[18] AIR 2000 Delhi 161.

same is not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority. Additionally, unlike the emergency arbitrator regimes of some other arbitration institutions, which can only be invoked after a notice of arbitration has been filed, the ICC emergency arbitrator procedure is available immediately, and can be invoked even before a Request for Arbitration is filed. This is because the new provisions are intended to deal with urgent situations that cannot await the constitution of the arbitral tribunal. However, if the application is made before a Request for Arbitration is filed, the applicant must file a Request within 10 days, failing which the emergency arbitrator procedure will be terminated.

IX. SECTION 9 VIS – A – VIS SECTION 17 OF INDIAN ARBITRATION ACT

Judgment of Delhi High Court in *NHAI v. M/s China Coal Construction Group Corporation*[19] the Court held that the pendency of an application under Section 17 before the arbitral tribunal does not denude the court of its power to make order of interim protection under Section 9 of the Act. The Supreme court in *M/s Sundaram Finance Ltd v. M/s NEPC India Ltd*[20], also observing in Paragraph 12 thereof that though Section 17 gives the arbitral tribunal the power to pass orders, the same cannot be enforced as orders of a court and it is for this reason only that Section 9 gives the court power to pass interim orders during the arbitration proceedings.

The Supreme Court, in *Sunderam Finance Ltd. v. NEPC India Ltd*.[21], held that Section 9 is available even before the commencement of the arbitration. It need not be preceded by the issuing of notice invoking the arbitration clause. This is in contrast to the power given to the arbitrators who can exercise the power u/s 17 only during the currency of the Tribunal. Once the mandate of the arbitral tribunal terminates, Section 17 cannot be pressed into service.

It is to be noted that in case interim relief, the same can be sought before after and during the arbitrations proceedings from the Courts. However, in the case of emergency relief, the arbitral institutions intervene before the constitution of the arbitral tribunal itself. Under the Indian Law, interim relief can be sought at anytime from the Courts under Section 9 as discussed above and during the arbitration proceedings from the arbitral tribunal under Section 17. Once a certain interim relief is sought from the Tribunal under Section 17, the same cannot be claimed for under Section 9 from the courts.[22]

Risk Premium and minimum judicial intervention standard: Foreign direct investment flows towards locations with a strong governance infrastructure, which includes how well the legal system enforces contracts and protects property rights. A legal system's protection of property rights and the enforcement of contracts lower transaction costs of trade and allow resources to be transferred to those who can use them in the most productive manner. Internationally, arbitration has evolved as the major means to minimise transaction costs of trade. However, the decisions of the Supreme Court of India have the exact opposite effect. Post Bhatia International and Venture Global, parties are more hesitant in dealing with India, and insist on terms in agreements that compensate for the legal risk. The 'risk premium' makes a plethora of transactions commercially unviable. Consequently, the Supreme Court decisions are disincentives to any long-term investment transaction and to entrepreneurial cooperation.[23]

In April 2010, the Ministry of Law and Justice, with the intention of reinforcing the 'minimum judicial intervention' standard, had proposed an amendment to correct the error made and followed since the decision in Bhatia International. The proposed amendment to Section 2(2) of the 1996 Act seeks to insert the word "only" with a view to explicitly limit the operation of Part I of the Act to domestic arbitration, albeit, with a solitary exception in the context of interim measures and assistance in collection of evidence. Unfortunately, no progress has since been made towards introducing the arbitration amendments in Parliament.

Therefore, the only light at the end of the tunnel is the constitutional bench reference, which will come up for hearing on January 10, 2012. It is to be hoped that the Supreme Court will reverse these deleterious holdings and assure the business community of its commitment in protecting and promoting international commercial arbitration in India.[24]

X. CONCLUSION

[19] AIR 2006 Delhi 134
[20] AIR 1999 SC 565.
[21] AIR 1999 SC 565.
[22] *Sri Krishan v. Anand* , OMP No. 597/2008, Delhi High Court (Unreported).
[23] Tyagi, K.S, *A Second look at International Arbitration*, The Hindu, December 22, 2011.
[24] ibid

International commercial arbitration is one of the leading methods for the resolution of commercial disputes between parties from different countries and legal systems. But arbitration cannot be carried on independently without the support of the Courts as even the most enthusiastic proponents of party autonomy are bound to recognise that they must rely on the judicial arm of the state to ensure that the agreement to arbitrate is given effect to. However, only where the departure from the agreed method is of a degree which involves real injustice, is the court entitled to intervene, and even then the intervention must be so crafted as to cause the minimum interference with the forward momentum of the process.

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