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ENFORCEMENT OF FOREIGN EMERGENCY ARBITRATION

AWARD: AN UNTURNED PAGE?

~ *Navanshu Pawar*

Introduction

With the visible issues in litigation, like the pendency of cases for a long time and the greater financial burden on parties, Alternative Dispute Resolution (ADR) mechanisms are gaining popularity in India. Although there are some restrictions on the cases that can be referred to ADR mechanisms, they are still proving their worth due to its speed fast mechanisms, flexibility, confidentiality and neutrality. One of the prominent forms of ADR mechanism is Arbitration. Arbitration primarily governed by Arbitration and Conciliation Act, 1996. There have been various amendments and upgradation in the statues for effective implementation and enforceability of arbitral award, still the concerned statute is silent on the matter of emergency arbitration, which is primarily interpreted with the precedents in force. Although the Arbitration and Conciliation has quite clear provisions for both domestic and foreign arbitration but, the provision for emergency arbitration seems missing.

Foreign emergency arbitration award

Although the arbitration in itself is a speedy process when compared to litigation, but in the cases when there's no acting tribunal and less time to setup one, Emergency arbitration turned out to be a ray of light in the dark, ensuring interim reliefs without much wastage of time. Section 9 of Arbitration and Conciliation Act, 1996¹ deals with the subject of interim reliefs but only final awards are enforceable under this and section 17 of 1996 act applies to only part 1 of the concerned Act (in the domestic cases) but not in the foreign seated arbitration. In the case of Bharat Aluminium Co. V. Kaiser aluminium technical service inc.² (famously known

¹ The Arbitration and Conciliation Act, 1996, No. 26 of 1996 (Ind)

² Bharat Aluminium Co. V. Kaiser aluminium technical service inc. (2012), 9 SCC 552

as BALCO case), honourable Supreme Court held that the Part 1 of Arbitration and conciliation act 1996³ would not be applicable to international commercial arbitration and would be only applicable to domestic arbitration of the country. It overruled the judgement of itself in the cases of Bhatia Int. V. Bulk Trading S.A⁴ of 2002 and Venture Global Engineering V. Satyam Computer Service Ltd⁵ of 2010.

The honourable Calcutta High Court in the case of Serajuddin and co. V. Michael Golodetz and ors.⁶ held the essentials for the term foreign arbitration- it should be held in a foreign land, by foreign arbitrator and laws applicable should be foreign and one of the party must be involved as a foreign national. The facts of the cases fulfilling all the condition will suffix as foreign arbitration and will be dealt accordingly. This ruling of honourable court clarified the confusion between the terms foreign and international arbitration by clearly setting a checklist of four essentials for determining a case as of foreign arbitration. Thus, foreign emergency arbitration is simply an arbitration proceeding conducted by foreign institution (example SIAC) according to foreign laws (example Singapore laws), in foreign land and passing the award or interim relief without wasting much of time.

Do we have laws for enforcement of foreign emergency arbitration in India?

In India, arbitration is primarily governed by Arbitration and Conciliation Act, 1996⁷. The 1996 act governs both domestic as well as foreign arbitration and its awards, in the part 1 and 2 respectively. Although the statute speaks about the foreign arbitration, under chapter 1 and 2, the two conventions are clearly defined as New York Convention awards and Geneva Convention awards respectively in part 2 of 1996 act. Both of these doesn't expressly provide provisions for emergency arbitration and its enforceability. Earlier the precedents Raffles Design International India Pvt. Ltd. Vs. Eudcomp Professional Education Ltd and Ors.⁸ In which honourable High Court of Delhi, although granted interim order which was similar to the concerned arbitral tribunal, but held that foreign seated arbitration can't be enforced in India. This stance was quite similar to the case of Avitel Post Studioz Limited & Ors. V. HSBC

³ The Arbitration and Conciliation Act, 1996, No. 26 of 1996 (Ind)

⁴ Bhatia Int. V. Bulk Trading S.A & Anr (2002), 4 SCC 105

⁵ Venture Global Engineering V. Satyam Computer Service Ltd. (2010), AIR 2010 SUPREME COURT 3371,

⁶ Serajuddin and co. V. Michael Golodetz and ors. (1959), AIR1960 CALCUTTA 47

⁷ The Arbitration and Conciliation Act, 1996, No. 26 of 1996 (India)

⁸ Raffles Design International Indian Pvt. Ltd. Vs. Eudcomp Professional Education Ltd & Ors., (2016)

PI Holdings (Mauritius) Limited⁹, in which Bombay High Court order interim relief under section 9 of Arbitration and Conciliation Act, 1996¹⁰ but held the award as unenforceable.

In 2014, the 20th Law Commission of India in its 246th report¹¹ suggested an amendment in the Sec. 2 (1) (d): definition of Arbitral Tribunal, to wider its ambit and include emergency arbitrator inside its purview and give it a statutory recognition. The amendments of 2015 and 2019 in Arbitration and Conciliation Act 1996¹², didn't implement the suggestion of Law Commission, leaving the matter of emergency arbitration homeless in Indian system.

The biggest breakthrough for emergency arbitration in India was the landmark case of Amazon NC Investment Holdings LLC V. Future Retail Ltd¹³. In this case Supreme Court approved enforceability of emergency arbitration award and clarified that '*definition of term Arbitral Tribunal in Section 2 (1) (d) of Arbitration Act is broad enough to include emergency arbitrator*'. The honourable Supreme Court in this decision has taken a progressive step towards arbitration resolution and laid its emphasis on the matter that the parties involved with their full autonomy has chosen to abide by emergency arbitrator, its decision and rules of institution and there's been no express or implied, contradiction or restriction against emergency arbitrator, then their awards shall be covered under clauses of arbitration act. Although the judgement of Supreme Court in Amazon case paved a way for emergency arbitration but it still left the question of foreign emergency arbitration untouched.

Conclusion

The enforcement of foreign arbitration always poses challenges due to conflicts of laws and jurisdictions of different parties involved of different nations. This challenge is even enlarged due to absence of any statute or precedent guiding or governing it. In India, due to silence of statutes, the question and doubt on the enforcement of foreign emergency arbitral award still stands unattended. The upcoming time might bring the necessity of amendments in the Arbitration and Conciliation Act, 1996¹⁴ or bringing in some more new statutes including the provisions for recognition, enforcement and applicability of foreign emergency arbitration award.

⁹ Avitel Post Studioz & Ors. V. HSBC PI Holdings (2020), AIR ONLINE 2020 SC 691

¹⁰ The Arbitration and Conciliation Act, 1996, No. 26 of 1996 (Ind)

¹¹ Law Commission of India, Amendments to Arbitration and Conciliation Act 1996 (Law no. 246, 2014), page 37-39

¹² The Arbitration and Conciliation Act, 1996, No. 26 of 1996 (India)

¹³ Amazon NC Investment Holdings LLC V. Future Retail Ltd. (2021), AIR 2021 SUPREME COURT 3723

¹⁴ The Arbitration and Conciliation Act, 1996, No. 26 of 1996 (Ind)

