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With this thought, we hereby present to you

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APPLICABILITY OF SECTION 9 ON INTERNATIONAL COMMERCIAL ARBITRATIONS

By Eesha Kalve and Simran Pahwa

ABSTRACT

The paper is a doctrinal study relying on secondary data sources to analyse and understand the scope and extent of Section 9 of the Arbitration and Conciliation Act of 1996, and its subsequent amendments concerning international commercial arbitration and awards thereof. The paper follows the evolution of law in this regard and the shift in the stance of the judiciary. It also discusses how the Hon'ble Supreme Court has interpreted the issue in multiple cases such as Bhatia International, Bharat Aluminium Co., Videocon, et al. Lastly, it attempts to analyse the judicial pronouncement and existent ambiguities which are left unanswered to form a coherent answer to the question- whether Section 9 applies to international commercial arbitrations, and to what extent.

INTRODUCTION

1. Arbitration is a legally and internationally recognised alternate dispute resolution method that enables parties to bypass cumbersome court litigation to settle disputes. Arbitrators and the seat of arbitration are decided by the parties themselves and this tribunal has the sole jurisdiction over the dispute to the extent of the contract in place in keeping with the settled law on arbitrability. The Act of 1940 and thereafter the present Act of 1996 aim for minimal judicial intervention and speedy disposal of disputes. With the growing international commercial disputes, various amendments have been brought in force to the Act of 1996 which are essentially based on UNCITRAL Model Law and Rules.

LITERATURE REVIEW

2. Historically, Part I of the Act of 1996 applied to arbitrations where the place of arbitration is in India. Part II contained provisions for enforcement of certain foreign awards. Sec. 9 in part I contains provision for interim measures, etc. by Court. This article focuses on the power of the

Court to order interim measures essentially concerning international commercial arbitration. Sec. 2(f) of the 1996 Act defines international commercial arbitration as-

“relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

- (i) an individual who is national of, or habitually resident in, any country other than India; or*
- (ii) a body corporate which is incorporated in any country other than India; or*
- (iii) 2 *** an association or a body of individuals whose central management and control is exercised in any country other than India; or*
- (iv) the Government of a foreign country”[1]*

3. On the applicability or otherwise of section 9 of the act to international commercial arbitration which takes place outside India, the Hon’ble Supreme Court in the case of *Bhatia International*[2] was pleased to hold that part 1 of the Act is not intended to hold that excluded even about such arbitrations. It was observed thus:

“28. Now let us consider Section 9. It reads as follows:

9. Interim measures, etc. by a court.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced following section 36, apply to a court:-

- (i) for the appointment of a guardian for a minor or a person of unsound mind for arbitral proceedings; or*
- (ii) for an interim measure of protection in respect of any of the following matters, namely:-*
 - (a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;*
 - (b) securing the amount in dispute in the arbitration;*
 - (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for obtaining full information or evidence;*
 - (d) interim injunction or the appointment of a receiver;*
 - (e) such other interim measure of protection as may appear to the court to be just and convenient and the Court shall have the same power for making orders as it has for, and concerning, any proceedings before it.”*

Thus under Section 9, a party could apply to the court (a) before, (b) during arbitral proceedings or (c) after the making of the arbitral award but before it is enforced per Section 36. The words "per Section 36" can only go with the words "after the making of the arbitral award". The words "following Section 36" can have no reference to an application made "before" or "during the arbitral proceedings". Thus it is clear that an application for the interim measure can be made to Courts in India, whether or not the arbitration takes place in India, before or during arbitral proceedings. Once an Award is passed, then that award itself can be executed. Sections 49 and 58 provide that awards covered by Part II are deemed to be a decree of the Court. Thus "foreign awards" which are enforceable in India are deemed to be decrees. A domestic award has to be enforced under the provisions of the Civil Procedure Code. All that Section 36 provides is that enforcement of a domestic award is to take place after the time to make an application to set aside the award has expired or such an application has been refused. Section 9 does suggest that once an award is made an application for the interim measure can only be made if the award is a "domestic award" as defined in Section 2(7) of the said Act. Thus where the Legislature wanted to restrict the applicability of Section 9 it has done so specifically."

4. The Hon'ble Supreme Court however was pleased to observe that once an award is made an application for the interim measure would be maintainable only if the award is domestic. As such, section 9 remedy was held not maintainable concerning the post-award stage in case of an International Commercial Arbitration. This judgment was followed in *Venture Global v Satyam Computer*^[3] *Intel Technical Services v W.S. Atkins*^[4] *Citation Infowares Ltd v Equinox Corporatio*^[5], *Dozco India v Doosan Infrastructure*^[6] and *Videocon Industries v Union of India*^[7].

5. A shift in this view came to be recorded in the decision of *Bharat Aluminium Co v. Kaiser Aluminium Technical Service*^[8]. The Hon'ble Supreme Court disagreed with the observations made in *Bhatia*^[9] as elaborated in para 28 of the judgment- holding that the Arbitral proceedings mentioned in section 9 of the Act cannot relate to arbitrations that take place outside India. It was held that extending the applicability of section 9 to such arbitrations would be violative of section 2(2) of the Act. Based on the law commission report and with intent to take remedial steps after the outcome of BALCO's decision, the legislature made certain amendments in sections 2(2), 2(2A), 20, 28 and 31 of the Act. A proviso came to be inserted to Section 2(2) of the Act by 2015 Amendment which seeks to apply the provision of section 9 to international commercial arbitrations even if the place of arbitrations is outside India.

ANALYSIS AND CONCLUSION

6. The proviso however still does not completely remove the ambiguities in an application under section 9 of the Act concerning an International Commercial Arbitration wherein the parties have chosen to be governed by a law other than India law including the Act of 1996, more particularly for the interim measures post the stage of the award having been made. Subsection (2) and (3) of section 9 have been amended. However, no amendment has been made to subsection (1). Further, the power to make interim measures at the post-award stage continues to be qualified by section 36 of the Act which applies only concerning domestic awards. In absence of an amendment to this part of subsection (1), it is difficult to perceive that the latter part of the proviso to section 2(2) is sufficiently clarificatory.

7. The phrase “subject to an agreement to the contrary” used in the proviso of Section 2(2) also qualifies the power of the court to order interim measures. If the parties to the agreement have agreed to be governed by a law which expressly or impliedly excludes the applicability of section 9 of the Act, the courts in such cases would not be empowered to order interim measures at all. The principle of implied exclusion was considered by the Hon’ble Supreme Court in the case of *Videocon, Reliance Industries*^[10] and *Harmony Innovation Shipping Ltd*^[11].

8. It, therefore, appears that even after the amendment the theme of enabling the parties to decide on the applicable law is maintained. Should the parties decide to be governed by a law other than the Act of 1996, the Indian Courts will not be empowered to order interim measures.

9. Additionally it is also necessary to give meaning to the latter part of the proviso subject to what is stated hereinabove. It seems that the power of Indian Courts to order interim measures at a staging post the award is made is subject to the condition that the foreign award is enforceable and recognized under Part-II of the Act. Chapter I of Part II deals with New York Convention Awards and Chapter II of Part II deals with Geneva Convention Awards. Both the chapters provide conditions for the enforcement of foreign awards. In absence of fulfilment of conditions stipulated for enforcement of a foreign award, it appears that an Indian Court would not have the jurisdiction to order interim measures. Interim measures are thus linked with the enforceability of foreign awards. These apparent ambiguities are like to substantially delay if not frustrate the object behind the insertion of the said proviso.

REFERENCES

[1] The Arbitration and Conciliation Act,1996,

[2] (2002) 4 SCC 105

[3] (2008) 4 SCC 190

[4] (2008) 10 SCC 308

[5] (2009) 7 SCC 220

[6] (2011) 6 SCC 179

[7] (2011) 6 SCC 161

[8] (2012) 9 SCC 552

[9] *Supra*

[10] (2015) (10) SCC 213

[11] (2015) 9 SCC 172

