ARREST OF SHIPS IN ARBITRATION CLAIMS: AN ANALYSIS OF INDIAN LAW

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ABSTRACT

Arbitration has become the preferred method of dispute resolution in transnational maritime claims. Various disputes under charter parties, shipbuilding contracts, ship management, sale and purchase agreements are mostly resolved by arbitration. Interim reliefs are considered as procedural mechanisms for dealing with urgent matter at a stage of legal proceedings when time is of essence. A vital question emerges whether the court’s interference would tamper arbitral autonomy.

KEYWORDS: Arbitration Claims, Ship Arrest

INTRODUCTION

Arbitration has become the preferred method of dispute resolution in transnational maritime claims. Disputes under charter parties, shipbuilding contracts, ship management, sale and purchase agreements are mostly preferred to be resolved by arbitration. Since shipping is a global business, getting financial security for arbitration claims by the arrest of ships is always of crucial importance.

Interim reliefs are considered as procedural mechanisms for dealing with urgent matter at a stage of legal proceedings when time is of essence. An arbitral tribunal has limited powers to enforce interim orders; the assistance of courts would definitely enhance the effectiveness of arbitral rulings. A vital question emerges whether the court’s interference would tamper arbitral autonomy.

The Law Commission of India has opined that the courts play a prominent role in facilitating and enhancing the process of maritime arbitration. The judiciary in major maritime legal systems provides curial assistance to maritime arbitration in many ways. Usually, orders for the arrest of ship to secure a potential arbitral award and to obtain security for enforcement of foreign arbitration award are issued. Mareva injunction is also ordered to support maritime arbitrations.

This paper analyses Indian Law on the arrest of ships for security for foreign maritime arbitration awards. Corresponding provisions in some of the major legal systems are analyzed to find out whether Indian law is in conformity with the international regime.
THE STATUTORY FRAMEWORK

The High Courts in India are exercising admiralty jurisdiction by virtue of the colonial legislation, the Admiralty Jurisdiction Act, 1860, and the decision in the *M.V. Elisabeth’s case* [iiii]. In India, under the Admiralty Jurisdiction Act, 1860, an action for claim can be brought ‘in personam or in rem’ [iv]. In this way, the claimant can proceed either against the ship involved in case or against the owner. The British law on admiralty jurisdiction and liability in maritime claims has undergone radical changes. But in India, the provisions remain the same, in spite of the dynamic changes in shipping operations. A committee appointed by the central government had opined that admiralty jurisdiction in India is outdated and requires a comprehensive legislation, defining the scope of admiralty jurisdiction of the courts [v].

Section 9 of the Arbitration and Conciliation Act, 1996 lays down the Indian law on interim reliefs in arbitration claim. It is akin to Article 9 of UNCITRAL Model Law on International Commercial Arbitration, 1985. The section confers upon the Court powers to grant interim measures, including interim measures for securing the amount in dispute in arbitration. Under section 45, the Court can refer the parties to arbitration, when a valid arbitration agreement existed.

CONFLICT IN DECISIONS

Whether Indian Courts have jurisdiction to grant interim reliefs to secure claims in foreign seated arbitrations was a major issue before the decision in the Balco case. This jurisdictional issue is well settled by the ruling in the Balco [vi]. In this case, the Supreme Court had over ruled the decision in the Bhatia International v. Bulk Trading S.A. [vii] and held that section 9 of the Arbitration and Conciliation Act, 1996 does not confer jurisdiction over Indian courts to issue interim relief to secure claims in foreign seated arbitration.

Whether admiralty jurisdiction to arrest a ship as security for a claim in arbitration proceedings was yet another issue, which the Indian law does not clearly addresses to. As a result, many conflicting decisions have come up on this point.

In the “*Mehrab*” [viii] the single Judge’s refusal to grant an order for arrest of the vessel to secure a future arbitration award was overturned by the Division Bench; which held that the Court in its Admiralty Jurisdiction had the power to arrest a vessel to secure a claim in pending or future arbitration proceedings.
In the “M.V. Indurva Valley” the Division Bench held that a suit in Admiralty Jurisdiction for securing a claim in arbitration was not maintainable. The only remedy available to the claimant was to make an application for interim relief under section 9 of Arbitration and Conciliation Act, 1996. The reasoning was that the Arbitration and Conciliation Act, 1996 was a complete code and section 5 of the Act provided that in matters governed by Part 1 no judicial authority could intervene except where so provided in that Part.

In J.S.Ocean Liner LLC v M.V. Golden Progress and another, the questions of law were as follows:
(a) Whether an application under section 9 of the Arbitration and Conciliation Act 1996 (Indian) was maintainable for arrest of a vessel for obtaining security for an award that may be made in arbitration proceedings?
(b) If the answer to (a) was in the negative, whether a suit solely for arresting a ship to obtain security for an award in pending arbitration could be maintained?

The Court held its decisions as follows:
(i) An application under Section 9 of the Arbitration and Conciliation Act 1996 was not maintainable for arrest of a vessel for obtaining security of an award that may be made in arbitration proceedings. In finding thus the Court overruled the decision in the “Indurva Valley”.
(ii) An action in rem for recovery of a claim and arrest of the vessel where parties had agreed to submit their disputes to arbitration was maintainable and, in such a case, if by way of an interim measure the vessel was arrested or security provided the matter was to proceed in accordance with Article VII of the Arrest Convention 1999.
(iii) If the proceedings were brought within the time prescribed by the Court before the Arbitral Tribunal, any final decision there from was to be enforced against the arrested ship or the security provided in order to obtain its release provided the Defendant was given reasonable notice of such proceedings and a reasonable opportunity to present the case for defence in accordance with the provisions contained in the Arbitration and Conciliation Act 1996.
(iv) Retention of security under (ii) and (iii) above was to remain at the discretion of the Court which could pass appropriate orders having taken into consideration all relevant circumstances.
The court reasoned that under section 9 of the Arbitration and Conciliation Act, 1996, the District court has been conferred with jurisdiction to grant interim relief in support of arbitrations. In India, the admiralty jurisdiction to order arrest of ships is vested only with certain High Courts. Therefore, the District court cannot order remedy by means of vessel arrest under Section 9.

The court held a distinction between the nature of application under section 9 and admiralty jurisdiction for the arrest of ship. The ship arrest is a right in rem, which means the party proceeds against the vessel (res) as if it has a juridical personality. The application under section 9 gives a right in personam; the proceedings are against a particular person. When a vessel is arrested, all parties who have a maritime claim but who may not be parties to suit are also affected. However, parties affected by an order under section 9 are generally not allowed to intervene in a suit under the said section.

The court also held that the 1999 Arrest Convention is a part of common law and hence it has to be given effect to. Accordingly, under Article II of the convention, a ship may be arrested for the purpose of providing security, irrespective of the fact that the maritime claim for which the arrest is affected is to be arbitrated. Under Article VII, the ship arrested can be retained as the security for the award of the arbitral tribunal.

AN ANALYSIS OF LAW ON THE ARREST OF SHIPS FOR SECURITY FOR MARITIME ARBITRATION CLAIMS IN FOREIGN LEGAL SYSTEMS

There are express statutory provisions in the UK, USA, South Africa, Singapore and many other major maritime countries for the retention of security for enforcement of foreign arbitral awards.

Inclusion of the in rem arrest of a vessel for security purposes under the scope of coverage of the International Convention on the Arrest of Ships, 1999 and section 8 of the Federal Arbitration Act, 1925 has been upheld consistently by the American courts. Section 8 provides that in admiralty transactions, a claimant may begin proceedings by seizure of the vessel. Accordingly, the in rem seizure, for purposes of providing security against an eventual arbitration award, was upheld. Likewise, an arrest for security purposes in conjunction with an arbitration clause was permitted.

Under the provision of English Law, where the court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration, it may order that any property arrested or security given to prevent arrest or to obtain release
from arrest shall be retained as security for satisfaction of the arbitration award. Or else, it may order that the stay be conditional upon the provision of equivalent security for the satisfaction of the arbitration award xvii.

The Court of Appeal has held in the Bazias 3 & 4 xviii that the effect of section 26 is to assimilate arbitration claims with in rem proceedings in the Admiralty Court. Thus, there is no longer a wider discretion when the claim is subject to an arbitration clause, and the ship arrested will ordinarily be released only if security is provided sufficient to cover the amount of the claim, together with interest and costs, on the basis of the plaintiff’s reasonably arguable best case xix.

CONCLUSION

In India, there is no such express statutory provision for retention of security. There are some major issues the courts will have to face, when it decides on whether to allow an arrest of a vessel as the security for foreign arbitration claims. At the outset, the court has to decide on whether it has the jurisdiction to arrest a vessel for a claim in arbitration. Second, there may be an issue on its discretion and preparedness to do so. Usually when an action in rem has commenced and there is a non-domestic clause, the ship owner would apply to stay the proceedings under the Arbitration and Conciliation Act, 1996. When an arbitration proceeding has already commenced under the Arbitration and Conciliation Act, 1996, the courts will be reluctant to order an action in rem. If the ship has been already arrested, whether the court should allow the stay and release the ship is yet another issue. The decisions are conflicting. In England and various other jurisdictions, the law is well developed to meet such contingencies. But in India, the admiralty law is not well developed so that it can be naturally applied in such cases. This has led to situations wherein Judges are not able to handle intricate questions, often leading to conflicting decisions. This trend is not acceptable and will certainly affect the future of maritime arbitrations in India.
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