



# Indian Perspectives on Arbitration & Maritime Law

## The Chambers of George Rebello

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## Summary

India is a pro-arbitration jurisdiction. This is evident from (1) the slew of Parliamentary amendments to The Arbitration & Conciliation Act, 1996 ("**Arbitration Act**") which recognises institutional arbitration procedures and permits appointments by arbitral institutions, as well as (2) the recent decisions by Indian Courts.

While there was little clarity<sup>1</sup> as to whether two Indian parties could seat an arbitration of their disputes outside India, this has now been resolved. The Supreme Court of India recently stated that "*Nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals.*"<sup>2</sup>

India's pro-arbitration approach was also most recently evident in the Supreme Court of India's decision in *Amazon.com NV Investment Holdings LLC v Future Retail Ltd & Ors*,<sup>3</sup> where it was held that emergency arbitrators' awards are valid as they are tantamount to interim reliefs contemplated under section 17 of the Arbitration Act.

In this article, we discuss the pro-maritime arbitration approach of the Indian Courts in the enforcement of domestic and foreign awards.

## Enforcement of Awards under Indian Arbitration Law

The arbitral law of India, the Arbitration Act, is divided into four parts namely, Part-I, Part-II, Part-III and Part-IV. Part-I and Part-II lay down the law relating to arbitration, Part-III deals with conciliations, and Part-IV contains supplementary provisions as to formulating rules, repealing other laws, etc.

Part-I and Part-II largely follow the scheme of the UNCITRAL Model Law on International Commercial Arbitration (1985).<sup>4</sup> Part-I of the Arbitration Act governs Indian domestic arbitrations and international commercial arbitrations seated in India.

Section 36 of the Arbitration Act provides for the enforcement of awards rendered in arbitrations governed by Part-I ("**Indian Awards**"). There are no pre-conditions to enforce Indian Awards. Indian Awards are treated on par with decrees of Indian Courts and may be directly enforced.<sup>5</sup> For enforcement, the enforcing party would simply need to file an application to execute the Indian Award, under the Code of Civil Procedure 1908, in a Court of the jurisdiction of the person against whom the award is to be enforced has property.<sup>6</sup>

Part-II governs the enforcement of awards rendered in arbitrations seated outside India ("**Foreign Awards**"). Sections 47,<sup>7</sup> 48,<sup>8</sup> and 49<sup>9</sup> of the Arbitration Act set out the provisions for (i) the evidentiary requirements for enforcement of Foreign Awards; (ii) the pre-

conditions for enforcement of Foreign Awards; and (iii) the manner of enforcement of Foreign Awards in terms of the New York Convention on the Recognition & Enforcement of Foreign Arbitral Awards 1958, respectively.

A party wishing to enforce a Foreign Award must apply to a Court and produce before it (i) the original or an authenticated copy of the Foreign Award; (ii) the original or certified copy of the arbitration agreement; and (iii) any other evidence to prove that it is a Foreign Award.<sup>10</sup> The enforcement may be refused by the court *only* if the party against whom enforcement is sought proves to the court that:<sup>11</sup>

- a. It was under some incapacity, or the arbitration agreement was not valid in terms of the law governing the arbitration agreement; or
- b. No proper notice of appointment of arbitrators or proceedings was given; or
- c. The award deals with a dispute outside the scope of the arbitration agreement; or
- d. The composition of the tribunal was not in accordance with the agreement or the curial law of the seat; or
- e. The award is not yet binding on the parties or has been set aside or stayed by a court at the seat of arbitration.

Enforcement of a Foreign Award may also be refused if the subject matter of the award is not arbitrable in India, or, if the enforcement would be contrary to the public policy of India. When the Court is satisfied of the enforceability of a Foreign Award, it is deemed to be a decree of the Court<sup>12</sup> and can be enforced as such.

In the case of both Indian Awards and Foreign Awards, Courts make no distinction between awards rendered in ad hoc arbitrations and awards rendered in institutional arbitrations. Courts in India regularly permit the enforcement of awards rendered in arbitration proceedings conducted under the rules of the London Maritime

Arbitrators Association, the Hong Kong International Arbitration Centre and the ICC International Court of Arbitration, for example.

### **Ad Hoc & Institutional Arbitration in India**

Despite there being no judicial distinction in the enforcement of ad hoc and institutional awards, parties tend to gravitate towards ad hoc arbitration over institutional arbitration in India. One concern of parties is the high costs of institutional arbitration as opposed to the perceived cost-effectiveness of ad hoc arbitration. Parties are also concerned with an apparent institutional rigidity that is not present in ad hoc arbitrations. For these reasons, courts have taken on a bespoke practice in allowing parties to opt out of agreed institutional arbitration and instead referring them to an ad hoc tribunal.

Recently, however, there has been a slight shift in the Indian attitude towards institutional arbitration. Institutional arbitration has started to gain traction as both Courts and disputants are embracing their benefits such as time bound awards, efficiency, and ease of conducting proceedings.

Parliament's amendments to the Arbitration Act in 2016 empower the Supreme Court or the High Court to delegate their powers of appointment of arbitrators, to any institution. In recognition of this, the Supreme Court of India has on occasion directed parties to approach the Mumbai Centre for International Arbitration for the appointment of arbitrators.<sup>13</sup>

Parliament has also enacted legislation to create a new institution, namely, the New Delhi International Arbitration Centre ("**NDIAC**"). This is the first institution to be established by way of statute. The NDIAC has also been given the status of being an institution of national importance.<sup>14</sup>

Thus, recent trends would indicate that where parties incorporate an SCMA model arbitration clause<sup>15</sup> in their contract, the Courts would refer their disputes to the Singapore Chamber of Maritime Arbitration (“**SCMA**”). The Rules of the Singapore Chamber of Maritime Arbitration (“**SCMA Rules**”) recognise that SCMA arbitrations may either be seated in Singapore or outside Singapore.

SCMA arbitrations seated in India would be governed by Part-I of the Arbitration Act. Awards rendered pursuant thereto would, as discussed above, be automatically enforceable under section 36 of the Arbitration Act. Enforcement of awards rendered in SCMA arbitrations that are seated in other jurisdictions will be governed by Part-II of the Arbitration Act.

### **Maritime Law in India**

The Parliament of India enacted The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act in 2017 (“**Admiralty Act**”). This piece of legislation expressly grants admiralty jurisdiction to all the High Courts situated in the Indian coastal states, namely, the High Courts of Gujarat, Bombay, Karnataka, Kerala, Madras, Andhra Pradesh, Odisha, and Calcutta.<sup>16</sup>

Prior to the enactment of the Admiralty Act, maritime law in India was an amalgamation of (1) British-era legislation granting admiralty jurisdiction to certain High Courts, (2) post-independence interpretations of the Geneva and Brussels Arrest Conventions, and (3) common law developed by the judiciary through reliance on the decisions of courts in other common law jurisdictions. The Admiralty Act repealed this amalgamation and consolidated maritime law in India.

The Admiralty Act defines maritime claims<sup>17</sup> and brings together various aspects of admiralty and maritime law. Generally, the Admiralty Act empowers High Courts vested with admiralty

jurisdiction (“**Admiralty Court**”) to arrest a ship calling at a port or within the Indian territorial waters in a state over which the concerned Admiralty Court exercises jurisdiction.<sup>18</sup>

To arrest a vessel in India, a plaintiff/claimant would have to initiate proceedings in any of the High Courts in the coastal states under the Admiralty Act, by showing the existence of a maritime claim. It is to be noted that the general way of instituting proceedings is by way of an admiralty suit. By arresting a ship, a plaintiff/claimant can overcome the difficulty of personal service on a shipowner by compelling it to enter appearance in the proceedings and furnish security for the ship’s release.<sup>19</sup> In the shipowner’s absence, an Admiralty Court may attribute a judicial personality to the ship in order to enter a decree against it and execute the decree by judicial sale.<sup>20</sup>

However, the Admiralty Act remains woefully silent on whether a ship can be arrested, and security retained, for the enforcement benefit of an arbitral award. Unfortunately, the Arbitration Act and the Code of Civil Procedure 1908 are also silent on this aspect. These pieces of legislation neither expressly prohibit nor permit the retention of an arrested vessel as security for the benefit of an arbitral award.

### **Ship Arrest for the Enforcement of a Foreign Award**

The legislative lacuna in the Admiralty Act has kept open a debate on whether a ship can be arrested by the Admiralty Court (or Arbitral Tribunal) to obtain security for the benefit of an arbitration. The debate is categorically more difficult to settle vis-à-vis Foreign Awards as compared to Indian Awards. With respect to Indian Awards, at least one of the parties is likely to have other assets in India, thus making enforcement significantly easier.

Arresting a vessel in admiralty proceedings is essentially restraining its movement and preventing its dissipation, to obtain security for the plaintiff/claimant’s claim. In a landmark case, the Supreme Court of

India has held that a suit cannot be brought simply to obtain interim relief for the purpose of restraining the dissipation or diminishing of assets.<sup>21</sup> This position has also been applied to admiralty law by the Bombay High Court.<sup>22</sup> Thus, the uncomfortable position is that an admiralty proceeding cannot be filed with a single prayer for arresting a ship as security; the plaintiff/claimant in the admiralty proceeding must also pray for a decree from the Admiralty Court.

However, this is problematic in cases where there is an arbitration clause. In these cases, it is the arbitral tribunal that has jurisdiction to decide the merits of disputes among the parties. The statutory provisions in civil procedure, admiralty law or arbitration legislation enabling the retention of security for an arbitration through an admiralty suit that are available in England,<sup>23</sup> Singapore<sup>24</sup> or Hong Kong,<sup>25</sup> are unavailable in India. The Bombay High Court observed that where there is a lacuna in the law, the Courts are bound to fill it by crafting procedural tools for the benefit of innocent plaintiffs/claimants, and that nothing in the statute books in India prevent the Admiralty Court from arresting a ship to obtain security for an arbitration.<sup>26</sup>

This issue has surfaced time and again in Indian Courts. The Bombay High Court's decision in *JS Ocean Liner LLC v MV Golden Progress*<sup>27</sup> ("**MV Golden Progress**") is of particular significance. In *MV Golden Progress*, the Admiralty Court held that an admiralty suit *in rem* against a ship would be stayed in cases where the existence of an arbitration clause is brought to the attention of the Admiralty Court, and the security obtained in the admiralty suit could be retained by the Admiralty Court in the admiralty proceedings entirely at its discretion.<sup>28</sup> The Admiralty Court will stay the *in rem* admiralty suit against a ship and the merits of the dispute will be referred to arbitration. Any award in favour of the plaintiff/claimant will be recognized by the Admiralty Court and be given effect with respect to the security in the admiralty proceedings, provided that the shipowner was given reasonable notice of arbitration and a

reasonable opportunity to present its defence in accordance with the Arbitration Act.

The upshot of *MV Golden Progress* is that a plaintiff/claimant is expected to obtain a decree in the admiralty proceedings in terms of the award after applying to a Court for recognition of the award and satisfying the Court that the award is enforceable in terms of sections 47 to 49 of the Arbitration Act. Once the award is declared enforceable by the Court to which an application for recognition of the award is made, a plaintiff/claimant may execute the award/decre against the security which was retained in the *in rem* admiralty suit. This position has been upheld most recently by the Bombay High Court in *Altus Uber v Siem Offshore Redri AS* ("**Altus Uber**").<sup>29</sup>

The decisions in *MV Golden Progress* and *Altus Uber* fill part of the lacuna in Indian law. However, there remains a view among Indian maritime lawyers that no Admiralty Court has the power to retain a ship arrested in an admiralty proceeding *in rem* or security obtained by way of bail for the benefit of a pending or future arbitration.

A Foreign Award holder can enforce its award against a shipowner by following the procedure in *MV Golden Progress*. However, this is procedurally complex as is evident below:

- a. The Foreign Award holder would have to first file an admiralty suit (as a plaintiff) by approaching a competent Admiralty Court and obtaining the arrest of the ship.
- b. After obtaining arrest and/or receiving security for the claim in the admiralty suit, the plaintiff/claimant would have to bring the existence of an arbitration clause to the attention of the Admiralty Court.
- c. The Admiralty Court would then have to mandatorily refer the dispute to arbitration and stay the admiralty suit until an award is rendered.

- d. Upon obtaining an award, the Foreign Award holder must mandatorily apply for the recognition and enforcement of the Foreign Award under sections 47 to 49 of the Arbitration Act.
- e. After satisfying the Court to which an application for recognition/enforcement that the Foreign Award is enforceable, the Foreign Award holder would have to revive the admiralty suit and claim the security in the admiralty suit for the enforcement benefit of the Foreign Award.

It is still unclear if the Admiralty Court would re-hear the dispute on merits or pass a decree in terms of the Foreign Award which has been declared to be enforceable. Some other questions remain unanswered, as follows:

- (1) *Is it mandatory to file an admiralty suit prior to reference to arbitration?*

In our view, there are legislative and judicial lacunae in this respect.

- (2) *Can a Foreign Award holder who has not filed an admiralty suit prior to obtaining the Foreign Award arrest a ship for the enforcement of the Award?*

The Admiralty Act does not define “enforcement of an award” as a maritime claim. However, the Admiralty Act does not strictly use the words “admiralty suit”. The words used are the broader “admiralty proceedings”.

- (3) *Can an award holder file an interim application to arrest a vessel under the Admiralty Act in an application enforce the Foreign Award under the Arbitration Act?*

Given that the words used are “admiralty proceedings”, in our view, this effectively means that an award holder can adopt this approach.

However, this remains to be tested in the Indian Courts. Further, in enforcement proceedings under the Arbitration Act, the Court to which an application to recognise/enforce an award is made would normally first issue notice to the award debtor, and thereafter consider if the award is enforceable in India in terms of section 48 of the Arbitration Act.

### **Final Comments**

Generally, sections 36 (in Part-I), and 47 to 49 (in Part-II) of the Arbitration Act deal with the enforcement of arbitral awards. While awards rendered in institutional arbitrations have always been recognised and enforced on par with awards rendered in ad hoc arbitrations, the gradual traction gained by arbitral institutions is of particular importance for users of the Singapore Chamber of Maritime Arbitration.

Indian Awards conducted under the SCMA Rules can easily be enforced since at least one of the parties is likely to have assets (other than a ship) in India which can be attached by the Court. Foreign Awards rendered under the SCMA Rules on the other hand, are on a slightly different footing. This is due to the lacunae in the law that has only been partially filled by the Courts, and as such, SCMA Foreign Awards can certainly be enforced in India. While there are practical difficulties and procedural complexities in the enforcement of SCMA Foreign Awards, the Indian Parliament and Courts are likely to continue to work together to resolve these issues.

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<sup>1</sup> See the apparent conflict between the decisions in *Addhar Mercantile Pvt Ltd v Shree Jagdamba Agrico Exports Pvt Ltd* [2015] SCC Online 7752 (Bombay High Court) and *Sasan Power Ltd v North American Coal Corporation (India) Pvt Ltd* [2015] SCC Online 813 (Madhya Pradesh High Court).

<sup>2</sup> *PASL Wind Solutions Pvt Ltd v GE Power Conversions India Pvt Ltd* [2021] SCC Online 331 (Supreme Court of India) [104].

<sup>3</sup> *Amazon.com NV Investment Holdings LLC v Future Retail Ltd & Ors* [2021] SCC Online 557 (Supreme Court of India).

<sup>4</sup> The Arbitration and Conciliation Act, 1996, Preamble.

<sup>5</sup> The Arbitration and Conciliation Act, 1996, section 36(1).

<sup>6</sup> Indian Awards are enforced as a decree of a court in terms of Code of Civil Procedure 1908.

<sup>7</sup> The Arbitration and Conciliation Act, 1996, section 47. Section 47 lays down the evidentiary requirements for the enforcement of Foreign Awards under the New York Convention.

<sup>8</sup> The Arbitration and Conciliation Act, 1996, section 48. Section 48 lays down conditions for denying the enforcement of Foreign Awards under the New York Convention.

<sup>9</sup> The Arbitration and Conciliation Act, 1996, section 49. Section 49 applies for the enforcement of Foreign Awards under the New York Convention.

<sup>10</sup> The Arbitration and Conciliation Act, 1996, section 47.

<sup>11</sup> The Arbitration and Conciliation Act, 1996, section 48.

<sup>12</sup> The Arbitration and Conciliation Act, 1996, section 49.

<sup>13</sup> *MCM Service Pvt Ltd v Italia Thai Development Public Co Ltd*, Arbitration Case (Civ) 44/2019 (Supreme Court of India) 1.

<sup>14</sup> Unfortunately, after Parliament passed the New Delhi International Arbitration Centre Act in 2019, the global SARS-Cov-2 pandemic has slowed down action taken to operationalize the institution.

<sup>15</sup> <https://www.scma.org.sg/model-clauses>.

<sup>16</sup> Admiralty (Jurisdiction & Settlement of Maritime Claims) Act, 2017, section 2(1)(e).

<sup>17</sup> Admiralty (Jurisdiction & Settlement of Maritime Claims) Act, 2017, section 4(1).

<sup>18</sup> Admiralty (Jurisdiction & Settlement of Maritime Claims) Act, 2017, section 5.

<sup>19</sup> *Chrisomar Corporation v MJR Steel Pvt Ltd* [2017] SCC Online 1104 (Supreme Court of India) [24]; See also, *MV Elisabeth v Harwan Investments Co Pvt Ltd* (1992) 1 SCR 1003 (Supreme Court of India) 1003.

<sup>20</sup> *Chrisomar Corporation v MJR Steel Pvt Ltd* [2017] SCC Online 1104 (Supreme Court of India) [24].

<sup>21</sup> *Bharat Aluminium Co v Kaiser Aluminium & Technical Service, Inc* [2012] SCC Online 693 (Supreme Court of India) [176].

<sup>22</sup> *Rushab Ship International LLC v Bunkers on Board MV African Eagle & Ors* [2014] SCC Online 620 (Bombay High Court).

<sup>23</sup> Civil Jurisdiction & Judgments Act, 1982 section 26, prior to its repeal by the (English) Arbitration Act in 1997. See also, The Arbitration and Conciliation Act, 1996 section 11. Under the Civil Jurisdiction & Judgments Act, English and Welsh admiralty courts were vested with wide discretion to retain security where admiralty proceedings were stayed or dismissed on the ground that the disputes between the parties were to be determined by courts in other parts of the United Kingdom, in another jurisdiction outside the UK or in arbitration. The word “arbitration” was deleted from section 26 of the Civil Jurisdiction & Judgments Act when the Arbitration Act was enacted, containing a similar provision.

<sup>24</sup> International Arbitration Act, section 6.

<sup>25</sup> Arbitration Ordinance, section 20.

<sup>26</sup> *Islamic Republic of Iran v mv Mehrab & Ors* (2002) 4 BomLR 785 (Bombay High Court) [14 & 18].

<sup>27</sup> *JS Ocean Liner LLC v MV Golden Progress* (2007) 2 ArbLR 104 (Bombay High Court).

<sup>28</sup> *JS Ocean Liner LLC v MV Golden Progress* (2007) 2 ArbLR 104 (Bombay High Court) [67].

<sup>29</sup> *Altus Uber & Ors v Siem Offshore Redri AS & Ors* (2019) 5 BomCR 256 (Bombay High Court).

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## THE CHAMBERS OF GEORGE REBELLO

The Chambers of George Rebello was established over three decades ago by (Late) Mr George Rebello and has since grown steadily as a commercial chambers. We specialize in commercial law, with a focus on maritime laws, logistics, commodity transactions, sale and purchase of ships, ship arrests, maritime arbitration, etc.



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