Analysing the Enforcement of Foreign Arbitral Awards through the Austbulk Shipping Case

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This paper attempts to track the genealogy of the enforcement of foreign arbitral awards through the unique case of *P.E.C Limited v. Austbulk Shipping*[1]. The case propounds a fascinating interpretation of section 47 of the Arbitration and Conciliation Act, 1996 ("Act"), holding that 'shall' should be treated as 'may' to submit the arbitral documents at the time of application of the enforcement of the foreign awards.

The article has distinct sections, the first being an introduction of the topic, followed by a summary of the Austbulk case. The second section comprises an in-depth analysis of the two direct issues and the reasoning behind the mandatory submission of the original arbitration agreement for the enforcement of foreign arbitration awards in India. The third section will help in further analysing the enforcement of foreign awards through the precedents laid down in the judgment. Lastly, the value of fairness in the dispute resolution process as envisaged by this judgment is analysed. In the backdrop of such an analysis, this article seeks to comprehend the judicial reasoning and evaluate the impact of this case on the Indian Arbitration law.

The role of courts has always been placed on a high pedestal because of the jerky road towards the initiation of arbitration in India as an alternative to legal discourse. The Act has been modified time and again with the recent amendments in furtherance of its objectives to give effect to the UNCITRAL Model laws as adopted by the United Nations Commission on International Trade Law (UNCITRAL), 1985.[2] The modifications or amendments have been quite centric towards evaluating the role of the courts in the process of arbitration, whereas, in recent times focus has been on diminishing the role of the courts to a great extent to further the scope of Alternative Dispute Resolution (referred to as as ADR hereinafter). The reasoning given in the judicial precedent has been direct in clarifying the

[1] [2019] AIR 105 (SC).
[2] *Arbitration and Conciliation Act 1996*.

stance that the interference of courts. beyond what is stipulated in the Act will not be tolerated as it defeats the whole purpose of establishing a separate dispute mechanism system by way of ADR.

The enforcement of foreign arbitral awards as valid in India has been vigorously debated time and again. However, this process has transcended above and beyond its traditional understanding because of the development of International Commercial Arbitration.

Summary

The case concerns a disputed Chartered Party agreement between the appellants (P.E.C. Limited) and the Respondent (Austbulk Shipping Company).

The Appellants hired the Respondent shipping company for the transportation of chickpeas in bulk from Geraldton Port, Australia, to Jawahar Lal Nehru Port, India (JNPT). In pursuance of the same, a final freight account was submitted by the Respondent taking into consideration the dispatch at Geraldton and the demurrage at Bombay. The final freight account showed that the Appellant owed some USD 150,000 to the Respondent.

The Sole Arbitrator passed an arbitral award directing the Appellants to pay the pending amounts. The enforcement of the arbitral award was rejected by the High Court for the absence of the arbitration agreement at the time of filing the application for the enforcement. The enforcement was also rejected on the grounds of the parties g not being the signatories to the Charter party agreement. The Supreme Court, while adjudicating the matter, decided in lieu of the object and purpose of the New York Convention that "*at the initial stage of filing of an application for enforcement, non-compliance of the production of the documents mentioned in Section 47 should not entail in the dismissal of the application for enforcement of an award. The party seeking enforcement can be asked to cure the defect of the non-filing of the arbitration agreement. The validity of the agreement is decided only at a later stage of the enforcement proceedings*." The Supreme Court re-interpreted section 47 to mean that "the word *shall* in the section relating to the production of the evidence as specified in the provision at the time of application has to be read as '*may'* only in the initial stage of the filing of the application and not after that".

The Supreme Court reiterated that an application for enforcement of a foreign award could be rejected only on grounds specified in Section 48. However, the very same section does not include the non-filing of documents mentioned in Section 47 as a ground for rejection of enforcement of foreign

arbitration awards. This reasoning also lent support to the view that the requirement to produce documents mentioned in Section 47 (i.e., the arbitration agreement) at the time of application was not intended to be mandatory in the first place. Concerning the second issue, regarding the existence of an arbitration agreement even for the non-signatories to the Charter Party, the Supreme Court held that the *conduct* of the parties alone can be the valid basis for an arbitration agreement. Such *conduct* can be determined by the existence of written correspondences between the parties, which in the present case was a set of correspondences exchanged as letters. Thus, *signing* the Charter Party is not a pre-condition to a valid arbitration agreement.

A legislative analysis of the reasoning provided by the court

This case is 'one of a kind' as the bench comprising **J. A.M Khanwilkar and J. L. Nageswara Rao** took up a highly contrasted interpretation of the word '*shall*' as used in Section 47 of the Arbitration and Conciliation Act 1996. Such an argument has merits and demerits. The merit is that this interpretation acts as a respite to the party who intends to get the foreign arbitral award enforced upon the other party. Thus, in a broader sense, it can be understood as a *furtherance of the object of the New York Convention*,[3] which is safeguarding the enforcement of arbitration agreements and arbitral awards and thus, providing an additional measure of commercial security for parties entering into cross-border transactions.

In this case, the foreign arbitral award was made in London, and, since the United Kingdom is a party to the New York Convention, the object and scope of the New York Convention was given utmost importance in the way in which the decision of the case turned out to be. The judges referred to Article II (Settlement by arbitration), III (state's obligations to enforce the arbitral awards), and IV (parties bound to submit arbitration agreements for enforcement of arbitral award) of the New York Convention and Article 35(2) of Chapter VIII of the UNCITRAL Model Law on International Commercial Arbitration to ensure a *swift* and *smooth* enforcement of the foreign awards, irrespective of the country in which the award was made.[4]

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[3] *P.E.C. Ltd.* (n 1).

[4] AMLEGALS, 'Arbitration and Conciliation Act, 1996 - Non-Production of Requisite Documents 'At the Time Of Application' Not A Ground For Dismissing Foreign Award Enforcement Application' (Mondaq, 20 December 2018) <www.mondaq.com/india/trials-appeals-compensation/766818/arbitration-and-conciliation-act-1996--non-production-of-requisite-documents-at-the-time-of-application39-not-a-ground-for-dismissing-foreign-award-enforcement-application> accessed 6 July 2020.

Another interpretation could be the *Decolonization Theory*,[5] which propounds that the arbitration seat should be construed as separate and distinct from the judicial seat. Such a separation gives absolute autonomy to the parties in a dispute to be able to keep their dispute in one forum only, i.e., arbitration and not courts. This theory is thus a confluence of the idea that judicial decisions must not be able to influence arbitration as that would defeat the purpose of resorting to arbitration. The nature of Foreign Awards is 'International,' and hence, national frontiers such as courts should not be able to limit these. The landmark judgment of *BALCO*[6] was the first case to consider decolonization theory in India in terms of its scope of no intervention of Domestic substantive law in International Arbitration.

The demerit of interpreting a '*shall*' provision as a '*may*' provision at the time of application for enforcement of the foreign arbitration award is that it would compromise the *Theory of Separation of Powers*. Indian history is a testament to the legislature making the laws and the courts merely interpreting the law. In the present case, the legislative intent to use the word '*shall*' would have been to require the production of documents at the time of the application for enforcement of a foreign arbitral award. Thus, by reading in between the lines, an opposite interpretation by the judges, even if it is favouring the rights of the parties, is problematic. It not only defeats the Separation of powers theory but also portrays an extremely purposive interpretation rendered by the courts, which is not always ideal for interpreting the law. A purposive perspective brings in morality in the law,[7] as opposed to a positivist perspective, which aims at interpreting the law as it is. While the purposive approach to law tries to find what the law '*ought'* to be, a positive approach looks at law as it '*is.*'[8]

Precedent value

A significant precedent used to support the reasoning behind interpreting the word *shall* as *may* in Section 47, was *Mohan Singh v. International Airport Authority of India.*[9] In this case, *the judges had made a critical observation of the mischief which could ensue if all the statutes were to be interpreted literally. The judges prescribed*

[5]Nikhil Suresh Pareek, 'International Commercial Arbitration in India: Governing Law Issues' (2013) 18 Uniform Law Review 154 <https://academic.oup.com/ulr/article/18/1/154/1693567> accessed 6 July 2020
[6]*Bharat Aluminum Co v. Kaiser Aluminum Technical Service, Inc.* [2012] 9 SCC 552
[7] Michael Freeman, *Introduction to Jurisprudence* (8th edn, Sweet & Maxwell 2007) 74-83
[8] Suri Ratnapala, *Jurisprudence* (1st edn, Cambridge University Press 2009) 21-57
[9]*[1997] 9 SCC 132.*

a more liberal view wherein the job of the judges would be to ascertain the intention of the legislature, and this could be done by comprehending the "design and scope"[10] *of the section.*

To further support their naturalist approach of altering the meaning of section 47, the judges relied on a foreign case of *Caldow v. Pixwell.*[11] The judges sided with the reasoning of this case to assert their claim that "*The scope and object of a Statute are the only guides in determining whether its provisions are directory or imperative.*"[12] Chief Justice Jervis, in the famous precedent of *Abley v. Gale,*[13] had pointed out that a 'Literal or a Positivist Interpretation' would strictly mean interpreting solely the plain text of the section even if it leads to giving an unfair or absurd sense of justice. It is interesting to observe the causality with which the overruled reasoning had been relied on by the judges when, in fact, that judges need to ascertain the scope and object of the statute from the words of the section itself.[14]

Considering both these precedents, it can be observed that the legislative intent was in favour of the production of documents before the application of enforcement of foreign awards. [15] The reason for this could be to avoid the wastage of the court's time and resources later. In several cases, parties had fraudulently wasted the court's time when they did not have any valid arbitration agreement in the first place. The reasoning of the judgement also relies on Section 48 of the Act to justify the stance by saying that the non-production of documents, as stipulated under section 47, is not a ground for the rejection of the enforcement of the foreign award.[16] This reasoning is slightly problematic due to the possibility of a legislative gap which the legislators forgot to fill, i.e., it could be possible for there to be an explicit absence of law. Thus, a mere lack of a rule cannot and should not be the basis of core judicial reasoning by the courts. If such an absence of laws can be allowed to be filled by judges, then the entire Separation of Powers theory would be defeated.

With respect to the second issue, the Supreme Court decided whether the parties compulsorily needed to be signatories to the Charter Party to constitute a valid arbitration agreement. It was found by way of evidence that both the parties formulated a Charter Party agreement together, wherein an arbitration clause was agreed upon. To this contention, the Supreme Court decided that signing the

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[10] William Feilden Craies, *Craies On Statute Law*, (5th edn, Sweet & Maxwell 1971)
[11] *Caldow v Pixwell* [1876] 2 C.P.D. 562
[12] *P.E.C. Ltd.* (n 1).
[13] *Abley v Gale* [1851] 20 L.J.C.P. 233 (N.S.)
[14] *Abley* (n 13).
[15] *Abley* (n 13).
[16] *P.E.C. Ltd.* (n 1).

Charter Party is not material; what is material is that there should exist a valid arbitration agreement which is discernable through other correspondences between parties. In the case at hand, the Supreme Court held that even if the Charter Party is not signed, it is a valid correspondence between the parties and hence, constitutes a valid arbitration agreement. We have noticed Supreme Court adopting a purposive approach inclined towards the motive of granting relief to the party claiming the existence of the arbitration agreement.

Conclusion

The UNCITRAL Model Law was adopted for the modernisation of Indian arbitration. However, the judicial intervention by the courts acted as a difficulty for the production of all documents during the time of application of the enforcement of foreign awards itself. The *Austbulk* case did away with such procedural challenges by specifying that it is not compulsory to produce documents at the time of application, as that can be done later in the proceedings. This was based upon the interpretation of 'shall' as 'may' in Section 47 of the Arbitration and Conciliation Act, 1996.

This article was an attempt to cull out the 'Purposive Approach' which has been taken up by the court to arrive at a landmark decision. The reasoning employed by the judges may not be very concrete in itself because they are merely relying upon the absence of a law for rejection of the application under section 48 if it is unaccompanied by the documents. Yet this reason does not suppress the greater good which this case puts forth.

In my opinion, the judges have been successful in establishing a fair parameter for the party applying for the enforcement of the foreign award by giving them the option of presenting the documents required under section 47 at a later stage in the proceedings. Such procedural fairness is not only beneficial for the parties applying under section 47 but also adds value to Indian Arbitration as a whole.