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Section 9 Applicability to Foreign Arbitrations: 'Hydra Head' of Concurrent Jurisdiction?

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ABSTRACT

Armed with a 'pro-arbitration' outlook, the judicial pronouncements by Courts in India over the last decade evidence a clear endorsement of the principle of party autonomy in arbitration and brings Indian arbitration jurisprudence in line with other 'arbitration-friendly' jurisdictions. An aspect of this is reflected in the recent Supreme Court ruling in PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.., wherein the Court was, inter alia, considering whether a party could approach the Indian courts for appropriate provisional reliefs (under section 9 of the Arbitration & Conciliation Act, 1996) in respect of arbitrations seated outside India or in pursuance of an award rendered in such foreign-seated arbitrations. Answering this query in the affirmative, the Apex Court has brought much-needed clarity in an otherwise dialectical sphere of jurisprudence. Through this article, we expound the irresolute history of the provision's applicability to foreign-seated arbitrations, analyse like-principles adopted in transnational litigation, and attempt to identify a trend towards legal certainty while examining the latest expression on this subject by the Calcutta High Court in Medima LLC v. Balasore Alloys Limited.

Keyword: *Enforcement of Awards, Court-Ordered Interim Measures, Foreign-Seated Arbitration, Quasi-in-Rem Jurisdiction, Concurrent Jurisdiction*

I. INTRODUCTION

"The second hydra-head of concurrent jurisdiction now raises its head, and that was in the famous Bhatia International case, and the judge who decided that case…was very exercised by the fact that there would be no other remedy, and rightly so…and with the anxiety to apply Part I and section 9 only, in particular, the entire baby and the bathwater were applied in this case, the opposite, instead of just the baby." – illuminating words by Mr Rohinton Fali Nariman, former Judge of the Supreme Court of India, reverberated amongst a captivated audience hearing his Keynote address on the Indian judiciary's vacillating position on the applicability of section 9[3] of the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**") to

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[3] The Arbitration and Conciliation Act, 1996, § 9, No. 26, Acts of Parliament, 1996 (India) [hereinafter *Arbitration*

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arbitrations seated outside India – delivered at the GAR Live India 2020 seminar[4].

For years, we have witnessed arbitration experts and legal pundits racking their brains over this issue: should the courts of the arbitral situs have exclusive authority to entertain petitions for interim relief, or put somewhat differently, should a *lex arbitri* authorize local courts to entertain petitions for interim relief in connection with arbitrations taking place in a foreign jurisdiction? In the Indian context, the question often takes the form of whether Indian courts' authority to provide interim relief under section 9 of the Arbitration Act, ordinarily available in domestic arbitrations, can be made applicable to a foreign-seated arbitration or be in pursuance of an award rendered in a foreign-seated arbitration.

The critical nature of this question stems from the fact that in the absence of provisional reliefs aiding the use of agreements to arbitrate, a successful party in a foreign-seated arbitration may be left without an efficacious remedy to pursue in furtherance of the resultant award. With a growing tendency amongst Indian parties to resort to institutional dispute settlement mechanisms abroad (with the clear favourite being the Singapore International Arbitration Centre or SIAC), it becomes increasingly pertinent to address the practical difficulties surrounding the enforcement and execution of a likely foreign award in its favour – which would, until then, remain merely a paper victory. It would be almost antithetical to the very objective of the Arbitration Act for an award-holder to wait until the award is recognised and enforced, or worse, to wait until an interim order obtained from a foreign court is decreed in a local civil suit, prior to attaching assets of an award-debtor located in India, as a means of securing recovery under an award.

After a lack of concurrence on the issue spanning several years, the recent decision of the

Act] ("(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—
(i) …
(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 the purpose of 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 the purpose of, and in relation to, any proceedings before it. …").

[4] Justice Rohinton Fali Nariman, (former) Judge of the Supreme Court of India, Keynote Address at the GAR Live India 2020 (Feb. 29, 2020).

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Calcutta High Court in *Medima LLC v. Balasore Alloys Limited*[5] (decided on 3 August 2021), taking a cue from the decision of the Apex Court in *PASL Wind Solutions*[6], might have 'finally' laid the matter to rest.

Through this article, we attempt to analyse the existing jurisprudence including a slew of judicial pronouncements on the subject and reflect on relevant international practices and institutional rules in an endeavour to identify a trend towards legal certainty. To this end, the first section of the article expounds on the irresolute history of the provision's applicability to arbitrations seated outside India. The second section provides an international perspective involving a discussion on like principles adopted in transnational litigation and its transfusion into the realm of international arbitration, mirroring also in the institutional arbitration rules. In the final section, the Article uncloaks the recent ruling of the Calcutta High Court in *Medima v. Balasore* (*supra*), which brings clarity in an otherwise dialectical sphere of jurisprudence.

II. TRACING THE ANOMALOUS PRECEDENTIAL HISTORY

(A) Pre-Amendment Era

Under the originally enacted Arbitration Act, there was a conscious demarcation made by the Indian legislature, whereby Part I[7] of the Act containing section 9 (*Interim measures, etc., by Court*) was to apply solely to domestic arbitrations, while Part II of the Act was made applicable to foreign-seated arbitrations. By way of abundant caution, section 2(2) of the Act (at the time) provided that "[t]his Part [I] shall apply where the place of arbitration is in India".

In 2002, a Three-Judges' Bench of the Supreme Court of India, in the *Bhatia International*[8] case, considered the applicability of Part I of the Act to international commercial arbitration[9] held outside India in light of the language used in section 2(2), and observed that Part I will be applicable to such arbitrations unless the parties' expressly contract out of such application. However, in 2012, by a complete *volte face*, a Five-Judges' Bench of the Supreme Court, in

[5] Medima LLC v. Balasore Alloys Limited, AP/267/2021, (Hon'ble Justice Moushumi Bhattacharya, Calcutta High Court, Aug. 3, 2021).
[6] PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd., Civil Appeal No. 1647 of 2021, (Supreme Court of India, Apr. 20, 2021).
[7] Part I (*Arbitration*) of the Arbitration Act contains § 2 to 43, while Part II (*Enforcement of Certain Foreign Awards*) contains § 44 to 60.
[8] Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105 (Supreme Court of India, Mar. 13, 2002).
[9] Arbitration Act, *supra* n. 2, § 2(f) ("international commercial arbitration" means an arbitration relating to disputes arising out of legal relationship, 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 a 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) a company or 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.)"

BALCO[10], while overruling the aforesaid decision in *Bhatia International* (*supra*), held that section 9 could not be made applicable to foreign-seated arbitrations[11]. The Supreme Court emphasized that "a plain reading of Section 2(2) makes it clear that Part I is limited in its application to arbitrations which take place in India"[12].

After lengthy deliberations over the anomalous situation created by the conflicting decisions[13] of the Apex Court, the Law Commission in its 246th Report[14] dated 5 August 2014 recommended the introduction of a *proviso* to section 2(2) to ensure that "an Indian Court can exercise jurisdiction with respect to these provisions even where the seat of the arbitration is outside India"[15].

Toeing the line drawn by the Law Commission, the Indian Legislature formalised the Arbitration and Conciliation (Amendment) Bill, 2015 (the "**Amendment Bill**")[16]. The Notes on Clauses[17] to the Amendment Bill clarified the legislative intent behind the amendment by noting that "…[a] proviso below sub-section (2) is inserted to provide that some of the

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[10] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 648 (Supreme Court of India, Sep. 06, 2012) [hereinafter *Balco Verdict*].

[11] The Court also declared that the law laid down in Balco be applied prospectively to arbitration agreements executed before the date of the decision i.e., Sep. 06 , 2012.

[12] *See Balco Verdict, supra* n. 9, para 67.

[13] *See also* Thyssen Stahlunion GmbH v. Steel Authority of India, (1999) 9 SCC 334 (Supreme Court of India, Oct. 7, 1999); Venture Global Engineering v. Satyam Computers Services Ltd. & Anr., (2008) 4 SCC 190 (Supreme Court of India, Aug. 11, 2010).

[14] *See* Law Commission of India, Government of India, *Report No. 246, Amendments to the Arbitration and Conciliation Act 1996* (Aug. 5, 2014), https://lawcommissionofindia.nic.in/reports/report246.pdf [hereinafter *Law Commission Report*], para 41 at 24 ("While the decision in BALCO is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.

(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it.
That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

(ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre-BALCO.").

[15] *Id.* Amendment of Section 2, *Chapter III Proposed Amendments to the Arbitration and Conciliation Act, 1996*, point (vi) at 39.

[16] The Arbitration and Conciliation (Amendment) Bill, 2015, Bill No. 252 of 2015, Statement of Objects and Reasons, cl. 6 at 16 (Nov. 27, 2015) [hereinafter *Amendment Bill 2015*] ("…(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of arbitration is outside India…").

[17] *Id.* Amendment Bill 2015, Notes on Clauses at 18.

provisions of Part I of the Act shall also apply to International Commercial Arbitration, even if the place of arbitration is outside India".

Following suit, in December 2015, the Arbitration and Conciliation (Amendment) Act, 2015 (the "**Amendment Act**") came to be promulgated[18], whereby section 2(2) of the Act was amended and restated as follows:

> "(2). This part shall apply where the place of arbitration is in India.
>
> Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (b) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

(B) Post-Amendment Era

Attorneys in India were, however, not content with the 'clarificatory' amendment – and creative argumentation crafted with ingenious wordplay (at their clients' behest) did try to rattle the status quo. But a largely unwavering judicial trend, as observed below, indicates that the issue may have finally been put to rest.

Notably, in June 2018, the Division Bench of the Bombay High Court, in the case of *Heligo Charters v. Aircon Felibars*[19] confirmed the Single Judge's decision and held, that in order to "prevent dissipation and diversion of assets"[20] by the appellant, the respondent was entitled to apply for an injunction under section 9 of the Arbitration Act. The High Court observed that "[t]he amended provisions of Section 2(2) clearly stipulates that subject to an agreement to the contrary, the provisions of Section 9 shall apply to international commercial arbitration even if the place of arbitration is outside India. The contention that unless the award is put to execution in accordance with provisions of Section 48, a party is not entitled to seek interim relief is not sustainable. There is no such embargo or restriction placed for seeking recourse to interim measures even if the award is [a] foreign-seated one."[21]

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[18] The Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016 was to take effect from Oct. 23, 2015.

[19] Heligo Charters Pvt. Ltd. v. Aircon Feibars FZE, (2018) 5 AIR Bom R 317 (Bombay High Court, Jun 29, 2018).

[20] *Id*, para 17 ("In respect of interpretation placed by the Counsel appearing for the appellant under the provisions of Section 2(2), 9 and 48, we are of the view that the interim protection in the facts cannot be denied to the respondent irrespective of as to whether the award was put to execution or not? Such a measure is made available in law under Section 9 of the Act so as to prevent dissipation and diversion of assets. This being the object and purpose behind the amended provisions which is based on the recommendations of the Law Commission. We do not find any error in the view adopted by the learned Single Judge on this count.")

[21] *Id*, para 15.

In a similar vein, the Delhi High Court, in the cases of *Big Charter v. Ezen Aviation*[22] and *Raffles Design*[23], recognised the need to obtain interim relief under section 9 of the Arbitration Act against dissipation of assets located in India.

An affirmation also came from the Apex Court through the decision of a Three-Judges' Bench in *PASL Wind Solutions* (*supra*), wherein it was observed that "a proviso has now been inserted to section 2(2) which only makes it clear that where, in an arbitration which takes place outside India, assets of one of the parties are situated in India and interim orders are required qua such assets, including preservation thereof, the courts in India may pass such orders. It is important to note that the expression "international commercial arbitration" is specifically spoken of in the context of a place of the arbitration being outside India, the consequence of which is an arbitral award to be made in such place, but which is enforced and recognised under the provisions of Part II of the Arbitration Act."[24]

While the aforesaid decision does provide legal certainty to disputing parties (and their advisors), there are some recent rulings still causing some intermittent disquiet. An apposite reference may be made to the decision of the Delhi High Court in *Ashwani Minda v. U-Shin Ltd.*[25], where the Court departed from the consistent view reflected above, by construing the arbitration agreement in the case to be an explicit intention by the parties to exclude the applicability of Part I of the Arbitration Act. However, on consideration of the entire

[22] Big Charter Pvt. Ltd. v. Ezen Aviation Pty. Ltd. and Ors., O.M.P. (I) (COMM.) 112/2020 (Delhi High Court, Oct. 23, 2020).

[23] Raffles Design International India Pvt. Ltd. & Anr. v. Educomp Professional Education Ltd. & Ors., (2016) 234 DLT 349 (Delhi High Court, Oct. 07, 2016).

[24] *See supra* n. 5, para 42 ("As a matter of fact, the reason for the insertion of the proviso to section 2(2) by the Arbitration and Conciliation (Amendment) Act, 2015 was because the judgment in Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105 ["Bhatia"] had muddied the waters by holding that section 9 would apply to arbitrations which take place outside India without any express provision to that effect. The judgment in Bhatia (supra) has been expressly overruled a five-Judge Bench in BALCO (supra). Pursuant thereto, a proviso has now been inserted to section 2(2) which only makes it clear that where, in an arbitration which takes place outside India, assets of one of the parties are situated in India and interim orders are required qua such assets, including preservation thereof, the courts in India may pass such orders. It is important to note that the expression "international commercial arbitration" is specifically spoken of in the context of a place of arbitration being outside India, the consequence of which is an arbitral award to be made in such place, but which is enforced and recognised under the provisions of Part II of the Arbitration Act. The context of this expression is, therefore, different from the context of the definition of "international commercial arbitration" contained in Section 2(1)(f), which is in the context of such arbitration taking place in India, which only applies "unless the context otherwise requires". The four sub-clauses contained in section 2(1)(f) would make it clear that the definition of the expression "international commercial arbitration" contained therein is party-centric in the sense that at least one of the parties to the arbitration agreement should, inter alia, be a person who is a national of or habitually resident in any country other than India. On the other hand, when "international commercial arbitration" is spoken of in the context of taking place outside India, it is place-centric as is provided by section 44 of the Arbitration Act. This expression, therefore, only means that it is an arbitration which takes place between two parties in a territory outside India, the New York Convention applying to such territory, thus making it an "international" commercial arbitration.")

[25] AIR 2020 (NOC 953) 314 (Supreme Court of India, May 12, 2020).

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judgement, it appears that the case can be distinguished on its peculiar factual matrix – and may not warrant any further exposition here.

III. THE INTERNATIONAL PERSPECTIVE

Preserving the dissipation and diversion of assets for securing the enforcement of an eventual judicial pronouncement is not an objective confined solely to the realm of arbitration. A similar conception is recognised in transnational litigation and particularly applied by Courts in the United States of America. A court exercises what is called 'Quasi-in-Rem' jurisdiction when it may lack personal jurisdiction over a defendant, but exercises jurisdiction over the defendant's property assets, including debts owed to the defendant by a third party.

Case in point – in *Carolina Power & Light Company v. Uranex*[26], the California District Court was faced with an application for attaching the defendant's property located within its jurisdiction, while lacking personal jurisdiction over the defendant's 'person'. The Court drew a distinction between the jurisdiction to adjudicate the underlying merits of the controversy and the jurisdiction to attach property as security for a judgement being sought in litigation elsewhere. Weighing this jurisdictional exercise against notions of "fair play and substantial justice"[27] included consideration by the Court of both, the jeopardy to the plaintiff's ultimate recovery and the limited nature of jurisdiction sought by the plaintiff (i.e. for an order of attachment). Exercising its 'quasi-in-rem' jurisdiction[28] over defendant's assets, the District Court attached the property of the defendant for a limited period of time, and observed: "[w]here the facts show that the presence of defendant's property within the state is not merely fortuitous and that the attaching jurisdiction is not an inconvenient arena for the defendant to litigate the limited issues arising from the attachment, assumption of limited jurisdiction to issue the attachment pending litigation in another forum would be constitutionally permissible."

Buttressing this exercise of jurisdiction by the Courts in America, it is befitting to quote one of the leading experts on International Arbitration and Transnational Litigation, Professor George A. Bermann, quote - "U.S. courts are not deemed to violate due process when they enforce a foreign country judgment against a judgment debtor who has no contacts with the forum other than ownership of local property that can be used to satisfy the foreign judgment. If that is so, there is no reason why the presence of local assets belonging to a party cannot also support a

[26] 451 F. Supp. 1044 (N.D. Cal. 1977).
[27] Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).
[28] *See also* Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A., 622 F Supp. 25 (S.D.N.Y. 1985); CME Media Enters. B.V. v. Zelezny, No. 01 CIV. 1733 (DC), 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001).

pre-judgment attachment to secure payment of an eventual judgment against the property owner, provided of course that the usual criteria for the award of provisional relief are met and the attachment is otherwise proper."[29]

The decision in *Carolina Power* (*supra*) has since acted as a stepping stone in American Jurisprudence to arrive at the modern view adopted in International Arbitration – whereby, it is appreciated that any court having adequate jurisdiction not just at the seat of arbitration i.e., alluding to the exercise of 'secondary jurisdiction', is empowered to grant interim reliefs in aid of an ongoing arbitration, subject, of course, to the *lex arbitri*.

The deliberate inclusion of such power in the exercise of secondary jurisdiction can be witnessed under Article 17 J of the UNCITRAL Model Law on International Commercial Arbitrations, 1985 (as amended in 2006) (the "**Model Law**"), Article 25.3 of the London Court of International Arbitration Rules, 2020 (the "**LCIA Rules**")[30], and Article 28.2 of the International Chamber of Commerce Rules, 2021 (the "**ICC Rules**")[31] reproduced below for easy reference:

"17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."

"25. Interim and Conservatory Measures

…25.3 – A party may apply to a competent state court or other legal authority for interim or conservatory measures that the Arbitral Tribunal would have the power to order under Article 25.1: (i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award. After the Commencement Date, any application and any order for such measures before

[29] George A. Bermann, *Provisional Relief in Transnational Litigation*, 35 COLUM. J. TRANSNAT'L L. 553, 562 (1997).

[30] The (erstwhile) LCIA Rules, 2014 similarly provided as follows:

25. Interim and Conservatory Measures

"…25.3 - The power of the Arbitral Tribunal under Article 25.1 shall not prejudice any party's right to apply to a state court or other legal authority for interim or conservatory measures to similar effect: (i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award. After the Commencement Date, any application and any order for such measures before the formation of the Arbitral Tribunal shall be communicated promptly in writing by the applicant party to the Registrar; after its formation, also to the Arbitral Tribunal; and in both cases also to all other parties."

[31] Article 28(2) of the (erstwhile) ICC Rules, 2017 is verbatim to Article 28(2) of the ICC Rules, 2021.

the formation of the Arbitral Tribunal shall be communicated promptly in writing by the applicant party to the Registrar; after its formation, also to the Arbitral Tribunal; and in both cases also to all other parties."

"28. Conservatory and Interim Measures

…2) Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof."

While the Singapore International Arbitration Centre Rules, 2016 (the "**SIAC Rules**")[32], the Hong Kong International Arbitration Centre Rules, 2018 (the "**HKIAC Rules**")[33], the UNCITRAL Arbitration Rules, 2013[34], the American Arbitration Association Rules (the "**AAA Rules**")[35], and the Stockholm Chamber of Commerce Rules, 2017 (the "**SCC Rules**")[36] do not explicitly provide the same comfort as the institutional rules reproduced above, it is anyone's guess whether in practice, the tribunals operating under these rules, and courts at the seat having primary jurisdiction, would let such power be wielded by courts having secondary jurisdiction.

IV. THE CALCUTTA HIGH COURT DECISION

In the recent *Medima v. Balasore* (*supra*) case, a challenge surrounding an interim application under section 9 in aid of a London-seated arbitral award again came up for consideration before the Indian Courts. Briefly stated, the case involved an ICC award passed in Medima's favour in arbitral proceedings held in London, UK and governed by English ('British') law. Medima

[32]30. Interim and Emergency Interim Relief
"…30.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances, thereafter, is not incompatible with these Rules."
[33]23. Interim Measures of Protection and Emergency Relief
"…23.9 A request for interim measures addressed by any party to a competent authority shall not be deemed incompatible with the arbitration agreement, or as a waiver thereof."
[34]26. Interim measures
"…9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."
[35]37. Interim Measures
"…C. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."
[36]37. Interim measures
"…(5) A request for interim measures made by a party to a judicial authority is not incompatible with the arbitration agreement or with these Rules."

approached the Calcutta High Court seeking protective orders to secure the dues payable by Balasore under the ICC award.

The Single Judge succinctly captured the questions for consideration as the following:

i. Whether section 9 can be made applicable to a London-based award made under the ICC Rules in arbitration proceedings governed by English Law? and

ii. Whether the arbitration clause[37] falls within the exception carved out in the proviso to section 2(2) and can be seen as "an agreement to the contrary" which would take the arbitration agreement outside the scope of the proviso to section 2(2) of the Act?

The Calcutta High Court found that the interim application under section 9 moved by Medima is maintainable in the instant case. In a well-crafted judgement, the Single Judge began by elaborately tracing the history behind the insertion of the *proviso* to section 2(2) of the Arbitration Act, including a thorough discussion on the cases right from *Bhatia International* and *Balco* to *PASL Wind Solutions*; and noting any departures therefrom by other courts. Thereafter, it observed that the "[t]he expression International Commercial Arbitration used in the proviso would therefore necessarily mean a foreign-seated arbitration which forms the substratum of Part II of the 1996 Act."[38]

The Single Judge emphasised that the arbitration agreement must clearly and expressly indicate the intention of the parties to exclude the operation of section 9 from the purview of the arbitration agreement – and laid down that, "an arbitration agreement which merely chooses the law governing the underlying agreement, the arbitration and the conduct thereof without anything more cannot be seen as excluding the application of Section 9 by implication and closing the gates to Section 9 or the scope of the proviso to 2(2) of the Act." (*emphasis supplied*). The Court thereby held that the applicant, Medima is entitled to seek interim measures against Balasore, the award-debtor in India.

V. CONCLUSION

Up until the last decade, while tackling the complexities of arbitrations in India – oversight and

[37] "23. Governing Law; Disputes
This Agreement shall be governed by and construed in accordance with the laws for the United Kingdom. Any claim, controversy or dispute arising out of or in connection with this Agreement or the performance hereof, after thirty day calendar period to enable the parties to resolve such dispute in good faith, shall be submitted to arbitration conducted in the English language in the United Kingdom in accordance with the Rules of Arbitration of the International Chamber of Commerce by 3 (Three) arbitrators appointed in accordance with the said Rules, to be conducted in the English language in London in accordance with British Law. Judgment on the award may be entered and enforced in any court having jurisdiction over the party against whom enforcement is sought."
[38] *See supra*, n. 4, para 17.

involvement of the judiciary in arbitral proceedings, and an apparent inclination to liberally entertain most challenges by the government (or its instrumentalities) to awards and restate jurisprudence on archaic issues (such as public policy) – have been marked features of Indian jurisprudence on the issue.

However, it might not be premature to say that the international arbitration space has seen positive changes trickling down from 'pro-arbitration' sensitized judges sitting at the helm of the judiciary – with (former) Justice R.F. Nariman providing the guiding light like a lodestar. The recent jurisprudential clarity in the form of the *PASL Wind Solutions* and *Medima v. Balasore* rulings may have come as a welcome respite to all and sundry.

Leaving the reader with the words of (former) Justice R.F. Nariman that have (hopefully) resonated throughout this Article - "…so we had this confusion largely because the Model Law somehow or the other was not followed so far as section 9 was concerned, and this got corrected only finally by a Five-Judges' Bench, 10 years later, and ultimately, pursuant to the Law Commission Report by legislation, because it is only when legislation comes in, and now expressly by a proviso says that 9 will apply, bringing the position back to Model Law that we are back to square one."[39]

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[39] *See supra* n. 3.

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