



## INJUNCTIONS AGAINST INVOCATION OF BANK GUARANTEES UNDER SECTION 17 OF THE ARBITRATION AND CONCILIATION ACT: SHOULD COURTS INTERFERE?

AUTHOR

Ms. Khushbu Turki

Advocate, Delhi High Court

---

### Introduction

Section 17 of the Arbitration and Conciliation Act, 1996 [**“Arbitration Act”**] deals with the interim measures that may be ordered by the arbitral tribunal.<sup>1</sup> Section 37(2)(b) of the Arbitration Act further provides that an appeal shall lie to the Court from an order of the arbitral tribunal granting or refusing to grant interim measures under Section 17 of the Arbitration Act.<sup>2</sup> While Section 37 mentions that an appeal shall be maintainable against such orders passed by the arbitral tribunal, it is silent on the grounds on which such an appeal may be filed. Different High Courts have elaborated on various grounds which an appellate Court may consider when faced with a challenge against an interim order of the arbitral tribunal. However, there are no fixed standards of review.

In commercial contracts, bank guarantees are often issued to ensure that in case the issuing party breaches the contract, the aggrieved party can encash the bank guarantee, and reimburse itself for any anticipated losses or losses that have already been incurred. Whenever disputes arise between such contracting parties, the issuing party often seeks an injunction against the encashment of such bank guarantees for various reasons. Over the years, the Courts have laid down certain criteria which are to be satisfied before such injunctions are granted.

Part I of this article explains the principles which are to be considered by Courts before issuing such injunctions. Part II discusses the ambit of Section 37(2)(b) of the Arbitration Act. Part III elaborates how Courts should be dealing with injunctions or interim orders granted under Section 17 of the Arbitration Act. Finally, Part IV emphasises on the need for Courts to avoid intervention

---

<sup>1</sup> The Arbitration and Conciliation Act 1996, s 17.

<sup>2</sup> The Arbitration and Conciliation Act 1996, s 37(2)(b).

with interim orders which are given by an arbitral tribunal unless such intervention becomes absolutely necessary.

### **Invocation of Bank Guarantees: When can Injunctions be Granted?**

Bank guarantees are used as performance securities to ensure that the issuing party or the guarantor does not renege on his contractual obligations. Unconditional bank guarantees further simplify this process by enabling the beneficiary to encash the guarantees on demand.

Courts generally deal with the invocation of conditional and unconditional bank guarantees differently. While the invocation of conditional bank guarantees is often restrained when there are pending disputes between the parties to a contract, the general principle regarding unconditional bank guarantees is that they should not be interfered with when challenged. This is because unconditional bank guarantees are absolute in nature, and essentially form a separate contract between the concerned parties.<sup>3</sup> While considering injunctions against the encashment of unconditional bank guarantees, Courts typically do not intervene unless the party seeking an injunction demonstrates a clear and egregious case of fraud, irretrievable injuries or special equities in its favour.<sup>4</sup> Additionally, the bank guarantee must also have been invoked in consonance with the terms of the bank guarantee itself.<sup>5</sup>

Firstly, the fraud in question must be of an egregious nature which vitiates the entire transaction, i.e., the transaction between the lender(s) and the borrower(s) which led to the issuance of the guarantee. Further, the fraud must also be related with the actions of the parties before entering the contract.<sup>6</sup>

Secondly, irretrievable injuries have not been defined in any statute. Hence, what constitutes an irretrievable injury varies depending on the facts and circumstances of each case. One of the factors which is considered by Courts relates to whether the party seeking the injunction has a legal remedy which is adequate to compensate the party for any injuries caused by the invocation of the bank guarantee.<sup>7</sup> However, in *U. P. State Sugar Corp. v Sumac International Ltd.*, the Supreme Court also clarified that exceptional circumstances which make it impossible for the guarantor to reimburse

---

<sup>3</sup> *Himadri Chemicals Industries Ltd. v Coal Tar Refining Co.* (2007) 8 SCC 110.

<sup>4</sup> *United Commercial Bank v Bank of India & Ors.* (1981) 2 SCC 766; *U.P. Coop. Federation Ltd. v Singh Consultants and Engineers Pvt. Ltd.* (1988) 1 SCC 174; *State of Maharashtra & Anr. v National Construction Co., Bombay & Anr.* (1996) 1 SCC 735; *BSES Ltd. (Now, Reliance Energy Ltd.) v Fenner India Ltd. & Anr.* (2006) 2 SCC 728.

<sup>5</sup> *Millenium Wires Pvt. Ltd. v State Trading Corporation of India Ltd. & Ors.* (2015) 14 SCC 375; *Andhra Pradesh Pollution Control Board v CCL Products (India) Ltd.* (2019) 20 SCC 669.

<sup>6</sup> *Reliance Salt Ltd. v Cosmos Enterprises & Anr.* (2006) 13 SC 599.

<sup>7</sup> *DLF Ltd. v Leighton India Contractors Pvt. Ltd. & Anr.* (2021) SCC OnLine Del 3772.

himself once he ultimately succeeds, have to be decisively established and a mere apprehension that the other party would not be able to pay is not enough to seek an injunction.<sup>8</sup>

Thirdly, the concept of special equities is extremely broad, and the varying interpretations by different Courts have given rise to a complex jurisprudence on the subject. Since special equities require the existence of exceptional conditions, the distinction between circumstances causing irretrievable injuries to the party seeking an injunction, and those leading to special equities in favour of such a party have become increasingly blurred. In many situations, the Courts have considered the existence of irretrievable injury and special equities as forming the similar criteria.<sup>9</sup> This also led to special equities being considered as a ground for granting an injunction only when irretrievable injury has been established by the party seeking the injunction.<sup>10</sup>

Interestingly, in *Standard Chartered Bank v Heavy Engineering Corp. Ltd.* [**“Standard Chartered Bank”**], the Supreme Court recognised special equities as a separate ground for seeking an injunction.<sup>11</sup> However, the Court did not clearly define the scope of special equities. Thereafter, special equities have often been evaluated after considering whether the party seeking an injunction would get unfairly prejudiced by the invocation of the bank guarantee even when no prima facie fault is attributable to it.<sup>12</sup> The main idea behind this is to ensure that the party seeking the encashment of the guarantee does not unjustly enrich himself by such invocation. Hence, post the judgement in *Standard Chartered Bank*, special equities are often established based on the prima-facie breach rule which involves a preliminary determination by Courts as to whether the reasons given for the invocation of the guarantee hold any merit or whether no fault can be attributed to the party seeking an injunction against the invocation of the guarantee.

### **Interplay Between Section 17 and Section 37(2)(b): The Scope of Interference**

Section 17 of the Arbitration Act provides for interim measures that may be granted by the arbitral tribunal. Section 37(2)(b) of the Arbitration Act further provides for an appellate mechanism to challenge such interim orders. However, in the absence of legislative standards of review, different Courts have preferred different grounds of evaluation.

---

<sup>8</sup> *U.P. State Sugar Corp. v Sumac International Ltd.* (1997) 1 SCC 568.

<sup>9</sup> *Vinitec Electronics Pvt. Ltd. v HCL Infosystems Ltd.* (2008) 1 SCC 544.

<sup>10</sup> *U.P. State Sugar Corp.* (n 8); *Indu Projects Ltd. v Union of India* (2013) SCC OnLine Del 4601.

<sup>11</sup> *Standard Chartered Bank v Heavy Engineering Corp. Ltd.* (2020) 13 SCC 574.

<sup>12</sup> *Svenska Handelsbanken v M/s Indian Charge Chrome & Ors.* (1994) 1 SCC 502.

Several decisions have emphasised that the scope for judicial interference with interim orders passed by arbitral tribunals is limited,<sup>13</sup> and since the relief under Section 17 of the Arbitration Act is discretionary in nature, Courts generally refrain from interfering with such interim orders as long as the decision is guided by sound and reasonable judicial principles.<sup>14</sup> However, these orders have often been examined on merits.<sup>15</sup> Notably, the Delhi High Court has reiterated multiple times that the grounds considered while setting aside an award under Section 34 of the Arbitration Act shall also be applicable while evaluating interim orders under Section 37(2)(b) of the Arbitration Act.<sup>16</sup> In addition to the aforementioned grounds of evaluating the interim orders, another prudent approach which may be considered by Courts while adjudicating an appeal under Section 37(2)(b) can be the procedure followed by appellate Courts while dealing with appeals against interim injunctions under Order XXXIX, Rules 1 and 2, or Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908 [“CPC”].<sup>17</sup>

In *ITI Ltd. v Siemens Public Communication Network Ltd.*, the Supreme Court observed that even though no provision of the Arbitration Act links it to the procedure given in the CPC, the principles underlying the exercise of power by Courts while considering interim injunctions should be kept in mind while giving orders under Section 9 of the Arbitration Act.<sup>18</sup> The same principles may be applied to the discretion exercised by the arbitral tribunals under Section 17 of the Arbitration Act.<sup>19</sup>

Additionally, in *Wander Ltd. v Antox India Pvt. Ltd.* [“**Wander Ltd.**”], the Supreme Court interpreted the scope of intervention while exercising the Courts’ discretion, and remarked that the appellate Court should ideally not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except in situations where the discretion has been

---

<sup>13</sup> *Subhash Chander Chachra & Ors. v Ashwani Kumar Chachra & Anr.* (2007) SCC OnLine Del 149; *Gainwell Commosales Pvt. Ltd. v Minsol Ltd. (Formerly Cuprum Bagrodia Ltd.)* (2022) SCC OnLine Cal 3975; *Karan Kirti Thakkar & Anr. v Badri Narayan Baldawa & Ors.* (2024) SCC OnLine Bom 4209; *Elster Instromet B. V. v Mrunal Gandhi* (2024) SCC OnLine Bom 350; *Prashant Mohita v Manoj Kumar Bothra & Ors.* (2024) SCC OnLine Cal 6613.

<sup>14</sup> *Ajanta Ltd. & Anr. v Ajanta Transistor Clock Manufacturing Co. & Ors.* (2013) SCC OnLine Del 3765; *Dalmia Cement (Bharat) Ltd. v Jaiprakash Associates Ltd.* (2020) SCC OnLine Del 393; *Karan Kirti Thakkar & Anr. v Badri Narayan Baldawa* (2024) SCC OnLine Bom 4209.

<sup>15</sup> *Intertoll ICS Cecons O & M Co. Pvt. Ltd. v National Highways Authority of India* (2013) SCC OnLine Del 447; *AmarNagar (SRA) Sab. Gruhanirman Sanstha & Ors. v Vikas Narayan Raikar & Ors.* [2014] SCC OnLine Bom 1649; *Sanjay Gambhir v BDR Builders and Developers Pvt. Ltd.* (2016) SCC OnLine Del 5366; *NTPC Ltd. v Jindal ITF Ltd. & Anr.* (2017) SCC OnLine Del 11219.

<sup>16</sup> *Dinesh Gupta & Ors. v Anand Gupta & Ors.* (2020) SCC OnLine Del 2099; *Augmont Gold Pvt. Ltd. v One97 Communication Ltd.* (2021) SCC OnLine Del 4484; *Sanjay Arora & Anr. v Rajan Chadha & Ors.* (2021) SCC OnLine Del 4619.

<sup>17</sup> Code of Civil Procedure 1908, Ord XXXIX, rr 1 and 2; Ord XXXVIII, r 5.

<sup>18</sup> *ITI Ltd. v Siemens Public Communications Network Ltd.* (2002) 5 SCC 510.

<sup>19</sup> *Ajay Singh & Anr. v Kal Airways Pvt. Ltd.* (2017) SCC OnLine Del 8934.

exercised arbitrarily, capriciously or perversely, or where the Court has ignored the settled principles of law regulating grant or refusal of injunctions.<sup>20</sup>

This principle was adopted by the Delhi High Court in the context of arbitration in the case of *Shiningkart Ecommerce Pvt. Ltd. v Jiayun Data Ltd.*, wherein it was held that the appellate Court should not interfere with the exercise of discretion by the arbitral tribunal if the view taken by such tribunal is a plausible one and does not suffer from any perversity.<sup>21</sup>

While the aforementioned two judgements can be said to have specifically introduced perversity as a ground for setting aside interim orders under the Arbitration Act, the scope of such interference has been expanded by subsequent judgements. For instance, in *Sanjay Arora v Rajan Chadha*, while dealing with the scope of interference under Section 37(2)(b) of the Arbitration Act, the Delhi High Court relied on the principles laid down in *Wander Ltd.*<sup>22</sup> to further mention that the considerations guiding the exercise of appellate jurisdiction under Section 37(2)(b) of the Arbitration Act are fundamentally not much different from those which govern the exercise of jurisdiction under Section 34 of the Arbitration Act.<sup>23</sup>

Further, in *World Window Infrastructure Pvt. Ltd. v Central Warehousing Corp.*, the Delhi High Court again reiterated that the principles applicable under Section 34 of the Arbitration Act while setting aside an award would also apply to Section 37(2)(b) of the Arbitration Act.<sup>24</sup> This essentially implies that before interfering with an award under Section 37, it must be seen if the arbitral tribunal has adopted a judicial approach, and has upheld the principles of natural justice or given an egregious decision which is bad in law.<sup>25</sup>

It must also be noted that the Arbitrators' views while considering an application under Section 17 of the Arbitration Act are merely of an interim nature. These views are not a final expression of their opinion regarding the disputes between the contracting parties. Hence, they may be modified at the stage of the final award and do not permanently prejudice any of the parties to the arbitration. Section 17 of the Arbitration Act is simply intended to be a protective measure for preserving the sanctity of the arbitral process. Therefore, the interim orders under Section 17 of the Arbitration Act should only be interfered with when the exercise of the arbitral tribunal's jurisdiction is arbitrary or unconscionable.

---

<sup>20</sup> *Wander Ltd. & Anr. v Antox India Pvt. Ltd.* (1990) Supp SCC 727.

<sup>21</sup> *Shiningkart Ecommerce Pvt. Ltd. v Jiayun Data Ltd.* (2019) SCC OnLine Del 11464.

<sup>22</sup> *Wander Ltd.* (n 20).

<sup>23</sup> *Sanjay Arora & Anr. v Rajan Chadha & Ors.* (2021) SCC OnLine Del 4619.

<sup>24</sup> *World Window Infrastructure Pvt. Ltd. v Central Warehousing Corp.* (2021) SCC OnLine Del 5099.

<sup>25</sup> *Shubham HP Security Force Pvt. Ltd. v Central Warehousing Corp.* (2023) SCC OnLine Del 3035.

The aforementioned judgements further indicate that the powers under Section 37(2)(b) of the Arbitration Act should be exercised with caution. An appellate Court would be exceeding its jurisdiction if it interferes with a discretionary order made by the arbitral tribunal simply because there could have been another possible view based on the facts of the case.<sup>26</sup> Hence, the interim orders of the arbitral tribunal should be substituted only on the grounds of perversity, arbitrariness or manifest illegality.

### **Injunctions against Bank Guarantees: The Discretion under Section 17**

As mentioned above, injunctions against the encashment of unconditional bank guarantees can be granted only if the party seeking the injunction, i.e., the applicant, establishes egregious fraud related to the contract, irretrievable harm faced by the applicant or special equities in his favour. While establishing fraud is a straightforward concept, the question of whether irretrievable harm has been suffered by the applicant, or special equities exist in his favour largely depends on the arbitral tribunal's interpretation of the facts of the case.

Hence, the exercise of the arbitral tribunal's powers under Section 17 of the Arbitration Act in granting or refusing to grant an injunction against the invocation of an unconditional bank guarantee should not be interfered with by Courts unless such exercise of discretion by the arbitral tribunal is found to be vitiated by arbitrariness or perversity. This is also in line with various precedents in which Courts have held that the jurisdiction under Section 37(2)(b) of the Arbitration Act should be exercised only in limited circumstances.<sup>27</sup>

However, in *Director General, Project Varsha v Navayuga-Van OORD JV*, the Delhi High Court set aside the injunction granted by the arbitral tribunal against the encashment of the bank guarantee in question simply because the Court took an alternative view to that of the arbitral tribunal, which believed that special equities existed in favour of the applicant. The Court set aside the interim order by holding that the suit was not fit to be granted an injunction.<sup>28</sup> Even in *National Highways Authority of India v VIL Rohtak Jind Highway Pvt. Ltd.*, the Delhi High Court set aside an interim order in which the Court felt that the arbitral tribunal should have given a more conclusive finding related to the facts of the case before restraining the encashment of the performance guarantee.<sup>29</sup>

---

<sup>26</sup> *Tabal Consulting Engineers India Pvt. Ltd. v Promax Power Ltd.* (2023) SCC OnLine Del 2069.

<sup>27</sup> *Managing Director, Army Welfare Housing Organisation v Sumangal Services Pvt. Ltd.* (2004) 9 SCC 619.

<sup>28</sup> *Director General, Project Varsha v Navayuga-Van OORD JV* (2024) SCC OnLine Del 6459.

<sup>29</sup> *National Highways Authority of India v VIL Rohtak Jind Highway Pvt. Ltd.* [2019] SCC OnLine Del 6545.

In both of the aforementioned cases, the Court did not make any observations as to how the decisions of the arbitral tribunals were bad in law but merely differed with the tribunals' interpretation of the facts of the case. In light of the above, it is imperative to understand what constitutes arbitrariness or perversity in terms of injunctions against unconditional bank guarantees. The grant of an injunction by the arbitral tribunal against the invocation of an unconditional bank guarantee merely because of the existence of a contractual dispute between the parties would certainly be erroneous since the bank guarantee constitutes a separate contract. Further, if the tribunal considers only the dispute between the parties, and fails to evaluate whether the applicant had made out a case of irretrievable injuries or special equities in its favour, such an order would also be against the established principles of law and indicate perversity.

However, it is only if the arbitral tribunal fails to consider the facts and evaluate if a case has been made for the grant of an injunction against a guarantee that the Courts must interfere with such interim orders. A mere difference of opinion or an alternative view on whether the facts indicate the existence of an irreparable injury or special equities in favour of the party seeking an injunction would not merit interference with the interim orders under Section 37(2)(b) of the Arbitration Act.

## **Conclusion**

While bank guarantees are crucial for commerce and commercial transactions, certain circumstances often give rise to situations where conditions like egregious fraud, irretrievable injuries and special equities justify injunctions restraining the invocation of such guarantees. In any event, irretrievable injuries along with special equities are evolving concepts, and Courts are slowly becoming more liberal towards the same.

Based on an analysis of the aforementioned judgements related to the invocation of unconditional bank guarantees, the Author believes that since the Hon'ble Supreme Court itself has held that there should be minimal court intervention in arbitral proceedings,<sup>30</sup> interim orders dealing with injunctions against bank guarantees should not be interfered with unless the order in question is prima facie perverse and the arbitral tribunal has not considered the relevant factors necessary to grant such an injunction. A mere difference of opinion regarding certain facts related to the existence of irretrievable harm or special equities in favour of the applicant should not merit any interference with the interim orders under Section 37(2)(b) of the Arbitration Act.

---

<sup>30</sup> *National Highways Authority of India v Gwalior-Jhansi Expressway Ltd.* (2018) 8 SCC 243.

Further, the scope of interference with interim orders under Section 17 of the Arbitration Act should be even more restricted than the scope of interference under Section 34 of the Arbitration Act. This is because the principle of restraint is even more stringent at the interim stage than at the final stage since any interference with the interim orders may adversely affect the arbitral proceedings.<sup>31</sup>

The primary reason behind the 2015 amendment to the Arbitration Act, which clarified that arbitral tribunals exercised the same powers as those wielded by Courts under Section 9 of the Arbitration Act had been to discourage the contracting parties from approaching Courts for interim relief regarding matters which ultimately fell in the domain of the arbitral tribunals. Hence, in the absence of prima facie perversity in such decisions, Courts should refrain from interfering with the interim orders granted under Section 17 of the Arbitration Act.

---

<sup>31</sup>*Lava International Ltd. v Mintellectuals LLP* (2024) SCC OnLine Del 6908.