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THE TWO-TIERED INTERNATIONAL COMMERCIAL ARBITRATION REGIME: ANALYSING THE POLICY FAILURE TO ENFORCE FOREIGN-SEATED EMERGENCY AWARDS AND ITS IMPACT ON INDIA'S INTERNATIONAL COMMERCIAL TRUST

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Introduction

The foundation of arbitral efficiency in the complex web of global trade and commerce is provided by interim measures of protection. In circumstances involving perishable products, fluctuating currency values, asset dissipation, or the possible frustration of contractual commitments, they protect a party's interests throughout the tumultuous time between the start of arbitration and the final verdict. The urgency and transnational nature of such disputes make emergency and interim reliefs indispensable tools for ensuring that the eventual arbitral award is not rendered illusory. In line with this recognition, India formally acknowledges emergency arbitration, allowing tribunals constituted under institutional rules to grant urgent interim measures even before the main tribunal is established.

The effectiveness of interim measures depends not merely on their issuance but on their enforceability, especially in jurisdictions outside the seat of arbitration, where enforcement mechanisms may be uncertain or inconsistently applied. Over the last decade, India's arbitral jurisprudence has sought to project a pro-arbitration orientation. Judicial efforts to align domestic practice with international arbitral standards are evident in selective areas, including the recognition of party autonomy and the reinforcement of the enforcement of foreign-seated final awards.[1] In addition, India has strengthened its statutory framework through the 2015 and 2019 Amendments to the Arbitration and Conciliation Act, 1996 ["**ACA**"], accession to the Singapore Convention on Mediation, and the adoption of a

[1] *Swiss Timing v Organising Committee of Commonwealth Games* (2012) 8 SCC 547.

revised Model Bilateral Investment Treaty that favors arbitration as the preferred dispute resolution mechanism.[2] The proviso to Section 2(2) of the Act, which expands the authority of Indian courts to grant interim relief in support of foreign-seated arbitrations, as affirmed by the Supreme Court in *PASL Wind Solutions Pvt. Ltd. v GE Power Conversion India Pvt. Ltd.* ["**PASL Wind**"],[3] further evidences this reform trajectory. By enacting this, the legislation recognized the practical requirement for temporary solutions in global trade, where parties may require immediate safeguarding of assets, proof, or contractual rights located in India.

However, a doctrinal discrepancy in implementation weakens this progressive legislative attitude. Parties may enter into a contract outside of the protection provided by Section 2(2) of the Act.[4] Courts utilize the principle of implied exclusion when there is no express clause, assuming that the parties' intention to exclude the application of Part I is indicated by the selection of a foreign seat or particular institutional standards. Even in cases where the dispute has a significant relationship to the jurisdiction, this approach frequently denies parties access to emergency or temporary relief in India. India's arbitration system has thus developed into a two-tiered system.[5] Section 17(2),[6] which was added by the 2015 amendment to the ACA,[7] makes India-seated emergency awards enforceable. However, because Part I of the Arbitration Act does not apply to foreign-seated arbitrations, an award made by an arbitral tribunal with a foreign seat cannot be enforced under this section.[8]

In *Amazon.com NV Investment Holdings LLC v Future Retail Ltd.* (2021),[9] the Supreme Court affirmed the enforceability of India-seated emergency awards, but deliberately limited its ruling to domestic arbitrations, leaving foreign-seated emergency awards outside the statutory framework. This exclusion compels parties to seek duplicative interim reliefs under Section 9, which is distinct from enforcement of an emergency award as the former allows courts to grant temporary relief in support of arbitration proceedings, but it does not automatically render a foreign-seated emergency award enforceable. On the other hand, regardless of the arbitral seat, countries like Singapore,

[2] Aparna Singh, 'The Quagmire of Enforcing Foreign Arbitral Awards in India: Have the Challenges Eased or Deepened in the New Legal Regime Established by the Indian Arbitration & Conciliation (Amendment) Act, 2015?' (2017) 3(6) The Law Brigade (Publishing) Group 10.
[3] *PASL Wind Solutions Pvt Ltd v GE Power Conversion India Pvt Ltd* (2021) 7 SCC 1.
[4] Arbitration and Conciliation Act 1996, s 2(2).
[5] Abhijeet Sadikale, 'The Arbitration & Conciliation (Amendment) Act 2019: Good Intentions, Bad Outcomes' (2020) 5 The Law Brigade (Publishing) Group 25.
[6] Arbitration and Conciliation Act 1996, s 17(2).
[7] Arbitration and Conciliation (Amendment) Act 2015.
[8] *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552.
[9] *Amazon.com NV Investment Holdings LLC v Future Retail Ltd.* AIR 2021 SC 3723.

England, and Hong Kong have developed logical procedures for implementing emergency awards. This essay contends that such selective recognition weakens the very international commercial trust that the Indian arbitration regime aims to foster, deters investors from selecting India as a trusted seat or enforcement forum, and prolongs uncertainty in cross-border enforcement.

For clarity, this analysis is limited to international commercial arbitration and does not extend to investment treaty arbitration, where the enforcement mechanisms and policy implications operate under a distinct legal framework

Legal Analysis

The execution of international arbitral awards in India is governed under Part II of the ACA, 1996. India is a signatory to the New York[10] and the Geneva[11] Conventions. Therefore, as long as the requirements outlined in Sections 44 to 52 of the ACA are met, Indian courts are required to accept and uphold foreign awards. The enforcement of emergency awards made by an arbitral tribunal in a foreign-seated arbitration, however, was not statutory before the ACA, 2015. The definition of 'arbitral tribunal' in the ACA, 2015 did not include emergency arbitrators, and courts, such as in *Raffles Design v Educomp* ["**Raffles Design**"],[12] declined to treat such awards as enforceable under the Act, leaving only the option of a fresh suit or relief under Section 9.[13] This flaw established a strict division between domestic and foreign arbitral procedures, which still exists today and serves as the basis for India's two-tiered arbitration system.

Through the ACA, 2015, the Indian legislature adopted a proviso to Section 2(2) that permitted Section 9 to be used to enforce the foreign-seated arbitrations. The goal of the amendment was also stated in the Law Commission of India's 246th Report, which recommended changing Section 2(2). It is said that if a party's assets are in India and the arbitration's seat is overseas, the party may take such assets elsewhere. There would be no "efficacious remedy" in these situations since the other party obtaining an interim order from a foreign court would not be able to have it enforced by filing an execution petition.[14] Therefore, if a foreign court's "judgment" placing the other party in contempt of court is implemented under the Code of Civil Procedure ["**CPC**"], that is the only

[10] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
[11] Convention on the Execution of Foreign Arbitral Awards 1927.
[12] *Raffles Design v Educomp,* 2016 SCC OnLine Del 5521.
[13] Rahul Mahajan and Bhumika Khandelwal, *India's Quandary Over Recognition of Emergency Arbitration: An Ongoing Saga* (2022) 2(4) IJALR <https://ijalr.in/wp-content/uploads/2022/09/INDIA_S-QUANDARY-OVER-RECOGNITION-OF-EMERGENCY-ARBITRATION-AN-ONGOING-SAGA.pdf> accessed 29 November 2025.
[14] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Com No 246, 2014).

way the opposing party can have an emergency award enforced. Since it won't be available until the other party defaults on the international order, this remedy isn't totally effective.[15]

Therefore, the modifications made to Section 2(2) support parties to a foreign-seated arbitration seeking interim relief in India and are consistent with the goal of the 2015 Amendment. However, even though the amendment's legislative goal was corrective, its efficacy was compromised by the way the proviso was written. The Law Commission in its 246th Report had expressly recommended that parties should be able to "expressly exclude" the applicability of Section 9. Yet, the legislature omitted the word "express" in the final text. This omission revived the regressive doctrine of implied exclusion, a remnant of the pre-*BALCO* jurisprudence, under which courts inferred the exclusion of Part I provisions from the terms of the arbitration clause itself. Because of this interpretive ambiguity, judicial discretion was once again used in a situation when precision was crucial.

The doctrine of implied exclusion traces its origin to the (in)famous judgment in *Bhatia International v Bulk Trading SA*.[16] The court ruled that parties to a foreign-seated arbitration could be governed by Part I of the ACA, 1996, unless they had explicitly or implicitly excluded its operation through their agreement, because the legislature had not "specifically" stated that its provisions would only apply to arbitrations seated in India. However, this interpretation was essentially at odds with the Act's territorial structure, which was based on the UNCITRAL Model Law and called for a distinct division between arbitrations with domestic and foreign seats.[17] This judgment was thus overruled in the BALCO case in 2010.[18]

Judicial interpretation of the proviso to Section 2(2) demonstrates how the courts' continued reliance on the theory of exclusion by necessary implication, anchored in an illogical understanding of the objectives of the ACA, has perpetuated inconsistency in India's arbitration jurisprudence. Courts have frequently resorted to the regressive pre-BALCO approach, treating foreign seat and choice of foreign law as indicative of an implied exclusion of Part I provisions, rather than adopting a purposive interpretation in line with the 2015 Amendment's intent to facilitate interim reliefs in support of arbitrations with foreign seats.[19]

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[15] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Com No 246, 2014).
[16] *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105.
[17] Vidhu Gupta, 'Stretching the Limits of Statutory Interpretation: Critical Review of Bhatia International v Bulk Trading' (2010) 5(9) NALSAR Student Law Review 140.
[18] *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552.
[19] Muskan Agarwal and Amitanshu Saxena, 'Interim Measures of Protection in Aid of Foreign-Seated Arbitrations: Judicial Misadventures and Legal Uncertainty' (2021) 7(2) NLSIU Review 73.

In *Raffles Design,*[20] the parties had chosen a Singapore seat under the Singapore Court of International Arbitration ["**SIAC**"] Rules. The petitioner filed a Section 9 protection request with the Delhi High Court after the defendant breached the emergency award given. The Court ruled that the simple selection of a foreign seat or foreign controlling law did not imply exclusion of Section 9, rightly acknowledging that the proviso to Section 2(2) was inserted to give interim judicial aid even to arbitrations with foreign seats. However, it also found that no specific clause in the ACA allowed for the direct implementation of interim measures issued by an arbitral tribunal with a foreign seat. Thus, in a practical but disjointed resolution that highlights the statutory gap, the Court permitted the petitioner to submit a new Section 9 application to seek equivalent relief on merits.[21]

In contrast, the Delhi High Court took a restrictive stance in *Ashwani Minda v U-Shin Ltd.* ['**Ashwani**'],[22] concluding that the parties had implicitly rejected the applicability of Part I and, thus, Section 9 by selecting Japan as the seat and Japan Commercial Arbitration Association ["**JCAA**"] regulations as the curial law. However, this line of thinking misinterprets the 2015 Amendment's legislative aim. The proviso was included to Section 2(2) specifically to enable parties to a foreign-seated arbitration, irrespective of the institutional architecture or controlling law, to seek temporary protection in India, where the subject matter or assets are located. This remedial objective falls apart when implied exclusion is inferred based only on a foreign seat, which restores the uncertainty that the amendment was intended to eliminate. This interpretation is also consistent with the Supreme Court's reasoning in *Sundaram Finance Ltd v NEPC India Ltd.*,[23] where the Court emphasized that the arbitral framework must be construed to ensure effective relief and prevent parties from frustrating enforcement by exploiting procedural gaps. The Court reasoned that interim protection is intrinsically linked to the location of assets and that arbitration law cannot be interpreted in a manner that enables parties to evade their obligations by shifting for a or capitalizing on statutory silence.

In *Actis Consumer Grooming Products Ltd. v Tigaksha Metallics (P) Ltd.*, ["**Actis**"][24] the Himachal Pradesh High Court considered a Section 9 petition in support of an arbitration that was to be held in Geneva under the London Court of International Arbitration ["**LCIA**"] Rules, reflecting a more purposeful approach. Without delving into a speculative analysis of any implied exclusion,

[20] *Raffles Design International India Pvt. Ltd. v Educomp Professional Education Ltd* 2016 SCC OnLine Del 5521.
[21] Sushmita Gandhi, 'The Conundrum in Seeking Interim Reliefs for Foreign Seated Arbitrations in India' (*SCC Online*, 1 Jan 2021) <https://www.scconline.com/blog/post/2021/01/01/the-conundrum-in-seeking-interim-reliefs-for-foreign-seated-arbitrations-in-india/> accessed 29 November 2025.
[22] *Ashwani Minda v U-Shin Ltd* 2020 SCC OnLine Del 1648.
[23] *Sundaram Finance Ltd. v NEPC India Ltd.* (1999) 2 SCC 479.
[24] *Actis Consumer Grooming Products Ltd. v Tigaksha Metallics (P) Ltd.* 2020 SCC OnLine HP 2234.

the Court highlighted that it was entitled to award interim relief because the dispute's subject matter was located within its geographical jurisdiction. Similarly, the Bombay High Court in *Heligo Charters Pvt. Ltd. v Aircon Beibars FZE* ["**Heligo**"][25] refused to infer exclusion of Section 9 solely because the seat was foreign and the curial law was not Indian. It held that in the absence of a specific agreement to the contrary, the availability of interim relief under Section 9 remained intact.

According to the author, the reasoning used in *Actis* and *Heligo* effectively furthers the goal and objective of the 2015 Amendment by avoiding a remediless situation and prioritizing the preservation of the subject matter situated in India. Despite its procedural limitations, the Delhi High Court's reasoning in Raffles Design was also motivated by a similar dedication to upholding substantive fairness as opposed to a "cut-and-dry" technical exclusion. Decisions like *Ashwani*, on the other hand, represent a rigid and unduly formalistic interpretation of the proviso, which defeats the purpose of the amendment and maintains a two-tiered enforcement system that favors arbitrations with Indian seats while leaving parties with foreign seats dependent on judicial discretion and disjointed relief procedures. This formalism is only partially mitigated by the Supreme Court's ruling in PASL Wind Solutions, which, while affirming party autonomy and post-award enforceability, stops short of resolving the persistent uncertainty surrounding access to interim relief in aid of foreign-seated arbitrations.

Comparative Global Legal Framework

According to the explanatory note to the 2006 revisions to the UNCITRAL Model Law, parties are still free to request interim measures from the arbitral tribunal or the appropriate court, and the mere existence of an arbitration agreement does not bar national courts from doing so.[26] This structure gave rise to what has been called the "free-choice model," in which courts and arbitral tribunals have the simultaneous power to provide temporary remedies. However, several jurisdictions, such as England and Singapore have gradually shifted toward the "court-subsidiarity model" to protect party autonomy and avoid undue judicial intrusion after a tribunal has been established.[27] Courts only step in under this paradigm when the arbitral tribunal is either ineffective or has not yet been established.[28] This strategy is further refined by the "flexible court-subsidiarity model," which allows limited judicial aid even after the tribunal is established, but only in dire

[25] *Heligo Charters Pvt. Ltd. v Aircon Beibars FZE* (2018) SCC OnLine Bom 1388.
[26] UNCITRAL Model Law on International Commercial Arbitration 1985.
[27] Jan K Schaefer, 'New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared' (1998) Electronic Journal of Comparative Law (EJCL) 2.
[28] William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2002) 28(3) Brooklyn Journal of International Law 1059.

situations where the tribunal's available redress would be ineffective.[29] Foreign courts have applied this approach in situations involving the imminent dissipation of assets, the need to bind third parties not subject to the arbitration agreement,[30] or where urgent coercive relief was required that exceeded the tribunal's enforcement powers.[31]

With the implementation of Section 9(3) of the ACA, 1996,[32] India's arbitration system, especially with the 2015 Amendment, represents an effort to move away from a free-choice paradigm and toward a flexible court-subsidiarity model. Once the arbitral tribunal has been established, this clause prohibits Indian courts from considering interim applications unless the tribunal's remedy is judged insufficient or unenforceable. In theory, this amendment puts India on par with established arbitration jurisdictions like Singapore and England, which both uphold a sophisticated version of the court-subsidiarity principle, but the practicality is different.[33]

Singapore's International Arbitration Act ["**IAA**"] explicitly empowers courts, under Section 12(6)[34] read with Section 12A,[35] to enforce emergency arbitrator orders as if they were orders of the court. This legislative clarity, reinforced by a consistently pro-enforcement judiciary, has positioned Singapore as a preferred arbitral seat in Asia, offering parties both procedural efficiency and certainty of outcome.[36] Similarly, in England, Section 44 of the ACA, 1996[37] authorizes courts to grant interim relief in support of arbitrations seated either within or outside the United Kingdom, provided the tribunal is unable to act effectively. English courts have interpreted this provision pragmatically, striking a balance between judicial support and arbitral autonomy, thereby ensuring seamless enforcement of emergency measures across borders.[38] The predictable application of these statutes has cultivated investor confidence and strengthened both jurisdictions' reputations as reliable arbitration hubs.

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[29] Rachael D Kent and Amanda Hollis, 'Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration' in *Interim and Emergency Relief in International Arbitration* (International Law Institute Series on International Law, Arbitration and Practice, Juris Legal Information, 2015).
[30] *Maldives Airports Co. Ltd. v GMR Male International Airport Pte. Ltd.* (2013) SGCA 16.
[31] Arbitration Act 1996, s 44.
[32] Arbitration and Conciliation Act 1996, s 9(3).
[33] Jan Schaefer, 'New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared' (1998) *Electronic Journal of Comparative Law (EJCL)* 2.
[34] Arbitration and Conciliation Act 1996, s 12(6).
[35] Arbitration and Conciliation Act 1996, s 12A.
[36] Ministry of Law (Singapore), 'Consultation Paper on the Draft International Arbitration (Amendment) Bill' (*Ministry of Law (Singapore*), 17 August 2009) <https://www.mlaw.gov.sg/files/linkclick967e.pdf> accessed on 29 November 2025.
[37] Arbitration and Conciliation Act 1996, s 44.
[38] Guy Pendell, 'England and Wales' in Lawrence W Newman and Colin Ong (eds), *Interim Measures in International Arbitration* (Juris Legal Information, 2014).

India, a common law nation, on the other hand, is still struggling with the "relic" of the implied exclusion theory and bases its rulings more on the ambiguity of the arbitration clause than the 2015 Amendment's obvious legislative goal. A structural obstacle that erodes the authority of the foreign Emergency Arbitrator and goes against the fundamental concept that a party should be able to depend on its contractual choice of procedure is India's workaround, which requires a party to apply de novo under Section 9. While Section 9(3) successfully delineates judicial restraint for India-seated arbitrations, the absence of a corresponding mechanism under Part II leaves parties to foreign-seated arbitrations in a procedural vacuum when seeking enforcement of emergency awards.[39] In order to ensure that its domestic law no longer dictates a competitive disadvantage in the global market for dispute resolution, India urgently needs to adopt a provision similar to UNCITRAL Model Law Article 17H[40] for both institutional and ad-hoc arbitrations. This is demonstrated by competitor jurisdictions' explicit statutory commitment to recognize and support foreign interim measures.

Conclusion and Recommendation

India's difficulty in enforcing foreign-seated emergency arbitrator awards is not merely a procedural lacuna but a manifestation of a deeper structural inconsistency within its arbitral framework. The differential treatment accorded to domestic and foreign-seated interim measures has resulted in an enforcement asymmetry that undermines legal certainty and investor confidence. India's reform trajectory must now shift from judicial improvisation to legislative coherence if it hopes to go from being a jurisdiction that supports arbitration to one that sets arbitration standards. The solution lies in constructing a unified enforcement framework that eliminates territorial discrimination between domestic and foreign-seated interim measures. Two specific reforms are needed to achieve this.

The first step is to change Part II to specifically acknowledge and uphold EA awards with foreign seats. India would comply with accepted international norms if it used a wording similar to Article 17H of the UNCITRAL Model Law (2006), which allows for the recognition and enforcement of interim measures "irrespective of the country in which they were issued." Such an amendment should allow execution of EA orders under Section 49, subject to the limited grounds for refusal in Section 48, ensuring due process without reopening merits.

[39] Yogendra Aldak, 'Interim Reliefs by Arbitral Tribunals in Foreign Seated Arbitrations: An Inefficacious Remedy?' (*Bar & Bench*, 29 August 2023), <https://www.barandbench.com/view-point/interim-reliefs-by-arbitral-tribunals-in-foreign-seated-arbitrations-an-inefficacious-remedy> accessed on 29 November 2025.
[40] UNCITRAL Model Law on International Commercial Arbitration 1985, art 17H.

Second, the Section 9 mechanism needs to change from being a judicial stand-in to becoming a tool for facilitation. Similar to Singapore's practical strategy, which strikes a balance between deference to arbitral authority and domestic judicial monitoring, courts should refrain from conducting de novo evaluations in cases where a foreign EA order already exists and limits their involvement to enforcement rather than review. There has to be a definitive resolution to the uncertainty surrounding arbitrations between Indian parties with foreign seats.