

INTERIM REMEDY IN INDIA UNDER SECTION 9: IS IT EFFICACIOUS ENOUGH?

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Introduction

The Arbitration and Conciliation Act, 1996 [**“Arbitration Act”**] has two important compartments for domestic and foreign arbitration: Part I and Part II. Part I lays down the procedure when the place of arbitration is in India. Part II applies to foreign awards that are sought to be enforced or recognised in India. The hot debate in the Indian courtrooms during the early 21st century revolved around whether the two parts could overlap with each other. To say otherwise, the big question was whether Part I could apply to Part II since the latter did not deal with other essentials of arbitration. One of these essentials is interim measures of protection where the subject matter of foreign-seated arbitration is situated in India. The division bench of *Bhatia International v. Bulk Trading S.A.*¹ [**“Bhatia”**] opened the floor to discuss the scope of Part I laid down under Section 2(2) of the Arbitration Act, which read as:²

“This Part shall apply where the place of arbitration is in India”

It was held that provisions of Part I equally apply to International Commercial Arbitrations [**“ICA”**] taking place outside India unless parties agree to exclude any or all such provisions of Part I, expressly or by implication. Accordingly, the Apex Court allowed the application seeking interim injunction under section 9 of the Arbitration Act for an arbitration being held in Paris as per the Rules of the International Chamber of Commerce [**“ICC”**]. Although the judgement attempted to widen the scope of Part I by covering seat-centric ICA, it digressed from the purpose behind the enactment of the two parts. After a decade, in *Bharat Aluminium v. Kaiser Aluminium*³

¹ *Bhatia International v Bulk Trading S.A.*, (2002) 4 SCC 105.

² Arbitration and Conciliation Act 1996, s. 2(2).

³ *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 648.

[“**BALCO**”] the Apex Court purposively interpreted the text, delineating the scope of two parts. It held that the courts of the country where arbitration is conducted have the authority to regulate the conduct of arbitral proceedings. Such regulation extends to the provision of interim protection. The judgement emphasised that there would have been an express provision regarding the jurisdiction of courts to entertain any application in case of foreign-seated arbitration had the legislature intended so. Implied inclusion or exclusion is an ambiguous trajectory.

In 2015, India’s self-contained arbitration code transcended the domestic limits of interim protection to cover foreign-seated arbitrations by introducing a proviso to Section 2(2) of the Arbitration Act in line with the suggestion of 246th Law Commission Report 2014 [“**246th LCI Report**”]. This internal aid bridges the gap that *Bhatia* ruling subconsciously intended for. It applies Section 9⁴, 27(1)(a)⁵ and 37(3)⁶ of Part I to Part II, thereby allowing the overlapping between the two. The sweetest fruit of this amendment is rendering interim relief by courts available even in cases where parties have opted for foreign-seated arbitration. By streamlining the protections available to the parties, this reform significantly adds to India’s efforts in becoming a hub for ICA, and contributes to ‘ease of doing business’ for the corporations.⁷ Further, it introduced sub-section (3) under Section 9, that limited the scope of Court’s interference only before constitution of arbitral tribunal or when “*circumstances exist which may not render the remedy under section 17 efficacious*”.⁸ This amendment gave effect to the “Court-subsidiarity Model”, which prompts the parties to move to a tribunal on a priority basis for relief rather than a court unless the tribunal has not yet been constituted or cannot deliver the appropriate relief.⁹

This article discusses three aspects. Firstly, it analyses the application of Section 9 to secure the subject matter or amount of dispute in the case of seat-centric ICA. Secondly, it highlights the interim remedies available before institutions or courts of different jurisdictions. This comparison enables us to understand the issues that remain unaddressed by the domestic law in terms of Section 9. Lastly, it concludes by exploring the available solutions with suggestive changes.

⁴ Arbitration and Conciliation Act 1996, s. 9.

⁵ Arbitration and Conciliation Act 1996, s. 27(1)(a).

⁶ Arbitration and Conciliation Act 1996, s. 37(3).

⁷ Zabeen Motorwala, ‘Arbitration And Conciliation (Amendment) Act, 2015 - Key Changes And Circumstances Leading To The Amendments’ (2016) *Bharati Law Review* <<https://docs.manupatra.in/newsline/articles/Upload/5A0EB862-FAAC-492E-9457-12119D50FD2A.pdf>> accessed 4 September 2024.

⁸ Arbitration and Conciliation Act 1996, s. 9(3).

⁹ Muskan Agarwal & Amitanshu Saxena, ‘Interim Measures of Protection in Aid of Foreign-Seated Arbitrations: Judicial Misadventures and Legal Uncertainty’ (2021) 7(2) *NLS Bus L Rev* 91 <<https://repository.nls.ac.in/nlsblr/vol7/iss2/6>> accessed 27 March 2024.

Developments post 2015 amendment: Relief by Indian courts for foreign-seated arbitrations

Ever since the scope of Section 9 has been extended to Part II, the parties referring their disputes to foreign-seated arbitration, have had better access to interim remedies where the subject matter or the security for the dispute exists in India, unless there is an agreement to the contrary.

i. *Seat-centric approach*

A party-centric arbitration is trapped in the confines of the nationality of the parties, limiting their choices before other jurisdictions; seat-centric approach frees the parties to exercise their choice of seat without compromising on their rights.¹⁰ The legislature imbued Part II with the principle of seat-centricity, doing away with the requirement of at least one party being a foreign national. Accordingly, the party-centric ICA, as defined under Section 2(1)(f) of the Arbitration Act, differs from the seat-centric ICA referred to in the proviso to Section 2(2). In *PASL v. G E Power*,¹¹ the court interpreted that even two Indian parties are free to opt for a neutral arbitration forum outside India and still be able to avail of interim protections by Indian courts. The proviso to Section 2(2) clarifies that the courts in India may pass interim orders where the seat of arbitration is outside India, but the assets requiring protection are situated in the country. This approach upholds the party autonomy without compromising on the judicial remedies available in India.

ii. *Foundation on Three Pillars*

To seek protection, the party should demonstrate first, that a prima facie case exists owing to the overt or covert behaviour of the defendant; second, that the balance of convenience favours the grant of interim injunction; and third, if the interim remedy is not provided, it will result in irreparable loss to the plaintiff.¹² These underlying principles govern the remedy of “attachment before judgment” available under Order XXXVIII Rule 5 of the Civil Procedure Code, 1908 [“CPC”].¹³ They equitably guide Section 9 of the Arbitration Act to prevent the “just and convenient” discretion of the court from being arbitrary.

iii. *Efficacious remedy*

Section 9 assumes more importance since interim reliefs by foreign arbitral tribunals or courts are not enforceable under Section 13 of the CPC¹⁴ which determines whether a foreign judgment is conclusive or not. An interim order by a foreign court is not a “judgment or decree”. Additionally,

¹⁰ *Sasan Power v North American Coal Company*, (2015) SCC OnLine MP 7417.

¹¹ *PASL Wind Solutions (P) Ltd. v GE Power Conversion (India)(P) Ltd.*, 2021 SCC OnLine SC 331.

¹² *Essar House (P) Ltd. v Arcelor Mittal Nippon Steel India Ltd.*, 2022 SCC OnLine SC 1219.

¹³ Civil Procedure Code 1908, O. XXXVIII R. 5.

¹⁴ Civil Procedure Code 1908, s. 13.

no remedy before a tribunal, which is analogous to Section 17¹⁵ of Arbitration Act exists. Such an order may only be treated as an ad-interim measure, and the party would need to utilise Section 9 to obtain the efficacious remedy. An emergency arbitrator's interim order was held to be unenforceable by the Delhi and Bombay High Courts in *Raffles Design International India v. Educomp Professional Education Ltd.*¹⁶ [“**Raffles**”] and *HSBC PI Holdings (Mauritius) v. Avitel Post Studioz*¹⁷ [“**HSBC**”] respectively. However, both the courts did not deprive the party of an interim remedy under Section 9.

The extent of Section 9 is far and wide. *Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd.*¹⁸ highlights that this relief is available to a party till an arbitral award is “enforced”. It is loud and clear that the absence of any other remedy renders Section 9 vital for the preservation of the status quo of the subject matter.

Limitations in the existing interim remedy: A Comparative

Despite the efficacy, Section 9 remedy is not in tandem with remedies available internationally. The Arbitration Act does not recognise or enforce interim reliefs passed by foreign arbitral tribunals, reducing the Court-subsidiarity model adopted through Section 9(3) contrary to the letter of the law. Consequently, the ambit of domestic relief restricts the international relief so awarded by a foreign tribunal when the subject matter relates to India. The legislature neither envisaged nor aims to fill the void, thereby, derailing its efforts to make India the hub for ICA. The reasons behind the lacuna are discussed below.

i. Implied exclusion

In case of foreign-seated arbitration, the exclusion of interim remedy without any express provision in the contract amounts to uncertainty. As an outcome of the Bhatia ruling, the application of implied exclusion has created a ruckus for the party seeking provisional relief. Despite the 2015 amendment maintaining “subject to an agreement to the contrary”, the courts lack consensus ad idem that exclusion should be express.

The Delhi High Court fell prey to the application of this principle in *Ashwani Minda v. U-Shin Ltd.*¹⁹ [“**Ashwani Minda**”] wherein the provision of an emergency arbitrator in the agreement impliedly deprived the party of approaching courts in India. The ruling is celebrated for observing minimum

¹⁵ Arbitration and Conciliation Act 1996, s. 17.

¹⁶ *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd.*, 2016 SCC OnLine Del 5521.

¹⁷ *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd.*, 2014 SCC OnLine Bom 929.

¹⁸ *Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd.*, 2024 SCC OnLine Del 1606.

¹⁹ *Ashwani Minda v U-Shin Ltd.*, 2020 SCC OnLine Del 721.

judicial interference and recognising the emergency arbitrator's decision under the Japan Commercial Arbitration Association Rules [**JCAA Rules**]. However, the finding of Section 9 being impliedly excluded from the arbitration clause by choice of a foreign seat creates conflict with proviso to Section 2(2). Dismissal of application on the ground of maintainability eliminated all paths for the party to enforce any reliefs in India.

ii. *Divergence from UNCITRAL Model Law*

The Arbitration Act, based on UNCITRAL Model Law, is perhaps not the latter's exact replica. Article 17H of the Model Law provides for the recognition and enforcement of interim measures by a tribunal "irrespective of the country in which it was issued". Such a corresponding provision is absent from the Arbitration Act. This implies that the courts in India are not in a position to enforce interim orders passed under the rules of international arbitration institutions. For instance, Rule 30 of the Singapore International Arbitration Centre [**SIAC**] Rules effectuates and recognizes the interim and emergency interim reliefs by both the tribunal and a judicial authority.²⁰ Similarly, the ICC,²¹ London Court of International Arbitration²² [**LCIA**], Stockholm Chamber of Commerce²³ [**SCC**], and others provide for similar interim measures. This void in domestic law leads India astray from a time-efficient and effective dispute resolution mechanism.

iii. *Emergency arbitration*

Emergency Arbitration is a tool in a tribunal's hands to provide urgent interim relief. It is mostly provided by arbitration institutions.²⁴ Unfortunately, the Arbitration Act does not recognise such arbitration despite the proposal by the 246th LCI Report to amend Section 2(1)(d) and include "emergency arbitrator" in it. The dispute between Amazon and Future Group granted the same pedestal to an emergency arbitrator as an arbitrator of a tribunal in the case of Indian-seated arbitrations.²⁵ However, it also created divergent perspectives in relation to foreign-seated arbitrations. While *HSBC* and *Raffles* did not recognise the emergency arbitration, a distinct view has been observed in *Ashwani Minda* wherein Section 9 interim relief was not granted on account of the party's failure to obtain similar relief from the emergency arbitrator.

²⁰ Singapore International Arbitration Centre Rules 2016, r. 30.3.

²¹ International Chamber of Commerce Arbitration Rules 2021, art. 28.

²² London Court of International Arbitration Rules 2020, art. 25.

²³ Stockholm Chamber of Commerce Arbitration Rules 2023, art. 37.

²⁴ Muskan Agarwal & Amitanshu Saxena, 'Interim Measures of Protection in Aid of Foreign-Seated Arbitrations: Judicial Misadventures and Legal Uncertainty' (2021) 7(2) NLS Bus L Rev 91 <<https://repository.nls.ac.in/nlsblr/vol7/iss2/6>> accessed 27 March 2024.

²⁵ *Amazon.com NV Investment Holdings LLC v Future Retail Ltd. & Ors.*, (2022) 1 SCC 209.

Extent of interim relief in other jurisdictions

Laws in other jurisdictions are more inclusive. They appreciate necessary intervention to abate threats to the subject matter of the arbitration. They concomitantly maintain comity by respecting the jurisdiction of the country whose governing law is involved.

i. *Singapore*

Singapore is a pro-arbitration state. Under the International Arbitration Act 1994, court-ordered interim measures under Article 12A are allowed notwithstanding the place of arbitration.²⁶ The power is entrusted with the General Division of the High Court of Singapore. The statute is cognizant of situation where the court should not interfere in case of foreign-seated arbitrations. Accordingly, the General Division may refuse to pass any order in such circumstances.²⁷ This act also acknowledges the supremacy of an arbitral tribunal. The order of the court ceases to have effect when the tribunal empowered to act on the subject matter of such order has expressly passed another order.²⁸

ii. *England*

The English Arbitration Act 1996 also empowers its courts, under Section 44, to make orders that buttress arbitral proceedings.²⁹ The power is like the one with Singapore. Enacted in the same year as India's act, England adopted rather a pro-arbitration approach than the Indian legislature. The court does not exercise its power inordinately but when it is appropriate. In England, the precedent is that the natural court in the seat of arbitration has the power to pass interim injunctive reliefs.³⁰ When the governing law is that of England, the courts are empowered to interfere.³¹

iv. *New Zealand*

Section 9 of New Zealand's Arbitration Act 1996 provides for interim measures either by High Courts or district courts and extends in cases where a seat is outside the state.³² Since the arbitral tribunal's power is given greater value than that of the courts, the provision may not have enough utility. In 2016, after an amendment to the act, the definition of arbitral tribunal now also includes

²⁶ International Arbitration Act, 1994, art. 12A.

²⁷ International Arbitration Act, 1994, art. 12A (3).

²⁸ International Arbitration Act, 1994, art. 12A (7).

²⁹ Arbitration Act 1996, s. 44.

³⁰ *Econet Wireless Ltd. v Vee Networks Ltd.*, [2006] EWHC 1568 (Comm).

³¹ *Company 1 v Company 2*, [2017] EWHC 2319(QB).

³² Arbitration Act 1996, s. 7.

an “emergency arbitrator”.³³ It implies that the awards by the emergency arbitrators are enforceable in the land of the Kiwis.

Conclusion

Section 9 of the Arbitration Act allows the court’s interference in limited matters in both domestic and foreign arbitrations. However, the enactment has certain grey areas that hinder India from adopting a pure pro-arbitration approach. By recognising the interim orders by other courts to express the inclusion of emergency arbitrators within the meaning of arbitral tribunal, the scope of relief can be widened.

Every state with a pro-arbitration stance enforces the interim measures by any tribunal within or outside the country. This equitable treatment of all types of tribunals streamlines the procedure for the parties. Since tribunals are not courts in Indian jurisprudence,³⁴ their orders should not be treated as foreign judgments under Section 13 of CPC, as the Arbitration Act can provide sufficient guidance to such orders. Measures by a tribunal should be kept on a higher pedestal based on the court-subsidiarity model. The principle of minimum judicial intervention can be juxtaposed with the recognition of interim measures by foreign tribunals for efficacious remedy. Section 9(3) needs to be effectuated both in its letter and spirit without any reservations in cases of ICA. This would clear the clutter surrounding the appropriate place and time for interim reliefs to be approached by the parties.

In the 246th LCI Report, the commission pursued to accord legislative sanction to institutional arbitration. It recommended the inclusion of emergency arbitrators within the meaning of arbitral tribunal. Provided the legislature acts upon this recommendation, the issue of foreign tribunals’ recognition of measures may be resolved.

Further, the legislature may amend the proviso to Section 2(2) to “subject to an *express* agreement to the contrary”. This would end the saga of divergent views by the courts and bring the proviso in line with Section 7, which only recognises written arbitration agreements. As the seat is the “centre of gravity” of arbitration, no party should be denied any remedy before the seat, regardless of the venue of the proceedings.

³³ Arbitration Act 1996, s. 2(1)(b).

³⁴ *Nabar Industrial Enterprises Ltd. v Hong Kong and Shanghai Banking Corporation*, (2009) 8 SCC 646.