Interim Reliefs in Arbitral Proceedings

Powerplay between Courts and Tribunals

June 2018
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1. Background

Arbitration has emerged as the preferred mechanism for the resolution of commercial disputes amongst various dispute resolution mechanisms available. One of the reasons for proliferation of arbitration has been the flexibility provided to the parties to conduct arbitral proceedings as per the law chosen by them, along with arbitrators of their choice and at a venue and place convenient to parties, as opposed to a court proceeding. Moreover, party autonomy being the thumb rule in arbitral proceedings, parties are also generally permitted to agree upon the procedure governing the resolution of disputes.

The arbitral process is normally accompanied by certain procedural safeguards such as interlocutory or interim measures that safeguard parties during the pendency of proceedings.

It has been observed that parties engage in dilatory tactics to delay proceedings or prejudice rights of opposite parties by *inter alia* dissipating assets or interfering with the functioning of bodies. (In case of a company where both parties are stakeholders). In such a situation, the final relief granted by a tribunal may be rendered nugatory or meaningless unless the arbitral tribunal or court is able to safeguard the rights of parties during the pendency of the arbitral proceedings. Therefore, in the intervening period between juncture at which the 'dispute' arose (in certain circumstances even before the commencement of arbitration) and till the execution of the award, certain interim measures may be necessary to protect a party's rights and ensure that justice is done.

The nature of interim relief sought by the parties may vary based on the facts and circumstances of the dispute. In certain situations the effective provision of interim reliefs may involve directions to third parties also. With the recent changes in the Arbitration and Conciliation Amendment Act, 2015 ("Amendment Act") and wider powers vested with arbitral tribunals, interim reliefs should be made easy and accessible to parties to secure the ultimate arbitral award. In this backdrop, it is of paramount importance to understand the nature of interim reliefs which can be granted by courts and arbitral tribunals and their respective limitations.
2. Who can apply for interim measures

Any party to the arbitration agreement can make an application for interim measures in the course of the arbitral proceedings. However, after making of the arbitral award, only a successful party which is entitled to seek the enforcement of the award can apply to the court under Section 9 of the Arbitration & Conciliation Act, 1996 ("Act") for protection in terms of Section 9 (ii) of the Act.

This emanates from the understanding that the scheme of Section 9 postulates an application for the grant of an interim measure of protection after the making of an arbitral award and before it is enforced for securing the property for the benefit of the party which seeks enforcement of the award. As was observed by the Bombay High Court (quoted below), an unsuccessful party would not be, in any event, entitled to enforcement for the simple reason that there is no award in its favour, to be enforced:

“If an application is made at the instance of such an unsuccessful party under section 9, there will not be any occasion to grant any interim measure which will be in the aid of the execution of the arbitral Award as such a party will not be entitled to seek enforcement under section 36.”

Consequently, even on the award being set aside, the party whose claim has been rejected vide the said award, cannot apply for interim measures under Section 9 of the Act. This is premised on the understanding that the court, under Section 34 of the Act does not act as a court of appeal, and not capable of granting any further relief to the party which challenges the award.

1. See Annexure III
3. Wind World (India) Ltd. v. Enercon GmbH and others 2017 SCC OnLine Bom 1147 (para 18)
3. Interim measures in arbitration

In India, the Act which was formulated on the basis of UNCITRAL Model Law on International Commercial Arbitration, 1985 (“Model Law”), provides for interim measures under Sections 9 and 17 by courts and arbitral tribunals respectively.

Section 9 of the Act is broadly based on Article 9 of Model Law and provides for the grant of interim measures by a court. Unlike Model Law, Section 9 provides for interim measures of protection not just before the commencement of arbitral proceedings and during the arbitral proceedings but also post the arbitral award has been delivered (but prior to its enforcement).

The Amendment Act has introduced certain changes to the provisions on interim reliefs with respect to kind of reliefs available and the time-frame for seeking such reliefs before courts. In case of arbitrations commenced on or after October 23, 2015, if an order of interim reliefs has been granted by a court prior to the constitution of the arbitral tribunal, parties are required to initiate arbitral proceedings within a period of ninety days.

Once arbitral proceedings have commenced, the parties would have to seek interim reliefs before the arbitral tribunal. A court would ordinarily not entertain a petition for interim reliefs in such a situation unless the party is able to prove the existence of circumstances that make a relief granted by an arbitral tribunal insufficient. However, in certain situations including where the interim relief sought affects third party rights such as an injunction against the encashment of bank guarantees, an application for interim reliefs would lie only before a court even if an arbitral tribunal is constituted.

After an award has been rendered by the arbitral tribunal, the successful party may also choose to approach courts for interim reliefs to safeguard the validity and effectiveness of the arbitral award prior to its enforcement. The application would generally have to be made before a court prior to the enforcement of the award in case of both domestic and international commercial arbitrations. It is also a corollary that the unsuccessful party may not seek to stall the enforcement of the award by filing an application under Section 9.

Interim measures ordered by arbitral tribunal set out in Section 17 of the Act, are also essentially based on Article 17 of the Model Law.

Previously, there was a debate whether the powers of an arbitral tribunal to grant interim reliefs were narrower compared to the power of a court under Section 9 of the Act. However, with the amendments in place, the powers of an arbitral tribunal to grant interim reliefs have been made at par with those of the court under Section 9 of the Act.

The operation of this provision is triggered only at the request of a party to the arbitral proceedings, only after the constitution of the tribunal. A party may seek interim reliefs up to the point in time at which an award is made by the tribunal.

I. Reliefs under Section 9

For assessing the powers of the court to grant interim measures under Section 9 of the Act vis-à-vis powers of the arbitral tribunal under Section 17 of the Act, the introduction of the following clause to Section 9 of the Act merits discussion:

“(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

Thus, to avoid prejudice to any party subsequent to the constitution of the arbitral tribunal, courts have begun to refrain themselves from making orders under Section 9 of the Act.

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5. See Sundaram Finance Ltd v NEPC India Ltd (1999) 2 SCC 479 (The Supreme Court held that parties would have to demonstrate the intention to commence arbitral proceedings to be eligible for the grant of interim reliefs).
However, subsequent to the amendments in Section 9 of the Act, the court can grant interim measures in the following circumstances:

- Prior to the constitution of the tribunal
- After the award has been made and prior to its enforcement
- In the course of the arbitral proceedings, after the constitution of the tribunal, when an interim measure granted by the tribunal would not be efficacious. In granting interim reliefs in such cases, courts assess the relevant facts and circumstances with precision including instances like the lethargic manner of arbitrators in granting interim reliefs in respect of assets rendering the remedy inefficacious.

Further, unless the parties have agreed otherwise, a court in India can pass orders for interim measures of protection even if the place or seat of arbitration is outside India.

In a recent case before the Delhi High Court, it was disputed as to whether the court before which an application for interim measures is pending, would have to relegate the same to the arbitral tribunal upon its constitution. Upholding the finding of the Single Judge, the Division Bench of the Delhi High Court observed that:

“If the argument...were to be accepted that the moment an Arbitral Tribunal is constituted, the Court which is seized of a Section 9 application, becomes coram non judice, would create a serious vacuum as there is no provision for dealing with pending matters. All the powers of the Court to grant interim measures before, during the arbitral proceedings or at any time after the making of the arbitral award but prior to its enforcement in accordance with Section 36 are intact (and, have not been altered by the amendment) as contained in Section 9(1) of the said Act. Furthermore, it is not as if upon the very fact that an Arbitral Tribunal had been constituted, the Court cannot deal with an application under sub-section (1) of Section 9 of the said Act. Section 9(3) itself provides that the Court can entertain an application under Section 9(1) if it finds that circumstances exist which may not render the remedy provided under Section 17 efficacious....there is no provision under the said Act which, even as a transitory measure, requires the Court to relegate or transfer a pending Section 9(1) application to the Arbitral Tribunal, the moment an Arbitral Tribunal has been constituted.”

Thus, to avoid a situation where a party is left without an interim order in respect of proceedings for interim measures pending before a court which have not been transferred to the tribunal after its constitution, the court may continue with the same and grant appropriate reliefs, where necessary.

As mentioned above, another significant aspect is that of the time-lines introduced vide the amendments. Section 9(2) of the Act provides that:

“Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.”

The insertion of such a time-bound mechanism aims at regulating of the role of the courts in granting interim measures once the arbitral tribunal has been constituted as it was deemed suitable to empower the tribunal to hear all interim applications, upon its constitution. After all, once the Tribunal is seized of the matter it is most appropriate for the Tribunal to hear all interim applications.

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7. Arbitration and Conciliation Act 1996, s 2(2) proviso
Reliefs generally sought from courts

A reading of various decisions suggests that parties generally approach courts for securing the amount in dispute and preventing the alienation or dissipation of property. The following are indicative of the reliefs generally sought and granted by courts under the Act:

i. Under Section 9(ii)(b) parties have sought to protect their financial interests by securing the amount in dispute, courts have directed parties to furnish guarantees.

ii. Under Section 9(ii)(c) courts have allowed parties to take symbolic possession of properties. Courts have also appointed a receiver to take possession of property not being the subject matter of the dispute.

iii. In exercise of the wide powers available under Section 9(ii)(e) courts have directed parties to disclose the properties owned by them. Courts have found that an order of attachment may be passed against a third party respondent as well as directing parties to not dispose of their properties.

II. Standards applicable to the grant of interim reliefs by the Court under Section 9

There are no standards prescribed under the Act for grant of interim reliefs by a court under Section 9 of the Act. Some courts have sought to apply standards under the Code of Civil Procedure, 1908 (“CPC”) such as Order XXXVIII and Order XXXIX. Courts have held that standards prescribed in the CPC would not be applicable to proceedings under Section 9 of the Act and have held that if a party can merely show that it has a good case on merits, it would be likely to succeed. In these situations courts have been guided by the principle that denial of the grant of such interim reliefs would lead to injustice to the applicant or that the resultant award would be rendered unenforceable/un-executable if such reliefs are not granted.

The degree of the applicability of the provisions of the CPC to proceedings under Section 9 of the Act remains unsettled in light of the divergent opinions by various high courts. Further, the Supreme Court in Arvind Constructions v. Kalinga Mining Corporation and Others, despite recognising that there were divergent decisions by various high courts, left this question open to be considered in an appropriate case. The Amendment Act does not address this lacuna and remains silent with respect to standards that may be applicable in case of grant of interim reliefs by courts.

From a reading of various decisions we have distilled two lines of reasoning: an exclusive approach and an inclusive approach. The former line of reasoning suggests that the rigours of every provision in the CPC cannot be put into place to defeat the grant of relief provided under Section 9 of the Act. Whereas the latter line of reasoning considers proceedings under Section 9 of the Act to be akin to proceedings under Order XXXVIII Rule 5 and Order XXXIX Rule 1 and 2 of the CPC and consequently the principles contained therein would have to be considered for the grant of interim reliefs.

Courts regulate the grant of temporary injunction in accordance with the procedure laid down in Order XXXVIII and Order XXXIX of the CPC. Order XXXVIII of the CPC pertains to certain reliefs that may be available at any stage of the suit prior to judgment including arrest of defendant as well as furnishing security, if a court is convinced that defendant intends to delay or obstruct the execution of a decree passed against it by disposing of its property or poses a threat to the property in dispute.
Under Order XXXIX of the CPC, the Court may grant temporary injunctions and interlocutory orders if in any suit it is proved that any property in dispute is in danger of being damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors. Courts in such cases may grant temporary injunction to restrain such act, or give such other order for the purpose of staying and preventing the damaging, alienation, sale, removal or disposition of the property provided the party can satisfy the three requirements in relation to:

(i) Prima facie (ii) Balance of convenience (iii) Irreparable injury.

A. Exclusive Approach

Order XXXVIII Rule 5 of the CPC provides for certain kinds of reliefs in the nature of grant of security, attachment of property or arrest of the defendant that are akin to the reliefs under Section 9(ii) (b) and (c) of the Act. These reliefs are granted only if the Court is satisfied that the respondent with an intention to obstruct or delay the execution of a decree is about to:

i. dispose of the whole or part of its property or

ii. remove the whole or any part of its property from the local limits of the civil court having jurisdiction.

Order XXXIX of the CPC provides for temporary injunctions which are akin to the reliefs under Section 9(ii) (d) and (e) of the Act. The standards to be shown by an applicant under Order XXXIX in order to successfully secure an injunction are that:

i. any property in dispute is in danger of being wasted, damaged or alienated by the respondent, or wrongfully sold in execution of a decree, or

ii. the respondent threatens, or intends, to remove or dispose of its property with a view to defrauding its creditors, or

iii. the defendant threatens to dispossess the applicant or otherwise cause injury to the applicant in relation to any property in dispute in the suit.

Various High Courts have taken the view that principles/standards contained in Order XXX-VIII Rule 5 and Order XXXIX mentioned above need not be strictly applied for the grant of interim measures under Section 9 by a court. Such strict application would defeat the very purpose of having an alternative mechanism of dispute resolution.

i. The Bombay High Court in Delta Construction Systems Ltd., Hyderabad v. M/S Narmada Cement Company Ltd, Mumbai18 (“Delta Construction”) held that court would not be bound by the provisions contained in the Order XXXVIII Rule 5 while granting a relief under Section 9 of the Act.

ii. Adverting to Delta Constructions the Bombay High Court in National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd.19 (“National Shipping”), held that while seeking an order for securing the amount in dispute, the petitioner would not need to satisfy the requirements of Order XXX-VIII Rule 5.

a. Instead a party applying for interim reliefs would only have to make a clear case regarding the merits of the claim for interim reliefs and establish that the denial of such reliefs would lead to injustice to the applicant.

b. Further, the applicant would have to make averments regarding the obstructive conduct of the opposite party or attempts to defeat the award thereby requiring the grant of interim relief.

iii. Similarly, in Steel Authority of India v. AMCI Pty Ltd20 (“SAIL”) the Delhi High Court took the view that principles contained in Order XXXVIII Rule 5 would

18. (2002) 2 BomLR 225
19. AIR 2004 Bom 136
20. (2011) 3 Arb LR 502
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only serve as guiding principle for the exercise of power by the court. A party seeking reliefs under Section 9 would essentially have to satisfy the court that the furnishing of security was paramount to safeguard its interests.


(“Adhunik Steels”), the Apex Court was of the opinion that “well known rules” of the CPC would have to be kept in mind while granting interim reliefs under Section 9. Therefore, the principles such as (i) prima facie case, (ii) balance of convenience, and (iii) irreparable injury would have to be kept in mind while granting an injunction. The Apex Court stopped short of stating that specific standards under Order XXXVIII Rule 5 and Order XXXIX Rule 1 and 2 would apply. However, the Bombay High Court in *Nimbus Communications Limited v. Board of Control for Cricket in India and Another* interpreted *Adhunik Steels* to come to the conclusion that standards set out in Order XXXVIII Rule 5 would have to be fulfilled.

However, in *Tata Capital Financial Services Ltd. v. Unity Infra Projects Ltd. & Ors* the Bombay High Court held that the Court will broadly bear in mind the fundamental principles of Order XXXVIII Rule 5 and Order XXXIX Rules 1 and 2, but at the same time, will have the discretion to mould the relief on a case by case basis with a view to secure the ends of justice and preserve the sanctity of the arbitral process. The Bombay High Court, herein, followed the ratio in the Division Bench’s judgment in *Deccan Chronicle Holdings Limited v. L&T Finance Limited* that the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind while making relevant orders under Section 9, however, the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice.

v. In maintaining an exclusive approach, the Delhi High Court has continued to recognise that the powers of courts to grant interim reliefs under Section 9 of the Act is considerably wide, as is apparent from its text. Nevertheless, such power should be exercised in a principled manner, premised on some known guidelines – hence, the reference to Orders XXXVIII and XXXIX of the CPC. It has further clarified that the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles.

Further, relying on the Supreme Court’s finding in *Indian Telephone Industries v. Siemens Public Communication*, the Delhi High Court concluded that though there is no textual basis in the Act, linking it with provisions of the CPC, nevertheless, the principles underlying exercise of power by courts in the CPC are to be kept in mind, while making orders under Section 9.

vi. A Division Bench of the Madras High Court chose to take up a firmer approach in holding that in a matter pertaining to Section 9 of the Act, CPC would have no application; rather a real, imminent danger of removal or disposal of the properties for such an extreme measure is to be proven.

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21. AIR 2007 SC 2563
22. 2012 (5) BomCR 114
23. 2015 SCC OnLine Bom 3597
24. 2013 SCC OnLine Bom 1005
B. Inclusive Approach

The following are indicative of judgments where the courts have taken the view that the principles/standards contained in the CPC under Order XXXVIII Rule 5 and Order XXXIX Rules 1 & 2 as specified above in Point 4.1 would apply to the grant of interim measures under Section 9 of the Act.

i. The Supreme Court in *ITI v Siemens Public Communication*29 (“ITI”), held that though there was no mention of applicability of the CPC to arbitral proceedings in the Act, the provisions of the CPC could be read in by a court exercising its powers during any proceedings arising out of the Act.

ii. In deference to the decision of the Apex Court in ITI, various High Courts30 had found that principles of Order XXXVIII Rule 5 and Order XXXIX Rules 1 and 2 of the CPC would have be read into when the court exercised its powers under the Act to grant interim reliefs.

iii. The Bombay High Court in *Nimbus* interpreted *Adhunik Steel* to state that the principles contained in Order XXXVIII Rule 5 i.e.

a. the conduct of the defendant indicated that it intended to alienate its property or to remove its properties from the jurisdiction of the court; and

b. the defendant intended to obstruct or delay the execution of a decree that may be passed against it;

would have to be kept in mind while determining an application under Section 9 (ii)(b). This approach has also been followed in various decisions subsequent to *Nimbus*.31

iv. Similarly, the Division Bench of the Delhi High Court in *Anantiji Gas Service v Indian Oil Corporation*32 interpreted *Adhunik Steel* and Arvind Constructions to conclude that the power granted to the court under Section 9 of the Act is akin to Order XXXIX Rules 1 and 2 of CPC. Thus, the court has to satisfy itself that the petitioner has established the three cardinal principles, i.e. *prima facie* case, balance of convenience and irreparable loss in case no protection is extended by way of interim measure under Section 9 of the Act. The same was reiterated by the Delhi High Court in *V.K. Sood Engineers and Contractors v. Northern Railways*.33

v. The Calcutta High Court in *Star Track Agency Pvt. Ltd. v Efcalon Tie Up Pot. Ltd.*34 noted - it is well-established that the principles for grant of interim order applied by Courts would also apply to proceedings under Section 9 of the Act for grant of interim reliefs.

vi. The High Court of Hyderabad has adopted a relatively strict approach in observing that the Court is under obligation to act in a fair manner, even while dealing with applications under a special enactment, such as the Act, consistent with the procedure being followed by it while disposing of applications under Order XXXIX of CPC.35

This approach does strike as an unwarranted inclusion of formalism and technicality to the arbitral process.

a. Under *The Arbitration Act, 1940* (“1940 Act”), the grant of interim measures36 was limited to only the post-award stage and was granted by courts only if it was satisfied that a party was taking steps to defeat,

29. (2002) 5 SCC 510
31. Housing Development and Infrastructure Ltd v Mumbai International Airport Pvt. Ltd, Appeal (L) No. 365 of 2013, Bombay High Court; C V Rao v Strategic Port Investments KPC Ltd., 2014 ArbK 9 (Delhi); Acorun Developers Pvt. Ltd. v Patel Engineering Ltd., 2014 (1) ArbLR 512 (Bom); Tata Capital Financial Service v Decan Chronicle Holdings Ltd Arbitration Petition No 1321 of 2012
32. 2014 SCC OnLine Del 3732
33. 2017 SCC OnLine Del 9211
34. AIR 2016 Cal 3267
36. See Annexure I
delay or obstruct an award. Therefore, the standard similar to that in Order XXXVIII or Order XXXIX was already incorporated in the 1940 Act. However, in the corresponding Section 9 of the Act, these wordings are absent in the Act. Therefore, it may be argued that the intention of the legislature was to depart from the standards prescribed earlier which were similar to Order XXXVIII or Order XXXIX standards.

b. It was specifically stated in the 1940 Act that provisions of the CPC would apply to all proceedings before a Court. This provision has not been retained in the Act; on the contrary Section 19 of the Act specifically excludes the applicability of provisions of the CPC. This also suggests that the legislature may have never intended to make standards set out in the CPC under Order XXXVIII or Order XXXIX applicable to proceedings under Section 9 of the Act.

c. Article 17 J of the Model Law as amended in 2006 ("Amended Model Law") provides that a court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration. However India has not made suitable amendments to the Act to give effect to Article 17 J. Therefore, the present sentiments of the courts may need to be re-evaluated while granting interim reliefs.

C. Enforceability of an interim order granted by a Court

Interim reliefs granted by a court may be enforced like any other order of court. In case of wilful non-compliance/disobedience of the judgment/order, parties may choose to initiate contempt proceedings for civil contempt under Section 2 (b) of the Contempt of Courts Act, 1971. The parties in wilful non-compliance may be punished with the maximum punishment as provided in terms of Section 12 of the Contempt of Courts Act, 1971.

37. See Annexure I
38. India has adopted only the 1985 version of the Model Law and not the amendments to the Model Law carried out in 2006. India being a dualist state would require the enactment of an appropriate legislation to give effect to the Amended Model Law.
40. Terra Manufacturing And Sales v. M/S Alagendiraa Apparels, CONT. CAS (C) No 920/2009, Judgment dated October 19, 2011 of the Delhi High Court
4. Interim Measures by an Arbitral Tribunal under Section 17

I. Reliefs sought by parties before arbitral tribunals

The power of an arbitral tribunal to grant interim measures is dealt with in Section 17. Prior to amendment, the section was quite open-textured in the scope of reliefs that could be provided; it permitted the tribunal to issue any interim measure of protection. However, courts and arbitral tribunals took the view that the scope of the interim measures that may be granted under Section 17 was more limited than that under Section 9. Consequently, various arbitral tribunals arrived at the incorrect conclusion that they could not pass orders such as a grant of security.

The Amendment Act has introduced much needed changes with respect to grant of interim reliefs by an arbitral tribunal and has brought clarity on the kind of reliefs that may be granted under Section 17 of the Act. The following are certain reliefs that may be granted by an arbitral tribunal.

i. securing the amount in dispute in the arbitration;

ii. the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration;

iii. interim injunctions and the appointment of a receiver;

iv. any other interim measure which is just and convenient.

However, as has been settled by the apex court in MD. Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. an arbitral tribunal, under Section 17 of the Act, has no jurisdiction to pass any interim measures against a third party.

II. Standards applicable to the grant of interim reliefs by the Arbitral Tribunal under Section 17

The jurisprudence in India relating to the standards to be applied by an arbitral tribunal while granting interim reliefs under Section 17 is sparse at best. International authors have suggested that an arbitral tribunal should be guided by arbitral case law, comparative analysis of arbitration rules, and scholarly opinions while granting interim measures. The standards applied by national courts while granting interim measures would have no bearing on arbitral tribunals. Arbitral tribunals have normally required a party to prove harm; (b) urgency; and (c) no prejudgment of the merits of the case. In some cases tribunals have also considered whether the party has established a prima facie case and that the balance of convenience weighed in favour of the party.


42. Intertole ICS (Cecons) O & M Company v. NHAI (2013) II Delhi

43. ibid; Arun Kapur v. Vikram Kapur and Ors. 2002 (61) DRJ 495

44. Baker Hughes Singapore Pte v. Shiu-Vani Oil and Gas Exploration Arbitration Petition No. 1127 OF 2014 (Bombay High Court); Yagraw Infrastructure Ltd. v. Shang Yong Engineering and Construction Co. Ltd. (2011) 9 SCC 735, Indiabulls Financial Services Ltd v. Jubilee Plots and Housing OMP Nos. 452/2009 (Delhi High Court)

45. (2004) 9 SCC 619

46. Followed in Wind World (India) Limited and Ors. v. Enercos GmbH and Anr. 2016 SCC OnLine Bom 1404


49. ibid

50. ibid; Ali Yesilirmak, Provisional Measures in International Commercial Arbitration (Kluwer Law International) International Arbitration Law Library Series Set (Book 13), pp 159 - 236
As discussed, courts in India have at times shied away from importing principles contained in Order XXXVII Rule 5 and Order XXXIX Rule 1 & 2 to the grant of interim reliefs under Section 9. When such principles are not necessarily applicable in proceedings before a court; it is inconceivable for the same to apply to flexible and tailor-made dispute resolution process like arbitration.

That said, in *Inter tol e I CS (Ce con s) O & M Company v. NHAI,* the Delhi High Court held that an arbitral tribunal would have to ascertain whether the petitioner has made out a case as per Order XXXVIII Rule 5, prior to granting an interim relief furnishing security for the amount claimed. However, the interim measures were not granted by the arbitral tribunal solely because the applicant was unable to establish a *prima facie* case.

In a recent judgment, the Delhi High Court, in observing the similarity between the objects of Sections 9(1)(ii)(b) and 17(1)(ii)(b) of the Act with that of Order XXXVIII Rule 5 of the CPC, held that the arbitral tribunal and court, while granting interim reliefs under the said provisions of the Act, must be satisfied that it is “necessary” to pass order to secure the amount in dispute.

### III. Enforceability of an interim measure granted by an arbitral tribunal

Despite the arbitral tribunal’s power to issue interim measures, the fact that the Act did not provide for a method of enforcing any interim relief granted meant that there were doubts regarding efficacy of the arbitral process in India.

The Delhi High Court in *Sri Krishan v. Anand,* held that any person failing to comply with the order of the arbitral tribunal under Section 17 would be deemed to be “making any other default” or “guilty of any contempt to the arbitral tribunal during the conduct of the proceedings” under Section 27 (5) of Act, being the only mechanism for enforcing its orders. Therefore, such party would be in contempt of court.

It may come as a measure of relief to parties that the Delhi High Court has held that an order passed by an arbitral tribunal that is subsequently upheld by a court in an appeal filed under Section 37 of the Act, would be enforceable as an order of the court.

The amendment to Section 17 of the Act has now clarified that an order of the tribunal would be enforceable like an order of the court in case of interim reliefs granted by arbitral tribunals. This applies only to arbitrations that commenced post October 23, 2015 (i.e. the date of commencement of the Amendment Act) since Section 26 of the Amendment Act stipulates that “nothing in the Amended Act, shall apply to ‘arbitral proceedings’ commenced as per Section 21 of the Act, before the commencement of the Amendment Act.”

Besides the statutory recognition of enforceability of interim orders granted by the tribunal, the Supreme Court, in a recent case, rendered non-compliance of an arbitral tribunal’s order or conduct amounting to contempt during the course of the arbitration proceedings, as triable under the Contempt of Courts Act, 1971.

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52. *Intertole ICS (Cecons) O & M Company v. NHAI* (2013) ILR 2 Delhi 1018


54. *Indiabulls Financial Services v. Jubilee Plots, OMP Nos 452-453/2009*

55. Arbitration and Conciliation Act 1996, s 27(5): “Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.”

56. *BPTP Limited v. CPI India I Limited and Ors.* 2015 (4) Arb LR 410 (Delhi)

57. See Annexure III

58. See Annexure III

5. India, U.K. and Singapore: A comparison

<table>
<thead>
<tr>
<th>Interim reliefs by arbitral tribunal</th>
<th>India</th>
<th>United Kingdom</th>
<th>Singapore</th>
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<tbody>
<tr>
<td><strong>India</strong></td>
<td>Under Section 17(1) of the Arbitration and Conciliation Act 1996, a party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced, apply to the arbitral tribunal—</td>
<td>Section 38 of The Arbitration Act, 1996 lays down the general powers exercisable by the tribunal. The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings. Unless otherwise agreed by the parties the tribunal has the following powers:</td>
<td>Section 28 of The Arbitration Act, 2002 lays down the powers exercisable by the arbitral tribunal which includes the following interim measures:</td>
</tr>
<tr>
<td>i. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or</td>
<td>i. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or</td>
<td>a. security for costs;</td>
<td></td>
</tr>
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<td>ii. for an interim measure of protection in respect of any of the following matters, namely:</td>
<td>ii. for an interim measure of protection in respect of any of the following matters, namely:</td>
<td>b. discovery of documents and interrogatories;</td>
<td></td>
</tr>
<tr>
<td>a. (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;</td>
<td>a. (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;</td>
<td>c. giving of evidence by affidavit;</td>
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<td>b. (b) securing the amount in dispute in the arbitration;</td>
<td>b. (b) securing the amount in dispute in the arbitration;</td>
<td>d. a party or witness to be examined on oath or affirmation;</td>
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<tr>
<td>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;</td>
<td>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;</td>
<td>e. the preservation and interim custody of any evidence;</td>
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<td>f. samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is a part of the proceedings; and</td>
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<td>g. the preservation, interim custody or sale of any property which forms part of the dispute.</td>
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<td>The Arbitration Act applies to domestic arbitration and to those proceedings where Part II of the International Arbitration Act does not apply. Section 12 of the International Arbitration Act lays down the powers of the arbitral tribunal which entails a number of interim reliefs that can be granted by the arbitral tribunal such as:</td>
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<td>• the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute</td>
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<td>• the preservation and interim custody of any evidence for the purposes of the proceedings</td>
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<td>• securing the amount in dispute;</td>
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### Enforceability of interim reliefs granted by the tribunal

An interim order passed by the tribunal is deemed to be an order of the court and is enforceable in accordance with the provisions of the CPC.\(^6\)

### Interim reliefs by the court

Section 9 lays down the interim measures that can be passed by the court before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced, on the application made by a party. The relief includes:

1. appointment of a guardian for a minor or person of unsound mind; or
2. an interim measure of protection in respect of any of the following matters, namely:-

### Interim Reliefs in Arbitral Proceedings

- d. interim injunction or the appointment of a receiver;
- e. such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.

- a. an order for the payment of money or the disposition of property, or
- b. an order to make an interim payment on account of the costs of the arbitration. The final order of the tribunal shall take into account such order.

- ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
- an interim injunction or any other interim measure.

The arbitral tribunal may award any remedy that could have been ordered by the High Court in the case of a civil proceeding.

\(^6\) The Arbitration and Conciliation Act 1996, s 17(2)
Section 12A of The International Arbitration Act empowers the High court to make an order in respect of the following as it has for any of the matters or action in court.

- giving of evidence by affidavit;
- the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;
- samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;
- the preservation and interim custody of any evidence for the purposes of the proceedings;
- securing the amount in dispute;
- ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party;
- interim injunction or any other interim measure.

However, sub-section (3) of the said section restricts this power of the High court if it is of the opinion that the place of arbitration is or likely to be outside Singapore when it is designated or determined makes it inappropriate to make such order. The Judge can make such orders as it thinks fit for the purpose of preservation of evidence or assets in case of urgency. Otherwise, it should act with the permission of arbitral tribunal or agreement of the parties.
Once the tribunal has been constituted, the exercise of powers under section 9 can be only be done where the remedy provided under section 17 would not be effective. An action can only be taken by the court, only if the authorized body has no power or is unable for the time being to act effectively. An order made otherwise will cease to have effect on an order made by the authorized body or tribunal.

Jurisdiction of the court vis-à-vis arbitral tribunal

The grant of interim relief is a discretionary order and no standards have been laid down in the act for the grant of interim relief (see 3.2.1, 3.2.2 and 4.2 above).

Grounds for granting interim relief

The national law has not laid down any guidelines that ought be followed in dealing with an application on interim relief. The guidelines issued by the Chartered Institute of Arbitrators lay down the following criteria:

i. prima facie establishment of jurisdiction;
ii. prima facie establishment of case on the merits;
iii. a risk of harm which is not adequately reparable by an award of damages if the measure is denied;

As the national law does not stipulate any standard that should be followed by the tribunal in dealing with application on interim relief, the action taken varies from tribunal to tribunal.

However, the tribunals and courts in Singapore have adopted the principles laid down in American Cyanamid v. Ethicon61 while dealing with such interim applications, which are as follows:

There is a serious issue to be tried

Irreparable harm if denied the relief

The balance of convenience pending trial favours the applicant.62

Further, section 3 of the International Arbitration Act provides that the UNCITRAL Model Law shall have the force of law in Singapore.

61. [1975] 2 WLR 316

62. See Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd [2013] SGCA 16
iv. proportionality. Arbitrators cannot grant interim measures requiring actions by third parties and do not have the power to directly enforce these measures. Further, they cannot impose penalties for non-compliance unless granted a specific power to do so by the arbitration agreement, including the applicable arbitration rules and/or the lex arbitri.

Article 17A of the UNCITRAL Model law lays down the conditions for granting interim measures. The party requesting the interim measure has to satisfy the arbitral tribunal that:

- Harm not adequately reparable by damages;
- Such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted;
- Reasonable possibility that the requesting party will succeed on the merits of the claim.
6. Conclusion

The amendments to the Act make it explicit that the purpose of these changes was to bring the powers of the arbitral tribunal under Section 17 of the Act on par with that of the Court under Section 9 of the Act and merely a clarificatory of an implicit legal position.  

At present, the question of whether the rigours of the CPC particularly in Order XXXVIII and Order XXXIX would have to be applied by a court, while deciding an application under Section 9, is inconclusive. However, regardless of the applicability of the CPC to proceedings under Section 9; importing these principles to proceedings under Section 17 would be an unwarranted inclusion of formalism in an otherwise flexible and tailor-made method of dispute resolution.

The Working Group of the UNCITRAL acknowledged that the Model Law, 1985 was silent in respect of the standards to be adopted by arbitral tribunal, though interim reliefs have far reaching consequences. It noted that arbitral tribunals were given a broad mandate to determine whether a relief was necessary. It chose to adopt standards that balanced the need for predictability as well as flexibility in the arbitral process. Article 17A of the Amended Model Law which adopts a more pragmatic approach than what has been preferred by Indian courts, states that a party would have to establish that:

i. it would suffer irreparable harm if the interim measure sought for was not granted; and
ii. there was a reasonable possibility that it would succeed on merits.

It is relevant to note that these principles have been distilled from the collective experience of various arbitrators and arbitration experts. Moreover from the perspective of international arbitrations the adoption of such standards would lead to uniformity in the treatment of applications for interim reliefs, which is also an important objective of arbitration.

63. Lanco Infratech Ltd. v. Hindustan Construction Company Ltd. (2016) 234 DLT 175


65. See Annexure II
Annexure I

Schedule II of the Arbitration Act, 1940

THE SECOND SCHEDULE
(See section 41)

Powers of Court

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, 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.

4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.
Annexure II

Relevant Provisions of the Model Law

Article 17 A: Conditions for granting interim measures

1. The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:
   a. Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
   b. There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

2. With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Article 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.
# Annexure III

## Relevant Provisions of the Act and the Code

<table>
<thead>
<tr>
<th>S.No</th>
<th>Provision</th>
<th>Relevant Extract</th>
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<tbody>
<tr>
<td></td>
<td><strong>Code of Civil Procedure, 1908</strong></td>
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</table>
| 1. | Order 38 Rule 5 | **Where defendant may be called upon to furnish security for production of property.—**  
(1) Where at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—  
(a) is about to dispose of the whole or any part of his property, or  
(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,  
the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.  
(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.  
(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.  
[(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.] |
| 2. | Order 39 Rule 1 | **Cases in which temporary injunction may be granted.—**  
Where in any suit it is proved by affidavit or otherwise—  
a. that any property in dispute in a suit in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or  
b. that the defendant threatens, or intends, to remove or dispose of his property with a view to [defrauding] his creditors,  
c. [that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,]  
the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossess of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.
### The Arbitration Act, 1940

<table>
<thead>
<tr>
<th>3.</th>
<th>Section 18</th>
<th><strong>Power of Court to pass interim orders:</strong></th>
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<td></td>
<td></td>
<td>(1) Notwithstanding anything contained in section 17, at any time after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.</td>
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<td>(2) Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary and just</td>
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</table>

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<th>4.</th>
<th>Section 41</th>
<th><strong>Procedure and powers of Court:</strong></th>
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<td>Subject to the provisions of this Act and of rules made thereunder (5 of 1908)</td>
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<td>(a) the provisions of Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and</td>
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<td>(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court. Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.</td>
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</table>

### The Arbitration and Conciliation Act, 1996

<table>
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<tr>
<th>5.</th>
<th>Section 9</th>
<th><strong>Interim measures, etc. by Court:</strong></th>
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<tr>
<td></td>
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<td>(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:—</td>
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<td></td>
<td>(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or</td>
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<td></td>
<td>(ii) for an interim measure of protection in respect of any of the following matters, namely:—</td>
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<td></td>
<td>(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;</td>
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<td></td>
<td>(b) securing the amount in dispute in the arbitration;</td>
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<td></td>
<td></td>
<td>(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;</td>
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</table>
6. Section 17

Interim measures ordered by arbitral tribunal.—

(1) A party may, during the 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 the arbitral tribunal—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(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 arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders as the court has for the purpose of, and in relation to, any proceedings before it.
(2) Subject to any orders passed in an appeal under Section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the court.

<table>
<thead>
<tr>
<th>Section</th>
<th>Determination of rules of procedure.—</th>
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</thead>
<tbody>
<tr>
<td>1.</td>
<td>The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).</td>
</tr>
<tr>
<td>2.</td>
<td>Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.</td>
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</table>

**The Arbitration and Conciliation (Amendment) Act, 2015**

| Section | Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act. |

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## Annexure IV

### Table of Cases

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<tbody>
<tr>
<td>1.</td>
<td>Delta Constructions v Narmada Cement 2002 (1) MhLJ 684</td>
<td>“The power of the court to secure the amount in dispute under arbitration is not hedged by the predicates as set out in Order 38. <strong>All that the court must be satisfied is that an interim measure is required.</strong> In other words, the party coming to the court must show that if it is not 'secured, the Award which it may obtain cannot be enforced on account of acts of a party pending arbitral process. Therefore, <strong>the court would not to be bound by the requirement of Order 38 Rule 5.</strong>”</td>
<td>3</td>
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<td>2.</td>
<td>ITI v Siemens Public Communication (2002) 5 SCC 510</td>
<td>“It is true in the present Act application of the Code is not specifically provided for but what is to be noted is : Is there an express prohibition against the application of the Code to a proceeding arising out of the Act before a civil court? We find no such specific exclusion of the Code in the present Act. <strong>When there is no express exclusion, we cannot by inference hold that the Code is not applicable.</strong>”</td>
<td>6</td>
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<tr>
<td>3.</td>
<td>National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd. AIR 2004 Bom 136</td>
<td>“The provisions of Order 38, Rule 5, CPC cannot be read into the said provision as it is nor can power of the Court in passing an order of interim measure under Section 9(ii) (b) be made subject to the stringent provision of Order 38, Rule 5. The power of the Court in passing the protection order to secure the amount in dispute in the Arbitration before or during Arbitral proceedings or at any time of making of the Arbitral amount but before it is enforced cannot be restricted by importing the provisions set out in Order 38 of C.P.C. but has to be exercised ex debito justitiae and in the interest of justice.”</td>
<td>5</td>
</tr>
<tr>
<td>4.</td>
<td>Om Sakthi Renergies Limited v. Megatech Control Limited (2006) 2 Arb LR 186 at Madras HC</td>
<td>“It is true that <strong>the provisions like Order 38 Rule 5 or Order 39 Rules 1 and 2 of the Code of Civil Procedure are not contained in the Arbitration and Conciliation Act, 1996</strong> but its principles will be applicable as has been held by the Supreme Court in M/s. I.T.I. Ltd., Vs. M/s. Siemens Public Communications Network Ltd.”</td>
<td>6</td>
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<td></td>
<td>5. Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd. AIR 2007 SC 2563</td>
<td>“we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case”</td>
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<td>6. Arvind Constructions v. Kalinga Mining Corporation and Others (2007) 6 SCC 798</td>
<td>“Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver.”</td>
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<td>7. Steel Authority of India Ltd. v. AMCI PTY Ltd (2011) 3 Arb LR 502 at Delhi HC</td>
<td>“In proceedings under Section 9 of the Act, at the highest what could be said is that the provisions of Order 38 Rule 5 CPC would serve as the guiding principle for the Court to exercise its discretion while dealing with a petition requiring the respondent to furnish security for the amount in dispute. Since the letter of the law per se is not applicable, the requirements set out in Order 38 Rule 5 CPC need not strictly be satisfied, and so long as the ingredients of the said provision are generally present, the Court would not be unjustified in exercising its jurisdiction to require the respondent to furnish security. The bottom line, in my view, is that the Court should be satisfied that the furnishing of security by the respondent is essential to safeguard the interests of the petitioner.”</td>
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<td>8. Tata Capital Financial Service v. Deccan Chronicle Holdings Ltd Arbitration Petition No. 1321 of 2012 at Bombay HC</td>
<td>“The principle is that when the Court decides a petition under Section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court. Similarly in an application for attachment, the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind. At the same time it needs to be noted that the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice.”</td>
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<tr>
<td>Case Study</td>
<td>Citation</td>
<td>Summary</td>
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<td>Nimbus Communications Limited v. Board of Control for Cricket in India and Another</td>
<td>2012 (5) BomCR 114</td>
<td>“It has been held by the Division Bench of this court that though the principles of Order 38 Rule 5 of the Code of Civil Procedure, 1908 has to be kept in mind while deciding an application under section 9 of the Arbitration Act, rigors of Order 38 Rule 5 of the Code of Civil Procedure does not apply to the proceedings under section 9. I am respectfully bound by the judgment of Division Bench of this court.”</td>
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<td>Deccan Chronicle Holdings Limited v. L&amp;T Finance Limited</td>
<td>Appeal (Lodging) Nos. 130 and 131 of 2013 in Arbitration Petition Nos. 1095 and 1321 of 2012 (Bombay)</td>
<td>“The principle is that when the Court decides a petition under Section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court. Similarly in an application for attachment, the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind. At the same time it needs to be noted that the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice.”</td>
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<td>Intertole ICS (Cecons) O &amp; M Company v. NHAI</td>
<td>ILR (2013) II Delhi</td>
<td>“Where even the Court exercising power under Section 9 of the Act has to be guided by the principles of the CPC then a fortiori an interim order by a Tribunal requiring furnishing of security for the monetary amount of claim by one party had to satisfy the requirement of Order XXXVIII Rule 5 CPC”</td>
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<td>Welspun Infratech v. Ashok Khurana</td>
<td>2014 (2) ArbLR 520 (Bom)</td>
<td>“This court in my view has ample power under section 9 of the Arbitration and Conciliation Act, 1996 to grant interim measures even in respect of the properties which are not subject matter of the dispute in arbitration. While deciding the application under section 9, court has to bear in mind the fundamental principles underlying the provisions of Code of Civil Procedure and at the same time has discretion to mould the relief in the appropriate cases to secure ends of justice and to preserve sanctity of the arbitral process”</td>
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<tr>
<td>Housing Development and Infrastructure Ltd v Mumbai International Airport Pvt. Ltd.</td>
<td>Appeal (L) No. 365 of 2013, Bombay High Court</td>
<td>“An application under Section 9 of the Arbitration Act requires the Applicant Petitioner to make out a strong prima-facie case and also to show that the balance of convenience is in its favour, and that it would suffer irreparable loss and injury if the reliefs it seeks were to be refused. The same principles that govern courts in the matter of grant of interim relief apply proprio vigore to petitions under Section 9 of the Arbitration Act”</td>
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<td>14.</td>
<td>C V Rao v. Strategic Port Investments KPC Ltd. 2014 (4) Arb LR 9 (Delhi HC)</td>
<td>An order restraining the opposite party from dealing with his properties being drastic in nature, grant of such relief has necessarily to be based on the principles governing Order 38 Rule 5 CPC and before passing such an order the Court has to ensure that a specific case is made out that the party against whom such an order is proposed to be made is attempting to remove or dispose of the assets with the intention of defeating the decree/award that may be passed.</td>
<td>6</td>
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<tr>
<td>15.</td>
<td>Acron Developers Pvt. Ltd. v Patel Engineering Ltd. 2014 (1) Arb LR 512 (Bom)</td>
<td>The Court should be satisfied that the plaintiff has prima facie case. It is also held that merely having just and valid claim or prima-facie case, will not entitle the plaintiff the order of attachment before judgment unless he also establishes that the defendant is attempting to remove or dispose of his assets with an intention of defeating the decree that may be passed.</td>
<td>6</td>
</tr>
<tr>
<td>16.</td>
<td>Tata Capital Financial Services Ltd. v. Unity Infraprojects Ltd. and Ors. 2015 SCC OnLine Bom 3597</td>
<td>It is settled law that the principles laid down in the Code of Civil Procedure, 1908 for grant for interlocutory reliefs as well as the underlying basis of Order 38 Rule 5 furnish a guide to the Court whenever similar reliefs are sought under Section 9 of the Act. At the same time, Courts must bear in mind the object of preserving the efficacy of arbitration as an effective form of dispute resolution behind a provision such as Section 9 of the Act. In other words, whilst deciding an application under Section 9 for reliefs in the nature of an attachment before judgment or an injunction, the Court will broadly bear in mind the fundamental principles of Order 38 Rule 5 and Order 39 Rules 1 and 2, but at the same time, will have the discretion to mould the relief on a case by case basis with a view to secure the ends of justice and preserve the sanctity of the arbitral process.</td>
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<td>17.</td>
<td>Natrip Implementation Society v. IVRCL Limited 2016 SCC OnLine Del 5023</td>
<td>In order for the court to exercise its powers under Order XXXVIII Rule 5 of the CPC, it is necessary that twin conditions be satisfied. First, that the plaintiff establishes a reasonably strong prima facie case for succeeding in the suit; and second, that the court is prima facie satisfied that the defendant is acting in a manner so as to defeat the realisation of the decree that ultimately may be passed. The object of Sections 9(1)(ii)(b) and 17(1)(ii)(b) of the Act is similar to the object of order XXXVIII Rule 5 of the CPC. The Arbitral Tribunal while exercising powers under Section 17(1)(ii)(b) of the Act or the Court while exercising power under Section 9(1)(ii)(b) of the Act must</td>
<td>20</td>
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The conclusion reached by the learned Single Judge is that in a matter pertaining to Section 9 of the said Act, the provision of Code of Civil Procedure, 1908 would have no application.”

“To the aforesaid extent, we tend to agree with what the learned Single Judge states, as there must be a real, imminent danger of removal or disposal of the properties for such an extreme measure to be taken against the party. This would naturally require necessary pleadings as to the facts.”


“The first question which the court addresses is the one adverted to by the appellant, that principles underlying Order 38, Rule 5 CPC have to be kept in mind, while making an interim order, in a given case, directing security by one party. Indian Telephone Industries v. Siemens Public Communication (2002) 5 SCC 510 is an authority of the Supreme Court, which tells the courts that though there is no textual basis in the Arbitration Act, linking it with provisions of the CPC, nevertheless, the principles underlying exercise of power by courts-in the CPC-are to be kept in mind, while making orders under Section 9.”


“In the absence of any guiding principles under the Arbitration Act, the Court has to necessarily fall back upon the provisions of Order XXXIX CPC which apply to every application filed for grant of temporary injunctions and interlocutory orders. This must be so, for, the Court which is conferred with the jurisdiction to grant an order of injunction under Section 9 of the Arbitration Act, is also the Court which is governed by the provisions of the CPC. Merely because the Court has derived the power to grant an injunction from an additional source under a special enactment, such as the Arbitration Act, it nevertheless cannot ignore the principles underlying the provisions of Order XXXIX CPC. Rule 3 of Order XXXIX CPC embodies principles of natural justice. Proviso to the said provision is an exception to the Rule. This being so, the Court is under obligation to act in a fair manner, even while dealing with applications under a special
| 21. | Ajay Singh v. Kal Airways Private Limited, 2017 SCC OnLine Del 8934 | “Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles.” |
| 22. | V.K. Sood Engineers and Contractors v. Northern Railways, 2017 SCC OnLine Del 9211 | “The principles for grant of injunction order under Section 9 of the Act are well known. The Division Bench of this High Court in the case of Anantji Gas Service v. Indian Oil Corporation, 2014 SCC OnLine Del 3732 held as follows:-

“10. The law is well settled that the power granted to the Civil Court under Section 9 of the Act is akin to Order 39 Rules 1 & 2 of CPC, 1908 and therefore the court has to satisfy itself that the petitioner has established the three cardinal principles of prima facie case, balance of convenience and irreparable loss in case no protection is extended by way of interim measure under Section 9 of the Act. Vide Adhunik Steels Ltd. v. Orissa Mangenese and Minerals Pvt. Ltd., (2007) 7 SCC 125 and Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation (2007) 6 SCC 798.” |
About NDA

At Nishith Desai Associates, we have earned the reputation of being Asia’s most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium Aligunjan, an international institution dedicated to designing a premeditated future with an embedded strategic foresight capability.

We are a research and strategy driven international firm with offices in Mumbai, Palo Alto (Silicon Valley), Bangalore, Singapore, New Delhi, Munich, and New York. Our team comprises of specialists who provide strategic advice on legal, regulatory, and tax related matters in an integrated manner basis key insights carefully culled from the allied industries.

As an active participant in shaping India’s regulatory environment, we at NDA, have the expertise and more importantly – the VISION – to navigate its complexities. Our ongoing endeavors in conducting and facilitating original research in emerging areas of law has helped us develop unparalleled proficiency to anticipate legal obstacles, mitigate potential risks and identify new opportunities for our clients on a global scale. Simply put, for conglomerates looking to conduct business in the subcontinent, NDA takes the uncertainty out of new frontiers.

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The firm has been consistently ranked as one of the Most Innovative Law Firms, across the globe. In fact, NDA has been the proud recipient of the Financial Times – RSG award 4 times in a row, (2014-2017) as the Most Innovative Indian Law Firm.

We are a trust based, non-hierarchical, democratic organization that leverages research and knowledge to deliver extraordinary value to our clients. Datum, our unique employer proposition has been developed into a global case study, aptly titled ‘Management by Trust in a Democratic Enterprise,’ published by John Wiley & Sons, USA.

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- IFLR 1000 (International Financial Review - a Euromoney Publication): Tier 1 for TMT, Private Equity

- IFLR: Indian Firm of the Year (2010-2013)

- Legal 500 2018: Tier 1 for Disputes, International Taxation, Investment Funds, Labour & Employment, TMT

- **Chambers and Partners Asia Pacific (2017 – 2018):** Tier 1 for Labour & Employment, Tax, TMT

- **IDEX Legal Awards 2015:** Nishith Desai Associates won the “M&A Deal of the year”, “Best Dispute Management lawyer”, “Best Use of Innovation and Technology in a law firm” and “Best Dispute Management Firm”
Interim Reliefs in Arbitral Proceedings

Powerplay between Courts and Tribunals

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Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm’s culture.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our “Anticipate-Prepare-Deliver” research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparallel mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to Intellectual Property.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular “Hotlines”, which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45 minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigad district. Imaginarium AliGunjan is a platform for creative thinking; an apolitical ecosystem that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire ‘blue sky’ thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at research@nishithdesai.com
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