LAYING OLD GHOSTS TO REST, OR NOT? – THE 'SECTION 9' ENIGMA CONTINUES …

Rajendra Barot[*] *& Sonali Mathur*[†]

Abstract

*India has faced criticism from global investors due to delay in disposal of court cases. Consequently, in the last three decades, there has been an increasing impetus towards employing arbitration as the alternate and preferred dispute resolution mechanism in most commercial transactions. This is due to several factors such as speed, flexibility, confidentiality and efficiency. The strategy of arbitration and mechanics of the arbitration clause (such as the seat, venue, institution, applicable law) are often driven by one key driver – the ability to obtain effective interim reliefs. Section 9 of the Arbitration and Conciliation Act, 1996 [the "**Act**"], which enables parties to approach courts for interim reliefs, has since long been considered as the Achilles' heel of Indian arbitration jurisprudence. The present Article discusses the challenges faced by parties in domestic and foreign-seated arbitrations while seeking interim reliefs under Section 9 of the Act. While some of the challenges are sought to be overcome by the 2015 amendment to the Act [the "**Amendment Act**"],*[1] *the question is whether the intended reforms have met their goals.*

I. Introduction

The strategy of seeking efficient interim measures can dictate the ultimate consequence in a dispute. Interim measures preserve the sanctity of arbitral proceedings and avert a situation which is likely to render an arbitration award meaningless.[2] They may go towards facilitating conduct of arbitral proceedings (for example, obtaining or preserving evidence), or avoiding loss or damage or to preserve a state of affairs, or facilitating later enforcement of the award (for example, preserving the property or value that are the subject of the proceedings).[3]

Traditionally, parties have turned to national courts for grant of interim measures in arbitrations. Gradually, there has been a shift towards seeking such interim reliefs from the arbitral tribunal itself, instead of approaching the court. The introduction of emergency arbitrator provisions in institutional rules (2014 LCIA Rules, 2012 ICC Rules, 2016 SIAC Rules- effective from August

* Senior Partner at AZB & Partners. He may be reached at rajendra.barot@azbpartners.com.
† Senior Associate at AZB & Partners. She may be reached at sonali.mathur@azbpartners.com.

1 The Arbitration and Conciliation (Amendment) Act, 2015 (Bill No. 252-C of 2015) was passed by the Lok Sabha on December 17, 2015 and the Rajya Sabha on December 23, 2015. The Amendment Act received the President's assent on December 31, 2015, and shall be deemed to have come into force on October 23, 2015.

2 S.M. Ferguson, *Interim Measures of Protection In International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 12 CURRENT INTERNATIONAL TRADE L.J. 55 (2003).

3 Ronald Wong, *Interim Relief in Aid of International Commercial Arbitration*, 24 S.A.L.J., 502 (2012).

1, 2016), further reinforces the expanding powers of the arbitral tribunal.[4] The same thread is visible in the fabric of the Amendment Act, wherein the legislature has sought to limit the powers of the courts under Section 9 of the Act and to expand the powers of the arbitral tribunal under Section 17 of the Act.

The interpretation, applicability and scope of Section 9 of the Act have been hotly debated in multiple decisions of the Indian courts, which have at times triggered controversies and confusion. The questions that have plagued Section 9 proceedings include (i) its applicability to foreign seated arbitrations; or (ii) its scope in relation to Section 17 of the Act (which permits parties to approach arbitrators for interim reliefs).

A. Applicability

Prior to the Amendment Act, the Supreme Court cases of *Bhatia*[5] and *BALCO*[6] divided the Indian arbitration law into two hemispheres. The *Bhatia* regime tolerated excessive intervention from the courts in arbitrations and even went so far as applying the provisions of Part I of the Act[7] to foreign seated arbitrations unless the parties had expressly or impliedly excluded the provisions of the same. The *BALCO* regime pioneered a paradigm shift since five judges of the Supreme Court held that Part I of the Act would have no applicability to foreign seated arbitrations and consequently, no application for interim relief would be maintainable under Section 9 of the Act for foreign seated arbitrations. While this case was appreciated in legal circles worldwide, it also attracted a considerable amount of criticism on account of its prospective overruling and application to arbitration agreements entered into only after the date of the ruling i.e. September 6, 2012.

Post *BALCO*, parties continued to face the practical challenge of seeking interim reliefs from Indian courts in a foreign seated arbitration. There was a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and converted into a shell company.[8] The Amendment Act sought to address this issue by making an amendment to Section 2(2) of the

---

4 Susan Field, *Narrowing the powers of the national courts to grant interim measures – A measure too far?*, (Aug. 27, 2015) *available at* http://kluwerarbitrationblog.com/2015/08/27/narrowing+the+powers+of+the+national+courts+to+grant+interim+measures+a+measure+too+far.

5 Bhatia International v. Bulk Trading SA (2002), 4 S.C.C. 105 (India).

6 Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 S.C.C. 552 (India).

7 Part I of the Act applies to domestic arbitrations and international commercial arbitrations (with at least one foreign party) with a seat/ place in India, whereas Part II of the Act applies to foreign seated arbitrations.

8 LAW COMMISSION OF INDIA, REPORT NO. 246 – AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996 25 (2014), *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf [hereinafter "Report"].

Act which states that subject to an agreement to the contrary, the provisions of Section 9 will apply to an international commercial arbitration even if the place (seat) of arbitration is outside India.

Interestingly, the recommended language of the amendment (by the Law Commission of India),[9] stated that *subject to an express agreement to the contrary*, the provisions of Section 9 would apply to foreign seated arbitrations. The question arises as to why the legislature chose to drop the word 'express' preceding the words 'agreement to the contrary'? Does this imply that Indian courts could potentially construe the arbitration clause to suggest an 'implied' exclusion of Section 9? Does this proviso rekindle the discourse on 'implied exclusion' (which is a legacy of the *Bhatia* case) or is it academic in light of the intention of the proviso to be applicable to foreign seated arbitrations?

B. Scope

The relationship between national courts and arbitral tribunals swings between forced cohabitation and true partnership[10]. While the arbitration process wishes to stand independent of the judicial machinery, it is certainly reliant on the courts "*who alone have the power to rescue the system when one party seeks to sabotage it.*"[11]

The Amendment Act seeks to curtail the powers of the judiciary in granting interim reliefs in arbitrations by (i) limiting the time when a party can approach the court, and (ii) providing teeth to the orders passed by an arbitral tribunal. Once the arbitral tribunal has been constituted, the court shall not entertain an application under Section 9 unless the court finds that the remedy under section 17 would be 'inefficacious'.[12] The default option during and after an arbitration for seeking interim reliefs is now to proceed before the arbitral tribunal.

Furthermore, the new threshold of 'inefficacious remedy' (under Section 17) in order to approach a Section 9 court will be subjected to judicial interpretation in different scenarios. When faced with an impending sale of assets by the opposing party in India, should the claimant in a foreign seated arbitration initiate Section 9 proceedings before the courts, making the argument of an inefficacious remedy before the arbitral tribunal? Or should the Claimant seek to invoke the emergency arbitrator provisions in foreign institutional arbitration rules, and then

---

9 *Id.* at 39.

10 ALAN REDFERN ET AL, REDFERN & HUNTER ON LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 328 (4th ed. 2006).

11 *Id.*

12 The Arbitration and Conciliation Act, No. 26 of 1996, § 9(3).

hope that such interim award is directly enforceable in India to stop such sale process? How will interim orders passed by a foreign seated tribunal be practically executed in India? A further complication could arise in some cases if third parties are involved, and whether that could be a ground to approach a Section 9 court, claiming inefficacious remedy under Section 17.

The other pertinent issue arises in the context of the *functus officio* status of an arbitral tribunal, upon delivering the final arbitral award, which terminates the arbitral proceedings. Since no amendment has been made to Section 32 of the Act,[13] one cannot help but wonder how a party is supposed to approach the arbitral tribunal for interim reliefs after the award but prior to its enforcement. In such a situation, is the golden gate of the Section 9 relief the only efficacious remedy?

Despite the Amendment Act being a positive step in the right direction, the provisions are yet to be subjected to judicial scrutiny and several questions still persist in relation to interim reliefs in arbitrations – which are sought to be examined in this Article.

II. Applicability of Section 9 to foreign seated arbitrations

The Act is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 [the "**UNCITRAL Model Law**"] and is reckoned to be a "*long leap in the direction of alternate dispute resolution systems.*"[14] Article 9 of the UNCITRAL Model Law expresses a principle that "*it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure*."[15] Section 9 of the Act is one of the permissible judicial interventions in an arbitration proceeding initiated under Part I of the Act. However, this provision was inapplicable to foreign seated arbitrations under Part II of the Act.

A division bench of the Delhi High Court,[16] grappled with this issue and held that even if a party was rendered "*remedyless"* and it could not approach the court for seeking interim measures, that was not a ground for making Section 9 applicable to arbitrations taking place outside India. The

---

13 Section 32 of the Act reads as follows: "(*1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under subsection (2). (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where— (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute, (b) the parties agree on the termination of the proceedings, or (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. (3) Subject to section 33 and subsection (4) of section 34 [correction and interpretation of award], the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.*").

14 Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 S.C.C. 155 (India).

15 PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION 83 (2nd ed. 2004).

16 Marriott International Inc. v. Ansal Hotels Limited, A.I.R. (2000) Delhi 377 (India).

court applied the principle of literal interpretation of statutes since the language of the Act was plain and unambiguous and held that "*it is entirely for the legislature to look into this question.*"

Thereafter, 3 judges of the Supreme Court in the *Bhatia* case, overruled the *Marriot* case referred above and upheld a Section 9 petition filed by a foreign party to a Paris seated arbitration – on the grounds that Part I was not expressly or impliedly excluded by the parties. The ruling was driven by the desire to not leave a foreign party "*remedyless*" if it wished to seek interim reliefs and security against Indian assets and ensure that the object of the Act applied uniformly to international commercial arbitrations seated outside India. However, the case has been criticized as being grossly erroneous,[17] particularly due to the brazen judicial overreach by Indian courts in subsequent cases even arising under Section 11 (*appointment of arbitrator*) and Section 34 (*setting aside of award*) in Part I of the Act.[18] Despite the arbitration being seated out of India, Indian courts began to intervene in all aspects of a foreign seated arbitration, in flagrant violation of party autonomy. This position now stands overruled pursuant to the *BALCO* case (which reinstates the thought behind the *Marriott* decision).

The *BALCO* decision came about whilst the Supreme Court examined the role of Indian courts in foreign seated arbitrations wherein it was held that the provisions of Part I and Part II of the Act are "*seat*" centric and mutually exclusive of each other. Whilst the *BALCO* decision was a positive step, it left the issue of seeking interim reliefs for parties in a foreign seated arbitration unresolved.

The 246th Law Commission Report[19] examined this issue in the context of a foreign seated arbitration where the assets of a party are located in India and there is a likelihood that the other party will dissipate its assets in the near future. In this situation, the foreign party can either obtain an interim order from a foreign court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. Neither of the possible remedies was considered practical or efficacious. Accordingly, the Law Commission recommended the following change to Section 2(2) of the Act[20]:

17 Fali S. Nariman, *India and International Arbitration*, 41 GEO. WASH. INT'L. L. REV. 367, 374-376 (2009).

18 Venture Global v. Satyam Computer, (2008) 4 S.C.C. 190 (India); Indtel Technical Services v. W.S. Atkins, (2008) 10 S.C.C. 308 (India); Citation Infowares Ltd v. Equinox Corporation, (2009) 7 S.C.C. 220 (India); Dozco India v. Doosan Infrastructure, (2011) 6 S.C.C. 179 (India); Videocon Industries v. Union of India, (2011) 6 S.C.C. 161 (India).

19 Report, *supra* note 6, at 24, 25.

20 *Id.*

Also insert the following proviso "Provided that, subject to an ***express*** *agreement to the contrary, the provisions of sections 9, 27, 37 (1)(a) and 37 (3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India, if an award made, or that which might be made, in such place would be enforceable and recognized under Part II of this Act."*

[NOTE: This proviso ensures that an Indian Court can exercise jurisdiction with respect to these provisions even where the seat of the arbitration is outside India.] [Emphasis Supplied]

However, the word 'express' has been dropped by the legislature in the Amendment Act. With the introduction of the proviso in the Amendment Act, the earlier analysis of whether a dispute falls in the pre-BALCO era or post-BALCO era is no longer applicable (subject to applicability of the Amendment Act under Section 26 of the Act).[21] However, an issue that surfaces now is whether the term "subject to an agreement to the contrary" can include an "*implied*" agreement between parties that the remedy of interim relief would not be available to parties in a foreign seated arbitration.

Pursuant to the *Bhatia* case, the issue of implied exclusion of the application of Indian arbitration law to foreign seated arbitrations is one that has been hotly discussed and debated among practitioners and academics alike.[22] The plethora of cases on this subject were summarized neatly in the 2015 decision of *Union Of India v. Reliance Industries Limited And Others*,[23] which stated that Part I is excluded by necessary implication, if it is found that on the facts of a case either the juridical seat of the arbitration is outside India or the law governing the arbitration agreement is any law other than the Indian law.[24]

---

21 Section 26 of the Act is as follows: "*Act not to apply to pending arbitral proceedings- 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.*".

22 Vikas Goel & R. V. Prabhat, *Applicability Of Section 9 (Interim Relief) To International Commercial Arbitrations Having A Foreign Seat & Governed By Foreign Law Vis-à-Vis 'Implied Exclusion' - Post Amendment Scenario*, MONDAQ (Apr. 22 2016), *available at* http://www.mondaq.com/india/x/484406/trials+appeals+compensation/Applicability+Of+Section+9+Interim+Relief+To+International+Commercial+Arbitrations+Having+A+Foreign+Seat+Governed+By+Foreign+Law+VisVis+Implied+Exclusion+Post+Amendment+Scenario.

23 (2015) 10 S.C.C. 213 (India).

24 Videocon Industries Ltd. v. Union of India & Anr., (2011) 6 S.C.C. 161 (India); Dozco India Private Limited v. Doosan Infracore Company Limited, (2011) 6 S.C.C. 179 (India); Yograj Infrastructure Limited v. Ssang Yong Engineering and Construction Company Limited, (2011) 9 S.C.C. 735 (India); Reliance Industries Limited v. Union of India, (2014) 7 S.C.C. 603 (India); Sakuma Exports Limited vs Louis Dreyfus Commodities And Ulsse S.A., 2013 6 Bom. C.R. 218.

In a related 2014 decision of *Reliance Industries Ltd v. Union of India*,[25] it was held that to determine whether applicability of Part I of the Act has been excluded, it is necessary to discover the intention of the parties. In this case, a partial consent award made by the London seated tribunal was sought to be challenged by Union of India in an Indian court stating that there was an unmistakable intention of the parties to be governed by Indian laws, the contracts were signed and performed in India and the subject matter was in India. The court held that the proper law of the arbitration agreement was the English law and the seat was London and the "*conclusion is inescapable that applicability of Arbitration Act, 1996 has been ruled out by a conscious decision and agreement of the parties.*"[26]

In a similar situation in *Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd.*,[27] the impugned clause stated that arbitration would be held in London, arbitrators to be members of the London Arbitration Association and the contract to be governed by English law. It was determined that the law of the arbitration agreement was London, and London was the seat. Therefore, the section 9 application filed in an Indian court was held to be without jurisdiction and Part I was impliedly excluded.

From the above, it is possible that a party could raise the argument that the 'implied exclusion' jurisprudence should be construed when deciding whether parties have made an agreement to the contrary to opt out of the proviso to Section 2(2) – thereby excluding the provisions of Section 9 in an arbitration with a foreign seat and foreign governing law, and/or foreign law governing the arbitration agreement.

In the authors' opinion, the above construction would be a fallacy, and would render the entire purpose of the amendment otiose. It cannot be gainsaid that the purpose of the proviso in Section 2(2) is for parties to be able to approach Indian courts for the limited purpose of Sections 9, 27, 37(1)(a) and 37(3) even when the seat of arbitration is outside India, and only an express contract to the contrary[28] can exclude the application of these sections. The amendment was occasioned on account of the lacuna in the previous Act, which was recognized and discussed in *Bhatia* and *BALCO*. To consider the 'implied exclusion' jurisprudence from the

25 (2014) 7 S.C.C. 603 (India).
26 *Id.* ¶ 41.
27 (2015) 9 S.C.C. 172 (India).
28 The words "contract to the contrary" were interpreted by the Supreme Court in the context of the Transfer of Property Act in Al Champdany Industries Ltd. v. Official Liquidator, (2009) 4 S.C.C. 486, and were held to mean an *express* contract to the contrary.

Bhatia regime in such a case would restore the very mischief that the Amendment Act sought to cure.[29]

Such argument would also fall foul of established principles of statutory interpretation. The '*Mischief Rule*', firmly established in the Heydon case[30] and followed by Indian courts,[31] states "*the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief."* Lord Shaw has stated, "[…] *where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system*".[32]

Thus, if the judiciary gets creative and reads the term 'implied' within the proviso, such construction would lead to confusion and friction, undermine the purpose of the Amendment Act and would not always stand true to the spirit of party autonomy. It is high time that arbitration law in India is limited to legislated law and not case law- only an express agreement to the contrary should exclude the application of Section 9 to foreign seated arbitrations.

In addition to the applicability of Section 9 to foreign seated arbitrations, the proviso also provides for applicability of Section 27 (*court assistance in taking evidence*), Sections 37(1)(a) and 37(3) (*appealable orders*). An interesting issue that may arise from an obvious typographical error in the *proviso* is that Section 37(1)(a) is an appeal from an order refusing to refer parties to arbitration under Section 8 of the Act, whereas Section 37(1)(b) is the provision which provides for an appeal from an order granting or refusing to grant any measure under Section 9. It is an accepted principle of interpretation of statutes that where an inadvertent grammatical or other error has palpably crept into the legislation, the court is at liberty to disregard the error in applying the statute.[33] It remains to be seen when this wrinkle is ironed out by courts.

III. Scope of Section 9

The relationship between courts and arbitrators has been compared to a relay race, wherein initially the baton is with the courts (either for grant of interim reliefs or appointment of the arbitrators). Once the arbitrators take charge, they retain the baton till the award is made.

29 Utkal Contractors and Joinery Pvt. Ltd. v. State of Orissa (1987) 3 S.C.C. 279, at 288 *("In case of doubt, it is always safe to have an eye on the object and purpose of the statute, or reason and spirit behind it.")*.

30 76 E.R. 637 (1584) (U.K.).

31 Bengal Immunity Co. v State of Bihar, A.I.R. 1955 S.C. 661 (India); Goodyear India v. State of Haryana and Anr., A.I.R. 1990 S.C. 781 (India).

32 Shannon Realities Ltd v. St. Michel (Ville De), (1924) A.C. 185, at 192, 193 ((India); Central Bank of India v. Ravindra (2002) 1 S.C.C. 3677 (India).

33 Afcons Infrastructure Ltd. v. Cherian Verkey Construction Co. (P) Ltd., (2010) 8 S.C.C. 24 (India).

Thereafter, the arbitrators hand back the baton so that the court can lend its coercive powers to the enforcement of the award.[34]

The UNCITRAL Model Law clarifies in Article 9 that merely because a party to an arbitration agreement requests the court for an interim measure, '*before or during arbitral proceedings'*, such recourse is not incompatible with an arbitration agreement, if a court grants such interim measure. Section 9 of the Act, modeled on the UNCITRAL Model Law goes one step further and provides that "*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*— for interim measure of protection." [Emphasis Supplied]

A. 'Before' the arbitration proceedings

There can be no debate on the powers of courts to grant interim reliefs 'before' the commencement of the arbitration and constitution of the arbitral tribunal.[35] Prior to the amendment, an undesirable trend was observed wherein parties would apply for swift interim reliefs from courts on a *prima facie* basis, and then delay the commencement of the arbitral proceedings, presumably since their objective of the 'first mover's advantage' was achieved. To ensure that there is a manifest intention and action on the part of the petitioner to initiate arbitration proceedings, the Amendment Act now requires the parties to commence arbitration within 90 days from the date of such order or such further time as the court may determine.

While the Act has adopted the recommendation of the 246th Law Commission Report to ensure timely initiation of arbitration proceedings by a party who is granted an interim measure of protection, it did not adopt the following words recommended by the Law Commission – "*failing which the interim measure of protection shall cease to operate*".[36] The corollary to the omission is that it is unclear from the wording of the statute, as to the effect of an interim order upon failure of a party to commence the arbitration. It appears to be an area where the courts will have to take the burden of clarification through case law.

One other omission from the Amendment Act is the statutory recognition to emergency arbitrators provided under several institutional rules, such as ICC, LCIA and SIAC. While the 246th Law Commission Report recommended the addition of 'emergency arbitrator' to the definition of 'arbitral tribunal' under Section 2(d) of the Act, the same has not been accepted by

---

34 Lord Mustill, *"Comments and Conclusions" in Conservatory & Provisional Measures in International Arbitration*, *in* 9th JOINT COLLOQUIUM ICC PUBLICATION 118 (1993).

35 Sundaram Finance Ltd. v N.E.P.C India Ltd., (1999) 2 S.C.C 479 (India).

36 Report, *supra* note 6, at 44.

the legislature. Further, due to lack of an effective mechanism for direct enforcement of interim orders of emergency arbitrators, parties will continue to approach the courts under Section 9 for interim reliefs prior to constitution of the arbitral tribunal.

B. 'During' the arbitration proceedings

In an attempt to make India an arbitration friendly jurisdiction, the Amendment Act made a departure from a "free choice model"[37] under the UNCITRAL Model Law, and has transferred the sovereign powers of a civil court to a private forum, consensually designed to adjudicate disputes between parties.

Prior to the Amendment Act, interim orders passed under Section 17 were limited in scope. The Supreme Court recognized that "*no power is conferred upon the arbitral tribunal to enforce its order nor does it provide for judicial enforcement thereof*".[38] While some courts did recognize the tribunal's powers of contempt under Section 27(5) of the Act,[39] the prevalent view was that Section 17 was "*without teeth*."[40] To enable Section 17 to match up to the efficacy of Section 9 reliefs, the legislature provided it with additional ammunition. Post amendment, Section 9(3) of the Act restricts the time when a party can approach a court for interim reliefs and provides that once the arbitral tribunal has been constituted, the court shall not entertain an application for interim reliefs, unless the court finds that circumstances exist which may not render the remedy provided under Section 17 'efficacious'.[41] Further, the scope of Section 17 reliefs has been enlarged by (i) deleting the initial inhibiting words "*Unless otherwise agreed by the parties*"; (ii) making it *pari materia* with the language in Section 9, including reliefs relating to appointment of a guardian, appointment of a receiver, detention, preservation or inspection of any property, and such other reliefs as may seem just and convenient to the arbitral tribunal; and (iii) providing that any order of the arbitral tribunal shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an order of the Court.

---

37 Parties have the choice of either applying to courts or tribunals for interim reliefs during an arbitration, which was the pre-amendment position under the Act.

38 M.D., Army Welfare Housing Organisation v. Sumangal Services, (2004) 9 S.C.C. 619 (India).

39 Section 27(5) of the Act:- "[P]*ersons failing to attend in accordance with such process, or making any other fault, 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*" [Emphasis Supplied].

40 Report, *supra* note 6, at 27.

41 Mohamood Ilahi v. Dayawati, 1989 (1) All. RC 105 ("*The term 'efficacious' means effective or "able to produce the intended effect or result*"); *see,* Article 226 of the Constitution of India (requiring "*no other alternate and efficacious remedy"* for maintainability of an action.). *Also see*, §41(h) of the Specific Relief Act, 1963 (refusing an injunction if an "*equally efficacious relief*" can be obtained by another usual mode of proceeding.).

It is pertinent to examine the provisions of Section 44 of the (English) Arbitration Act, which also limit the powers of courts in granting interim reliefs except in cases of "*urgency*" or if the arbitral tribunal… "*has no power or is unable for the time being to act effectively.*" In *Seele Middle East FZE v Drake & Skull International SA Co,*[42] the English High Court recognized that since the case was one of urgency and the ICC arbitral tribunal could not act effectively, an order of injunction was warranted by the court. In this case, the 2012 ICC Rules which provide for an emergency arbitrator did not apply. In *Ikon International (HK) Holdings Public Co Ltd v Ikon Finance Ltd,*[43] the court refused to grant interim reliefs since the LCIA tribunal had been constituted and no evidence was placed before the court that the tribunal could not act effectively to grant interim reliefs.

With broad concurrent powers provided to arbitral tribunals to grant interim reliefs and such orders being deemed to be enforceable as orders of a civil court, it is likely that very few applications will be entertained by Courts to grant interim reliefs during an arbitral proceeding. Cases where the arbitral tribunal is unable to match diaries and grant urgent interim reliefs could be categorized as '*inefficacious*', and would fall within the domain of Section 9 courts. Further, in certain other cases, especially involving third parties, the inherent differences between the state machinery and a private contractual forum, could make the remedy *inefficacious* before an arbitral tribunal.

The issue of subjecting a third party to the arbitration proceedings, in order to preserve and protect the subject matter of the arbitration has arisen on several occasions, and courts have not always followed a linear path. In several cases, it has been held that under Section 9 of the Act, civil courts have inherent powers to pass interim orders against third parties[44] under Sections 94 and 151 of the Code of Civil Procedure Code, 1908, particularly where the situation demands such orders such as (i) if the court appointed a guardian or a receiver; or (ii) if the amount to be secured was in the form of money payable or property in hands of a third party; or (iii) if the goods required to be preserved were in the custody of a third party.[45]

While courts enjoyed a wider latitude in granting interim measures, the pre-amendment Act constricted the powers of the arbitral tribunal such that it could order a party (only) to take an

42 [2013] EWHC 4350 (Comm.) (U.K.).

43 [2015] EWHC 3088 (Comm.) (U.K.).

44 Chunilal Kapoorchandji Shah & Ors. v. Yuvraj Industries Ltd. & Ors., 2010 (1) Arb. L.R. 138 (Gujarat High Court) (India); Girish Mulchand Mehta and Durga Jaishankar Mehta v. Mahesh S. Mehta, 2010 (1) Bom. C.R. 31 (India); Dorling Kindersley (India) Pvt. Ltd. V. Sanguine Technical Publishers & Ors., 2013 (3) Arb. L.R. 52 (Delhi High Court) (India).

45 Value Advisory Services v. M/s. Zte Corporation & Ors., 2009 (3) Arb. L.R. 315 (Delhi High Court) (India).

interim measure of protection, and did not have jurisdiction to pass interim measures against a third party.[46] In *Wind World (India) Limited and Ors. v. Enercon GmbH and Ors*,[47] the Bombay High Court refused to recognize an arbitral tribunal's order which had permitted disclosure of documents and information of third parties to the arbitration proceedings.

Now, with the exact powers of the court under Section 9 being transposed upon the arbitral tribunal, is it possible to argue that an arbitral tribunal can grant reliefs against third parties in order to preserve the subject matter of the dispute, including granting third party garnishee orders, injunction against invocation of a bank guarantee, *Mareva* injunctions or *Anton Pillar* orders? Does the deeming provision in the amendment empower tribunals to pass such orders and enforce the same as a court, even against third parties?

A party seeking interim reliefs from the tribunal would argue that an answer to the above questions in the negative would undermine the purpose and intent of the Amendment Act, which is to empower the arbitral tribunal with the same power as a court, such that the parties are discouraged from approaching the courts during an arbitration. It can also be argued that even though the genesis of the tribunal's existence is a private commercial contract, the powers exercised by such tribunal for granting interim reliefs, are governed by statute. Therefore, parties, including third parties, ought to be bound by the tribunals' interim orders in the same manner as they would, by that of a civil court.

The counter argument by a third party against the tribunal's orders could be based on the age-old doctrine of privity of contract, and that the tribunal ought not to replace a sovereign court in binding third parties to its interim orders. In fact, despite the amendment, the arbitral tribunal still requires assistance from court in taking evidence, issuing summons to witnesses or production of documents under Section 27 of the Act. Therefore, it could be argued that a tribunal would not be effective in passing orders against third parties to the arbitration proceeding, and getting them to comply with such orders in the same manner as a court.

Further, the enforcement of certain orders of an arbitral tribunal seated in India would require the assistance of a civil court. Recently, the Kerala High Court in *Pradeep K.N v. The Station House*

---

46 Pre-amendment Section 17 of the Act:- "*Interim measures ordered by arbitral tribunal- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. (2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)*".

47 Order dated March 29, 2016, Arbitration Petition (L) No. 374 of 2016 (India).

Officer,[48] discussed an interim order passed by an arbitral tribunal (after the Amendment Act) appointing a receiver to take repossession of certain vehicles. The single judge in this decision examined how an interim order passed by the tribunal under Section 17(2) of the amended Act can be "*enforceable under the Civil Procedure Code, 1908 in the same manner as if it were an order of the Court.*" It was held that the amendment to Section 17 does not confer any powers on the Tribunal to enforce its own order and the tribunal, "*by its constitution or creation, inherently lacks power to deal with any sovereign function or public law in the sense that their authority is founded in a contract and power is regulated by the statute… enforcement itself signifies that there must be a force to put the order in motion, to ensure that the party bound by the order is complied with such order. The Arbitral Tribunal's by very nature of its composition cannot exercise any such power vested with the court, which discharges sovereign function.*"[49] Therefore, in this case, the Advocate Commissioner or Receiver appointed by the arbitral tribunal could not enforce an order of repossession passed by the tribunal, and such order could only be enforced through a civil court. The present case is currently under challenge, and it remains to be seen whether courts will interpret the amendment to permit a private tribunal into the space of public law remedies. In any event, such issues and any delay or debate on account thereof, create more ground for parties to avoid approaching the arbitral tribunal for reliefs on grounds of 'inefficacious relief', wherein court assistance may be required for enforcement. The ultimate burden will lie upon the courts to restrain themselves in interfering in cases where the tribunal is empowered to pass interim orders.

In a foreign seated arbitration, the remedy of interim reliefs by the arbitral tribunal or emergency arbitrators would arguably be rendered inefficacious in most situations, since there is no mechanism for recognition of interim orders of foreign seated tribunals in India. In *HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited and others*,[50] the Petitioner obtained interim reliefs from an emergency arbitrator in Singapore under the SIAC Rules freezing the bank account of the Respondent, and converted the order of the emergency arbitrator into a Singapore court decree. Thereafter, the Petitioner filed a Section 9 petition seeking similar reliefs on the strength of the emergency arbitrator's order and the Singapore court decree. While the legislature has provided the remedy of a Section 9 provision to foreign seated tribunals, the reforms should have logically proceeded an extra step and provided for recognition and enforcement of interim orders of foreign seated tribunals in India as well.

---

48 Pradeep K.N. v. The Station House Officer, WP (C) No. 38725 of 2015, WP (C) No. 39542 of 2015, WP Nos. 4325, 4333, 7435, 7932, 8667, 9660 and 10044 of 2016, (Mar. 16, 2016) (Kerala High Court) (2016) (India).

49 *Id.* ¶13.

50 2014 S.C.C. OnLine Bom. 929.

C. 'After' the arbitration proceedings

The amended Act, in Section 17 provides that parties can now approach an arbitral tribunal after the making of an award, but before it is enforced, for seeking interim measure of protection. The arbitral tribunal has the powers to grant wide interim measures of protection at the time of making the final award, to secure the amount in dispute or protect property from dissipation. However, once the final award is passed, if a party wishes to apply for interim reliefs, it cannot approach the tribunal.

Section 32 of the Act provides that the arbitral proceedings shall be terminated by the passing of final arbitral award, and the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings. Once the arbitration tribunal becomes *functus officio*, upon the passing of the final arbitral award, it cannot entertain an application for interim reliefs by the parties. In 2004, the Supreme Court in *Firm Ashok Traders v. Gurumukhdas Saluja*[51] wisely held that section 17 would operate only during the existence of the Arbitral Tribunal. Pre and post arbitration proceedings, the parties should approach the Courts.

With the amendment of Section 17 in the Amendment Act, an important and consequential amendment to section 32 of the Act has been omitted - thereby creating a potential problem. It is likely that parties seeking interim reliefs after the award, will approach courts on the ground that the relief is not 'efficacious' before the arbitral tribunal.

IV. Conclusion

Lord Macaulay's famous words in the House of Commons speech of July 10, 1833 resonate even today at the foundation of every legislation and its amendment - "*Our principle is simply this- uniformity when you can have it; diversity when you must have it; but in all cases, certainty*." The Amendment Act and the resulting reforms are certainly a step in the right direction of building an efficient arbitration environment, but have to now be interpreted consistently by the courts to ensure that never again do we land in a soup of judicial confusion.

The applicability of Section 9 to foreign seated arbitrations should only be restrained if there is an express agreement by the parties to the contrary, and not otherwise. Some opinions suggest that to avoid any issues, parties should *expressly include* a saving provision in their agreements that the provisions of Section 9 should apply to their foreign seated arbitrations.[52] While such precautions can be built by the parties into the agreements, the interpretation of the statute

51 A.I.R. 2004 S.C. 1433 (India).
52 Goel & Prabhat, *supra* note 22.

should not be made contingent on such wording, especially if the intention of the legislation is clear – that Section 9 reliefs should be available to a foreign seated arbitration.

Further, despite the Amendment Act, and despite the provision of emergency arbitrator provision in most institutional arbitration rules, the powers of Indian courts under Section 9 cannot be negated. The Amendment Act, whilst equating the powers of an arbitral tribunal with those of court, should have retained the free-choice model of permitting a party to make a choice where it sought to obtain interim reliefs. There are still areas where a party may seek court assistance, and the orders of a tribunal/ emergency arbitrator may not be swift or efficacious or cost-efficient to provide adequate interim reliefs to the parties, including third parties to the arbitration proceedings. Instead, the Amendment Act should have focussed on providing clear progressive solutions for enforcement of interim orders passed by an arbitral tribunal / emergency arbitrators in a domestic as well as foreign seated arbitration.

While the legislature has granted expansive powers to an arbitral tribunal for granting interim reliefs on one hand, on the other hand, it has removed the choice of parties to decide whether to approach the court or a tribunal for seeking interim reliefs. Such choice is inherent in the party autonomy model.

In the current scenario, Indian courts will have to exercise judicial maturity to ensure that there is no excessive interference in the arbitration, and at the same time, judiciously keep its doors open to parties seeking urgent interim measures.