STANDARDS APPLICABLE TO INTERIM RELIEFS IN INDIA: A COMPREHENSIVE ANALYTICAL INVESTIGATION

Sarthak Malhotra & Sujoy Sur†*

Abstract

The issue of standards and guidelines applicable to court-ordered and tribunal-ordered interim reliefs in arbitrations in India is an important issue insofar as it allows for court intervention, thus putting a question to the efficiency, independence and effectiveness of the whole process. In this article, an analysis has been charted out by discussing the relevant case laws and an attempt has been made to discern the plausibility of conditions applicable to interim reliefs ordered by a court. Further, the authors discuss the standards followed in different jurisdictions along with the best practices followed in international arbitration. This is followed by a comparative analysis of internationally accepted standards and the standards adopted by Indian courts. It can be seen that there has been an attempt globally, as well as in India, to not shun the involvement of objective standards established by the law and applied by the courts, but to embrace them as pragmatically possible, thus, aiming to make the mechanism more efficacious and uniform. Though the moot point cannot be said to settled, the practice of Indian courts while dealing with the issue of interim reliefs seems to be in line with the internationally accepted standards and guidelines.

I. Introduction

The very purpose for resorting to arbitration is to create a mechanism which is far away from the rigours of the court but also serves the needs of the parties involved with greater satisfaction by allowing greater control over the process. One of the objects and reasons for a new Arbitration Act in 1996 was "*to minimise the supervisory role of courts in the arbitral process*".[1] Section 5 of the Arbitration and Conciliation Act, 1996 [the "**Act**"] specifically mentions that courts shall not interfere except where it has been provided for under the Act. Reading the aforementioned statement with Section 19(1) which says that the arbitral tribunal is not bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872, one gets the idea that there is a certain attempt being made of distancing arbitration from the rigours of court procedure. But the need for judicial intervention, especially in matters of enforcement, is an aspect which cannot be ignored because it is only by way of judicial intervention and standards prescribed by it that the whole

* Fifth Year Student, B.Com./LL.B.(Hons.), Gujarat National Law University. The author can be contacted at sarthakm14@gmail.com.

† Fifth Year Student, B.A./LL.B. (Hons.), Gujarat National Law University. The author can be contacted at sujoysur20@gmail.com.

1 *See* Arbitration and Conciliation Act, No. 26 of 1996, Statements of Objects and Reasons; G. Subba Rao, *Applicability of the Civil Procedure Code to Matters Before the Civil Courts Under the Arbitration and Conciliation Act*, 1996 (2004) J.U.N.E. P.L. (Jour.) 16.

procedure gets the forceful potency which otherwise a mutually decided upon set up of dispute resolution can never have. It often becomes a challenge to balance the level of interference by courts; on one end, their authority ensures that orders of arbitral tribunals are followed and on the other end, excessive court intervention is not desirable since it is the courts that parties opting for arbitration wished to avoid in the first place. A possible solution to this is bringing greater uniformity to standards employed by courts while adjudicating the issue of grant of interim reliefs, thus addressing parties' reasonable expectations from such proceedings.

Section 89 of the Code of Civil Procedure gives the court the power to refer parties to alternate means of dispute resolution. While the Arbitration and Conciliation Act, 1940 [the "**1940 Act**"] had been held to be a complete and exhaustive code in itself in so far as domestic arbitration was concerned,[2] the same cannot be said for the Arbitration and Conciliation Act, 1996 [the "**Act**" or the "**1996 Act**"]. There was judicial dispute regarding the Arbitration and Conciliation Act, 1996 on the same point, as Part I was considered to be a complete code in itself but Part II was not.[3] However, the judicial pronouncements in *BALCO*[4] and *Fuerst Day Lawson*[5] cleared the air and held Part I as not being supplementary to Part II[6] and the Act as an exhaustive and self-contained code[7] respectively. Though the question of the arbitration legislation seemingly being an inclusively self-contained code can be said to be an ensconced deliberation,[8] the same cannot be said with certainty for the question as to whether it does need the supplementary measures of the Code of Civil Procedure, 1908 ["the **Code**"] to make it conclusively and effectively applicable. Thus, the question of applicability of the Code in interpretation and execution of the mechanism provided under the Act has repeatedly arisen.

This question has arisen in cases under Section 34 while dealing with setting aside arbitral awards[9] and Section 37 where appeals have been sought from orders made at different junctures of the proceedings.[10] But, most specifically and most importantly, it has arisen in cases of interim measures being sought either from the court or from the tribunal, that is, in cases of Section 9 and Section 17 of the Act respectively. This article would attempt to discern the standard that is

---

2 Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc., (2012) 9 S.C.C. 552 (India) ¶ 32 [hereinafter "*BALCO*"].

3 The 1996 Act is divided into two Parts. Part I of the Act applies where the place of arbitration is in India whereas Part II concerns the enforcement of foreign awards.

4 *Id.*

5 Fuerst Day Lawson v. Jindal Exports Ltd. (2011) 8 S.C.C. 333 (India), ¶¶ 89-90 [hereinafter "*Furest Day Lawson*"].

6 *BALCO,* (2012) 9 S.C.C. 552 (India), ¶¶ 125, 129.

7 *Furest Day Lawson,* (2011) 8 S.C.C. 333 (India), ¶¶ 89-90.

8 *See* P. C. MARKANDA ET AL., ARBITRATION STEP BY STEP 3 (2012); *Furest Day Lawson,* (2011) 8 S.C.C. 333 (India).

9 *See* B. Rama Swamy v. B. Ranga Swamy, A.I.R. 2004 A.P. 280 (India).

10 *See* ITI Ltd. v. Siemens Public Communication Network Ltd., (2002) 5 S.C.C. 510 (India).

being adopted by Indian courts and arbitral tribunals, in determining whether an interim or conservatory relief should be issued or not. Thereafter, the authors shall juxtapose the standard so identified with international standards and best practices of international arbitration.

The authors will attempt to analyse Section 9 and Section 17 of the Act on the basis of the prevailing jurisprudence and case laws. There are two approaches which can be culled out, but they cannot be said to be absolutely distinctive in nature. Rather, they constitute the ends of a single spectrum with many judicial pronouncements falling within these two ends. To further corroborate and make the analysis comprehensive, an aphoristic analysis of the prevailing international standards has been attempted – both of international commercial arbitration jurisprudence and of country specific municipal laws.

II. Jurisprudential Approaches to Standards governing Court Ordered Interim Measures

Section 9 of the Act empowers the court to order interim reliefs *before or during arbitral proceedings or at any time after the making of the arbitral award*. It confers wide powers on the court to order interim measures to protect the interest of parties that otherwise cannot be protected. These interim measures can be issued for -

i. Preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
ii. securing the amount in dispute in the arbitration;
iii. detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration,
iv. interim injunction;
v. appointment of a receiver; and
vi. such other interim measure of protection as may appear to the Court to be just and convenient.

Albeit described as a compound of Section 41(b) and paragraph 2 of the Second Schedule of the 1940 Act,[11] the text of Section 9 differs from these provisions. While Section 41(b) of the 1940 Act envisaged that the provisions of the Code shall be applicable to all proceedings before the court, Section 9 of the 1996 Act does not address this issue. However, as per Section 19 of the 1996 Act, an arbitral tribunal is not bound by the Code or the Indian Evidence Act, 1872.

11 O. P MALHOTRA & INDU MALHOTRA, THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION 381 (2nd ed. 2006).

Evidently, the Act is silent on the issue of applicability of the Code to court proceedings arising in relation to the Act. Further, neither Section 9 nor any other provision of the Act throws any light on the conditions or standards a court should take into account for granting an interim relief. Although, under Section 9, for exercising the power to grant an interim relief, the court has been conferred *the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it*. Hence, arguably, this provision could be read to permit the court to apply the relevant law existing under the Code or the Indian Evidence Act, 1872.[12]

Since the provisions offer rather perfunctory guidance, it becomes imperative to discuss and examine judicial pronouncements that have discussed the parameters within which the court must exercise such power. A perusal of leading Supreme Court and High Court judgments shows that the issue, though seems to be moving linearly, cannot be said to have been conclusively determined, and still allows doubts to prevail. The courts have adopted either an inclusive approach or an exclusive approach to the applicability of provisions of Code in cases related to grant of interim reliefs under Section 9 of the Act.

A. Interim Reliefs under the Code of Civil Procedure, 1908

The Code provides for several types of interim orders to assist the parties for the purpose of protecting the subject matter of the suit and otherwise. These are 'Security for Costs' (Order 25), 'Commissions' (Order 26), 'Arrest before Judgment' (Order 38, Rules 1-4), 'Attachment before Judgment' (Order 38, Rules 5-13), 'Temporary Injunctions and Interlocutory Orders' (Order 39) and 'Appointment of Receiver' (Order 40).

In the context of arbitration, the most widely used reliefs are 'Attachment before Judgment' (Order 38) and 'Temporary Injunctions and Interlocutory Orders' (Order 39). Order 38 of the Code empowers the courts to decide when to order attachment of properties, when the defendant may be called upon to furnish security, and the mode of attachment of the property. Order 39 provides for temporary injunctions in matters of civil nature and when such temporary injunctions might be issued – when the property in dispute is under the risk of being wasted, damaged, or alienated. Hence, a sizeable portion of the discussion in this article would revolve around the rules under Order 38 and Order 39 of the Code. The "three pillars" on the basis of

12 *Id.* at 383; Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd., (2007) 7 S.C.C. 125 (India).

which a determination of grant of interim relief, *specifically,* injunction is contingent upon are ["***Three Pillars***"]:-[13]

i. Whether the plaintiff has a prima facie case?
ii. Whether the plaintiff would suffer irreparable injury if injunction is not granted?
iii. Whether the balance of convenience is in plaintiff's favour?

The question of supplementing the Act with provisions of the Code, despite it being a self-contained code is best highlighted in matters where an interim measure is sought from the court or even the tribunal, without which going ahead with the arbitral proceeding would not make sense or would actually prejudice the interest of one party. Now, one may, on a distant understanding, feel that the very purpose of seeking interim measures of a court is to override the mechanisms of the tribunal. However, this is not the case. In matters of urgency and those requiring injunctive relief, the first and foremost factor to be considered is the need for the relief, as any such relief acts like an off-shooting branch necessary to balance the tree which an arbitral proceeding is. Even though the need for an interim relief can be adjudicated upon *ex debito justitiae*,[14] the primary considerations for granting an interim relief would not be any different from the ones laid down under Order 38, Rule 5 and Order 39, Rules 1 and 2, when read conjunctively. Further, under the established jurisprudence for Order 38 of the Code, Rule 5 is an extraordinary provision and cannot be used mechanically.[15] Thus, it is not so that the courts would apply these standards inconsiderately.

Even under the Model Law by United Nations Commission on International Trade Law ["**UNCITRAL**"],[16] the competence to pass an order lies with the tribunal but enforcement is left to the laws and procedures adopted by the national courts. In an unofficial note, the UNCITRAL Secretariat explains how it expects Articles 9[17] and 17[18] to function:[19]

---

13 Dorab Cawasji Warden v. Coomi Sorab Warden and Ors, (1990) 2 S.C.C. 117 (India); Best Sellers Retail v. Aditya Birla, (2012) 6 S.C.C. 792 (India); Kishoresinh v. Maruti Corporation, (2009) 11 S.C.C. 229 (India).

14 National Shipping Company of Saudi Arabia v. Sentrans Industries Limited A.I.R. 2004 Bom. 136 (India).

15 Raman Tech. & Process Engg. Co. v. Solanki Traders, (2008) 2 S.C.C. 302 (India) ¶ 5 (cited in Rashmi Cement Ltd. v. Trafigura Beheer B.V. (2011) 102 A.I.C. 793 (India)); K.S. Gita v. Vision Time India Pvt. Ltd. and Ors. 2010 S.C.C. OnLine Mad. 1590 (India); C.V. Rao v. Strategic Port Investments KPC Ltd., 2014(4) Arb. L.R. 9 (Delhi) (India); SJJ Marine Pte. Ltd. v. Pisces Exim (India) Pvt. Ltd. and Anr. (2013) 3 Bom. C.R. 192 (India).

16 United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration,* G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985) [hereinafter "UNCITRAL Model Law"]

17 Article 9 of the UNCITRAL Model Law permits the parties to approach courts to seek, and empowers the courts to grant, interim measures before or during arbitral proceedings.

18 Article 17 of the UNCITRAL Model Law confers the arbitral tribunal with the power to grant interim measures.

"*21. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (e.g. pre-award attachments) are compatible with an arbitration agreement.*

[…]

26. Unlike some national laws, the Model Law empowers the arbitral tribunal, unless otherwise agreed by the parties, to order any party to take an interim measure of protection in respect of the subject-matter of the dispute, if so requested by a party (article 17). It may be noted that the article does not deal with enforcement of such measures; any State adopting the Model Law would be free to provide court assistance in this regard."

The argument for a stronger interplay with respect to interim measures between procedural code and arbitration law has arisen after the 2015 Amendment to the Act.[20] The arbitral tribunal's power under Section 17 has been expanded and orders passed under this section are now enforceable in the same manner as orders of a civil court.[21] Section 9 has also been amended and when read in light of Section 17, it can be seen that a marked differentiation has been created in stages of exercising of power by the court and the tribunal,[22] the result of which is that the tribunal has been given strong enforcement authority. This leads to the conclusion that authority of the Court is now to be assumed by the tribunal to make sure that there is better compliance with the Act and that the proceedings are taken with greater seriousness and more urgency. A note must be made that this by no way means that there has been an allowance of greater judicial intervention, but just like UNCITRAL, the legislature does realize that the authority of the Court cannot be replaced so it must be vested in the hands of the tribunal itself. This gives the proceeding much-needed independence by way of greater competence. The prescription of time limit for validity of court ordered interim measures can also be seen as a factor in contributing clarity regarding such measures and discouraging use of interim measures as a method of stalling the proceedings. However, it remains to be seen if this will also lead to a more uniform application of standards applied by courts in interim relief applications adjudicated by tribunals.

B. Judicial Analysis

Order 38 and Order 39 of the Code contain the provisions for attachment and arrest before judgment, and the grant of temporary/interim injunctions and interlocutory orders respectively.

---

19 United Nations Commission on International Trade Law, *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006* (Sep. 20, 2007), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf.

20 The Arbitration & Conciliation (Amendment) Act, No. 3 of 2015 (India).

21 The Arbitration & Conciliation Act, No. 26 of 1996, § 17(2) (India).

22 § 9(3) of the 1996 Act:- "*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.*".

While issuing a temporary injunction in a civil proceeding under the Code, the court has to keep in mind the tests of balance of convenience, prima facie case and irreparable loss.[23] Even though this legal position is broadly settled,[24] the same cannot be said with certainty for proceedings under Section 9 of the Act. As will be discussed below, the courts have generally taken the view that the principles contained in Order 38, Rule 5 and Order 39, Rule 1 and 2 of the Code[25] shall be applicable to proceedings under Section 9 of the Act, albeit, the degree of applicability remains a contentious issue.

Before one proceeds to discuss the issue of standard applicable to proceedings under Section 9 of the Act, it is imperative to discuss the legal position of the applicability of the Code to such court proceedings arising under the Act. The Supreme Court in *ITI* v. *Siemens Public Communication*[26] ["**ITI Ltd.**"] refused to hold that the Code is not applicable to the Act. The issue that fell for the Court's consideration was whether a revision petition, under Section 115 of the Code, against a civil court order under Section 37 of the Act[27] would lie to the High Court. The Court held that in absence of any specific exclusion of the Code except to the extent stated in Section 37(2) of the Act,[28] it could not be inferred that the Code was not applicable. The Court also found the rationale behind this conclusion in the now overruled[29] *Bhatia International v. Bulk Trading S.A. and Anr.*[30] where the Court held: *"While examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion."*

Relying on *ITI Ltd.*, various High Courts have taken the view that principles of Order 38, Rule 5 and Order 39, Rules 1 and 2 of the Code would have to be taken into account while exercising the discretion[31] under Section 9 of the Act. A Division Bench of Delhi High Court in *Goel*

---

23 Bloom Decor v. Subash Himat Lal Desai, (1994) 6 S.C.C. 322 (India); Morgan Stanley Mutual Fund v. Kartik Das, (1994) 4 S.C.C. 225. (India).

24 *See* Raman Tech & Process Engg. Co. v. Solanki Traders (2008) 2 S.C.C. 302 (India); Premraj Mundra v. Mohd. Maneck Gazi A.I.R 1951 Cal. 156 (India); Dalpat Kumar v. Prahlad Singh (1992) 1 S.C.C. 719 (India).

25 *See* "Three Pillars" in Part II of the article.

26 (2002) 5 S.C.C. 510 (India) ¶ 11.

27 Section 37 permits parties to appeal certain orders of the courts and the arbitral tribunal, including orders under Section 9 and Section 17.

28 Ideally, the court should have mentioned Section 37(2), read with 37(3), instead of Section 37(2) in the judgment. Since it did not do so, the authors have also followed suit (for the sake of not distorting the ratio).

29 *BALCO,* (2012) 9 S.C.C. 552 (India).

30 (2002) 2 S.C.R. 411 (India).

31 *See generally* GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 209-226 (2nd ed. 2015) [hereinafter "BORN"] ("*Although the standards applicable to the granting of provisional measures continue to develop, it is wrong to treat the subject as a matter of discretion, and not of legal right.*").

Associates v. Jivan Bima Rashtriya Avas Samiti Ltd.[32] held that procedural aspects as provided in the Code shall be a guiding factor for exercise of power under Section 9(1)(ii)(b) of the Act. The Madras High Court took note of this Delhi High Court decision and held that *provisions of the Code have to be read into as it is, when the Court exercises powers as prescribed under the Act of 1996*.[33] However, the Bombay High Court adopted a slightly moderate position when it held that the exercise of power under Section 9(1)(ii)(b) cannot be restricted by importing the rigors of Order 38, Rule 5.[34] According to the Court, the judgment in *ITI Ltd.* did not stand for the principle that provisions of Code have to be adopted as they are, rather only the procedural aspects of the Code shall be applicable. The Court held that the guiding factor for exercise of power by the Court under Section 9(1)(ii)(b) has to be whether it is necessary to pass such order to achieve justice, while keeping in mind subjective factual considerations of each case.

In *Delta Constructions v. Narmada Cement*[35] ["**Delta Constructions**"], the Bombay High Court stated that the predicates of Order 38 are not required to be seen if an order is to be passed under Section 9; all that is required to be seen is whether a case for genuine need of an interim relief has been made out. This case falls on one end of the spectrum as far as the approach regarding exclusion of the Code is concerned. Relying on *Delta Constructions,* in *National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd*.,[36] the Bombay High Court held that exercise of power cannot be restricted by importing the provisions of Order 38, Rule 5 of the Code as it is; that the legislature while enacting Section 9(1)(ii)(b) could not have intended to read into it the provisions of Order 38, Rule 5 of the Code as it is. Taking note of *ITI Ltd.*, the court held that while it may be said that the Code is applicable to Section 9 proceedings, it cannot be read into Section 9 as it is. It further observed that Section 9(1)(ii)(b) cannot be *restricted* by Order 38 but has to be exercised *ex debito justitiae,* the interest being the interest of the party seeking the relief. Thus, in principle, the Court held that it can go beyond Order 38, if need be, to grant an interim relief and it need not strictly comply with the rigors of Order 38.

The Supreme Court acknowledged the existence of these divergent views in *Arvind Constructions v. Kalinga Mining Corporation and Others*[37] [*"**Arvind Constructions Company**"*] but ultimately left the question unanswered. However, the Court *prima facie* took the view that the exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of

32 2004 3 R.A.J. 658 (India).
33 Om Sakthi Renergies Limited v. Megatech Control Limited, (2006) 2 Arb. L.R. 186 (India).
34 National Shipping Company of Saudi Arabia v. Sentrans Industries Limited, A.I.R. 2004 Bom. 136 (India).
35 (2002) 2 Bom. L.R. 225. (India).
36 A.I.R. 2004 Bom. 136, ¶ 25 (India).
37 (2007) 6 S.C.C. 798 (India).

interim injunctions and other orders of interim protection, thus adverting to the position taken by the Bombay High Court in *National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd.*

The question arose again in *Adhunik Steels v. Orissa Manganese and Minerals Pvt. Ltd.*[38] ["**Adhunik Steels**"] where the Supreme Court observed that the concluding words of Section 9, "*and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it*" suggested that it was not possible to ignore the well-established concepts in rules of interim reliefs such as balance of convenience, *prima facie* case, irreparable injury and the concept of just and convenient, while passing interim measures.

In *C.V. Rao v. Strategic Port Investments KPC Ltd.*,[39] the Delhi Court held that the underlying principles of Order 38, Rule 5 and Order 39, Rules 1 and 2 are to be kept in mind but the scope of Section 9 cannot be extended to specific enforcement of the contract since the objective of maintaining efficacy of the arbitral process has to be kept in mind.[40] In recent cases, the courts have taken a view that they cannot ignore the underlying principles which govern the analogous power under Order 39, Rules 1 and 2 and Order 38, Rule 5 of CPC but also, need not apply them strictly.[41]

Relying on *Adhunik Steels*, the Bombay High Court deviated from its previously held position[42] in *Perma Container (UK) Line Ltd. v. Perma Container Line (India) Pvt. Ltd. and Ors.*[43] and *Networth Stock Broking Ltd. v. Madhava Rao Nadella*,[44] where it took into account all the relevant ingredients as contemplated under Order 38, Rule 5, Order 39, Rule (1), and Order 40 read with the Specific Relief Act, 1963. Finally, in *Nimbus*,[45] a Division Bench held that a balance needs to be struck between the underlying principles which govern the exercise of an analogous power in the Code and the need to promote the efficacy of arbitration. In any case, the underlying basis of Order

38 (2007) 7 S.C.C. 125 (India).

39 2014 (4) Arb. L.R. 9 (Delhi) (India).

40 *See also* Steel Authority of India Ltd. v. AMCIPTY Ltd., 2011 (3) Arb. L.R. 502 (Delhi) (India) (where the question of furnishing securities arose and the court held that Order 38 need not be strictly adhered to in letter, so long as the ingredients of Order 38 are in general present).

41 C.V. Rao v. Strategic Port Investments KPC Ltd., 2014(4) Arb. L.R. 9 (Delhi) (India); VLS Finance Ltd. v. BMS IT Institute Private Limited and Ors., 220 (2015) D.L.T. 113 (India); Gatx India Pvt. Ld. v. Arshiya Rail Infrastructure Limited, 216 (2015) D.L.T. 20 (India).

42 *See* National Shipping Company of Saudi Arabia v. Sentrans Industries Limited, A.I.R. 2004 Bom. 136 (India); Pushpa P. Mulchandani (Mrs.) and Ors. v. Admiral Radhakrishin Tahilani (Retd.) and Ors., 2001(2) Arb. L.R. 284 (Bom.) (India); Delta Construction Systems Ltd Hyderabad v. Narmada Cement Company Ltd., 2002 (2) Arb. L.R. 47 (India).

43 2010 (2) Bom. C.R. 419 (India).

44 2010 (1) Bom. C.R.175 (India).

45 Nimbus Communications Ltd. v. Board of Control for Cricket in India and Anr., 2012(4) Arb. L.R. 113 (Bom.) (India).

38, Rule 5 has to be kept in mind while deciding an application under Section 9(1)(ii)(b). This position has subsequently been adopted in more recent judgments as well.[46]

The Gujarat High Court, in the case of *Essar Oil Ltd. v. United India Insurance Company*,[47] held that cases under Section 9 of the Act have to be guided by the underlying principles of Order 38 Rule 5. It reached this position by also doing a detailed analysis of the very possibility of incorporating other statutes which are supplementary to the Arbitration Act, building up the argument that where there is a procedural need or lacunae, other acts can be interpreted in furtherance of the Act. The Court also took note of the principle with respect to the Specific Relief Act, which was first iterated in the case of *Arvind Constructions Company*. The principle stipulates that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply.

The Madras High Court seems to have adopted a slightly stricter position.[48] In *Sundaram BNP Paribas Home Finance Limited v. Mir Ali*,[49] a Division Bench dismissed the appeal against a judge's order refusing to issue a prohibitory order against the garnishee under Section 9. Relying on *Adhunik Steels*, the Court applied the standard of Order 21, Rule 46A[50] of the Code and decided not to prohibit the garnishee since attachment under Order 21, Rule 46[51] of the Code (garnishee proceedings) could be ordered only when the debt is not secured by any negotiable instrument. However, an application under Section 9, coupled with Order 38 Rule 5, seeking furnishing of security and a simultaneous order of conditional attachment of property may be decided without seeking the aid of the ingredients of Order 38, Rule 5 of the Code.[52]

---

46 Acron Developers Private Limited v. Patel Engineering Limited, Arbitration Petition No. 62 of 2014, (Aug. 21, 2015) (Bombay High Court) (India).

47 (2015) 3 G.L.H. 28 (Gujarat High Court) (India).

48 Sundaram Finance Ltd. v. K. Stalin, (2013) 5 M.L.J. 251 India); Royal Orchid Hotels Ltd. v. Ferdous Hotels Pvt. Ltd., O.A. No. 134 of 2013 (Apr. 15, 2013) (Madras High Court) (India).

49 2012 (2) C.T.C. 209 (India).

50 "*46A Notice to garnishee.- (1) The court may in the case of a debt (other than a debt secured by a mortgage or a charge) which has been attached under rule 46, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt, calling upon him either to pay into court the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so.*"

51 "*46. Attachment of debt, share and other property not in possession of judgment debtor.- (1) In the case of—(a) a debt not secured by a negotiable instrument;(b) a share in the capital of a corporation;(c) other movable property not in the possession of the judgment debtor, except property deposited in, or in the custody of, any court, the attachment shall be made by a written order prohibiting,—(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the court; (ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon; iii) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment debtor.*"

52 Sundaram Finance Limited v. Mr. M.K. Khunhabdulla, 2014 (3) C.T.C. 159 (India).

Other High courts such as Calcutta High Court[53] and Allahabad High Court[54] have also taken the view that the Court should be guided by the same principles, which are required to be followed while disposing of the applications under Orders 38-40 of the Code.

If we concatenate these ingredients into one basic principle, that principle will revolve around a postulation that interest of the relief seeker must not be defeated. Actions like obstructing the execution of the decree of the decree holder, or disposing off of property central to the dispute will, in all its obviousness, go against the interests of the relief seeker.

In the case of *Deccan Chronicle Holdings v. L & T Finance*,[55] the Bombay High Court held that Order 38, Rule 5 cannot be put into place in order to defeat the grant of relief which would sub-serve the paramount interests of the parties involved in an arbitration. It held so while admitting that the underlying basis for Order 38, Rule 5 has to be borne in mind, but not used in letter to defeat interest under Section 9 of the Arbitration Act. In this case, the requirement for security was held to be important, but this was held so looking at the facts of the case, in accordance with practices which generally prevail in the modern scheme of market dealings. Thus, Order 38, Rule 5 was not followed blindly without considering the need for it. A similar case was made out in the case of *Gatx India Pvt. Ltd. v. Arshiya Rail Infrastructure Limited & Anr*[56] where the Delhi High Court, citing *Nimbus*, held that Order 38 cannot be bodily lifted and applied in syntaxically the same manner. It also cited and recognised the ruling in *Steel Authority of India Ltd. v. AMCI PTY Ltd*, quoting *"Since the letter of the law per se is not applicable, the requirements set out in Order 38 Rule 5 Code of Civil Procedure need not strictly be satisfied, and so long as the ingredients of the said provision are generally present*[…]"

In *Tata Capital Financial Services Ltd. v. Unity Infraprojects Ltd. and Ors*,[57] the Bombay High Court affirmed the jurisprudence that the underlying principles of Order 38 and Order 39 have to be complied with, but the Court will have the discretion to mould them on the basis of subjective considerations of facts and relief sought to secure the ends of justice and preserve the sanctity of arbitral process.

---

53 Brand Value Communications Ltd. v. Eskay Video Private Ltd., A.I.R. 2010 Cal. 166 (India); Kajal Kumar Bhowmick v. Indian Oil Corporation Ltd., 2011(5) C.H.N. 742 (India).

54 Samay Singh v. Hindustan Petroleum Corporation Ltd. and Anr., 2013 (1) Arb. L.R. 493 (Allahabad High Court) (India).

55 2013 S.C.C. OnLine Bom. 1005 (India).

56 216 (2015) D.L.T. 20 (India).

57 2015 S.C.C. OnLine Bom. 3597 (India).

All in all, the range of the pendulum seems to be that on one end, the provisions of Order 38 and Order 39 have to be followed to make sure the law is complied with, and on the other end, the Court cannot be expected to contain itself within the rigors of the Code. At best, the provisions must be kept in mind as guiding principles, since the Court can also pass orders *ex debito justitiae,* by going beyond the statutory principles. Post *Adhunik Steels*, at least at the level of the High Courts, there seems to be a gradual movement towards a more liberal interpretation; that of considering Order 38 and Order 39 as guiding principles which need to be followed in spirit but not absolutely in letter.

III. Enforceability of Tribunal Ordered Reliefs under Section 17: Conundrum Finally Put To Rest

With respect to Section 17, the established jurisprudence is that an arbitral tribunal can also pass an order for interim relief as it may deem fit but only to the parties of the proceedings and within the confines of the arbitration agreement.[58] The premise is simple and limits the tribunal's power to the very matters which have been listed before it. The established jurisprudence on the basis of case laws shall be delved into in light of the aforementioned premise.

Section 17's applicability has to be read and understood in light of Section 9 because they are complementary in nature; they aim for the same ends but at different walks of a proceeding's life. In *M.D., Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*,[59] the Supreme Court admitted the limited scope of Section 17 and held that the section does not confer any power upon the arbitrator to enforce its orders or for judicial enforcement thereof. The decision in *Sundaram Finance*[60] later established a conclusive and settled position by holding that although Section 17 gives the arbitral tribunal the power to pass orders, the same cannot be enforced as orders of a court. It is for this reason that Section 9 admittedly gives the Court power to pass interim orders even "during" the continuation of arbitration proceedings.

It can be clearly seen that, in a broader sense, the pertinent question is whether the court can, or should, and to what extent, step into the arbitral process and make the process tend towards the road most often travelled by, thus, making the arbitral process murkier and less independent. As per Dr. Peter Binder,[61] in most cases it is much less complicated to seek the order from the

58 M.D., Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 S.C.C. 619 (India); Rashtriya Chemicals and Fertilizers Ltd. v. Chowgule Brothers and Ors. (2010) 8 S.C.C. 563 (India).

59 A.I.R. 2004 S.C. 1344 (India).

60 Sundaram Finance v. NEPC Ltd., 1999 (1) S.C.R. 89 (India).

61 *See generally* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS (2nd ed. 2005).

arbitral tribunal and expect the tribunal to follow through with it as it is much better acquainted with the facts and circumstances, and in general, with the case at hand. He notes, although the courts should act like a safety net in the background, affording a high degree of independence to the arbitral tribunal is necessary to maintain the integrity of the process of arbitration. His views seem to have resonated by the House of Lords in the case of *Channel Tunnel Group Ltd. v. Balfour Beatty Ltd.*,[62] where it cautioned against jural grant of interim measures by courts in cases which can be addressed by tribunals; primacy of the latter should, therefore, be assiduously preserved and Courts may interfere only where there is an irreversible and irretrievable error which would be prejudicial to either party's interest.

However, in India, under the erstwhile pre-amendment regime, Section 9 and Section 17 were complementary to each other in preserving the inherent interest in the suit. There was no ouster of the jural powers of the Court[63] even during the pendency of arbitral proceedings. The position post 2015 has changed radically as Section 17(2) now provides that every order made out under Section 17 shall be taken to be an order of the Court and be enforceable under the Code in the same manner as an order of the Court,[64] as also proposed by the Law Commission of India in its 246th Report.[65]

This, if read with the 2006 Amendment to Article 17 of the UNCITRAL Model Law, it can be said to be in tune with the course the law is taking on this point,[66] as the tribunal may take any step, right from directing the party to do or refrain from doing something to preserving evidence. It may do so by framing its order in the "form of an award" or otherwise as it may deem appropriate. This means that a tribunal ordered interim measure though limited to the confines of the arbitration agreement, can be independent enough to have a spirit of its own; that is, it can be appealed against and can, as per the municipal law, have a right of enforcement of its own.

---

62 (1993) 1 All. 664 (India).

63 Firm Ashok Traders v. Gurumukh Das, A.I.R. 2004 S.C. 1433. (India). ("[P]*osition regarding the 'nature' of interim orders was settled in the case of Sundaram Finance v. NPEC Ltd.,* [1999 (1) S.C.R. 89 (India)] *where it was held that the jural powers are not completely ousted merely because of pendency of proceedings, thus, a Section 9 recourse is always possible. It further says that under Section 17 the arbitral tribunal is allowed to make order amounting to interim measures. This, in all its obviousness, must be seen in whatever limited powers and authority a tribunal exercise.*").

64 *See* The Code of Civil Procedure, No. 5 of 1908, § 2(14) (1908) ("*An order of the Court means the formal expression of any decision of a civil court which is not a decree). Furthermore, Orders are not usually appealable in nature except as provided under Section 104 of the Code*").

65 *See* LAW COMMISSION OF INDIA, REPORT NO. 246- AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996, ¶49 (2015), ¶ 49, *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf.

66 Sumeet Kachwaha, *Interim Relief: Comments on the UNCITRAL Amendments and the Indian Perspective* (May 2012), WWW.KAPLEGAL.COM *available at* http://www.kaplegal.com/upload/pdf/Transnational_Dispute_Management.pdf.

IV. Brief Roundup of Municipal Laws on Standards Applicable to Interim Reliefs across Jurisdictions

While most national legislations do not set out detailed standards for interim reliefs,[67] Article 17A of the revised UNCITRAL Model Law does address this issue insomuch as it requires a party seeking interim measures to prove the existence of irreparable harm, which outweighs possible injury to other parties, and reasonable possibility of winning on merits of the claim.[68] Most international arbitral tribunals require that the applicant demonstrate (a) serious or irreparable harm; (b) urgency; (c) no prejudgment of the merits, and (d) *prima facie* case on the merits.[69] Even though there is diversity amongst different countries' articulation of a standard, they revolve around one key element- "Has the applicant demonstrated sufficiently that a right has been infringed or threatened by the defendant, and is the relief sought (objectively) urgently necessary to protect that right before a full decision on the merits?"[70] A survey of few key jurisdictions indicates that the courts weigh more towards likelihood to succeed on merits, necessity and urgency, what the interim relief intends to achieve, and how prejudicial will the interim relief be to enforcement of the final award.[71]

A. Belgium

The Belgian Judicial Code ["**B.J.C.**"] provides concurrent powers to arbitral tribunal and State Courts to grant interim and conservatory measures with an exception that Belgian courts are exclusively competent to grant conservatory attachment orders.[72] Rather than incorporating a list of interim and conservatory measures a tribunal may order, the B.J.C. provides for a wide standard of "as it deems necessary".[73] The legislative intent behind doing so was to not restrict the arbitral tribunal to a specific set of conditions when adjudging the issue of grant of interim or conservatory measures.[74] Therefore, the tribunal may take into account relevant facts and

---

67 BORN, *supra* note 31, at 209.

68 United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration 1985*, U.N. Doc.A/40/17, Annex I, U.N.Doc.A/61/17, (July 7, 2006).

69 BORN, *supra* note 31, at 209-226.

70 Donald Francis Donovan, *The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For Moving Forward*, *in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, 11 ICCA CONGRESS SERIES 82 (Albert Jan van den Berg ed., 2003).

71 *Id.* at 119-120.

72 BELGIAN JUDICIAL CODE [B.J.C] art. 1683, art. 1691 (Belg.).

73 Explanatory Memorandum to the Bill, Doc 53 2743/001 at 24 (Belg.); Niuscha Bassiri, *Article 1691, in* ARBITRATION IN BELGIUM 211-212 (Niuscha Bassiri & Maarten Draye eds., 2016).

74 *Id.*

circumstances of the case.[75] Nevertheless, the party must demonstrate a *prima facie* case, reasonable possibility to succeed on the merits, and irreparable harm and urgency.[76]

Similar to the regime in India, the Belgian law provides that a court holding summary proceedings has the same power of issuing interim or conservatory measures in relation to arbitration proceedings as it has in court proceedings.[77] This power should be exercised *in accordance with its own procedures taking into account the specific features of arbitration*.[78]

With respect to the conflict between the jurisdiction of courts and tribunal, the circumstances in which a court may intervene are not clear. The favoured view is that the court may intervene when the tribunal is powerless to grant a relief and urgency can be demonstrated.[79]

B. China

In China, Article 101 of the Civil Procedure Law 2012 provides for courts' power to grant interim and conservatory measures.[80] An application in this respect may be made to the people's court of the place where the property is situated, or at the place of residence of the respondent, or to a people's court having jurisdiction over the matter, before the arbitration proceedings begin.[81] A perusal of the provision shows that the following conditions must be fulfilled before an interim relief can be granted- i. Urgent circumstances, ii. Irreparable damage. An arbitral tribunal is not empowered to grant interim reliefs.[82] Hence, once the arbitration proceedings have begun, any application for interim measures should be submitted to the arbitral institution, which would forward the application to the relevant court.[83]

C. United Kingdom

The power of English courts to order interim measures is set out in Section 44 of the Arbitration Act, 1996.[84] The court may intervene in arbitration proceedings in limited circumstances *to support*

---

75 D. De Meulemester, *Voorlopige of Bewarende Maatregelen, in* DE NIEUWE ARBITRAGEWET 2013- ESSENTIËLE BEPALINGEN EN HUN PRAKTISCHE WERKING 66-67 (M. Piers ed., 2013).

76 Niuscha Bassiri, *supra* note 73, at 211-212.

77 B.J.C art. 1698 (Belg.).

78 *Id.*

79 Charles Price, *Conflict With State Courts*, *in* INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION, 47 (2007); Georges De Leval, *Les Mesures Provisoires Et Conservatoires Et L'Arbitrage, in* ARBITRAGE ET MODES ALTERNATIFS DE RÈGLEMENT DES CONFLITS, 177-178 (2002).

80 Civil Procedure Law of People's Republic of China (as amended by the Decision of August 31, 2012, on Amending the Civil Procedure Law of the People's Republic of China), *available at* www.inchinalaw.com/wp-content/uploads/2013/09/PRC-Civil-Procedure-Law-2012.pdf (China).

81 *Id.*

82 Arbitration Law of People's Republic of China, (adopted by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Aug. 31, 1994) *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=182634 (China).

83 *Id.*; *see* WEI SUN & MELANIE WILLEMS, ARBITRATION IN CHINA, 199-208 (2015).

84 ARBITRATION ACT 1996 (OF ENGLAND) c. 23, *available at* www.legislation.gov.uk/ukpga/1996/23/contents (U.K.).

rather than displace the arbitral process.[85] Except in cases of urgency, the court can act only if the tribunal has permitted a party to apply to the Court or all the parties have agreed in writing to do so.[86] The provision does not throw any light on standard or conditions that need to be fulfilled for issuing an interim relief except a stipulation that the court may make such orders *as it thinks necessary for the purpose of preserving evidence or assets*.[87] Nonetheless, the party must be able to demonstrate urgency and the necessity of the interim measure for the purpose of preserving evidence or assets.[88] Apart from this, the party must also satisfy the court that the tribunal "*has no power or is* unable for the time being to act effectively".[89] This could be either because the tribunal has not been constituted yet[90] or because it is "*in the nature of things it cannot act quickly or effectively enough*".[91]

Reference must also be made to the House of Lords decision in *American Cyanamid v. Ethicon Ltd.*[92] and *NWL Ltd. v. Woods (The Nawala)* (No. 2)[93] where Lord Diplock explained the English standard on interim relief.[94] The key elements that can be culled out from Lord Diplock's observations are-

i. Whether there is "serious question be tried"?
ii. Whether "balance of convenience" lies in favour of granting interim relief?
iii. Whether there is the presence of irreparable damage?
iv. Whether there is reasonably establishment of *prima facie* case on merits?

Thus, the English test of interim reliefs in civil cases is in line with the internationally acceptable standard, as will become clear in subsequent discussion.[95]

D. Germany

The German Civil Procedure law ["**ZPO**"] provides for two categories of interim reliefs, pre-judgement attachment[96] and preliminary injunction.[97] For the purpose of claiming pre-judgement

---

85 DEPARTMENTAL ADVISORY COMMITTEE, ARBITRATION LAW REPORT ON THE ARBITRATION BILL (Feb. 1996), ¶ 22, *available at* http://uk.practicallaw.com/5-205-4994?service=arbitration [*hereinafter* "DEPARTMENTAL ADVISORY COMMITTEE"].

86 Arbitration Act, 1996, c. 23, §§ 44(3)-44(4) (U.K.).

87 *Id.* § 44(3).

88 RUSSEL ON ARBITRATION, 432 (David St. john Sutton et al. eds., 23rd ed. 2007)

89 Arbitration Act, 1996, c. 23, § 44(5), (U.K.).

90 DEPARTMENTAL ADVISORY COMMITTEE, *supra* note 85, ¶ 215; Cetelem SA v. Roust Holdings Ltd., [2005] EWCA Civ. 618 (U.K.).

91 *Id.*

92 (1975) A.C. 396 (U.K.).

93 (1980) 1 Lloyd's Rep. 1, 10 (1979 H.L.) (U.K.).

94 *See* Donald Francis Donovan, *supra* note 70.

95 *See generally* The Civil Procedural Rules, 1998, Part 25 (U.K.).Rule 25.2 and Rule 25.7, in particular law the guidelines for Courts to follow.

attachment, the party must demonstrate that a *prima facie* claim against the opposite party exists.[98] Further, the attachment must be necessary to protect the plaintiff's interests and the future execution of the arbitral award.[99] For the purpose of claiming a preliminary injunction, it is enough to prove to the court that such a measure is necessary for protection of the party's interests.[100] Hence, as is true for other jurisdictions, delay in filing such an application may therefore be counter-intuitive to a party's cause while demonstrating the 'necessity' of such a measure. As far as the tribunal's power is concerned, the law does not impose any pre-conditions except the 'necessity' requirement.[101] Hence, an arbitral tribunal may grant interim measures as it considers necessary. A measure is often regarded as necessary if "*there is a risk that an applicant's right might be infringed.*"[102]

E. Switzerland

The Swiss law does take into account the limitations an arbitral tribunal faces while issuing and enforcing interim reliefs. To address such situations, it recognizes the jurisdiction of courts to award interim reliefs and also provides for a process for enforcement of interim measures issues by an arbitral tribunal. Such measures include, but are not limited to, conservatory measures aimed at securing the enforcement of the final award, regulatory measures, preservation of evidence, and measures securing interim performance by a party.[103]

Since Article 183 of Federal Private International Law Statute ["**PILS**"][104] does not stipulate any guidelines or standards for issuing interim relief, primacy is given to the standards, law or the set of rules agreed upon by the parties.[105] In the authors' opinion, in the absence of such agreement, the arbitral tribunal should apply *requirements developed in international arbitration*. Various commentators suggest that it is best to apply a proportionality test to evaluate whether the applicant will suffer irreparable harm which is serious enough to warrant an interim relief.[106]

---

96 Zivilprozessordnung [ZPO] [Civil Procedure Code], Dec. 5, 2005, BUNDESGESETZBLATT [BGBI.], § 916 (Ger.).

97 *Id.* § 935.

98 Richard H. Kreindler and Johannes Schmidt, *Chapter II: Arbitration Agreement*, *Section 1033 – Arbitration Agreement and Interim Measures by Court, in* ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 137-138 (Karl Heinz Böckstiegel et al. eds., 2nd ed. 2015).

99 *Id.*

100 ZPO, Dec. 5, 2005, BGBI., §§ 936, 920 (2).

101 *Id.* § 1041.

102 Richard H. Kreindler and Johannes Schmidt, *supra* note 98; Jan Schäfer, Chapter IV: Jurisdiction of Arbitral Tribunal, Section 1041-Interim Measures of Protection, at 228-229.

103 Private International Law Statute, Dec. 18, 1987, art. 183(1) (Switz.); S. BESSON, ARBITRAGE INTERNATIONAL ET MESURES PROVISOIRES 444 (1998).

104 *Id.*

105 Christopher Boog, *Interim Measures in International Arbitration, in* ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 1359-1360 (Manuel Arroyo ed., 2013).

106 *Id.*

Other requirements include reasonable possibility of winning on merits of the claim,[107] and urgency.[108]

Pursuant to Article 261(1) of the Swiss Code of Civil Procedure,[109] for claiming an interim relief, an applicant must *prima facie* prove to the court that- (a) its right is being violated or threatened to be violated, (b) the loss caused by such violation cannot be easily remedied. An interim relief may be refused if the opposite party agrees to provide appropriate security.[110]

F. United States of America

The U.S. has no provision for grant of provisional or interim relief by the courts under its Federal Arbitration Act, 1925. Since the statutory law is silent on this point, there has been a state-to-state development of law.[111] Further, because of this lack of statutory allowance, the arbitrators have very wide powers of granting interim measures.[112] Thus, courts generally do not prefer to interfere in the arbitral proceedings. There is no requirement that the interim measures have to take the form of an award.[113] There are not many court rulings on the point and this makes the stance of the Courts with respect to judicial involvement in arbitration dispute debatably non-interventionist.[114] Even though the arbitrator can be said to have the power to take conclusive steps to prevent the subject matter of the dispute or inherent rights of the parties from getting affected, the Courts have to be approached to enforce such measures. Again, this might be dependent on the stage of the suit, as sometimes the Court might not interfere unless

---

107 *See* G. Petrochilos, *Interim Measures under the Revised UNCITRAL Arbitration Rules,* [2010] ASA BULL. 882.

108 Nathalie Voser, *Interim Relief in International Arbitration: The Tendency Towards a More Business-Oriented Approach*, 1(2) DISPUTE RESOLUTION INTERNATIONAL 171 (2007).

109 SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODICE CIVILE [CC], Dec. 19, 2008, *available at* http://www.admin.ch/opc/en/classified-compilation/20061121/index.html (Switz.)

110 ZGB, CC, Dec. 10, 1907, SR 210, RS 210, art. 261(2) (Switz.).

111 Kate Brown, *The Availability of Court-Ordered Interim and Conservatory Measures in Aid of International Arbitration in the United States of America and France - A Comparative Essay*, 8 INT'L TRADE BUS. L. REV. 5 (2003).

112 *See* Rule 34(a), AAA Commercial Arbitration Rule 34(a); Arbitration Rule 13.1, International Institute for Conflict Prevention & Resolution ('CPR'); *See* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983); McCreary Tire & Rubber Co v. CEAT, SpA [1974] USCA3; 389: 501 F 2d 1032 (3d Cir 1974). Judge Brennan's noted opinion that if the issue has been decided to be arbitrated upon, the District Court cannot interfere and put a stay on it went on to gain widespread acknowledgement in the form of FAA's applicability to myriad arbitration proceedings and encourage independent arbitration as a mechanism. In Southland Corp. v Keating 465 U.S. 1 (1984), the Court dealt with the same question and widened the scope of FAA applicability on arbitration proceedings.

113 MARK W. FRIEDMAN AND FLORIANE LAVAUD, DEBEVOISE & PLIMPTON LLP, ARBITRATION GUIDE IBA ARBITRATION COMMITTEE, UNITED STATES, *available at* http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64.

114 Kate Brown, *supra* note 111 ("*There has been a fair criticism of this approach as well, with Schlosser arguing that, "[t]o approach the issue in terms of 'court interference' is entirely inadequate* […][on] *the contrary, the courts may be very helpful to arbitrators and arbitrating parties by 'interfering' where such interference is animated by the desire to provide a reliable foundation for commencing arbitration and to arbitration procedures risking the loss of their reliable foundation or even deadlock. The courts should be encouraged to intervene in a timely fashion rather than be blamed for being too distrustful of arbitration.*").

provided by the mechanism.[115] Statutory attachment and enforcement of preliminary injunction in aid of arbitration is done as per Rule 64 and Rule 65 of the Federal Rules of Civil Procedure ["**FCRP**"].[116] Statutory application of this would be under Section 7502(c) of the New York Civil Practice Law and Rules ["**CPLR**"] which also provides similar criteria that a petitioner must satisfy to seek relief.[117] These standards are applied solely keeping in mind the procedural enforcement of it, for example, order of attachment (Article 62) or preliminary injunction (Article 63).[118] The U.S. imposes an "equitable criteria" which must be fulfilled for a movant to enforce an award effectively. This, as the First and Second Departments have confirmed, is "*customary equitable criteria*" in addition to the "*a likelihood of success on the merits, irreparable harm and a balance of equities in their favour*" and the Section 7502(c) "rendered ineffectual" test.[119] In *Thornton & Naumes v. Athari Law Office*,[120] the Third Department stated that the criteria set forth in Section 6212(a) for orders of attachment as applicable to petitions in aid of arbitration under Section 7502(c) are also to be seen. If the criteria as set out in CPLR 6201(c) overlaps, then the three-pronged test is usually not applied, which otherwise, as stated in *Matter of Richard Manno & Co. v. Manno*,[121] is compulsory criteria to be satisfied.

V. Is the standard followed by Courts in India in line with international standards?

As noted above, the test applied by Indian courts revolves around concepts such as balance of convenience, *prima facie* case, irreparable injury and the concept of 'just and convenient'. Due regard is also given to facts and circumstances of each case. Given the importance of efficiency and effectiveness in arbitration and its transnational nature, one may rightly begin to wonder whether the standards followed by the Indian courts are in principle consonance with international practice or not.

---

115 MARK W. FRIEDMAN AND FLORIANE LAVAUD, *supra* note 113, at 8.

116 Federal Rules of Civil Procedure (effective September 16, 1938), *available at* https://www.federalrulesofcivilprocedure.org/frcp/.

117 Federal Rules of Civil Procedure, 26 U.S.C., Title VIII, Rule 64, Rule 65 (2006) (U.S.); 7502, Article 75, New York Civil Practice Law & Rules, *available at* http://www.newyorkcplr.com/article-75.php.

118 George Bundy Smith & Thomas J. Hall, *Criteria for Provisional Remedies in Aid of Arbitration*, 251 N.Y.L.J. (2014).

119 *See*, e.g., G Builders IV, LLC v. Madison Park Owner, LLC, 924 N.Y.S.2d 75 (1st Dept. 2011) (U.S.) (reversing the lower court's decision, court held that supposed increased costs associated with arbitration (even if they were certain to occur) are quantifiable and the fear that witnesses would invoke Fifth Amendment was entirely speculative, thus plaintiff failed to establish irreparable harm); Winter v. Brown, 853 N.Y.S.2d 361, (2d Dept. 2008) (trial court erred when it granted preliminary injunction in favour of seller in breach of contract action where seller failed to satisfy the traditional equitable criteria for preliminary injunctive relief) (U.S.); David C. Singer, New York State Bar Association, An Arbitration Primer for Litigators, *available at* https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/An_Arbitration_Primer_For_Litigators.html.

120 36 A.D.3d 1119, 829 N.Y.S.2d 248 (App. Div. 2007) (U.S.).

121 N.Y. Slip Op 50224 (Sup. Ct. 2012) (U.S.).

The most obvious point of information in this respect is the UNCITRAL Model Law. Article 17J of the Model Law, as amended in 2006, reads:

"*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.*"

It must be noted that this provision was absent in the 1985 version of the Model Law, the inspiration behind the Act.[122] A provision to the effect of court exercising this *power in consideration of specific features of international arbitration* is thus missing from the Indian arbitration regime. Nevertheless, it will be noticed that the standards adopted by the Indian courts seem to be in line with widely accepted internationally standards. In order to discern what these transnational standards are, reference must first be made to Article 17A of the Model Law. It provides that a party claiming interim relief must prove to the 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."

Article 17A lists three important elements of the test a tribunal should employ while deciding a party's application for interim reliefs. These elements are- (a) irreparable damage, (b) balance of convenience and (c) likelihood of success on merits of the claim. In practice, most tribunals require a demonstration of these elements while keeping in mind the nature of interim relief and relative injury.[123] Therefore, the test employed by Indian courts is arguably in line with the internationally accepted rules.

With respect to the issue of enforcement of tribunal ordered measures, it has been argued by us that it essentially is a question of the amount of acceptable interference. It has been observed that the ICC Pre-Arbitral Reference Rules and other similar efforts have largely failed to provide

122 *See* Arbitration & Conciliation Act, No. 26 of 1996, Statements of Object and Reasons, Preamble, ¶ 3.
123 BORN, *supra* note 31, at 209-226.

any satisfactory non-judicial mechanism for obtaining provisional measures in arbitration.[124] Consequentially, parties requiring provisional assistance or relief at the outset of a dispute must often seek the assistance of national courts,[125] which at times is the only method by which an enforcement can be sought.[126] This, thus, entails that the provisional measures in International Commercial Arbitration are to be recognized and enforced as per national procedural laws.

VI. Conclusion

In conclusion, it can be seen that the position of law regarding the applicability of the Civil Procedure Code to interim measures under the Arbitration and Conciliation Act, 1996 is gradually seeing greater acceptance. While there are enough cases discussing applicability of Order, 38, Rule 5 and Order 39, Rules 1 and 2 to Section 9, there is no definitive judgment discussing the need, the *whys and hows* of the aspect in greater detail; even though a clear slant of judicial interpretation can be observed. With regard to Section 17, there is no major judicial pronouncement on this aspect but with the amendment in place, a dispute on this point of law can be said to be round the corner, especially as Section 19 dictates that an arbitral tribunal is not bound by the Code. Though with the emerging trend, the debate must be settled in favor of statutorily established procedural law being held as the guiding principle; more so because, in cases of international commercial arbitration, the Model Law does acquiesce to the adoption of national procedural rules for enforcement.

Prudent logic dictates that courts are an important aspect of any system trying to enforce laws. The adjudication of disputes might be done by alternative mechanisms, but to provide uniform and objective standards for governance of measures requiring immediate action, such as in cases of interim, interlocutory, or preliminary orders requiring attachment of property, the Courts and its rules are a necessary evil. A well thought-out mechanism which succinctly lists the places where and when the Court can intervene, will supplement the mechanism as a whole, making the procedure more reliable and speedy. The legislature has attempted to put such a mechanism in place with the amendment. Further, the standards so provided in the Code, such as balance of convenience, *prima facie* case and loss of subject matter are principles which, when broadly interpreted in spirit, are equitable in nature rather than being stringent screening mechanisms. This is why these standards have gained acceptance all around the world.

---

124 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2029 (2009); (further extending the argument, it would naturally flow that the arbitration are virtually never able to provide any relief with respect to third parties).

125 Sigvard Jarvin, *Is Exclusion of Concurrent Courts' Jurisdiction Over Conservatory Measures to be Introduced by A Revision of the Convention*, 6(1) J. INT'L. ARB. 171 (1989).

126 *Id.*

When seen from an international perspective, the jurisprudence on the point can be said to be converging with the international standards. First, because the amendment to Section 17 takes into account the 2006 amendment to Model Law. Second, the law seems to be aligning with the international position, that the national courts and their standards are ones which can lead to effective recognition and enforcement of actions over which the tribunal has no legitimate hold.

All in all, through the discernment of standards of the court applicable to arbitral mechanisms, one can conclude, albeit conjecturally for now, that there is a gradual but certain shift towards embracing the role of the court in matters of arbitration to make the process more uniform, objective and ultimately efficacious.