

# Interim Reliefs in Arbitral Proceedings

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Powerplay between Courts and  
Tribunals

January 2020



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January 2020

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# 1. Background

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

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

It has been observed that parties engage in dilatory tactics to delay proceedings or prejudice the rights of opposite parties by *inter alia* dissipating assets or interfering with the functioning of bodies (in case of a company where both parties are stakeholders). In such a situation, the final relief granted by a tribunal

may be rendered nugatory or meaningless unless the arbitral tribunal or court is able to safeguard the rights of parties during the pendency of the arbitral proceedings. Therefore, in the intervening period between juncture at which the 'dispute' arose (in certain circumstances even before the commencement of arbitration) and till the execution of the award, certain interim measures may be necessary to protect a party's rights. The nature of interim reliefs sought by the parties may vary based on the facts and circumstances of the dispute. In certain situations, the effective provision of interim reliefs may involve directions to third parties also.

With the changes introduced by the Arbitration and Conciliation Amendment Act, 2015 ("**Amendment Act 2015**"), arbitral tribunals have now been vested with wider powers to grant interim measures. In this backdrop, it is of paramount importance to understand the nature of interim reliefs which can be granted by courts and arbitral tribunals and their respective limitations.

## 2. Interim measures in arbitration: an overview

In India, the Arbitration & Conciliation Act, 1996 (“**Act**”) which was formulated on the basis of UNCITRAL Model Law on International Commercial Arbitration, 1985 (“**Model Law**”), provides for interim measures under Sections 9<sup>1</sup> and 17<sup>2</sup> by courts and arbitral tribunals respectively.

Section 9 of the Act is broadly based on Article 9 of Model Law and provides for the grant of interim measures by a court. Unlike Model Law, Section 9 provides for interim measures of protection not just before the commencement of arbitral proceedings<sup>3</sup> and during the arbitral proceedings but also post the arbitral award has been rendered (but prior to its enforcement).

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

Once arbitral proceedings have commenced, the parties would have to seek interim reliefs before the arbitral tribunal. A court would ordinarily not entertain a petition for interim reliefs in such a situation unless the party is able to prove the existence of circumstances that make a relief granted by an arbitral tribunal ineffectual.

After an award has been rendered by the arbitral tribunal, the successful party may also choose to approach courts for interim reliefs to secure and safeguard the effectiveness of the arbitral award prior to its enforcement.

The application would generally have to be made before a court prior to the enforcement of the award in case of both domestic and international commercial arbitrations.

Interim measures ordered by arbitral tribunal set out in Section 17 of the Act, are also essentially based on Article 17 of the Model Law. The operation of this provision is triggered only at the request of a party to the arbitral proceedings, only after the constitution of the tribunal. A party may seek interim reliefs up to the point in time at which an award is made by the tribunal.

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

### I. Who can apply for interim measures

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

This emanates from the understanding that the scheme of Section 9 postulates an application for the grant of an interim measure of protection after the making of an arbitral award and before it is enforced for securing the property for the benefit of the party which seeks enforcement of the award.<sup>4</sup> As was observed by the Bombay High Court (quoted below) that an unsuccessful party would not be, in any event, entitled to

1. See Annexure III

2. See Annexure III

3. *Sundaram Finance Ltd. v. NEPC India Ltd.*, (1999) 2 SCC 479: “...when an application under Section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application under Section 9 is filed, the proceedings have not commenced under Section 21 of the 1996 Act.”

4. *Dirk India Private Limited v. Maharashtra State Electricity Generation Company Limited* 2013 (7) Bom.C.R. 493

enforcement for the simple reason that there is no award in its favour to be enforced:

*“If an application is made at the instance of such an unsuccessful party under section 9, there will not be any occasion to grant any interim measure which will be in the aid of the execution of the arbitral Award as such a party will not be entitled to seek enforcement under section 36.”<sup>5</sup>*

Consequently, even on the award being set aside, the party whose claim has been rejected vide the said award, cannot apply for interim measures under Section 9 of the Act. This is premised on the understanding that the court, under Section 34 of the Act does not act as a court of appeal, and does not review the merits of the dispute.<sup>6</sup>

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5. *Wind World (India) Ltd. v. Enercon GmbH and others* 2017 SCC OnLine Bom 1147 (para 18)

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6. *Dirk India Private Limited v. Maharashtra State Electricity Generation Company Limited* 2013 (7) Bom.C.R 493

## 3. Interim measures by courts

### 1. Which court to apply?

The ‘court’ as defined in Section 2(1)(e) of the Act can either be a district court or a High Court having ‘original jurisdiction’, which would have the jurisdiction to decide the subject matter of the arbitration as if the same were the subject matter of a civil suit. In case of an international commercial arbitration, i.e., an arbitration relating to a commercial dispute where at least one of the parties is non-Indian, only a High Court of a state in India will have powers under the Act.

Following the Supreme Court’s judgment in *Bharat Aluminum Company v Kaiser Aluminum*<sup>7</sup>, the court of the seat of arbitration will have jurisdiction under the Act. Fixation of a seat of arbitration is equivalent to assigning exclusive jurisdiction to the courts of the seat for any supervisory functions over including powers to interim reliefs. Needless to say, such designation of the seat would oust the jurisdiction of all other courts.<sup>8</sup> In case an application is made to a court under Part I of the Act with respect to the arbitration agreement, Section 42 of the Act will apply to preclude the making of all subsequent applications under Part I (including those under Section 9 of the Act) to any court except the court to which such application has been made.

Similarly, if an application for interim relief is made to a court, all subsequent applications under Part I would have to be made to that court to which an application has been made under Section 9 of the Act.

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

*“(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application*

*under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”*

Thus, to avoid prejudice to any party subsequent to the constitution of the arbitral tribunal, courts have begun to refrain themselves from making orders under Section 9 of the Act.<sup>9</sup> However, subsequent to the amendments in Section 9 of the Act, the court can grant interim measures in the following circumstances:

- Prior to the constitution of the tribunal
- After the award has been made and prior to its enforcement.
- Recently, a Division Bench of the Kerala High Court observed that when an application is made before a court under Section 9(1) of the Act after the award is made but yet to be enforced, the court shall bear in mind that it is a stage where the arbitral tribunal has ceased to function.<sup>10</sup> It further held that, the court has to adopt a liberal approach in such circumstances.<sup>11</sup>
- In the course of the arbitral proceedings, after the constitution of the tribunal, when an interim measure granted by the tribunal would not be efficacious. In granting interim reliefs in such cases, courts assess the relevant facts and circumstances with precision including instances like the lethargic manner of arbitrators in granting interim reliefs in respect of assets rendering the remedy inefficacious.<sup>12</sup> Some courts have been of the view that courts would be required to adopt a strict approach in entertaining such applications under Section 9, in the course of the arbitral proceedings.<sup>13</sup>

9. *Manbhupinder Singh Atwal v. Neeraj Kumarpal Shah* 2019 GLH (3) 234

10. *M Ashraf v. Kasim VK* 2018 SCC Online Ker 4913

11. *ibid*

12. *SREI Equipment Finance Limited (Seff) v. Ray Infra Services Private Limited & Anr.*, 2016 SCC OnLine Cal 6765

13. See, *M Ashraf v. Kasim VK* 2018 SCC Online Ker 4913

7. (2012) 9 SCC 552

8. *Indus Mobile Distribution Private Ltd. v. Datawind Innovations Private & Ors* (2017) 7 SCC 678

In a recent case before the Delhi High Court, it was disputed as to whether the court before which an application for interim measures is pending, would have to relegate the same to the arbitral tribunal upon its constitution. The Delhi High Court was of the view that - to avoid a situation where a party is left without an interim relief in respect of proceedings for interim measures pending before a court which have not been transferred to the tribunal after its constitution, the court may continue with the same and grant appropriate reliefs, where necessary.

Accordingly, it observed that:

*"If the argument...were to be accepted that the moment an Arbitral Tribunal is constituted, the Court which is seized of a Section 9 application, becomes coram non judice, would create a serious vacuum as there is no provision for dealing with pending matters. All the powers of the Court to grant interim measures before, during the arbitral proceedings or at any time after the making of the arbitral award but prior to its enforcement in accordance with Section 36 are intact (and, have not been altered by the amendment) as contained in Section 9(1) of the said Act. Furthermore, it is not as if upon the very fact that an Arbitral Tribunal had been constituted, the Court cannot deal with an application under sub-section (1) of Section 9 of the said Act. Section 9(3) itself provides that the Court can entertain an application under Section 9(1) if it finds that circumstances exist which may not render the remedy provided under Section 17 efficacious....there is no provision under the said Act which, even as a transitory measure, requires the Court to relegate or transfer a pending Section 9(1) application to the Arbitral Tribunal, the moment an Arbitral Tribunal has been constituted."*<sup>14</sup>

As explained above, another significant aspect is the time-line introduced vide the Amendment Act 2015. Section 9(2) of the Act provides that:

*"Where, before the commencement of the arbitral proceedings, a Court passes an order for any*

*interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine."*

The insertion of such a time-bound mechanism aims at regulating of the role of the courts in granting interim measures once the arbitral tribunal has been constituted as it was deemed suitable to empower the tribunal to hear all interim applications, upon its constitution. After all, once the arbitral tribunal is seized of the matter it is most appropriate for the tribunal to hear all interim applications.<sup>15</sup>

## II. Interim reliefs in case of foreign-seated arbitrations

Pursuant to an award being passed, applications under Section 9 of the Act may be filed for seeking interim measures against dissipation or alienation of assets in India, even if the place or seat of arbitration is outside India.<sup>16</sup> In such cases, the court having jurisdiction over the subject matter of the arbitral award (assets of the party against which such measures are being sought) may be considered as the appropriate court.<sup>17</sup>

## III. Reliefs sought

A reading of various decisions suggests that parties generally approach courts for securing the amount in dispute and preventing the alienation or dissipation of property. The following are indicative of the reliefs generally sought and granted by courts under the Act<sup>18</sup>:

14. *Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd.*, 2017 SCC OnLine Del 7226 (para 25, 27)

15. Law Commission of India, 'Amendments to the Arbitration and Conciliation Act 1996' (Report No. 246, August 2014) 44 <<http://lawcommissionofindia.nic.in/reports/report246.pdf>> accessed 19 December 2017

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

17. *Trammo DMCC v. Nagarjuna Fertilizers and Chemicals Ltd.* (2018) 1 AIR Bom R 1: "... 'Court' as defined in 'Explanation' to Section 47 which would be the Court having jurisdiction to entertain the Section 9 petition..."

18. Refer to Annexure III for a list of interim reliefs that may be granted by a court

- i. Under Section 9(ii)(b) of the Act, a party can seek to protect its financial interests by securing the amount in dispute, including by way of guarantees furnished by the opposite party.<sup>19</sup>
- ii. Under Section 9(ii)(c) of the Act, courts can allow parties to take symbolic possession of properties.<sup>20</sup> Courts may also appoint receivers to take possession of property not being the subject matter of the dispute.<sup>21</sup>
- iii. In exercise of the wide powers available under Section 9(ii)(e) of the Act, courts may direct parties to disclose the properties owned by them,<sup>22</sup> issue attachment orders against third party respondents<sup>23</sup> as well as direct parties to not dispose their properties.

### ***Appeals from orders under Section 9***

An appeal from an order granting or refusing to grant any such interim measure under Section 9 can be made under Section 37(1) of the Act, which provides that:

*“(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:*

- a. *refusing to refer the parties to arbitration under section 8;*
- b. *granting or refusing to grant any measure under section 9;*
- c. *setting aside or refusing to set aside an arbitral award under section 34”*

19. *Delta Constructions v Narmada Cement* (2002) 1 Mah LJ 684

20. *Karvy Financial Services Ltd v Progressive Construction Ltd* Arbitration Petition No. 1162 of 2014, (judgment dated 24 December 2014 of the Bombay High Court)

21. *Tata Capital Financial Service v Deccan Chronicle Holdings Ltd* Arbitration Petition No 1321 of 2012, (judgment dated 21 February 2013 of the Bombay High Court). See also *Welspun Infraitech v. Ashok Khurana* 2014 (2) Arb LR 520 (Bom)

22. *ibid*

23. *Value Advisory Services v ZTE Corporation* (2009) 3 Arb LR 315

## **IV. Standards applicable to the grant of interim reliefs by the court**

There are no standards prescribed under the Act for grant of interim reliefs by a court under Section 9 of the Act. Some courts have sought to apply standards under the Code of Civil Procedure, 1908 (“CPC” or “Code”) such as Order XXXVIII<sup>24</sup> and Order XXXIX<sup>25</sup>. Courts have held that standards prescribed in the CPC would not be applicable to proceedings under Section 9 of the Act and have held that if a party can merely show that it has a good case on merits, it would be likely to succeed in obtaining an interim relief. In these situations, courts have been guided by the principle that denial of the grant of such interim reliefs would lead to injustice to the applicant or that the resultant award would be rendered unenforceable/ un-executable if such reliefs are not granted.

The degree of the applicability of the provisions of the CPC to proceedings under Section 9 of the Act remains unsettled in light of the divergent opinions by various High Courts (discussed below). Further, the Supreme Court in *Arvind Constructions v. Kalinga Mining Corporation and Others*<sup>26</sup>, despite recognising that there were divergent decisions by various High Courts, left this question open to be considered in an appropriate case. The Amendment Act 2015 does not address this lacuna and remains silent with respect to standards that may be applicable in case of grant of interim reliefs by courts under Section 9 of the Act.

From a reading of various decisions, we have distilled two lines of reasoning: an exclusive approach and an inclusive approach. The former line of reasoning suggests that the rigours of every provision in the CPC cannot be put into place to defeat the grant of relief provided under Section 9 of the Act. Whereas, the latter line of reasoning considers proceedings under

24. Annexure III

25. *ibid*

26. (2007) 6 SCC 798



Section 9 of the Act to be akin to proceedings under Order XXXVIII Rule 5 and Order XXXIX Rule 1 and 2 of the CPC and consequently the principles contained therein would have to be considered for the grant of interim reliefs.

Courts regulate the grant of temporary injunction in accordance with the procedure laid down in Order XXXVIII and Order XXXIX of the CPC. Order XXXVIII of the CPC pertains to certain reliefs that may be available at any stage of the suit prior to the judgment including arrest of defendant as well as furnishing security, if a court is convinced that defendant intends to delay or obstruct the execution of a decree passed against it by disposing of its property or poses a threat to the property in dispute.

Under Order XXXIX of the CPC, a court may grant temporary injunctions and interlocutory orders if in any suit, it is proved that any property in dispute is in danger of being damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors. Courts in such cases may grant temporary injunction to restrain such act, or give such other order for the purpose of staying and preventing the damaging, alienation, sale, removal or disposition of the property provided the party can satisfy the three requirements in relation to:

- i. *Prima facie* case
- ii. Balance of convenience
- iii. Irreparable injury.

## A. Exclusive Approach

Order XXXVIII Rule 5 of the CPC provides for certain kinds of reliefs in the nature of grant of security, attachment of property or arrest of the defendant that are akin to the reliefs under Section 9(ii) (b) and (c) of the Act.<sup>27</sup> These reliefs are granted only if the court is satisfied that the respondent with an intention to obstruct or delay the execution of a decree is about to:

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

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

- i. any property in dispute is in danger of being wasted, damaged or alienated by the respondent, or wrongfully sold in execution of a decree, or
- ii. the respondent threatens, or intends, to remove or dispose of its property with a view to defrauding its creditors, or
- iii. the defendant threatens to dispossess the applicant or otherwise cause injury to the applicant in relation to any property in dispute in the suit.

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

- i. The Bombay High Court in *Delta Construction Systems Ltd., Hyderabad v. M/S Narmada Cement Company Ltd, Mumbai*<sup>28</sup> ("**Delta Construction**") held that court would not be bound by the provisions contained in the Order XXXVIII Rule 5 while granting a relief under Section 9 of the Act.

27. It should be noted that Section 9 does not provide for arrests

28. (2002) 2 BomLR 225

ii. Adverting to *Delta Constructions the Bombay High Court in National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd.*<sup>29</sup> (“**National Shipping**”), held that while seeking an order for securing the amount in dispute, the petitioner would not need to satisfy the requirements of Order XXXVIII Rule 5.

- a. Instead a party applying for interim reliefs would only have to make a clear case regarding the merits of the claim for interim reliefs and establish that the denial of such reliefs would lead to injustice to the applicant.
- b. Further, the applicant would have to make averments regarding the obstructive conduct of the opposite party or attempts to defeat the award thereby requiring the grant of interim relief.

iii. Similarly, in *Steel Authority of India v. AMCI Pty Ltd*<sup>30</sup> (“**SAIL**”) the Delhi High Court took the view that principles contained in Order XXXVIII Rule 5 would only serve as guiding principles for the exercise of power by the court. A party seeking reliefs under Section 9 would essentially have to satisfy the court that the furnishing of security was paramount to safeguard its interests.

iv. Interestingly in *Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.*<sup>31</sup> (“**Adhunik Steels**”), the apex court was of the opinion that “*well known rules*” of the CPC would have to be kept in mind while granting interim reliefs under Section 9. Therefore, the principles such as (i) *prima facie* case, (ii) balance of convenience, and (iii) irreparable injury would have to be kept in mind while granting an injunction.<sup>32</sup> The apex court stopped short of stating that specific

standards under Order XXXVIII Rule 5 and Order XXXIX Rule 1 and 2 would apply. However, the Bombay High Court in *Nimbus Communications Limited v. Board of Control for Cricket in India and Another*<sup>33</sup> (“**Nimbus**”) interpreted *Adhunik Steels* to come to the conclusion that standards for grant of interim reliefs under Section 9 would not be completely independent of the principles in the CPC.

v. In *Tata Capital Financial Services Ltd. v. Unity Infraprojects Ltd. & Ors*<sup>34</sup>, the Bombay High Court held that the court will broadly bear in mind the fundamental principles of Order XXXVIII Rule 5 and Order XXXIX Rules 1 and 2, but at the same time, will have the discretion to mould the relief on a case by case basis with a view to secure the ends of justice and preserve the sanctity of the arbitral process. The Bombay High Court, herein, followed the ratio in the Division Bench’s judgment in *Deccan Chronicle Holdings Limited v. L&T Finance Limited*<sup>35</sup> that the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind while making relevant orders under Section 9, however, the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice.

vi. In maintaining an exclusive approach, the Delhi High Court<sup>36</sup> has continued to recognise that the power of courts to grant interim reliefs under Section 9 of the Act is considerably wide, as is apparent from its text. Nevertheless, such power should be exercised in a principled manner, premised

29. AIR 2004 Bom 136

30. (2011) 3 Arb LR 502

31. AIR 2007 SC 2563

32. See, *Umaxe Projects Private Limited v. Air Force Naval Housing Board and Ors* 262 (2019) DLT 469

33. 2012 (5) BomCR 114 (confirmed in *Nimbus Communications Limited v. Board of Control for Cricket in India* 2016 SCC OnLine Bom 6781)

34. 2015 SCC OnLine Bom 3597

35. 2013 SCC OnLine Bom 1005

36. See *Ajay Singh v. Kal Airways Private Limited*, 2017 SCC On-Line Del 8934, followed in *Jetpur Somnath Tollways Limited and Ors v. Respondent: National Highways Authority of India and Ors*, 2017(4) Arb LR 391 (Delhi); *National Highways Authority of India v. Punjab National Bank*, 2017 SCC OnLine Del 11312

on some known guidelines – hence, the reference to Orders XXXVIII and XXXIX of the CPC. It has further clarified that the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles. Further, relying on the Supreme Court's finding in *Indian Telephone Industries v. Siemens Public Communication*<sup>37</sup>, the Delhi High Court concluded that though there is no textual basis in the Act, linking it with provisions of the CPC, nevertheless, the principles underlying exercise of power by courts in the CPC are to be kept in mind, while making orders under Section 9.<sup>38</sup>

- vii. The Delhi High Court followed its ruling in SAIL in a recent judgment and held that the Court is competent to pass an appropriate protection order of interim measure as provided under Section 9 of the Act outside the provisions of Order XXXVIII, Rule 5 of the CPC.<sup>39</sup> Each case under Section 9 of the Act has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience. The power of the Court under Section 9 cannot be restricted to the power conferred CPC though analogous principles may be kept in mind.<sup>40</sup>
  - viii. A Division Bench of the Madras High Court chose to take up a firmer approach in holding that in a matter pertaining to Section 9 of the Act, CPC would have no application; rather a real, imminent danger of removal or disposal of the properties for such an extreme measure is to be proven.<sup>41</sup>
  - ix. A relatively liberal approach was prescribed by the Jammu & Kashmir High Court in dealing with standards for interim reliefs under Section 9 of the Act. It observed that
- the standards laid down in the CPC may not be applicable to the proceedings under Section 9 of the Act *stricto sensu* but the underlying principles are applied by the courts to pass interim orders to protect the subject matter of arbitration.<sup>42</sup> It further observed that the court enjoys wide powers in the matter of grant of interim measures and, “such power entrusted to the Court is not limited, controlled or circumscribed by the provisions of order 39 Rule 5, Order 39 Rule 1 and 2 of the Code of Civil Procedure.”<sup>43</sup>

## B. Inclusive Approach

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

- i. The Supreme Court in *ITI v Siemens Public Communication*<sup>44</sup> (“*ITT*”), held that though there was no mention of applicability of the CPC to arbitral proceedings in the Act, the provisions of the CPC could be read in by a court exercising its powers during any proceedings arising out of the Act.
- ii. In deference to the decision of the apex court in *ITI*, various High Courts<sup>45</sup> had found that principles of Order XXXVIII Rule 5 and Order XXXIX Rules 1 and 2 of the CPC would have to be read into when the court exercised its powers under the Act to grant interim reliefs.
- iii. The Bombay High Court in *Nimbus* interpreted *Adhunik Steel* to state that the principles contained in Order XXXVIII Rule 5, i.e.

37. (2002) 5 SCC 510

38. *Supertrack Hotels Pvt. Ltd. v. Friends Motels Pvt. Ltd.*, 2017 SCC OnLine Del 11662

39. *Motor & General Finance Ltd. v. Bravo Hotels Pvt. Ltd.* 2018(2) Arb LR 50 (Delhi)

40. *Ibid*; also see, *Reliance Communications v. Bharti Infratel* 2018 II AD (Delhi) 487.

41. *M/s. KGS Constructions Limited v. Karishmaa MEP Services Pvt. Ltd.*, (2017) 4 CTC 51 (DB)

42. *NKG Infrastructure v. Granco Industries* 2018 SCC OnLine J&K 335

43. *ibid*

44. (2002) 5 SCC 510

45. *Om Sakthi Renegies Limited v. Megatech Control Limited* (2006) 2 Arb LR 186; *Goel Associates v. Jivan Bima Rashtriya Avas Samiti* 114 (2004) DLT 478

- a. the conduct of the defendant indicated that it intended to alienate its property or to remove its properties from the jurisdiction of the court; and
- b. the defendant intended to obstruct or delay the execution of a decree that may be passed against it;

would have to be kept in mind while determining an application under Section 9(ii)(b) of the Act. This approach has also been followed in various decisions subsequent to *Nimbus*.<sup>46</sup>

- iv. Similarly, the Division Bench of the Delhi High Court in *Anantji Gas Service v. Indian Oil Corporation*<sup>47</sup> interpreted *Adhunik Steel and Arvind Constructions* to conclude that the power granted to the court under Section 9 of the Act is akin to Order XXXIX Rules 1 and 2 of CPC. Thus, the court has to satisfy itself that the petitioner has established the three cardinal principles, i.e., *prima facie* case, balance of convenience and irreparable loss in case no protection is extended by way of interim measure under Section 9 of the Act. The same was reiterated by the Delhi High Court in *V.K. Sood Engineers and Contractors v. Northern Railways*.<sup>48</sup>
- v. The Calcutta High Court in *Star Track Agency Pvt. Ltd.*<sup>49</sup> v. Efcalon Tie Up Pvt. Ltd. noted that it is well-established that the principles for grant of interim order applied by courts would also apply to proceedings under Section 9 of the Act for grant of interim reliefs.
- vi. The High Court of Hyderabad has adopted a relatively strict approach in observing

that the court is under obligation to act in a fair manner, even while dealing with applications under a special enactment, such as the Act, consistent with the procedure being followed by it while disposing of applications under Order XXXIX of CPC.<sup>50</sup>

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

- i. Under the Arbitration Act, 1940 (“**1940 Act**”), the grant of interim measures<sup>51</sup> was limited to only the post-award stage and was granted by courts only if it was satisfied that a party was taking steps to defeat, delay or obstruct an award. Therefore, the standard similar to that in Order XXXVIII or Order XXXIX was already incorporated in the 1940 Act. However, in the corresponding Section 9 of the Act, these wordings are absent. Therefore, it may be argued that the intention of the legislature was to depart from the standards prescribed earlier which were similar to Order XXXVIII or Order XXXIX standards.
- ii. It was specifically stated in the 1940 Act that provisions of the CPC would apply to all proceedings before a court.<sup>52</sup> This provision has not been retained in the Act; on the contrary Section 19 of the Act specifically excludes the applicability of provisions of the CPC. This also suggests that the legislature may have never intended to make standards set out in the CPC under Order XXXVIII or Order XXXIX applicable to proceedings under Section 9 of the Act.
- iii. Article 17 J of the Model Law as amended in 2006 (“**Amended Model Law**”) provides that a court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration. However, India

46. *Housing Development and Infrastructure Ltd v Mumbai International Airport Pvt. Ltd.* Appeal (L) No. 365 of 2013 in Arbitration Petition (L) No. 902 of 2013 (judgment dated 28 November 2013 of the Bombay High Court); *C V Rao v Strategic Port Investments KPC Ltd.*, 2014 Arb LR 9 (Delhi); *Acron Developers Pvt. Ltd. v Patel Engineering Ltd.*, 2014 (1) Arb LR 512 (Bom); *Tata Capital Financial Service v Deccan Chronicle Holdings Ltd.* Arbitration Petition No 1321 of 2012 (judgment dated 21 February 2013 of the Bombay High Court)

47. 2014 SCC OnLine Del 3732

48. 2017 SCC OnLine Del 9211

49. AIR 2016 Cal 3267

50. *Mahaveer Infoway Limited v. Tech Mify Info Solutions LLP*, 2017 SCC OnLine Hyd 221

51. See Annexure I

52. See Annexure I

has not made suitable amendments to the Act to give effect to Article 17 J.<sup>53</sup> Therefore, the present sentiments of the courts may need to be re-evaluated while granting interim reliefs.

### C. Applicability of the Specific Relief Act 1963

In a recent judgment of the Delhi High Court, it was held that injunctions that cannot be granted under Section 41 of the Specific Relief Act, 1963<sup>54</sup> cannot be granted under Section 9 of the Act either.<sup>55</sup>

## V. Enforceability of an interim order granted by a court

Interim reliefs granted by a court may be enforced like any other order of court. In case of wilful non-compliance/disobedience of the judgment/order, parties may choose to initiate contempt proceedings for civil contempt under Section 2 (b) of the Contempt of Courts Act, 1971.<sup>56</sup> The parties in wilful non-compliance may be punished with the maximum punishment as provided in terms of Section 12 of the Contempt of Courts Act, 1971.<sup>57</sup>

53. India has adopted only the 1985 version of the Model Law and not the amendments to the Model Law carried out in 2006. India being a dualist state would require the enactment of an appropriate legislation to give effect to the Amended Model Law.

54. Specific Relief Act 1963, s 41: "*Injunction when refused - An injunction cannot be granted—*  
 (a) *to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;*  
 (b) *to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;*  
 (c) *to restrain any person from applying to any legislative body;*  
 (d) *to restrain any person from instituting or prosecuting any proceeding in a criminal matter;*  
 (e) *to prevent the breach of a contract the performance of which would not be specifically enforced;*  
 (f) *to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;*  
 (g) *to prevent a continuing breach in which the plaintiff has acquiesced;*  
 (h) *when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;*  
 (ha) *if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project;*  
 (i) *when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;*  
 (j) *when the plaintiff has no personal interest in the matter."*

55. *Parsoli Motor Works (P) Ltd. v. BMW India P Ltd.* 2018 SCC Online Del 6556

56. *Mtech Solutions v. Pclit Solutions Pvt. Ltd.*, CCP No.132/2007 in OMP No.320/2007 (judgment dated 31 July 2009 of the Delhi High Court)

57. *Terra Manufacturing and Sales v. M/S Alagendiraa Apparels*, CONT. CAS (C) No 920/2009 (judgment dated 19 October 2011 of the Delhi High Court)

## 4. Interim measures by arbitral tribunals

### I. Reliefs sought

The power of an arbitral tribunal to grant interim measures is dealt with in Section 17 of the Act. Prior to the Amendment Act 2015, the section was quite open-textured in the scope of reliefs that could be provided; it permitted the tribunal to issue any interim measure of protection. However, courts and arbitral tribunals took the view that the scope of the interim measures that may be granted under Section 17 was more limited than that under Section 9.<sup>58</sup> Consequently, various arbitral tribunals refrained from granting interim orders such as a grant of security.

The Amendment Act 2015 has introduced much needed changes with respect to grant of interim reliefs by an arbitral tribunal and has brought clarity on the kind of reliefs that may be granted, bringing them at par with the interim reliefs that may be granted by courts under Section 9 of the Act.<sup>59</sup> The following are certain reliefs that may be granted by an arbitral tribunal:

- i. securing the amount in dispute in the arbitration;<sup>60</sup>
- ii. the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration;<sup>61</sup>
- iii. interim injunctions and the appointment of a receiver;<sup>62</sup>
- iv. any other interim measure which is just and convenient.

However, as has been settled by the apex court in *MD Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*,<sup>63</sup> an arbitral tribunal, under Section 17 of the Act, has no jurisdiction to pass interim measures against a third party.<sup>64</sup>

#### *Appeals from orders under Section 17*

An appeal from an order granting or refusing to grant any such interim measure under Section 17 can be made under Section 37(2) of the Act, which provides that:

*“An appeal shall also lie to a Court from an order granting of the arbitral tribunal —*

- a. *accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or*
- b. *ranting or refusing to grant an interim measure under section 17.”*

### II. Standards applicable to the grant of interim reliefs by arbitral tribunals

International authors have suggested that an arbitral tribunal should be guided by arbitral case law, comparative analysis of arbitration rules, and scholarly opinions while granting interim measures.<sup>65</sup> The standards applied by national courts while granting interim measures would have no bearing on arbitral tribunals.<sup>66</sup>

Arbitral tribunals have normally required irreparable harm; (b) urgency; and (c) no prejudgment of the merits of the case.<sup>67</sup> In some cases tribunals have also considered whether the party has established a *prima*

58. *Areeb Rolling Mills (P) Ltd v. NKGSB Cooperative Bank Ltd* (2013) 2 Mah LJ 424; *Managing Director, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*, (2004) 9 SCC 619

59. *Shakti International v. Excel* 2017 SCC OnLine Bom 321; *Raymond Limited v. Akshaypat Singhania*, 2019 SCC OnLine Bom 227

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

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

62. *Baker Hughes Singapore Pte v. Shiv-Vani Oil and Gas Exploration* Arbitration Petition No. 1127 OF 2014 (Bombay High Court)

63. (2004) 9 SCC 619

64. Followed in *Wind World (India) Limited and Ors. v. Enercon GmbH and Anr.* 2016 SCC OnLine Bom 1404

65. Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, International Arbitration Law Library Series Set (Book 13) (Kluwer Law International) 159 - 236

66. Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2424 - 2563

67. *ibid*

*facie* case and that the balance of convenience weighed in favour of the party.<sup>68</sup>

As discussed, courts in India have at times shied away from importing principles contained in Order XXXVII Rule 5 and Order XXXIX Rules 1 and 2 to the grant of interim reliefs under Section 9.<sup>69</sup> When such principles are not necessarily applicable in proceedings before a court; it is inconceivable for the same to apply to flexible and tailor-made dispute resolution process like arbitration.<sup>70</sup>

That said, in *Intertole ICS (Cecons) O & M Company v. NHAI*<sup>71</sup>, the Delhi High Court held that that an arbitral tribunal would have to ascertain whether the petitioner has made out a case as per Order XXXVIII Rule 5, prior to granting an interim relief furnishing security for the amount claimed. However, the interim measures were not granted by the arbitral tribunal solely because the applicant was unable to establish a *prima facie* case.

Recently, in *Yusuf Khan v. Prajita Developers Pvt. Ltd. and Ors.*<sup>72</sup>, the Bombay High Court observed that the principles laid down in *Nimbus* would equally apply to the arbitral tribunal, while exercising powers under Section 17 and more particularly Section 17(1)(ii)(b) of the Act, i.e., the principles laid down in the CPC for the grant of interlocutory remedies must furnish a guide to while determining an application under Section 17 of the Act.

In a recent judgment, the Delhi High Court, in observing the similarity between the objects of Sections 9(1)(ii)(b) and 17(1)(ii)(b) of the Act with that of Order XXXVIII Rule 5 of the CPC, held that the arbitral tribunal and court, while granting interim reliefs under the said provisions of the Act, must be satisfied that it is “necessary” to pass order to secure the amount in dispute.<sup>73</sup>

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

Despite the arbitral tribunal’s power to issue interim measures, the fact that the Act did not provide for a method of enforcing any interim relief granted meant that there were doubts regarding efficacy of the arbitral process in India.<sup>74</sup>

The Delhi High Court in *Sri Krishan v. Anand*<sup>75</sup>, held that any person failing to comply with the order of the arbitral tribunal under Section 17 would be deemed to be “making any other default” or “guilty of any contempt to the arbitral tribunal during the conduct of the proceedings” under Section 27 (5) of the Act, being the only mechanism for enforcing its orders.<sup>76</sup> Therefore, such party would be in contempt of court.

It may come as a measure of relief to parties that the Delhi High Court<sup>77</sup> has held that an order passed by an arbitral tribunal that is subsequently upheld by a court in an appeal

68. *ibid*; Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, International Arbitration Law Library Series Set (Book 13) (Kluwer Law International) 159 - 236; *Shabnam Dhillon v. Zee Entertainment Enterprises Ltd. and Ors.* (2019) 176 DRJ 429

69. *Delta Construction Systems Ltd., Hyderabad v. M/S Narmada Cement Company Ltd., Mumbai*, (2002) 2 BomLR 225; *National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd.* AIR 2004 Bom 136; *Steel Authority of India v. AMCI Pty Ltd* (2011) 3 Arb LR 502; *Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.* AIR 2007 SC 2563. See discussion on Exclusive Approach at 3.2.1 above.

70. See, *Shabnam Dhillon v. Zee Entertainment Enterprises Ltd. and Ors.* (2019) 176 DRJ 429

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

72. Arbitration Petition No. 1012 of 2018, (judgment dated 25 March 2019 of the Bombay High Court)

73. *Natrip Implementation Society v. IVRCL Limited* 2016 SCC OnLine Del 5023; *Shailendra Bhadauria and Ors. v. Matrix Partners India and Ors.* 2019 (1) ABR 788

74. *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.*, (2004) 9 SCC 619; *Sri Krishan v. Anand* (2009) 3 Arb LR 447 (Del)

75. (2009) 3 Arb LR 447 (Del); *Indiabulls Financial Services v. Jubilee Plots*, OMP Nos 452-453/2009 (judgment dated 18 August 2009 of the Delhi High Court)

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

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

filed under Section 37 of the Act, would be enforceable as an order of the court.

The amendment to Section 17 of the Act<sup>78</sup> has now clarified that an order of the tribunal would be enforceable like an order of the court in case of interim reliefs granted by arbitral tribunals.

Besides the statutory recognition of enforceability of interim orders granted by the tribunal, the Supreme Court, in a recent case, rendered non-compliance of an arbitral tribunal's order or conduct amounting to contempt during the course of the arbitration proceedings, as triable under the Contempt of Courts Act, 1971.<sup>79</sup>

Article 17H of the Model Law provides that interim reliefs granted by arbitral tribunals shall be recognized as binding. Ordinarily, such interim reliefs would be enforceable upon an application to the competent court, irrespective of the country in which it was issued. However, in the absence of a similar provision in India, interim reliefs (including emergency awards) granted by foreign arbitral tribunals are not directly enforceable in India. A fresh application under Section 9 of the Act has to be filed, which may be based on the interim relief granted by the foreign arbitral tribunal.<sup>80</sup>

78. See Annexure III

79. *Alka Chandewar v. Shamshul Ishrar Khan* 2017 SCC OnLine SC 758

80. *Raffles India International Private Limited v. Educomp Professional Education Limited* 2016 SCC Online Del 5521



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

	India	United Kingdom	Singapore
<b>Interim reliefs by arbitral tribunal</b>	<p>Under Section 17(1) of the Arbitration and Conciliation Act, 1996, a party may, during the arbitral proceedings, apply to the arbitral tribunal—</p> <ol style="list-style-type: none"> <li>for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or</li> <li>for an interim measure of protection in respect of any of the following matters, namely:- <ol style="list-style-type: none"> <li>the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;</li> <li>securing the amount in dispute in the arbitration;</li> <li>the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or</li> </ol> </li> </ol>	<p>Section 38 of The Arbitration Act, 1996 lays down the general powers exercisable by the tribunal. The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.</p> <p>Unless otherwise agreed by the parties the tribunal has the following powers:</p> <ul style="list-style-type: none"> <li>- security for the costs</li> <li>- give directions in relation to any property which forms a part of the proceedings— <ol style="list-style-type: none"> <li>inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or</li> <li>ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.</li> </ol> </li> </ul>	<p>Section 28 of The Arbitration Act, 2002 lays down the powers exercisable by the arbitral tribunal which includes the following interim measures:</p> <ol style="list-style-type: none"> <li>security for costs;</li> <li>discovery of documents and interrogatories;</li> <li>giving of evidence by affidavit;</li> <li>a party or witness to be examined on oath or affirmation;</li> <li>the preservation and interim custody of any evidence;</li> <li>samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is a part of the proceedings; and</li> <li>the preservation, interim custody or sale of any property which forms part of the dispute.</li> </ol> <p>The Arbitration Act applies to domestic arbitration and to those proceedings where Part II of the International Arbitration Act does not apply.</p>

	<p>authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;</p> <p>d. interim injunction or the appointment of a receiver;</p> <p>e. such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.</p>	<ul style="list-style-type: none"> <li>- direct that a party or witness shall be examined on oath or affirmation.</li> <li>- direct a party for the preservation of any evidence in his custody or control.</li> </ul> <p>Section 39 encapsulates the power of the tribunal to make provisional awards.</p> <p>However, this power can be exercised only on an agreement between the parties that the tribunal can order on a provisional basis any relief which it would have power to grant in a final award. This includes:</p> <ul style="list-style-type: none"> <li>a. an order for the payment of money or the disposition of property, or</li> <li>b. an order to make an interim payment on account of the costs of the arbitration.</li> </ul> <p>The final order of the tribunal shall take into account such order.</p>	<p>Section 12 of the International Arbitration Act lays down the powers of the arbitral tribunal which entails a number of interim reliefs that can be granted by the arbitral tribunal such as:</p> <ul style="list-style-type: none"> <li>- the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute</li> <li>- the preservation and interim custody of any evidence for the purposes of the proceedings</li> <li>- securing the amount in dispute;</li> <li>- ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and</li> <li>- an interim injunction or any other interim measure.</li> </ul> <p>The arbitral tribunal may award any remedy that could have been ordered by the High Court in the case of a civil proceeding.</p>
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<b>Enforceability of interim reliefs granted by the tribunal</b>	<p>An interim order passed by the tribunal is deemed to be an order of the court and is enforceable in accordance with the provisions of the CPC.<sup>81</sup></p>	<p>Such an order passed by the tribunal under Section 39 of the Arbitration Act 1996 is contingent upon the authority to be conferred by the parties to arbitration.</p> <p>Further, orders passed by the arbitral tribunal under the general powers of the tribunal under Section 38 of the Arbitration Act 1996 are not deemed to be orders of the court.</p>	<p>Section 12(6) of the International Arbitration Act provides that the orders made by the arbitral tribunal, with the leave of the court, shall be enforceable in the same manner as if they are orders made by the court.</p> <p>Section 28(4) of The Arbitration act lays down that all orders and directions given by the arbitral tribunal shall, by the leave of the court, be enforceable in the same manner as if they were orders made by the court and, where leave is so given, judgment may be entered in terms of the order or direction.</p>
<b>Interim reliefs by the court</b>	<p>Section 9 lays down the interim measures that can be passed by the court before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced, on the application made by a party. The relief includes:</p> <ol style="list-style-type: none"> <li>i. appointment of a guardian for a minor or person of unsound mind; or</li> </ol>	<p>Under section 44, unless an agreement to the contrary exists among the parties, the court can exercise its powers regarding:</p> <ol style="list-style-type: none"> <li>a. the taking of the evidence of witnesses;</li> <li>b. the preservation of evidence;</li> </ol>	<p>Section 31 of The Arbitration act lays down the power of the court in relation to the arbitral proceedings:</p> <ul style="list-style-type: none"> <li>-the same power to make orders in respect of any of the matters set out in section 28 as it has for the purpose of and in relation to an action or matter in the Court;</li> <li>- securing the amount in dispute;</li> </ul>

81. The Arbitration and Conciliation Act 1996, s 17(2)

	<p>ii. an interim measure of protection in respect of any of the following matters, namely:-</p> <p>a. the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;</p> <p>b. securing the amount in dispute</p> <p>c. the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute, or as to which any question may arise therein and for the aforesaid authorising any person to enter upon any land or building or any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or for the purpose of obtaining full information or evidence;</p> <p>d. interim injunction or the appointment of a receiver;</p> <p>e. other interim measure of protection as the court may consider just and convenient,</p>	<p>c. making orders relating to property which forms a part of the proceedings—</p> <p>i. for the inspection, photographing, preservation, custody or detention of the property, or</p> <p>ii. ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration</p> <p>d. the sale of any goods the subject of the proceedings;</p> <p>e. the granting of an interim injunction or the appointment of a receiver.</p> <p>If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make orders necessary for the preservation of assets or evidence.</p>	<p>- ensuring that any award is not rendered ineffectual by the dissipation of assets by a party; and</p> <p>- an interim injunction or any other interim measure.</p> <p>Section 12A of The International Arbitration Act empowers the High court to make an order in respect of the following as it has for any of the matters or action in court.</p> <p>- giving of evidence by affidavit;</p> <p>- the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;</p> <p>- samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;</p> <p>-the preservation and interim custody of any evidence for the purposes of the proceedings;</p> <p>-securing the amount in dispute;</p> <p>- ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party;</p>
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	<p>The Court has the same power for making orders under this section as it has for the purpose of any proceedings before it.</p> <p>Where an interim order is passed before the commencement of arbitral proceedings, the arbitral proceedings should commence within 90 days or such time as the court may determine.</p>	<p>Otherwise, the court should act only on an application of a party made either with the permission of the tribunal or the agreement in writing of the other parties.</p> <p>The leave of the court is required to file an appeal from a decision of the court under this section.</p>	<p>- interim injunction or any other interim measure.</p> <p>However, sub-section (3) of the said section restricts this power of the High court if it is of the opinion that the place of arbitration is or likely to be outside Singapore when it is designated or determined makes it inappropriate to make such order.</p> <p>The Judge can make such orders as it thinks fit for the purpose of preservation of evidence or assets in case of urgency. Otherwise, it should act with the permission of arbitral tribunal or agreement of the parties.</p>
<p><b>Jurisdiction of the court vis-à-vis arbitral tribunal</b></p>	<p>Once the tribunal has been constituted, the exercise of powers under section 9 can be only be done where the remedy provided under section 17 would not be effective.</p>	<p>An action can only be taken by the court, only if the authorized body has no power or is unable for the time being to act effectively. An order made otherwise will cease to have effect on an order made by the authorized body or tribunal.</p>	<p>While exercising power under section 31 of the Arbitration Act, the court will have regard to the application made before the arbitral tribunal or an order made by it. An order made by the court will cease to have effect on an order being made by the authorized body.</p> <p>Under section 12A (6) of the International Arbitration Act, the Court shall make an order only if the tribunal or the authorized body has no power or is unable to act effectively.</p>

<p><b>Grounds for granting interim relief</b></p>	<p>The grant of interim relief is a discretionary order and no standards have been laid down in the act for the grant of interim relief (see 3.2.1, 3.2.2 and 4.2 above).</p>	<p>The national law has not laid down any guidelines that ought to be followed in dealing with an application on interim relief.</p> <p>The guidelines issued by the Chartered Institute of Arbitrators lay down the following criteria :</p> <ul style="list-style-type: none"> <li>i. prima facie establishment of jurisdiction;</li> <li>ii. prima facie establishment of case on the merits;</li> <li>iii. a risk of harm which is not adequately reparable by an award of damages if the measure is denied;</li> <li>iv. proportionality.</li> </ul> <p>Courts have been reluctant to grant interim reliefs if the necessary conditions are not satisfied, for example, a party seeking interim relief is required to establish some concrete basis to infer a real risk of dissipation of the relevant asset and would not succeed merely on the balance of prejudice.<sup>82</sup></p>	<p>Section 3 of the International Arbitration Act provides that the UNCITRAL Model Law shall have the force of law in Singapore.</p> <p>Article 17A of the UNCITRAL Model law lays down the conditions for granting interim measures. The party requesting the interim measure has to satisfy the arbitral tribunal that:</p> <ul style="list-style-type: none"> <li>-Harm not adequately reparable by damages;</li> <li>-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;</li> <li>-Reasonable possibility that the requesting party will succeed on the merits of the claim. Further, in the context of court-ordered interim measures, Article 17 J provides that, “...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.”</li> </ul>
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82. See, *Gerald Metals SA v. Timis and Ors*. 2016 [EWHC] 2327 (Ch)

		Arbitrators cannot grant interim measures requiring actions by third parties and do not have the power to directly enforce these measures. Further, they cannot impose penalties for non-compliance unless granted a specific power to do so by the arbitration agreement, including the applicable arbitration rules and/or the lex arbitri.	<p>The tribunals and courts in Singapore have adopted the principles laid down in <i>American Cyanamide v. Ethicon</i><sup>83</sup> while dealing with such interim applications, which are as follows:</p> <p>There is a serious issue to be tried Irreparable harm if denied the relief The balance of convenience pending trial favours the applicant.<sup>84</sup></p>
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83. [1975] 2 WLR 316

84. See *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] SGCA 16

## 6. Conclusion

The amendments to the Act make it explicit that the purpose of these changes was to bring the powers of arbitral tribunals under Section 17 of the Act on par with that of courts under Section 9 of the Act.<sup>85</sup>

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

The Working Group of the UNCITRAL acknowledged that the Model Law was silent in respect of the standards to be adopted by arbitral tribunal, though interim reliefs have far reaching consequences. It noted that arbitral tribunals were given a broad mandate to determine whether a relief was necessary<sup>86</sup>. It chose to adopt standards that balanced the need for predictability as well as flexibility in the arbitral process. Article 17A of the Amended Model Law<sup>87</sup>, which adopts a more pragmatic approach than what has been preferred by Indian courts, states that a party would have to establish that:

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

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

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

86. United Nations Commission on International Trade Law Working Group II, *Arbitration and Conciliation* 36th session (New York, 4-8 March 2002)

87. See Annexure II



# Annexure I

## Schedule II of the Arbitration Act, 1940

### THE SECOND SCHEDULE(See section 41)Powers of Court

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.
2. Securing the amount in difference in the reference.
3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.
4. Interim injunctions or the appointment of a receiver.
5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

# Annexure II

## Relevant Provisions of the Model Law

### Article 17 A: Conditions for granting interim measures

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

- c. merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
2. With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

### Article 17 J: Court-ordered interim measures

*A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.*

## Annexure III

### Relevant Provisions of the Act and the Code

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

		the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.
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### ***The Arbitration Act, 1940***

3	Section 18	<p><b>Power of Court to pass interim orders:-</b></p> <ol style="list-style-type: none"> <li>1. Notwithstanding anything contained in section 17, at any time after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.</li> <li>2. Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary and just.</li> </ol>
4	Section 41	<p><b>Procedure and powers of Court:-</b> Subject to the provisions of this Act and of rules made thereunder (5 of 1908)</p> <ol style="list-style-type: none"> <li>a. the provisions of Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and</li> <li>b. the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court. Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.</li> </ol>

### ***The Arbitration and Conciliation Act, 1996***

5	Section 9	<p><i>Interim measures, etc. by Court.—</i></p> <ol style="list-style-type: none"> <li>1. A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:— <ol style="list-style-type: none"> <li>i. for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or</li> <li>ii. for an interim measure of protection in respect of any of the following matters, namely:— <ol style="list-style-type: none"> <li>a. the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;</li> <li>b. securing the amount in dispute in the arbitration;</li> <li>c. the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising</li> </ol> </li> </ol> </li> </ol>
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		<p><i>for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;</i></p> <p>d. <i>interim injunction or the appointment of a receiver;</i></p> <p>e. <i>such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.</i></p> <p>2. <i>[Where, before the commencement of the arbitral proceedings, a court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the court may determine.</i></p> <p>3. <i>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.]</i></p>
6	Section 17	<p><b><i>Interim measures ordered by arbitral tribunal.—</i></b></p> <p>1. <i>A party may, during the arbitral proceedings apply to the arbitral tribunal—</i></p> <p>i. <i>for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or</i></p> <p>ii. <i>for an interim measure of protection in respect of any of the following matters, namely—</i></p> <p>a. <i>the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;</i></p> <p>b. <i>securing the amount in dispute in the arbitration;</i></p> <p>c. <i>the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;</i></p> <p>d. <i>interim injunction or the appointment of a receiver;</i></p> <p>e. <i>such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.</i></p>

		<p>2. Subject to any orders passed in an appeal under Section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the court.]</p>
7	Section 19	<p><b>Determination of rules of procedure.—</b></p> <p>1. The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).</p> <p>2. Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings..</p>
<b>The Arbitration and Conciliation (Amendment) Act, 2015</b>		
8	Section 26	<p>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.</p>

## Annexure IV

## Table of Cases

Sl. No.	Judgment	Extracts	Para Nos.
1.	<i>Delta Constructions v Narmada Cement</i> 2002 (1) Mh LJ 684	"The power of the court to secure the amount in dispute under arbitration is not hedged by the predicates as set out in Order 38. <b><u>All that the court must be satisfied is that an interim measure is required.</u></b> In other words, the party coming to the court must show that if it is not 'secured, the Award which it may obtain cannot be enforced on account of acts of a party pending arbitral process. Therefore, <b><u>the court would not to be bound by the requirement of Order 38 Rule 5.</u></b> "	3
2.	<i>ITI v Siemens Public Communication</i> (2002) 5 SCC 510	"It is true in the present Act application of the Code is not specifically provided for but what is to be noted is : Is there an express prohibition against the application of the Code to a proceeding arising out of the Act before a civil court? We find no such specific exclusion of the Code in the present Act. <b><u>When there is no express exclusion, we cannot by inference hold that the Code is not applicable.</u></b> "	6
3.	<i>National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd.</i> AIR 2004 Bom 136	"The provisions of Order 38, Rule 5, CPC cannot be read into the said provision as it is nor can power of the Court in passing an order of interim measure under Section 9(ii) (b) be made subject to the stringent provision of Order 38, Rule 5. <b><u>The power of the Court in passing the protection order to secure the amount in dispute in the Arbitration before or during Arbitral proceedings or at any time of making of the Arbitral amount but before it is enforced cannot be restricted by importing the provisions set out in Order 38 of C.P.C. but has to be exercised ex debito iustitiae and in the interest of justice.</u></b> "	5
4.	<i>Om Sakthi Renegies Limited v. Megatech Control Limited</i> (2006) 2 Arb LR 186 (Madras HC)	"It is true that <b><u>the provisions like Order 38 Rule 5 or Order 39 Rules 1 and 2 of the Code of Civil Procedure are not contained in the Arbitration and Conciliation Act, 1996</u></b> but its principles will be applicable as has been held by the Supreme Court in <i>M/s. ITI Ltd., Vs. M/s. Siemens Public Communications Network Ltd.</i> "	6

5.	<i>Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.</i> AIR 2007 SC 2563	“we feel that <b><u>it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection.</u></b> So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case”	5
6.	<i>Arvind Constructions v. Kalinga Mining Corporation and Others</i> (2007) 6 SCC 798	“Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that <b><u>exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver.</u></b> ”	4
7.	<i>Steel Authority of India Ltd. v. AMCI PTY Ltd</i> (2011) 3 Arb LR 502 (Delhi HC)	“In proceedings under Section 9 of the Act, at the highest what could be said is that <b><u>the provisions of Order 38 Rule 5 CPC would serve as the guiding principle for the Court to exercise its discretion</u></b> while dealing with a petition requiring the respondent to furnish security for the amount in dispute. <b><u>Since the letter of the law per se is not applicable, the requirements set out in Order 38 Rule 5 CPC need not strictly be satisfied, and so long as the ingredients of the said provision are generally present, the Court would not be unjustified in exercising its jurisdiction</u></b> to require the respondent to furnish security. The bottom line, in my view, is that the Court should be satisfied that the furnishing of security by the respondent is essential to safeguard the interests of the petitioner.”	5
8.	<i>Motor &amp; General Finance Ltd. v. Bravo Hotels Pvt. Ltd.</i> 2018 (2) ArbLR 50 (Delhi)	“The Court is competent to pass an appropriate protection order of interim measure as provided under Section 9(ii)(b) outside the provisions of Order 38, Rule 5 of the Code of Civil Procedure. Each case under Section 9(ii)(b) of the Act of 1996 has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience. The power of the Court under Section 9(ii)(b) cannot be restricted to the power conferred on the Court under Civil Procedure Code though analogous principles may be kept in mind.”	15



9.	<i>Tata Capital Financial Service v. Deccan Chronicle Holdings Ltd</i> Arbitration Petition No. 1321 of 2012 (judgment dated 21 February 2013 of the Bombay High Court)	<p>"The principle is that when the Court decides a petition under Section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court. Similarly in an application for attachment, the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind. At the same time <b><u>it needs to be noted that the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice.</u></b>"</p>	3
10.	<i>Nimbus Communications Limited v. Board of Control for Cricket in India and Another</i> 2012 (5) Bom CR 114	<p>"It has been held by the Division Bench of this court that though the principles of Order 38 Rule 5 of the Code of Civil Procedure, 1908 has to be kept in mind while deciding an application under section 9 of the Arbitration Act, <b><u>rigors of Order 38 Rule 5 of the Code of Civil Procedure does not apply to the proceedings under section 9.</u></b> I am respectfully bound by the judgment of Division Bench of this court."</p> <p>"The exercise of the <b><u>power to order that security should be furnished is, however, preconditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be passed against him.</u></b> In view of the decisions of the Supreme Court both in Arvind Constructions and Adhunik Steels, it <b><u>would not be possible to subscribe to the position that the power to grant an interim measure of protection under section 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure 1908 or that the exercise of that power is untrammelled by the Code.</u></b>"</p>	5
11.	<i>Deccan Chronicle Holdings Limited v. L&amp;T Finance Limited</i> 2013 SCC OnLine Bom 1005	<p>"The principle is that <b><u>when the Court decides a petition under Section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court.</u></b> Similarly in an application for attachment, the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind. At the same time it needs to be noted that the <b><u>rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice.</u></b> The object of preserving the efficacy of arbitration as an effective form of dispute resolution must be duly fulfilled. This would necessarily mean that <b><u>in deciding an application under Section 9, the Court would while bearing in mind the</u></b></p>	10

		<b><u>fundamental principles underlying the provisions of the CPC, at the same time, have the discretion to mould the relief in appropriate cases</u></b> to secure the ends of justice and to preserve the sanctity of the arbitral process.”	
12.	<i>Intertole ICS (Cecons) O &amp; M Company v. NHAI</i> (2013) ILR 2 Delhi 1018	“Where even the Court exercising power under Section 9 of the Act has to be guided by the principles of the CPC then afortiori an interim order by a Tribunal requiring furnishing of security for the monetary amount of claim by one party had to satisfy the requirement of Order XXXVIII Rule 5 CPC”	8
13.	<i>Welspun Infratech v. Ashok Khurana</i> 2014 (2) Arb LR 520 (Bom)	“This court in my view has ample power under section 9 of the Arbitration and Conciliation Act, 1996 to grant interim measures even in respect of the properties which are not subject matter of the dispute in arbitration. While deciding the application under section 9, <b><u>court has to bear in mind the fundamental principles underlying the provisions of Code of Civil Procedure and at the same time has discretion to mould the relief in the appropriate cases to secure ends of justice and to preserve sanctity of the arbitral process</u></b> ”	3
14.	<i>Housing Development and Infrastructure Ltd v Mumbai International Airport Pvt. Ltd.</i> Appeal (L) No. 365 of 2013 in Arbitration Petition (L) No.902 of 2013 (judgment dated 28 November 2013 of the Bombay High Court)	“An application under Section 9 of the Arbitration Act requires the Applicant Petitioner to make out a strong prima-facie case and also to show that the balance of convenience is in its favour, and that it would suffer irreparable loss and injury if the reliefs it seeks were to be refused. <b><u>The same principles that govern courts in the matter of grant of interim relief apply proprio vigore to petitions under Section 9 of the Arbitration Act</u></b> ”	6
15.	<i>C V Rao v. Strategic Port Investments KPC Ltd.</i> 2014 (4) Arb LR 9 (Delhi HC)	“An order restraining the opposite party from dealing with his properties being drastic in nature, grant of such relief has necessarily to be <b><u>based on the principles governing Order 38 Rule 5 CPC and before passing such an order the Court has to ensure that a specific case is made out that the party against whom such an order is proposed to be made is attempting to remove or dispose of the assets with the intention of defeating the decree/award that may be passed.</u></b> ”	6
16.	<i>Acron Developers Pvt. Ltd. v Patel Engineering Ltd.</i> 2014 (1) Arb LR 512 (Bom)	“The Court should be satisfied that the plaintiff has prima facie case. It is also held that merely having just and valid claim or prima-facie case, will not entitle the plaintiff the order of attachment before judgment unless he also establishes that the defendant is attempting to remove or dispose of his assets with an intention of defeating the decree that may be passed.”	6

17.	<i>Tata Capital Financial Services Ltd. v. Unity Infraprojects Ltd. and Ors.</i> 2015 SCC OnLine Bom 3597	<p>"It is settled law that the principles laid down in the Code of Civil Procedure, 1908 for grant for interlocutory reliefs as well as the underlying basis of Order 38 Rule 5 furnish a guide to the Court whenever similar reliefs are sought under Section 9 of the Act. At the same time, Courts must bear in mind the object of preserving the efficacy of arbitration as an effective form of dispute resolution behind a provision such as Section 9 of the Act. In other words, whilst deciding an application under Section 9 for reliefs in the nature of an attachment before judgment or an injunction, <b><u>the Court will broadly bear in mind the fundamental principles of Order 38 Rule 5 and Order 39 Rules 1 and 2, but at the same time, will have the discretion to mould the relief on a case by case basis with a view to secure the ends of justice and preserve the sanctity of the arbitral process.</u></b>"</p>	8
18.	<i>Natrip Implementation Society v. IVRCL Limited</i> 2016 SCC OnLine Del 5023	<p>"In order for the court to exercise its powers under Order XXXVIII Rule 5 of the CPC, it is necessary that twin conditions be satisfied. First, that the plaintiff establishes a reasonably strong prima facie case for succeeding in the suit; and second, that the court is prima facie satisfied that the defendant is acting in a manner so as to defeat the realisation of the decree that ultimately may be passed. <b><u>The object of Sections 9(1)(ii)(b) and 17(1)(ii)(b) of the Act is similar to the object of order XXXVIII Rule 5 of the CPC. The Arbitral Tribunal while exercising powers under Section 17(1)(ii)(b) of the Act or the Court while exercising power under Section 9(1)(ii)(b) of the Act must be satisfied that it is necessary to pass order to secure the amount in dispute.</u></b> Such orders cannot be passed mechanically. Further, the object of the order would be to prevent the party against whom the claim has been made from dispersing its assets or from acting in a manner to so as to frustrate the award that may be passed."</p>	20
19.	<i>KGS Constructions Limited v. Karishmaa MEP Services Pvt. Ltd., Rep.,</i> (2017) 4 CTC 51 (DB)	<p>"The conclusion reached by the learned Single Judge is that in a <b><u>matter pertaining to Section 9 of the said Act, the provision of Code of Civil Procedure, 1908 would have no application.</u></b>"</p> <p>"To the aforesaid extent, we tend to agree with what the learned Single Judge states, <b><u>as there must be a real, imminent danger of removal or disposal of the properties for such an extreme measure to be taken against the party.</u></b> This would naturally require necessary pleadings as to the facts."</p>	3,6

20.	<i>Supertrack Hotels Pvt. Ltd. v. Friends Motels Pvt. Ltd.</i> , 2017 SCC OnLine Del 11662.	<i>"We are therefore of the opinion that while exercising the powers under Section 9 of the Act, the Court can certainly be guided by the principles of Order XV-A and Order XXXIX Rule 10 of CPC. The same view was expressed by another Division Bench of this Court in the case of Value Source Mercantile Ltd. (supra)."</i>	19
21.	<i>Mahaveer Infoway Limited v. Tech Mify Info Solutions LLP</i> , 2017 SCC OnLine Hyd 221.	<b><u>"In the absence of any guiding principles under the Arbitration Act, the Court has to necessarily fall back upon the provisions of Order XXXIX CPC which apply to every application filed for grant of temporary injunctions and interlocutory orders.</u></b> <i>This must be so, for, the Court which is conferred with the jurisdiction to grant an order of injunction under Section 9 of the Arbitration Act, is also the Court which is governed by the provisions of the CPC. Merely because the Court has derived the power to grant an injunction from an additional source under a special enactment, such as the Arbitration Act, it nevertheless cannot ignore the principles underlying the provisions of Order XXXIX CPC. Rule 3 of Order XXXIX CPC embodies principles of natural justice. Proviso to the said provision is an exception to the Rule. This being so, the Court is under obligation to act in a fair manner, even while dealing with applications under a special enactment, such as the Arbitration Act, consistent with the procedure being followed by it while disposing of applications under Order XXXIX CPC. <b><u>It would be paradoxical if the same court while considering grant of similar reliefs applies varying standards of procedure depending upon the enactment under which it exercises its powers.</u></b> Viewed in this manner, we have no hesitation to hold that even if the proviso to Rule 3 of Order XXXIX CPC does not per se apply, the analogous procedure must be followed by the Court, dealing with an application for injunction under Section 9 of the Arbitration Act. This point is accordingly answered in the affirmative."</i>	9
22.	<i>Ajay Singh v. Kal Airways Private Limited</i> , 2017 SCC OnLine Del 8934	<i>"The first question which the court addresses is the one adverted to by the appellant, that principles underlying Order 38, Rule 5 CPC have to be kept in mind, while making an interim order, in a given case, directing security by one party. Indian Telephone Industries v. Siemens Public Communication (2002) 5 SCC 510 is an authority of the Supreme Court, which tells the courts that though there is no textual basis in the Arbitration Act, linking it with provisions of the CPC, nevertheless, the principles underlying exercise of power by courts-in the CPC-are to be kept in mind, while making orders under Section 9..."</i>	24,25,27

		<p><i>"Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that <b><u>the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles.</u></b>"</i></p>	
23.	V.K. Sood Engineers and Contractors v. Northern Railways, 2017 SCC OnLine Del 9211	<p><i>"The principles for grant of injunction order under Section 9 of the Act are well known. The Division Bench of this High Court in the case of Anantji Gas Service v. Indian Oil Corporation, 2014 SCC OnLine Del 3732 held as follows:-</i></p> <p><i>"10. The law is well settled that <b><u>the power granted to the Civil Court under Section 9 of the Act is akin to Order 39 Rules 1 &amp; 2 of CPC, 1908 and therefore the court has to satisfy itself</u></b> that the petitioner has established the three cardinal principles of prima facie case, balance of convenience and irreparable loss in case no protection is extended by way of interim measure under Section 9 of the Act. Vide Adhunik Steels Ltd. v. Orissa Mangenese and Minerals Pvt. Ltd., (2007) 7 SCC 125 and Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation (2007) 6 SCC 798."</i></p>	17
24.	NKG Infrastructure v. Granco Industries 2018 SCC OnLine J&K 335	<p><i>"Apparently there are no standards prescribed under the Act for grant of interim relief by the Court under Section 9 of the Act. The Court while considering an application under Section of the 9 of the Act would invariably apply the standards laid down in Order 39 and order 38 of the Code of Civil Procedure. The standards laid down in the Code of Civil Procedure for regulating the grant of interim relief may not be applicable to the proceedings under Section 9 of the Act stricto sensu but the underlying principles are applied by the Courts to pass interim orders to protect the subject matter of arbitration."</i></p> <p><i>"The Court under Section 9 of the Act enjoys wide powers in the matter of grant of interim measures and such power entrusted to the Court is not limited, controlled or circumscribed by the provisions of order 39 Rule 5, Order 39 Rule 1 and 2 of the Code of Civil Procedure."</i></p>	9,14

25.	<i>Parsoli Motor Works (P) Ltd. v. BMW India P Ltd.</i> 2018 SCC Online Del 6556	<i>“...power to grant injunctive relief, under Section 9 of the 1996 Act, has to abide by the provisions of the Specific Relief Act. Injunction which cannot be granted under Section 41 of the Specific Relief Act, cannot be granted under Section 9 of the 1996 Act, either. Neither can relief be granted, under Section 9, as would amount to specific enforcement of a contract which, by nature, is determinable, in view of Section 41 of the Specific Relief Act...Such relief [under Section 9] can be granted only if the three pre-requisites, governing grant of injunctive relief, i.e. existence of a prima facie case, balance of convenience being in favour of the claimant and possibility of irreparable loss that would ensue to the claimant were such relief not granted, stand fully satisfied. Even in cases where a contract is being sought to be terminated, in violation of the terms thereof, if it appears that the party who suffers as a result of such termination could be adequately compensated in terms of money at the stage of final adjudication of the dispute, no injunctive relief, under Section 9 of the 1996 Act, would be granted”</i>	36
26.	<i>Yusuf Khan v. Prajita Developers Pvt. Ltd. and Ors.</i> Arbitration Petition No. 1012 of 2018, (judgment dated 25 March 2019 of the Bombay High Court)	<i>“The decision of the Division Bench in the case of Nimbus Communications (supra) was followed by me in the case of Mahaguj Collieries Ltd. (supra), wherein I have held that after Amendment of Section 17, the principles laid down in the decision of the Division Bench in the case of Nimbus Communications (supra) would equally apply to the Arbitral Tribunal, whilst exercising powers under Section 17 and more particularly Section 17(1)(ii)(b) of the Act.”</i>	23
27.	<i>Umaxe Projects Private Limited v. Air Force Naval Housing Board and Ors</i> 262 (2019) DLT 469	<i>“The contention of the Petitioner that while exercising the jurisdiction under Section 9, the Court is not bound to follow the principles of CPC, is not a correct position. The Supreme Court as well as this Court in several judgments has consistently held that while exercising the jurisdiction under Section 9 of the Act, the Court will be guided by the well known principles relating to grant of injunctions and interim reliefs. Reference here may be made to Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd. MANU/SC/2936/2007 : (2007) 7 SCC 125, Modi Rubber Ltd. v. Guardian International Corp. MANU/DE/1169/2007, Nimbus Communication Ltd. v. Board of Control for Cricket in India, MANU/MH/0247/2012.</i>  <i>The test of prima facie case, balance of convenience, irreparable loss has to be borne in mind before the Court can make an order in the nature of granting interim orders”</i>	14

28.	Shabnam Dhillon v. Zee Entertainment Enterprises Ltd. and Ors. (2019) 176 DRJ 429	<p><i>"Besides this, to my mind, what is most crucial is that the Court while exercising appellate jurisdiction under Section 37 of the 1996 Act is not required to interfere with discretion employed by an arbitrator while passing orders under Section 17 of the 1996 Act as long the course adopted is, broadly, wholesome, maintains a robust balance between the interest of warring parties, and is not arbitrary or capricious. In other words, the order passed by the learned arbitrator is not one which transcends the bounds of reasonableness. An appeal impugning the exercise of discretion by an arbitrator can only be an "appeal on principle". (See Wander Ltd. v. Antox India P. Ltd., 1990 (Supp) SCC 727). In my opinion, the learned arbitrator has kept in mind largely the principles analogous to the provisions of Orders 38 and 39 of the CPC. Zee not only has, in my view, a prima facie case but also the balance of convenience appears to be, presently, in its favour. If an order of a kind which the learned arbitrator has passed is not sustained, it could seriously jeopardise the interest of Zee."</i></p>	38,39
29.	M Ashraf v. Kasim VK 2018 SCC Online Ker 4913	<p><i>"The <b><u>approach of the Court in entertaining an application under Section 9(1) of the Act, at the three different stages</u></b> mentioned above, shall not be the same. At the <b><u>first stage</u></b>, that is, before commencement of arbitral proceedings, evidently, the restriction provided under Section 9(3) of the Act against entertaining an application under Section 9(1), does not apply. This is for the reason that, at that stage, the Arbitral Tribunal does not exist and no question of exercise of power by it under Section 17(1) of the Act then arises. The decisions of the Apex Court in Sundaram Finance Ltd. v. NEPC India Ltd., (1999) 2 SCC 479, Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 SCC 155 and the decision of this Court in Board of Trustees of Port of Cochin v. Jaisu Shipping Company, 2012 (1) KLT 217 provide necessary guidelines regarding exercise of power by the Court under Section 9(1) of the Act, before commencement of arbitral proceedings."</i></p> <p><i>"At the <b><u>second stage</u></b>, that is, during arbitral proceedings, the Court shall adopt a strict approach in entertaining an application under Section 9(1) of the Act. The party who approaches the Court at that stage with an application under Section 9(1) of the Act shall be required by the Court to satisfy the court regarding the existence of circumstances which would render the remedy provided to him under Section 17 not efficacious."</i></p>	10-12

*He shall plead the circumstances which may render that remedy not efficacious. He should be able to convince the Court why he could not approach the Arbitral Tribunal and obtain interim relief under Section 17(1) of the Act."*

*"When an application under Section 9(1) of the Act is made by a party at the **third stage**, that is, after the passing of the award but before it is enforced, the Court shall bear in mind that it is a stage where the Arbitral Tribunal has ceased to function. Except in cases provided under Section 33 of the Act, the Arbitral Tribunal would have then ceased to function. The unsuccessful party may then take hasty steps to alienate or dispose of the property which was the subject matter of dispute. The successful party may then approach the Court with an application under Section 9(1) of the Act for granting interim relief. In such circumstances, it would not be proper for the Court to reject the application merely on the ground that he has got efficacious remedy under Section 17 of the Act. The Court has to adopt a liberal approach in such circumstances. When interim relief is sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the subject matter of dispute or the fruits of the proceedings till the enforcement of the award. Interim measure of protection, then sought, is a step in aid of enforcement of the award. It is intended to ensure that the award is not rendered illusory by the opposite party. In such circumstances, when urgent relief is required, especially by a party who is successful in the arbitral proceedings, remedy under Section 17 of the Act may not be efficacious because the Arbitral Tribunal may not be then actually functioning. It may also be possible that the Arbitrator is not readily available. When an application under Section 9(1) of the Act is made by a party after the passing of the award but before it is enforced, the Court has to consider all these circumstances. Of course, the party who approaches the Court has to enlighten the Court with regard to such or similar circumstances."*





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## Research @ NDA

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

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

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

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