

Interim Reliefs in Arbitral Proceedings

Powerplay Between Courts and
Tribunals

April 2016

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1. Background

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

The arbitral process is normally accompanied by certain procedural safeguards such as interlocutory or interim measures that safeguard parties during the pendency of proceedings. It has been observed that parties engage in dilatory tactics to delay proceedings or prejudice rights of opposite parties by *inter alia* dissipating assets or interfering with the functioning of bodies. (In case of a company where both parties are stakeholders).

In such a situation, the final relief granted by a tribunal may be rendered nugatory or meaningless unless the arbitral tribunal or court is able to safeguard the rights of parties during the pendency of the arbitral proceedings. Therefore, in the intervening period between juncture at which the 'dispute' arose (in certain circumstances even before the commencement of arbitration) and till the execution of the award, certain interim measures may be necessary to protect a party's rights and ensure that justice is done before court or arbitral tribunal.

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

2. What interim measures may be granted by a Court vis-à-vis a Tribunal

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 Section 9 and 17 by courts and arbitral tribunals respectively.

Section 9¹ 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 proceedings² and during the arbitral proceedings but also post the arbitral award has been delivered (but prior to its enforcement).

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

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

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

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

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.

1. Refer Annexure III

2. See *Sundaram Finance Ltd v NEPC India Ltd* (1999) 2 SCC 479 (The Supreme Court held that parties would have to demonstrate the intention to commence arbitral proceedings to be eligible for the grant of interim reliefs.)

3. Interim Reliefs by a Court under Section 9

I. Reliefs generally sought under Section 9

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 Act³:

- i. Under Section 9(ii)(b) parties have sought to protect their financial interests by securing the amount in dispute, courts have directed parties to furnish guarantees.⁴
- ii. Under Section 9(ii)(c) courts have allowed parties to take symbolic possession of properties.⁵ Courts have also appointed a receiver to take possession of property not being the subject matter of the dispute.⁶

- iii. In exercise of the wide powers available under Section 9(ii)(e) courts have directed parties to disclose the properties owned by them.⁷ Courts have found that an order of attachment may be passed against a third party respondent⁸ as well as directing parties to not dispose of their properties.

3. Refer to Annexure I for a list of interim reliefs that may be granted by a court under the 1940 Act

4. *Delta Constructions v Narmada Cement* 2002(1) MHLJ

5. *Karvy Financial Services Ltd v Progressive Construction Ltd* Arbitration Petition No. 1162 of 2014

6. *Tata Capital Financial Service v Deccan Chronicle Holdings Ltd* Arbitration Petition No 1321 of 2012. See also *Welspun Infratech v. Ashok Khurana* 2014 (2) ARBLR 520 (Bom)

7. *Id*

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

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

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

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

From a reading of various decisions we have distilled two lines of reasoning: an exclusive approach and an inclusive approach. The former line of reasoning suggests that the rigours of every provision in the Code cannot be put into place to defeat the grant of relief provided under Section 9 of the Act. Whereas the latter line of reasoning considers proceedings under Section 9 of the Act to be akin to proceedings under Order XXXVIII Rule 5 and Order XXXIX Rule 1 and 2 of the Code 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 Code. Order XXXVIII of the Code pertains to certain reliefs that may be available at any stage of the suit prior to judgment including arrest of defendant as well as furnishing security, if a court is convinced that defendant intends to delay or obstruct the execution of a decree passed against it by disposing of its property or poses a threat to the property in dispute.

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

I. Exclusive Approach

Order XXXVIII Rule 5 of the Code 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.¹⁰ 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:

9. (2007) 6 SCC 798

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

- 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 Code 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,
- 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*¹¹ (“**Delta Construction**”) held that court would not be bound by the provisions contained in the Order XXXVIII Rule 5 while granting a relief under Section 9 of the Act.
- ii. Adverting to *Delta Constructions the Bombay High Court in National Shipping Company of Saudi Arabia vs. Sentrans Industries Ltd.*¹² (“**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 vs AMCI Pty Ltd*¹³ (“**SAIL**”) the Delhi High Court took the view that principles contained in Order XXXVIII Rule 5 would only serve as guiding principle for the exercise of power by the court. A party seeking reliefs under Section 9 would essentially have to satisfy the court that the furnishing of security was paramount to safeguard its interests.
- iv. Interestingly in *Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.*¹⁴ (“**Adhunik Steels**”), the Apex Court was of the opinion that “*well known rules*” of the Code would have to be kept in mind while granting interim reliefs under Section 9. Therefore, the principles such as (i) prima facie case, (ii) balance of convenience, and (iii) irreparable injury would have to be kept in mind while granting an injunction. The Apex Court stopped short of stating that specific standards under Order XXXVIII Rule 5 and Order XXXIX Rule 1 and 2 would apply. However, the Bombay High Court in *Nimbus Communications Limited v. Board of Control for Cricket in India and Another*¹⁵ (“**Nimbus**”) interpreted *Adhunik Steels* to come to the conclusion that stand-

11. (2002) 2 BOMLR225

12. AIR 2004 Bom 136

13. (2011) 3 Arb LR 502,

14. AIR 2007 SC 2563

15. 2012 (5) BomCR 114

ards set out in Order XXXVIII Rule 5 would have to be fulfilled.

II. Inclusive Approach

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

- i. The Supreme Court in *ITI v Siemens Public Communication*¹⁶ (“**ITI**”), held that though there was no mention of applicability of the Code to arbitration proceedings in the Act, the provisions of the Code 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 Courts¹⁷ had found that principles of Order XXXVIII Rule 5 and Order XXXIX Rules 1 and 2 of the Code 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 38 Rule 5 i.e.
 - a. the conduct of the defendant indicated that it intended to alienate its property or to remove its properties from the jurisdiction of the court; and
 - b. the defendant intended to obstruct or delay the execution of a decree that may be passed against it;

would have to be kept in mind while determining an application under Section 9(ii)(b). This approach has also been followed in various decisions subsequent to *Nimbus*.¹⁸

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 measures¹⁹ 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 words are absent in the Act. Therefore, it may be argued that the intention of the legislature was to depart from the standards prescribed earlier which were similar to Order XXXVIII or Order XXXIX standards.
- ii. It was specifically stated in the 1940 Act that provisions of the Code would apply to all proceedings before a Court.²⁰ 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 Code. This also suggests that the legislature may have never intended to make standards set out in the Code under Order XXXVIII or Order XXXIX applicable to proceedings under Section 9 of the Act.

16. (2002) 5 SCC 510

17. *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

18. *Housing Development and Infrastructure Ltd v Mumbai International Airport Pvt. Ltd.*, Appeal (L) No. 365 of 2013, Bombay High Court; *C V Rao v Strategic Port Investments KPC Ltd.*, 2014 (4) ARBLR 9 (Delhi); *Acron Developers Pvt. Ltd. v Patel Engineering Ltd.*, 2014(1) ARBLR 512(Bom); *Deccan Chronicle Holdings Limited v. I&T Finance Limited* Appeal Arbitration Petition Nos. 1095 and 1321 of 2012 (Bombay), *Tata Capital Financial Service v Deccan Chronicle Holdings Ltd* Arbitration Petition No 1321 of 2012

19. §18 Refer Annexure III

20. § 41 Refer Annexure III

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 has not made suitable amendments to the Act to give effect to Article 17 J.²¹

Therefore, the present sentiments of the courts may need to be re-evaluated while granting interim reliefs.

III. 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, 1971.²² 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, 1971.²³

21. 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.

22. Mtech Solutions vs Pclit Solutions Pvt. Ltd, CCP No.132/2007 in OMP No.320/2007, Judgment dated July 31 2009 of the Delhi High Court

23. Terra Manufacturing And Sales vs M/S Alagendiraa Apparels, CONT. CAS (C) No 920/2009, Judgment dated October 19, 2011 of the Delhi High Court

5. Interim Measures by an Arbitral Tribunal under Section 17

I. Reliefs sought by parties before arbitral tribunals

The power of an arbitral tribunal to grant interim measures is dealt with in Section 17. Prior to amendment, the section was quite open-textured in the scope of reliefs that could be provided; it permitted the tribunal to issue any interim measure of protection. However, courts and arbitral tribunals took the view that the scope of the interim measures that may be granted under Section 17 was more limited than that under Section 9.²⁴ Consequently, various arbitral tribunals arrived at the incorrect conclusion that they could not pass orders such as a grant of security.

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

- i. securing the amount in dispute in the arbitration²⁵;
- ii. the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration²⁶;

iii. interim injunctions and the appointment of a receiver²⁷;

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

The tribunal has also been vested with wide powers to issue such other interim measure of protection as may appear to be just and convenient, bringing it at par with the powers of a court under Section 9 of the Act. After commencement of arbitral proceedings, parties may now seek interim reliefs only before arbitral tribunals unless the nature of reliefs requires a courts.

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

The jurisprudence in India relating to the standards to be applied by an arbitral tribunal while granting interim reliefs under Section 17 is sparse at best.

International authors have suggested that an arbitral tribunal should be guided by arbitral case law, comparative analysis of arbitration rules, and scholarly opinions while granting interim measures.²⁸ The standards applied by national courts while granting interim measures would have no bearing on arbitral tribunals.²⁹ Arbitral tribunals have normally required a party

24. *Aareb 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

25. *Intertole ICS (Cecons) O & M Company v. NHAI* (2013) II Delhi, *Tulsi Casting and Machining Ltd vs India Venture Trust* Arbitration Petition No. 769 of 2014 (Bombay High Court)

26. *Id, Arun Kapur v. Vikram Kapur and Ors.* 2002 (61) DRJ 495

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

28. Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, International Arbitration Law Library, Volume 12, pp. 159 - 236

29. Gary B. Born, *International Commercial Arbitration* (Second Edition), 2nd edition, pp. 2424 - 2563

to demonstrate (a) the risk of serious or irreparable harm; (b) urgency; and (c) no prejudgment of the merits of the case.³⁰ In some cases tribunals have also considered whether the party has established a prima facie case and that the balance of convenience weighed in favour of the party.³¹

As discussed, courts in India have at times shied away from importing principles contained in Order XXXVII Rule 5 and Order XXXIX Rule 1 & 2 to the grant of interim reliefs under Section 9.³² When such principles are not necessarily applicable in proceedings before a court; it is inconceivable for the same to apply to flexible and tailor-made dispute resolution process like arbitration.

That said, in *Intertole ICS (Cecons) O & M Company v. NHAI*³³, the Delhi High Court held that an arbitral tribunal would have to ascertain whether the petitioner has made out a case as per Order XXXVIII Rule 5, prior to granting an interim relief furnishing security for the amount claimed. However, the interim measures were not granted by the arbitral tribunal solely because the applicant was unable to establish a prima facie case.

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

Despite the arbitral tribunal's power to issue interim measures, the fact that the Act did not provide for a method of enforcing any interim relief granted meant that there were doubts regarding efficacy of the arbitral process in India.³⁴

The Delhi High Court in *Sri Krishan v. Anand*³⁵, held that any person failing to comply with the order of the arbitral tribunal under Section 17 would be deemed to be “making any other default” or “guilty of any contempt to the arbitral tribunal during the conduct of the proceedings” under Section 27 (5) of Act, being the only mechanism for enforcing its orders.³⁶ Therefore, such party would be in contempt of court.

It may come as a measure of relief to parties that the Delhi High Court³⁷ has held that an order passed by an arbitral tribunal that is subsequently upheld by a court in an appeal filed under Section 37 of the Act, would be enforceable as an order of the court.

The amendment to Section 17 of the Act³⁸ has now clarified that an order of the tribunal would be enforceable like an order of the court in case of interim reliefs granted by arbitral tribunals. This applies only to arbitrations that commenced post October 23, 2015 (i.e. the date of commencement of the Amendment Act) since Section 26 of the Amendment Act³⁹ stipulates that “nothing in the Amended Act, shall apply to ‘arbitral proceedings’ commenced as per Section 21 of the Act, before the commencement of the Amendment Act.”.

Pvt. Ltd., (2004) 9 SCC 619, *Sri Krishan v. Anand* (2009) 3 Arb LR 447 (Del)

30. Id

31. *Supra* N. 28 and 29

32. *Delta Construction Systems Ltd., Hyderabad v. M/S Narmada Cement Company Ltd, Mumbai*, (2002) 2 BOMLR225; *National Shipping Company of Saudi Arabia vs. Sentrans Industries Ltd.* AIR 2004 Bom 136; *Steel Authority of India vs 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 4.1 above.

33. *Supra* N. 25

34. *M.D. Army Welfare Housing Organisation v. Sumangal Services*

35. (2009) 3 Arb LR 447 (Del) *Indiabulls Financial Services v. Jubilee Plots, OMP Nos 452-453/2009*

36. Section 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.

37. *BPTP Limited v. CPI India I Limited and Ors.* 2015 (4) ARBLR 410 (Delhi)

38. Refer Annexure III

39. Refer Annexure III

6. Conclusion

At present, the question of whether the rigours of the Code 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 Code to proceedings under Section 9; importing these principles to proceedings under Section 17 would be an unwarranted inclusion of formalism in an otherwise flexible and tailor made method of dispute resolution.

The Working Group of the UNCITRAL acknowledged that the Model Law, 1985 was silent in respect of the standards to be adopted by arbitral tribunal, though interim reliefs have far reaching consequences. It noted that arbitral tribunals were given a broad mandate to determine whether a relief was necessary.⁴⁰ 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 Law⁴¹ 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.⁴²

40. United Nations Commission on International Trade Law Working Group II (Arbitration and Conciliation) Thirty-sixth session New York, 4-8 March 2002

41. Refer Annexure II.

42. *Supra* N.28

Annexure

Annexure I - Schedule II of the Arbitration Act, 1940

THE SECOND SCHEDULE

(See section 41)

Powers of Court

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

Annexure II- Relevant Provisions of the Model Law

Article 17 A: Conditions for granting interim measures

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

Article 17 J: Court-ordered interim measures

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

Annexure III- Relevant Provisions of the Act and the Code

S.No	Provision	Relevant Extract
Code of Civil Procedure, 1908		
1.	Order 38 Rule 5	<p>Where defendant may be called upon to furnish security for production of property.—</p> <p>(1) Where at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—</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,</p> <p>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>Cases in which temporary injunction may be granted.—</p> <p>Where in any suit it is proved by affidavit or otherwise—</p> <p>a. that any property in dispute in a suit in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or</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> <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.</p>

The Arbitration Act, 1940

3.	Section 18	<p>Power of Court to pass interim orders:-</p> <p>(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.</p> <p>(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</p>
4.	Section 41	<p>Procedure and powers of Court:-</p> <p>Subject to the provisions of this Act and of rules made thereunder (5 of 1908)</p> <p>(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</p> <p>(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.</p>

The Arbitration and Conciliation Act, 1996

5.	Section 9	<p>Interim measures, etc. by Court.—</p> <p>(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:—</p> <p>(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or</p> <p>(ii) for 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 in the arbitration;</p> <p>(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to</p>
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		<p><i>be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;</i></p> <p><i>(d) interim injunction or the appointment of a receiver;</i></p> <p><i>(e) such other interim measure of protection as may appear to the Court to be just and convenient,</i></p> <p><i>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><i>[(2) 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><i>(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.]</i></p>
6.	Section 17	<p><i>Interim measures ordered by arbitral tribunal.—</i></p> <p><i>(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to the arbitral tribunal—</i></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><i>(ii) for an interim measure of protection in respect of any of the following matters, namely—</i></p> <p><i>(a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;</i></p> <p><i>(b) securing the amount in dispute in the arbitration;</i></p> <p><i>(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;</i></p> <p><i>(d) interim injunction or the appointment of a receiver;</i></p> <p><i>(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,</i></p> <p><i>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>

		<i>(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.]</i>
7.	Section 19	<p>Determination of rules of procedure.—</p> <ol style="list-style-type: none"> 1. <i>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).</i> 2. <i>Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings..</i>
The Arbitration and Conciliation (Amendment) Act, 2015		
8.	Section 26	<i>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.</i>

Annexure IV- Table of Cases

S.No	Judgment	Section under which interim relief was claimed	Ratio of the Judgment	Standards to be fulfilled	Pg No.
1.	<i>Delta Constructions v Narmada Cement</i> 2002(1) MHLJ	9(ii)(b)	<i>“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. All that the court must be satisfied is that an interim measure is required. 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, the court would not to be bound by the requirement of Order 38 Rule 5.”</i>	<p>The court found that a case for securing the amount awarded by the arbitral tribunal was made out based on the following factor:</p> <p>a. The petitioner had performed the contract and was awarded the amount claimed, by the arbitral tribunal.</p> <p>There is no requirement to fulfil the standards provided under the Code of Civil Procedure, 1908.</p>	3
2.	<i>Tata Capital Financial Service v Deccan Chronicle Holdings Ltd</i> Arbitration Petition No 1321 of 2012 at Bombay HC	9(ii)(b)	<i>“The principle is that when the Court decides a petition under Section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court. Similarly in an application for attachment, the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind. At the same time it needs to be noted that the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice.”</i>	<p>The court was of the opinion that fundamental principles underlying provisions of Order XVIII Rule 5 to be borne in mind.</p> <p>The court considered the following factors while upholding the grant of reliefs</p> <p>a. The appellant owed a large financial obligation to banks and financial institutions</p> <p>b. that with an intention to defeat the award the appellant was likely to alienate its properties.</p> <p>c. The appellant had intentionally and wilfully failed to comply with the conditions of loan agreement and the security documents.</p> <p>d. The appellant did not comply with the orders passed by the single judge of the court.</p>	3

				This case held that standards provided under the Code of Civil Procedure were to be followed.	
3.	<i>Welspun Infratech v. Ashok Khurana</i> 2014 (2) ARBLR 520 (Bom)	9(ii)(b), 9(ii)(d)	<i>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.</i> <i>While deciding the application under section 9, court has to bear in mind the fundamental principles underlying the provisions of Code of Civil Procedure and at the same time has discretion to mould the relief in the appropriate cases to secure ends of justice and to preserve sanctity of the arbitral process.</i>	The court applied principles contained in Order XXXVIII Rule 5 for granting the interim measure. The court noted that: a. There was a prima facie case for the grant of interim measures; b. The balance of convenience was in favour of the petitioner; c. respondents has effected transactions with a view to alienate or dispose of assets, with an intention to defeat the decree that may be passed in the arbitration. This case held that standards provided under the Code of Civil Procedure are required to be followed.	3
4.	<i>Arvind Constructions v. Kalinga Mining Corporation and Others</i> (2007) 6 SCC 798	9(ii)(d)	<i>“Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver.”</i>	This case held that standards provided under the Code of Civil Procedure are required to be followed.	4
5.	<i>National Shipping Company of Saudi Arabia vs. Sentrans Industries Ltd.</i> AIR 2004 Bom 136	9(ii)(b)	<i>“The provisions of Order 38, Rule 5, CPC cannot be read into the said provision as it is nor can power of the Court in passing an order of interim measure under Section 9(ii) (b) be made subject to the stringent provision of Order 38, Rule 5. The power of the Court in passing the protection order to secure the amount in dispute in the Arbitration before or during Arbitral proceedings or at any time of making of the Arbitral amount but before it is</i>	The court did not grant the interim relief sought for by way of deposit of the security the appellant’s claim. The court did not apply principles contained in Order 38. The court noted that: a. no material has been brought to indicate that the respondent intended to defeat the claim of the appellant or that it would not be possible for the appellant to execute the award.	5

			<i>enforced cannot be restricted by importing the provisions set out in Order 38 of C.P.C. but has to be exercised ex debito justitiae and in the interest of justice."</i>	This case held that standards provided under the Code of Civil Procedure were not required to be followed.	
6.	<i>Steel Authority of India Ltd. v. AMCI PTY Ltd (2011) 3 Arb LR 502 at Delhi HC</i>	9(ii)(b)	<i>"In proceedings under Section 9 of the Act, at the highest what could be said is that the provisions of Order 38 Rule 5 CPC would serve as the guiding principle for the Court to exercise its discretion while dealing with a petition requiring the respondent to furnish security for the amount in dispute. Since the letter of the law per se is not applicable, the requirements set out in Order 38 Rule 5 CPC need not strictly be satisfied, and so long as the ingredients of the said provision are generally present, the Court would not be unjustified in exercising its jurisdiction to require the respondent to furnish security. The bottom line, in my view, is that the Court should be satisfied that the furnishing of security by the respondent is essential to safeguard the interests of the petitioner."</i>	<p>The court allowed the petitioner's application for security of the award amount.</p> <p>The petitioner did not make any averment as set out in Order XXXVIII Rule 5 to the effect that the defendant intended to obstruct or delay the execution of the award or was about to dispose of the whole or any of its property. The court noted</p> <ol style="list-style-type: none"> the petitioner had made out a prima-facie case; further it observed that the respondent was running into losses, consequently, the balance of convenience was in the petitioner's favour; the petitioner would suffer irreparable injury if its interests were not adequately protected. <p>This case held that standards provided under the Code of Civil Procedure were not required to be followed.</p>	5
7.	<i>Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd. AIR 2007 SC 2563</i>	9(ii)(d)	<i>"we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case."</i>	<p>The court applied principles provided in Order XXXIX Rule 2 of CPC while granting an injunction. It was noted that</p> <ol style="list-style-type: none"> A prima facie case was made out for breach of contract by the respondent; it was just and convenient to grant the injunction; Irreparable harm could be caused to the appellant. 	5

				This case held that standards provided under the Code of Civil Procedure are required to be followed.	
8.	<i>Nimbus Communications Limited v. Board of Control for Cricket in India and Another</i> 2012 (5) BomCR 114	9(ii)(b)	<i>"It has been held by the Division Bench of this court that though the principles of Order 38 Rule 5 of the Code of Civil Procedure, 1908 has to be kept in mind while deciding an application under section 9 of the Arbitration Act, rigors of Order 38 Rule 5 of the Code of Civil Procedure does not apply to the proceedings under section 9. I am respectfully bound by the judgment of Division Bench of this court."</i>	<p>The court found that principles of Order XXXVIII Rule 5 would have to be kept in mind while granting security for the amount in dispute. The court noted that:</p> <ul style="list-style-type: none"> a. The appellant made a strong prima facie case; b. The respondent may obstruct, delay or defeat the appellant's claim and arbitral award; <p>This case held that standards provided under the Code of Civil Procedure are required to be followed.</p>	5
9.	<i>ITI v Siemens Public Communication</i> (2002) 5 SCC 510	17	<i>"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. When there is no express exclusion, we cannot by inference hold that the Code is not applicable."</i>	<p>This case held that standards provided under the Code of Civil Procedure are required to be followed.</p>	6
10.	<i>Om Sakthi Renergies Limited v Megatech Control Limited</i> (2006) 2 Arb LR 186 at Madras HC	9(ii)(b)	<i>"It is true that 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 but its principles will be applicable as has been held by the Supreme Court in M/s. I.T.I. Ltd., Vs. M/s. Siemens Public Communications Network Ltd."</i>	<p>The court did not grant the interim relief sought on applying principles contained in Order XXXVIII Rule 5 and Order XXXIX Rule 1 and 2. The court noted that:</p> <ul style="list-style-type: none"> a. The respondent failed to make out prima facie case b. no irreparable injury would be caused if relief sought was not granted. <p>This case held that standards provided under the Code of Civil Procedure are required to be followed.</p>	6

11.	<i>Goel Associates v. Jivan Bima Rashtriya Avas Samiti</i> 114 (2004) DLT 478	9(ii)(b)	<i>“No doubt that the provisions like Order 38 Rule 5 Code of Civil Procedure are not contained in the Arbitration and Conciliation Act but its principles are to be applicable as such. However, one cannot loose the sight that the provisions of Code of Civil Procedure would be the guiding principles as has been held by Supreme Court in ITI Ltd. Vs. Siemens Public Communications Network Ltd.”</i>	The Division Bench of the Delhi High Court upheld the decision of the single judge vacating an interim order after applying principles contained in Order XXXVIII Rule 5. This case held that standards provided under the Code of Civil Procedure are required to be followed.	6
12.	<i>Housing Development and Infrastructure Ltd v Mumbai International Airport Pvt. Ltd.</i> Appeal (L) No. 365 of 2013, Bombay High Court	9(ii)(d)	<i>“An application under Section 9 of the Arbitration Act requires the Applicant-Petitioner to make out a strong prima-facie case and also to show that the balance of convenience is in its favour, and that it would suffer irreparable loss and injury if the reliefs it seeks were to be refused. The same principles that govern courts in the matter of grant of interim relief apply proprio vigore to petitions under Section 9 of the Arbitration Act.”</i>	The court did not grant the interim reliefs in light of the fact that the petitioner was unable to make out a prima facie case. The standards provided under the Code of Civil Procedure are required to be followed.	6
13.	<i>C V Rao v Strategic Port Investments KPC Ltd.</i> 2014 (4) ARBLR 9 (Delhi HC)	9(ii)(b), 9(ii)(d)	<i>“An order restraining the opposite party from dealing with his properties being drastic in nature, grant of such relief has necessarily to be based on the principles governing Order 38 Rule 5 CPC and before passing such an order the Court has to ensure that a specific case is made out that the party against whom such an order is proposed to be made is attempting to remove or dispose off the assets with the intention of defeating the decree/award that may be passed.”</i>	The court found no case for granting interim reliefs. Applying Order XXXVIII Rule 5 it found that there was no evidence that the appellant was attempting to defeat the right of the respondent to enforce an eventual arbitral award. This case held that standards provided under the Code of Civil Procedure are required to be followed.	6

<p>14.</p>	<p><i>Acron Developers Pvt. Ltd. v Patel Engineering Ltd.</i> 2014(1) ARBLR 512(Bom)</p>	<p>9(ii)(b), 9(ii)(d)</p>	<p><i>“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.”</i></p>	<p>The Court granted the application for interim reliefs applying principles contained in Order XXXVII Rule 5 and Order XXXIX Rule 1 and 2. The relief was granted on the basis of the following factors</p> <ul style="list-style-type: none"> a. A prima facie case existed since the petitioner had a good chance of succeeding in the arbitral proceedings since the amount claimed was an admitted liability. b. The respondent was obstructing the arbitral proceedings c. the respondent was selling its property with an intention to deprive the petitioner of its legitimate claim. <p>This case held that standards provided under the Code of Civil Procedure are required to be followed.</p>	<p>6</p>
<p>15.</p>	<p><i>Deccan Chronicle Holdings Limited v. L&T Finance Limited</i> Appeal (Lodging) Nos. 130 and 131 of 2013 in Arbitration Petition Nos. 1095 and 1321 of 2012 (Bombay)</p>	<p>9(ii)(b)</p>	<p><i>“The principle is that when the Court decides a petition under Section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court. Similarly in an application for attachment, the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind. At the same time it needs to be noted that the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice.”</i></p>	<p>The court was of the opinion that fundamental principles underlying provisions of Order XVIII Rule 5 to be borne in mind.</p> <p>The court considered the following factors while upholding the grant of reliefs</p> <ul style="list-style-type: none"> a. The appellant owed a large financial obligation to banks and financial institutions b. that with an intention to defeat the award the appellant was likely to alienate its properties. c. The appellant had intentionally and wilfully failed to comply with the conditions of loan agreement and the security documents. d. The appellant did not comply with the orders passed by the single judge of the court. 	<p>6</p>

				This case held that standards provided under the Code of Civil Procedure were to be followed.	
16.	<i>Intertole ICS (Cecons) O & M Company v. NHAI</i> (2013) II Delhi	17	<i>“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.”</i>	The court while dismissing the interim relief granted by the tribunal of providing security to the counter claims of the respondent, was of the opinion that a. no prima facie case had been made out by the respondent The court held that a tribunal would have to be satisfied that the principles of Order XXXVIII Rule 5 were fulfilled in case the relief sought was the furnishing of security for the monetary amount of claim.	8
17.	<i>Tulsi Casting and Machining Ltd vs India Venture Trust</i> Arbitration Petition No. 769 of 2014, Bombay High Court	17	<i>“if a Court comes to the conclusion that principles under Order 38 Rule 5 of the Civil Procedure Code are not satisfied, even injunction can not be granted on that ground which will substantially have the same effect as an order of attachment before judgment.”</i>	The court and arbitrator considered whether a case for grant of interim measures was made out with respect to the principles contained Order 38 Rule 5	8

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