The Section 9 and Section 17 of the Arbitration and Conciliation Act, 1996 involve interim measures of protection in ADR and bear special significance as the Amendment Bill, 2003 proposes to make sweeping changes in them. The article analyses the existing provisions as well as the amendment proposals.

Interim Measures of Protection in Arbitration – An Analysis

—Pawan Agarwal

Alternative Dispute Resolution (ADR) is now the most accepted method of dispute resolution in the US, UK, Canada, Australia and several other countries. According to a survey about 80% of the litigants prefer ADR methods in these countries and not more than 20% cases go to the national courts. There is no reason why we cannot make ADR methods popular in India too.

ADR has four facets to commend it: Speed, Finality Cheapness and Justice. Negotiation, mediation, conciliation and arbitration are the four basic methods of resolving a dispute under ADR system. The Arbitration and Conciliation Act, 1996 (in short The Act) contains provisions regarding arbitration and conciliation, which are two major methods under the ADR.

The Act has been enacted on the line of UNCITRAL model law of International Commercial Arbitration. The Act provides autonomy to the parties in various matters and has reduced the intervention of court to the minimum. However, the courts can intervene to give effect to various matters as permitted by the Act. One such situation is to grant interim measures of protection as contemplated by Section 9. This is similar to the power available to the court under the Arbitration Act of 1940. But what is clearly revolutionary is section 17 of the Act, which also uses the phrase 'Interim measures of protection' and thus gives co-terminus power to the Arbitral Tribunal as well. The Amendment Bill, 2003 proposes to make sweeping changes in these two sections.

Section 9 of the 1996 Act

It will be apposite to advert to section 9 of the Act which reads thus:

Interim measures, etc. by court: A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a

court for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings or for an interim measure of protection in respect of any of the following matters namely: -

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

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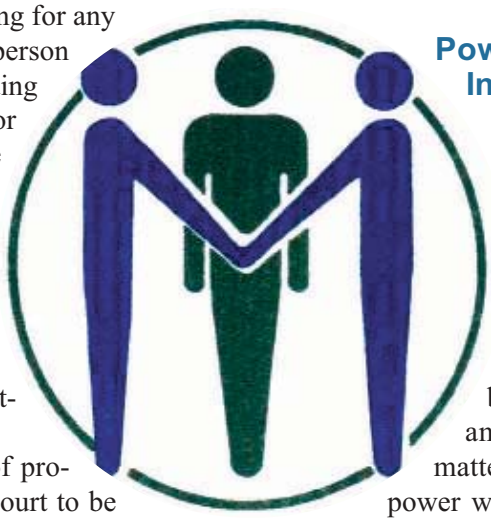
tion agreement.

- Securing the amount in dispute in the arbitration
- 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.
- Interim injunction or the appointment of a receiver
- Such other interim measures 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.



Obviously, all such factors, which the court considers in passing interim order, would be applicable to orders passed under Section 9 of the Act also. Basically, the party seeking injunctive relief should establish a likelihood of success on the merits, irreparable harms that might be caused to him if the interim relief is denied and the balance of convenience in its favour.

It may be relevant to point out that the Arbitration Act, 1996 of England makes interim relief more stringent in the sense that it permits such relief only when the parties have not otherwise agreed and only if and to the extent that the arbitral tribunal or any institution agreed to by the parties has no power or is unable for the time being to act effectively. Thus, the English Arbitration Act has minimised the intervention of the court and as such the provision is truly pro-arbitration.

Power to Grant Anton Piller Order

Anton Piller Order is an ex-parte interlocutory mandatory injunction, which orders the defendant to allow the plaintiff to enter his premises for the purpose of searching for, inspecting and seizing property or documents infringing the plaintiff rights.

However, such orders are passed by a court with circumspection because powers are of considerable magnitude.

It may be noted that Delhi High Court in (AIR 1998 page 144) has opined that court has no power u/s 9 to issue any interlocutory orders.

Power to Grant Mareva Injunction

The value of power to grant Mareva injunction is to prevent a third party from disposing of any asset or removing it from the jurisdiction of the court so as to defeat the claim of the plaintiff. The court has power to pass orders of attachment of property before award for securing the amount where the same is subject matter of dispute. The content of the power would be same as the power exercised by the court under order 38 Rule 5 of the Code of Civil Procedure wherein appropriate cases the court can order attachment of the assets of a party to survive till judgement is passed in the matter.

Power of the Arbitral Tribunal

As mentioned earlier, the Act gives co-terminus powers to the arbitral tribunals to order interim measures of protection. However, parties have a right to prevent the tribunal to exercise such powers by mutual agreement. Section 17 reads as follows:

Unless otherwise agreed by the parties, the arbitral tribunal may at the request of a party, order a party to take any interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.

The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).

It can be observed that Section 9 does not contain any express provisions saving the arbitrators' own power of ordering interim measures. The same is not enforceable as a decree or order of the court.

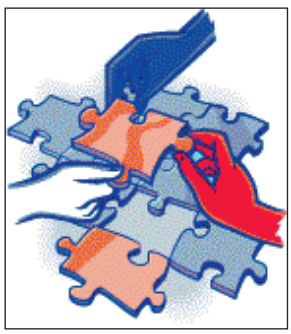
At what stage the court can pass interim order

The Supreme Court, in Sunderam Finance Ltd. vs. NEPC India Ltd. AIR 1999 SC 565, held that Section

9 is available even before the commencement of the arbitration. It need not be preceded by the issuing of notice invoking the arbitration clause. This is in contrast to the power given to the arbitrators who can exercise the power u/s 17 only during the currency of the tribunal. Once the mandate of the arbitral tribunal terminates, Section 17 cannot be pressed into service.

The Supreme Court also made an observation about the relevance of Arbitration Act, 1940 in interpreting the Act of 1996. The Court held that:

"The provision of this Act have, therefore to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words, the provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act."



Provisions contained in section 9 regarding the availability of interim relief even before the arbitration proceedings commence may be misused by a party. It may so happen that after obtaining an interim order from the court it may not take initiative to have an arbitral tribunal constituted. This will amount to reaping the benefit of the interim order without any time limit. To curb such possibilities, the Amendment Bill 2003 proposes to introduce subsections 4 to 6 in the existing section 9 which are reproduced below:

As per **Sub-Sec (4)**, where a party makes an application under sub-section (1) for the grant of interim measures before the commencement of arbitration, the Court shall direct the party in whose favour the interim measure is granted, to take effective steps for the appointment of the arbitral tribunal in accordance with the procedure specified in section 11, within a period of thirty days from the date of such direction.

As per **Sub-sec (5)**, the Court may direct that if the steps referred to in sub-section (1) are not taken within the period specified in sub-section (4), the interim measure granted under sub-section (2) shall stand vacated on the expiry of the said period;

Provided that the court may, on sufficient cause being shown for the delay in taking such steps, extend the said period.

In **Sub-sec. (6),** where an interim measure granted stands vacated under sub-section (5), the Court may pass such further direction as to restitution as it may deem fit against the party in whose favour the interim measure was granted under this section.

Thus, if the Amendment Bill is passed, it will be then mandatory on the part of the party who has obtained interim relief from a court to constitute the arbitral tribunal expeditiously. Failure to do so, a party may run the risk of automatic vacation of the interim measure. This is a step in the right direction.

Circumstances preventing court from granting interim relief

The Bombay High Court in Nimbus Television & Sports Vs D G Doordarshan [All Mah. L R 1998(2) page 6] opined that if the interim relief prayed for u/s 9 would amount to granting final relief frustrating the arbitration proceedings such a relief cannot be granted by the court.

The Delhi High Court, in Narain Sahai Aggarwal Vs Santosh Rani [AIR1998 page 14], held that while several interim measures of protection can be ordered under section 9, the section is not meant for interlocutory orders for the production of documents.

In Navbharat Ferro Alloys Ltd. vs. Continental Glass Ltd. [1998, 1 ALR 492], the Delhi High Court held that when the claim is for money, the sale of materials cannot be ordered as an interim relief.

However, it is submitted that an order of interim measure of protection can be passed by a competent court for sale of property where such property forming the subject matter of the dispute is perishable in nature.

The Bombay High Court, in Anil Construction vs. Vidharbha Irrigation Dev. Corpn [2000 (1) M L J 38],

The Amendment proposed in section 17 is more or less on the lines of English Arbitration Act and provides much-needed teeth to the existing section. It empowers the arbitral tribunal to direct a party to furnish security for costs of arbitration. This will help prevent frivolous arbitration proceedings.

held that the benefit of section 9 cannot be availed of by a party, which has no intention to appoint the arbitral tribunal. The provision cannot be availed by a party for restraining the other party from approaching the arbitral tribunal.

Delhi High court in Andaz Securities (P) Ltd vs Ghanshyamdas Kedia [2002 (2) Arb. LR 60] observed that for seeking interim relief u/s 9, subsistence and existence of a valid agreement is a pre-condition.

Again, the Delhi High Court had an occasion to examine the issue of interim relief in connection with a building contract. In this case, the petitioner who was a building contractor, entered in to an agreement to execute certain works. He failed to do so within time. He then sought from the court an injunction restraining the respondents from getting the work executed by the contractor. The court held that a building contract of the nature involved therein could not be specifically enforced by granting relief u/s 9. The court opined that such a relief would delay the construction work, which was considered very urgent by the respondent. The court further observed that prima facie case for grant of interim injunction was not made out and accordingly no interim injunction was granted [B S M contractors (P) Ltd. vs. Rajasthan State Bridge & Construction Corp. Ltd. AIR 1999 Delhi 117]

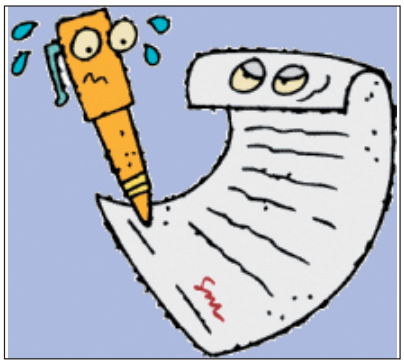
In Escotel Mobile & Communication vs. Union of India [1998-3 RAJ 307] it was held that an interim injunction cannot be granted, when many technical and engineering details are involved.

The Supreme Court in Grid Corp. of Orissa Vs Indian Charge Chrome Ltd. [1998 2 RAJ 416] observed that financial constraints are not a ground for restraining the recovery of arrears.

The Delhi High Court in Forcast Vs Steel Authority of India [1998 -1 Raj 66] held that an injunction cannot be issued against the encashment of a bank guarantee, where the respondent beneficiary is a big public sector corporation. If the award goes against the respondents, it could not be difficult to realise the money.

The Delhi High Court, in Arun Kapur Vs Vikram Kapoor and others [2002 (1) ARB. L R 256], after considering the decision of an English court in Channel Tunnel group Ltd. vs. Balfour Beatty construction Limited [1993 (1) ALL E R 664] observed as follows:

"It is cardinal rule that if the property invokes preliminary alternative remedy before the Arbitral Tribunal, it is debarred from invoking the jurisdiction of the court under Section 9 of the Act. Ordinarily if the arbitrator is seized of the matter the interim relief should not be entertained and the parties should be advised to approach the arbitrator for interim relief unless and until the nature of relief intended to be sought falls outside the jurisdiction of the arbitrator or beyond terms of the agreement or reference of disputes. Otherwise, the very object of adjudication of disputes by arbitration would stand frustrated. A party should always be discouraged to knock the door of the Court particularly when the arbitrator is seized of all the relevant or even ancillary disputes."



Just and convenient interim orders

The last part of the section contemplates "just and convenient" interim orders. These words have been construed not to authorise the courts to pass orders in respect of interim measures simply because the court thinks it to be convenient. That expression means that the court should pass orders for protection of rights or for prevention of injury according to legal principles. The order is discretionary and discretion, though the words are capable of conferring on the court a very wide discretion. Accordingly, a meeting of the shareholders for confirming the appointment of a managing director was not stayed. (Suzuki Motor Corporation vs. Union of India,1997, 2ALR 477 Del.)

Power of Arbitral Tribunal to grant interim relief

As mentioned earlier, section 17 empowers the arbitral tribunal to order a party to take any interim measures of protection in respect of the subject matter of the dispute. The arbitral tribunal may also require a party to provide appropriate security in connection with a measure ordered as above. Such measures would include the measure for preservation, custody or sale of goods, which are the subject matter of the reference.

However, as compared to power of the court u/s 9, the arbitral tribunal's powers are limited in scope and

sweep. The tribunal's powers are restricted to the subject matter of the dispute. However, it is open to the arbitral tribunal to call upon the party seeking relief to provide adequate security as a precondition for granting interim relief.

Proposed amendment to Section 17

Section 17 is proposed to be amended by the Amendment Bill 2003 by adding some more powers that can be exercised by the arbitral tribunal. The new

provisions are more or less similar to the section 38 of the English arbitration Act, 1996. The amended version of section 17 is reproduced below.

Section 17

"The arbitral tribunal may, pending arbitral proceedings,

- direct the other party, at the request of a party, to take steps for the protection of the subject-matter of the dispute in the manner considered necessary by it; or
- direct a party to provide appropriate security in connection with the directions issued under clause (a); or
- direct a party, making any claim, to furnish security for the costs of the arbitration; or
- give directions in relation any property which is the subject matter of the arbitral proceedings and which is owned by or is in possession of a party to the proceedings-
  - for the inspection, photographing, preservation, custody or detention of the property by the arbitral tribunal, by an expert or by a party; or
  - for samples to be taken from, or any observation to be made of, or experiment conducted upon, the property; or
- direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation; or
- give directions to a party for the preservation of any evidence in his custody or control for the purpose of the proceedings."

The system of dual agency for providing relief needs to be abolished or otherwise some enforcement mechanism be provided for enforcement of the interim measures of protections ordered by the Arbitral Tribunal.

Section 38 of The (English) Arbitration Act, 1996: It will be relevant to study the provisions of interim measures of protection as contained in the (English) Arbitration Act, 1996. The section 38 of this act is quoted below:

38.General powers exercisable by the tribunal

1. The parties are free to agree on the powers exercisable by the arbitral tribunal for the purpose of and relation to the proceedings.
2. Unless otherwise agreed by the parties the tribunal has the following powers.
3. The tribunal may order a claimant to provide security for the costs of the arbitration.

This power shall not be exercised on the ground that the claimant is –

a) an individual ordinarily resident outside the United Kingdom, or

b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside United Kingdom.

1. The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings —-

(a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party or

(b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.

1. The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.
2. The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.

The Amendment proposed in section 17 is more or less on the lines of English Arbitration Act. It provides the much needed teeth to the existing section. It empowers the arbitral tribunal to direct a party to furnish security for the costs of the arbitration. This will help prevent frivolous arbitration proceedings and now it will in the interest of the parties to expedite the arbitral proceedings. Likewise clause (d) regarding inspection of property etc. also widens the power of the tribunal. Clause (e) now gives explicit powers to the arbitrators to examine a party or witness on oath or affirmation. Arbitrators can now validly administer oath and take necessary affirmation. In the existing provision there was confusion regarding such power of the arbitrators and as a result few arbitrators used to refuse to examine witnesses on oath. This controversy will be settled if the amendment Bill becomes the law. It is submitted that though the power of the arbitral tribunal is proposed to be enlarged by the Amendment Bill 2003, no mechanism has been proposed for enforcement of the same. Ultimately, a party will have to knock the doors of the Court to obtain necessary relief. Many experts have opined that there should be only one agency to grant interim measures. Senior Advocate from Goa Mr. M.S. Usgaonkar has mentioned in his article in ICA Arbitration Quarterly (July-Sept.2002 issue, page 30 as follows;

Provisions contained in section 9 regarding availability of interim relief even before the arbitration proceedings commence may be misused by a party. It may so happen that after obtaining an interim order from the court it may not take initiative to have an arbitral tribunal constituted.

"It is not intelligible while same powers are given to two different agencies. Would not such type of provision create more litigation? Would not there be conflict of powers between two agencies? Apart from that, in order to fill up the lacuna now provisions are inserted in the proposed amendment to make the orders enforceable and punish the defaulter by way of contempt of court and also dismissing the claim or striking the defence as the case may be. Ultimately, no appeal would lie against such orders of the arbitral tribunal. In my view, that is not the answer to the problem. It could be very well understood that powers are given to one agency either Arbitral Tribunal or Court and not to both. I am reminded of the expression of Lord Macaulay, wherein he said;

"Our principle is simply this- uniformity when you can have it; diversity when you must have it; but in all cases, certainty."

Would not power given to two distinct authorities for same purposes create uncertainty and protract the arbitral proceedings? But if I was to suggest the amendments, I would have unhesitatingly said, considering the magnitude of the relief granted at the interim stage, that power should be left to the Court instead of Arbitration Tribunal."

Is parallel application u/s 9 as well as u/s 17 possible?

The Court can exercise power under section 9 to grant interim measures even during the pendency of application under section 17 before the arbitral tribunal. Remedy available to a party under section 17 is an additional remedy and is not in substitution of section 9. (Atul Ltd Vs Prakash Industries Ltd, 2003(2) RAJ 409 Delhi)]

Considerations while granting relief u/s 9

The Court will generally take into account the following considerations while granting interim relief under section 9:

1. The party applying for interim relief must establish a prima-facie case.
2. The balance of convenience should be in its favour.
3. The party will suffer irreparable loss or injury if the interim measure is denied to it.
4. The exercise of discretion has to be in beneficial man-

ner depending upon the circumstances of each case.

(Newage Fincorp (India) Ltd. V/s Asian Corp Securities Ltd. 2001 (1) RAJ page 170 Bombay.)

Applicability of Section 9 where seat of arbitration is outside India

Sub section (2) of section 2 provides in a clear and unambiguous language that Part I shall apply where the place of Arbitration is in India. However, the Delhi High Court, Dominant Offset (P)Ltd vs. Adamovske Strojirny As [1997 (2) ALR 335], where the arbitration took place at London, held that Part I also applies to International Commercial Arbitration conducted outside India . Similar view was again taken by Delhi High Court in the case of Olex Focas Private Limited vs. Skoda export co. Ltd., (AIR 2000 Delhi 161).

However, the Division Bench of Delhi High Court in Marriott International Inc. vs. Ansal Hotels Limited (AIR 2000 Delhi 377), where arbitration proceedings were held at Kuala Lumpur in Malaysia, held that Part I of the Act shall apply to all arbitrations where the place of arbitration is in India. However, in Bhatia International vs. Bulk Trading S.A. [2002 (1) ALR 677] the Supreme Court of India has held that an application for interim measures can be made to Court in India, whether or not the arbitration takes place in India before or during the proceedings. The apex court has observed that Part I of the Act also applies to International Commercial Arbitrations, which take place out of India, unless the parties by agreement express or implied exclude it or any of its provisions.

If the Amendment Bill, 2003 is passed, it will be mandatory on part of the party who has obtained interim relief from a court to constitute the arbitral tribunal expeditiously. Failure to do so, a party may run the risk of automatic vacation of the interim measure.

The interpretation is given by the apex court; sub section (2) does not provide that Part I of the Act will 'only' apply where the place of Arbitration is in India. Rt. Hon. Lady Justice Mary Howarth Arden DBE, Lord Justice of Appeal, UK at the second Conference on Dispute Resolution on 13th September, 2003 on Arbitration and the Courts organised by International Centre for ADR observed as follows: -

"This ruling calls for a number of observations. First it goes much further than the Law Commission's recommendation, which was not that the whole of Part I should apply to international commercial arbitration, but only the power to grant interim measures. This much is permitted by UNCITRAL Model Law. Second, the application of Part I to arbitrations outside India is not consonant with party autonomy. If the parties choose to arbitrate under ICC rules in Paris, they have chosen that the arbitration shall be conducted under ICC Rules and subject to the supervisory jurisdiction of the French Courts. Third, taken literally, the Bhatia decision seems to undermine India's adherence to the New York Convention. Fourth, in addition, the Bhatia decision is inconsistent with Renusagar's case under which the court can only decline to recognise and enforce a foreign award on the grounds of the narrow view of public policy."

Recent judgement of SC

Recently, a two-ember bench of the Supreme Court, in the case of Firm Ashok Traders vs. G.D Saluja decided on 9th January, 2004(AWLJ 175) held that

(1) An application under Section 9 is neither a suit nor an application for enforcing a right arising from a contract – Prima facie the bar enacted by Section 69 of the Partnership Act, 1932 is not attracted to an application under Section 9 of the Act.

(2) Only a party to an Arbitration agreement is qualified to make an application under Section 9. A person not a party to an arbitration agreement cannot make an application under Section 9.

(3) When application under Section 9 is filed before the commencement of arbitral proceedings, the applicant must be able to satisfy the Court that arbitral proceedings are positively going to commence within a reasonable time. There should be proximity between the application and the arbitral proceedings.

Appeals against interim orders

Sub-section 1(a) of section 37 provides that an appeal shall lie from the order of the court granting or refusing to grant any measure under section 9. The appeal shall lie in the same court to which appeal lies from the original decrees. Only one appeal is allowed against the orders of the court refusing or granting interim measure.

Sub-section 2(b) of section 37 provides that an appeal shall lie to a court from an order of an arbitral tribunal granting or refusing to grant an interim measure under section 17. In this case also only one appeal is allowed.

However this provision does not override the provisions of article 133 of the constitution of India and an appeal will lie to the Supreme Court if the provisions of article 133 are otherwise complied with.

Conclusion

From time to time, the interests of justice may require the making of orders in relation to goods or other property, pending the hearing and the award. Such orders fulfil two distinct functions –

1. They ensure that the property which is the subject of dispute does not come to harm until the dispute has been resolved; and

2. Where the property, or an aspect of it, is an item of evidence in the reference they ensure that the parties are able to exploit its evidentiary value in the full.

(Mustill and Boyd in Commercial Arbitration in England, Butterworths 1989 page 328)

It is submitted that lacunas in the provisions of interim measures should be set right by legislative initiation. The system of dual agency for providing relief needs to be abolished or otherwise some enforcement mechanism be provided for enforcement of the interim measures of protections ordered by the Arbitral Tribunal. It would be better that application of interim measures is put to the arbitral tribunals as they are seized of the subject matter under disputes. Only when a party is not able to get relief from the arbitral tribunal, it should be allowed to knock the doors of the Court. This will be in line with the objectives of the Act to minimise the intervention of the Court in arbitral proceedings. ■