

Dispute Resolution Hotline

August 18, 2020

INTERIM RELIEF IN FOREIGN-SEATED ARBITRATIONS – EFFICACIOUS REMEDY AND IMPLIED EXCLUSION

- After the commencement of arbitral proceedings, Courts can be approached for interim relief only if it can be demonstrated that there is no efficacious remedy available before the Arbitral Tribunal. This principle applies equally to foreign-seated and India-seated arbitrations.
- The issue regarding an ‘implied exclusion’ of Section 9 of the Arbitration and Conciliation Act, 1996 in a foreign seated arbitration has been left open by the Division Bench of the Delhi High Court.

INTRODUCTION

The Division Bench of the Delhi High Court (“**Division Bench**”) in the case of *Ashwani Mnda and Ors. v. U-shin Limited and Ors.*¹ recently held that the proceeding initiated by the Petitioners/Appellants under Section 9 of the Arbitration and Conciliation Act, 1996 (“**Act**”) for interim relief in aid of a foreign seated arbitration was not maintainable.

In arriving at its decision, the Division Bench held that even when an application for interim relief before Indian courts under Section 9 of the Act in a foreign-seated arbitration is maintainable, such application would not lie after the constitution of the arbitral tribunal, unless it can be proven that there is no efficacious remedy before the tribunal. On the facts of the case before it, the Division Bench held that there is nothing to show that remedy before the arbitral tribunal is inefficacious and that the arbitral tribunal had been constituted.

On July 31, 2020, the Supreme Court refused to interfere with the judgment of the Division Bench and dismissed the Special Leave Petition filed by the Appellants.

BACKGROUND

The dispute arose out of a joint-venture agreement (“**JVA**”), wherein the arbitration clause provided that if the Indian party to the agreement were to initiate arbitration, the proceedings would be held in Japan pursuant to the Rules of the Japan Commercial Arbitration Association (“**JCAA Rules**”). The Appellants invoked the clause and applied for an emergency measure of protection pursuant to the JCAA rules. An emergency arbitrator was appointed, and she/he dismissed the application for interim reliefs merits on April 2, 2020 (“**EA Order**”). During the pendency of the emergency arbitration proceedings, the Appellants also issued a request for arbitration pursuant to the JCAA Rules.

Subsequently, the Appellants filed an application under Section 9 of the Act before the Single Judge of the Delhi High Court (“**Single Judge**”) seeking interim relief measures. On May 12, 2020, the Single Judge held that the petition under Section 9 was not maintainable for the following reasons:²

- The parties, by agreement had impliedly excluded the applicability of Part I of the Act (which includes Section 9) by seating the arbitration in Japan and agreeing to the application of the JCAA Rules;
- The JCAA Rules provide a detailed mechanism for seeking interim measures, which the parties agreed to in their arbitration clause;
- The Appellants have already raised the issues before the emergency arbitrator, and it is not open to them to take a second bite at the cherry before Indian courts under Section 9 of the Act. Further, there have been no changes in the circumstances after the EA Order. The Court cannot sit in appeal over the EA Order.³

Our analysis of the Single Judge’s ruling can be accessed [here](#).

On May 13, 2020, the arbitral tribunal was constituted under the JCAA Rules (“**Tribunal**”).

The Appellants filed an appeal against the order of the Single Judge before the Division Bench.

JUDGMENT

A. Applicability of Section 9(3) of the Act

The Division Bench considered Section 9(3) of the Act which provides that,

“(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.”

Section 17 of the Act pertains to “Interim measures ordered by arbitral tribunal” and the provision does not extend to foreign-seated arbitrations. The Appellants argued that Section 17 of the Act does not apply to foreign-seated arbitrations, as interim measures granted by India-seated tribunals alone are automatically enforceable in India under Section 17(2) of the Act, and thus the principle behind in Section 9(3) would not extend to the present case. The Appellants also argued that any order passed by the Tribunal would be unenforceable in India, and thus, the Appellants would be left without any efficacious remedy.

The Division Bench rejected the Appellants’ argument and held that the principles behind Section 9(3), i.e., (i) resolution of disputes by a tribunal of the parties’ choice; and (ii) reduced interference by courts, would continue to apply. Section 9(3) shows the legislative preference for these principals. Thus, the Division Bench concluded that even in the case of a foreign-seated arbitration, the remedy under Section 9 of the Act is available after the constitution of the arbitral tribunal *only* if there is no efficacious remedy before the tribunal. While determining the efficaciousness of the remedy, courts should consider whether the tribunal is sufficiently empowered to grant effective interim measures of protection. The Division Bench refrained from making a finding on whether the availability of a remedy before an emergency arbitrator would impede Indian courts from granting interim relief under Section 9 of the Act.

Further, the Division Bench held that it cannot sit in appeal over the EA Order as no such appellate remedy is provided for under the Act.

B. Implied Exclusion of Section 9

As noted previously, the Single Judge had held that the parties had impliedly excluded the applicability of Section 9 of the Act by seating the arbitration in Japan and agreeing to the JCAA Rules. However, the Division Bench did not make a determination on this point and left it open to parties to resolve in subsequent proceedings. The Division Bench also noted that the Single Judge’s order should not be treated as having decided the issue finally. This is a welcome move, as the Single Judge’s finding on this issue was fraught with problems. Our analysis of the Single Judge’s ruling can be accessed [here](#).

SUPREME COURT’S DISMISSAL

The Appellants appealed the judgment of the Division Bench to the Supreme Court of India by way of a Special Leave Petition.⁴ On July 31, 2020, the Supreme

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COMMENT

Primary Powers Given to Tribunals

Division Bench's decision that Section 9 cannot be invoked after the constitution of an arbitral tribunal in foreign-seated arbitrations, when there is an efficacious remedy available to the parties, is laudable. This is in line with the rationale for the insertion of Section 9(3) to the Act through the Arbitration and Conciliation (Amendment) Act, 2015 ("Amendment Act 2015"). The 246th Law Commission Report,⁵ which suggested this amendment, had noted that this amendment seeks to "reduce the role of the Court in relation to grant of interim measures once the Arbitral Tribunal has been constituted. After all, once the Tribunal is seized of the matter it is most appropriate for the Tribunal to hear all interim applications. This also appears to be the spirit of the UNCITRAL Model Law as amended in 2006." Thus, the court recognized the adoption of the court-subidiarity model for interim reliefs by India, which gives primacy to tribunals over the courts.

Interestingly, the UNCITRAL Model Law on International Commercial Arbitration, 1985 (with amendments as adopted in 2006) ("UNCITRAL Model Law") did not ultimately determine whether the court power should be a secondary option available only where an arbitrator cannot act effectively.⁶ In fact, the proposal that the court could only act in circumstances where, and to the extent that, the arbitral tribunal did not have the power to so act or was unable to act effectively, was specifically kept for consideration at a later stage.⁷ Thus, reliance on UNCITRAL Model Law for adoption of this approach may not be cogent.

However, considering that courts in India are generally overwhelmed with cases, the Indian legislature's intent to shift the primary power to arbitral tribunals, unless it is not efficacious, is a welcome move. This is in line with the position of law in certain other countries such as England⁸ and Singapore.⁹ By incorporating Section 9(3) into the Act, the India has also adopted the view that once an arbitral tribunal has been constituted, all applications for interim measures should be determined by the tribunal itself, barring the circumstance where it is inefficacious to do so. The Division Bench in this judgment has appropriately clarified the extension of the application of this principle to foreign-seated arbitrations as well.

Efficacy of the Remedy

Another interesting observation by the Division Bench is in relation to how to determine the "efficacy" of the remedy before an arbitral tribunal. The Division Bench held that the efficacy of the remedy before the arbitral tribunal would depend on the facts and circumstances of each case. In the present case it relied upon the following facts and circumstances to hold that the remedy before the arbitral tribunal was efficacious:

- The Tribunal was constituted and had the powers to grant interim measures pursuant to the JCAA Rules, notwithstanding the findings of the emergency arbitrator;
- The Respondents were Japanese entities and the interim reliefs sought were in the nature injunctions against them. The Division Bench also noted that the Respondents made voluntary statements before the Court that they would comply to with any interim measures passed by the Tribunal;
- It was the Appellants who first approached the emergency arbitrator under the JCAA Rules, thus, it can be presumed that the Appellants did not have any reservations on the efficacy of the remedy.

The efficacy of the remedy also depends on its enforceability. The Indian legislature realized this problem and consequently gave tooth to arbitral tribunals by making their interim orders enforceable as if they are orders of the court in Indian-seated arbitrations. A similar provision is not present for interim reliefs awarded in foreign-seated arbitrations. However, the Division Bench in this case was not affected by potential non-enforceability of the interim measures in India. However, by holding that the efficacy of a remedy would have to be determined on a case by case basis, the Division Bench has left it open to parties in the future to raise an argument that the potential non-enforceability of interim measures in certain situations could render the remedy by the arbitral tribunal inefficacious.

Enforceability of Interim Measures

The move towards giving primacy to the powers of the arbitral tribunal in granting interim relief is promising, however, the enforcement interim reliefs granted in foreign-seated arbitrations is not entirely simplistic. To enforce interim reliefs (including emergency arbitrator reliefs) granted in foreign-seated arbitrations, parties would be required to file a fresh application under Section 9 of the Act, which may be based on the interim relief granted by the foreign tribunal.¹⁰ This creates an additional burden upon the parties to prove a case for interim relief which has already been determined by the arbitral tribunal. In order to continue the move towards giving the primacy of the power to grant interim relief to arbitral tribunals, the English position laid down in the case of *Patley Wood Farm LLP v. Nihal Mohammed Kamal Brake, Andrew Young Brake*¹¹ can be considered. In this case, it was held that it is not the Court's role to review or second-guess the arbitrator's interim order. However, the Court may intervene if the arbitrator has proceeded on a wholly mistaken basis, or the exercise of powers by the arbitrator was fatally undermined in some fundamental respect. Unless such an approach is adopted by Indian courts the remedy of seeking an interim relief in a foreign seated arbitration may remain an inefficacious remedy, if such an interim relief were to be enforced in India. In similar vein, orders passed in emergency arbitrations too may also continue to remain ineffective.

The question that has been left open by the Division Bench on the implied exclusion of Section 9 of the Act in foreign seated arbitrations is concerning. For a detailed criticism on the Single Judge's ruling, please read our earlier [analysis](#). For now, we can take comfort in the fact that the Division Bench has expressly stated that the Single Judge's ruling on this issue should not be treated as having decided the issue finally. It is hoped that this position of law will quickly be clarified to dispel any notions of an 'implied exclusion' of Section 9 of the Act in foreign-seated arbitrations.

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You can direct your queries or comments to the authors

¹ FAO (OS) (COMM) 65/2020

² OMP (I) (COMM.) 90/2020

³ For a detailed comment on the Single Judge's judgment, please see:

http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/200626_A_India_parties_cannot_apply_to_courts_after_emergency_arbitration.pdf.

⁴ Special Leave to Appeal (C) No(s). 9003/2020

⁵ Law Commission Report No. 246 on Amendments to the Arbitration and Conciliation Act, August 2014.

⁶ Note by the UNCITRAL Secretariat, Interim measures of protection, A/CN.9/WG.II/WP.125, 2 October 2003 at para 44, available at: <https://undocs.org/en/A/CN.9/WG.II/WP.125>.

⁷ A/CN.9/589 - Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session (Vienna, 3-7 October 2005) dated 12 October 2005, para 103 available at: <https://undocs.org/en/A/CN.9/589>

⁸ Section 44 of the Arbitration Act, 1996 (England).

⁹ Section 12A, International Arbitration Act (Singapore).

¹⁰ *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd.*, (2016) 234 DLT 349

¹¹ [2014] EWHC 4499 (Ch)

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