Analysis of Interim measures u/s 9 and 17 of Arbitration and Conciliation Act,1996

G S Rao  
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**Introduction:**

Arbitration and Conciliation Act 1996 repealed old Arbitration Act and incorporated law relating to domestic arbitration, international commercial arbitration and law relating to conciliation. The New Act was enacted on the lines of the United Nations commission on International Trade Law (UNCITRAL) for ensuring a fair and efficient settlement of disputes in an international commercial contracts. Whenever there is an ambiguity in arbitration matters, our Courts have relied on UNCITRAL rules for interpretation and application of the provisions of new act.

**Why parties choose Arbitration?**

The new Act minimized the intervention of courts and it provided that final award passed is binding on parties and is enforceable as if it were a decree, if it is not set aside on challenge u/s 36. The arbitrators are vested with powers for deciding matters such as law to be
applied, procedure to be followed for evidence, jurisdiction, venue, interest etc. As these factors contribute to speedy arbitral process, it is quite common to find arbitration clause in commercial agreements.

**Arbitration Process:**

Arbitration process starts when parties to agreement fail to amicably resolve their disputes or differences and aggrieved party issues a notice for referring the dispute/claim to the arbitrator (Section 21). After the arbitral Tribunal is constituted, claimant will state facts of his case submit his claim and seek relief. Respondent will file his counter claim or his defence to the claim. Arbitrator passes an award on completion of arbitration proceedings.

**Definition of award:**

As per definition of arbitral award appearing in Section 2(e), an arbitral award includes an interim award within its ambit. Section 31(6) provides that the arbitral tribunal may, at any time during the proceedings make an interim award on any matters with respect to which it may make a final award. A question that arises in the minds of everyone is that whether interim measures can be treated as an interim award especially when such measures of protection are ordered by the Tribunal. The author is of the view that such measures will amount to granting of interim award. This view is subscribed from the definition of arbitral award as defined u/s 2 (e) of the new Act.

With the above background, it is now appropriate to shift the focus of this article to the interim measures /relief provided under the New act and their effectiveness. The sections that deal with interim relief are Section 9 and Section 17. Both these are compared for ascertaining the ground reality of these measures.

**Comparison of Interim relief provisions in the Old Act and New act:**

Under the Arbitration Act, 1940,a party could commence proceedings in a Court by moving an application under Section 20 for appointment of an arbitrator and simultaneously it could move an application for interim relief under the Second Schedule read with Section 41(b) of
the old Act. Under the New Act 1996, Section 9 empowers the court to order a party to take interim measure or protection when an application is made. Besides this Section 17 gives power to the Arbitral Tribunal to order interim measures unless the agreement prohibits such power.

**Interim relief u/s 9**

A plain reading of the section 9 indicates that a party may before or during the arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with Section 36, may apply, to the court for interim measure of protection. Prayers for interim measures of protection may include:

- Appointment of a guardian for a minor or person of unsound mind
- Preservation or interim custody or sale of goods, if goods are of perishable nature
- Securing the amount of claims
- Allowing inspection or interim injunction or appointment of receiver
- Any other reliefs as the court may in its discretion may deem proper considering the circumstances of the case.

**Interim relief u/s 17**

Let us now examine the powers of Arbitral Tribunal u/s 17. If the arbitration agreement does not prohibit, Arbitral Tribunal at the request of a party, may order the other party to take such interim measures of protection as it may deem necessary in respect of subject matter of dispute. In the process, it can order for providing appropriate security in exercise of its power. This power also has to be exercised within the terms of reference or arbitration agreement. It is very strange that Section 17 although permits Arbitral tribunal to pass interim order, it does not give any power to Tribunal to enforce its order. Also there is no section in the new Arbitration Act which ensures enforcement of interim orders passed by the Tribunal or to treat interim order as an enforceable decree like that of final award. In
other words, the power of the tribunal is limited and any interim award necessarily has to merge with the final award for attaining enforceability.

In UNCITRAL model law similar power is given to arbitral tribunal under Article 16 and 21 of Arbitration Rules.

**Comparison between Section 9 and Section 17:**

Analysis of Section 9 and Section 17 would lead us to the following conclusions:-

- The new arbitration Act empowers the arbitral tribunal to pass orders for giving interim relief while such power is not vested under the Old Act.

- Powers under Section 17 can be exercised only after the arbitral tribunal is constituted and it starts functioning.

- Powers of court under section 9 are wide as the words “before, during or after indicate so. A party can approach the court to seek interim measures of protection even before the arbitration commences.

- Court’s powers are wide and have supremacy in granting interim relief. However interference of court when Tribunal is constituted is minimum.

**Judicial precedents:**

Let us now refer to some important judgments for understanding the effectiveness or limited effectiveness of Section 17.

No power to Arbitral tribunal to enforce its orders u/s17

Supreme court of India in the case of M D Army WHO Vs Sumangal services (p) Ltd reported in AIR 2004 SC 1344 observed that even under S. 17 of the 1996 Act the power of the Arbitrator is a limited one. It cannot issue any direction which would go beyond the reference or the arbitration agreement. Even under S. 17 of 1996 Act, an interim order must relate to the protection of subject-matter of dispute and the order may be addressed only
to a party to the arbitration. It cannot be addressed to other parties. Even under S. 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof.

Relief u/s 9 can be granted even before commencement of arbitration

In the case of M/s. Sundaram Finance Ltd. v. M/s. NEPC India Ltd., AIR 1999 SC 565, Supreme Court was to examine the issue whether u/s 9 of the Arbitration and Conciliation Act, 1996, the Court has jurisdiction to pass interim orders even before arbitral proceedings commence and before an arbitrator is appointed. SC held that it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application under Section 9 is filed.

**Interim measure u/s 9 and u/s 17 are distinguishable**

In Firm Asok Traders Vs Gurumukhdas Saluja AIR2004 SC 1433, the Apex court observed that Section 17 would operate only during the existence of the Arbitral Tribunal. During that period power conferred on Arbitral tribunal u/s 17 and power of court u/s 9 may overlap to some extent but so far as the pre and post the arbitral proceedings are concerned, party seeking interim measure of protection has to approach only court.

**Conclusion:** While drafting arbitration clause, one should keep in mind whether the arbitral tribunal should be given the power to grant interim relief or not. If arbitration clause provides for such power to arbitral Tribunal, then one need not approach the court for such relief. But there exists a doubt about its enforceability, if it is not complied with by the party. Courts can be approached only if interim relief as prayed is refused u/s 37(2)b) but not for enforcing the interim relief granted by the arbitrator. It is high time that Law makers should amend the Act to make interim award enforceable like that of Final award.

*G S Rao,*

*DGM (Legal), OCL India Limited*

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