'Interim Relief': Comments on the UNCITRAL amendments and the Indian perspective

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Executive Summary

In recent times, the issue of grant of interim relief by arbitral tribunals has become centre stage. The 1985 Model Law contemplated grant of interim measures (Article 17) but it seemed half-hearted, as it did not contain an enforcement mechanism and nor were any adverse affects sanctioned in the event of non-compliance. The old Article 17 was essentially premised on voluntary compliance and therefore (not unsurprisingly) was rarely resorted to. At the same time, an approach to court (while effective) had deterrents (including the inconvenience of moving a different forum, perhaps through another legal team). Resort to courts also carried an inbuilt risk of the court pre-determining (or influencing) parties substantive rights. With this backdrop, in the year 2006 UNCITRAL made extensive amendments to the Model Law and elaborate provisions now stand incorporated on the subject. This article presents an analysis of the UNCITRAL amendments to the Model Law and points out some problem areas. In the second part, the article sets out the Indian law and practice on the subject.

The paper consists of two parts. In the first part, I comment upon the amendments brought about in the year 2006 to the UNCITRAL Model Law in relation to interim measures. In the second part, I discuss the Indian law and practice of grant of interim relief by arbitral tribunals.

PART I [The UNCITRAL Model Law]

Survey of the new provisions:

The 1985 UNCITRAL Model Law provided for interim measures vide Article 17. The provision however contained two express conditions: The measure had to be shown to be "necessary" and be "In respect of the subject matter of the dispute". Besides, there were at least two inherent hurdles in the path. First, one has to await the constitution of the tribunal and allow for a reasonable opportunity for it to assemble at the seat and for the opposite side to respond to the request. This essentially ruled out relief in the case of urgency (and more often than not an application for interim relief cannot brook delay). Secondly, there was no mechanism to enforce an order of the tribunal.

The 1985 Model Law proceeded on an assumption that the parties would voluntarily accept the interim order of the tribunal and there would be no need to even contemplate of an enforcement procedure. On the other hand, if a party felt the need for an enforceable order, it would not be incompatible for it to approach a court with a request in this regard.

The position was not satisfactory and after an elaborated process, in December, 2006 the UNCITRAL Model Law stood amended. The old Article 17 stands completely replaced by an extensive scheme providing *inter alia* for ex parte orders and for interim measures to be binding and enforceable.

Article 17 now sets forth the powers of the arbitral tribunal in the widest terms. The earlier twin conditions have been done away with. The amended Article 17 *inter alia* empowers the arbitral tribunal to maintain or restore the status quo; direct a party to refrain from doing anything which may prejudicially affect the arbitral process; provide a means for preserving assets for satisfaction of the award, or preserve evidence that may be material for resolution of the dispute. The tribunal may do so by framing its order in a form of an award or otherwise as it may deem appropriate.

Article 17 A provides for the conditions which must be satisfied for grant of an interim measure. These conditions are universally recognised: balance of convenience; irreparable harm and "a reasonable possibility that the requesting party will succeed on the merits of the claim".

Article 17 B is somewhat revolutionary in the realm of arbitration as it introduces the concept of *ex parte* ad interim orders (called "preliminary orders"). The scope of such orders is narrower and is essentially confined to maintaining the status quo. An *ex parte* order shall be valid only for 20 days from the date of its issuance (within which time the tribunal may affirm or modify the order after notice and an opportunity to the opposite side to present its case). The general condition for *ex parte* orders is that the tribunal will require the applicant to provide appropriate security in connection with the same unless the tribunal considers it unnecessary to do so. An *ex parte* order shall be binding on the parties but shall not be enforceable by a court process. Further such an order shall not be in the form of an award.

Perhaps the most far reaching amendment to the Model Law is vide Article 17 H and I. This provides for recognition and enforcement of an interim measure ordered by the tribunal (i.e. other than an *ex parte* order). Article 17 H *inter alia* states that an interim measure shall be recognized as binding, unless otherwise stated by the tribunal. It may be enforced upon application to a competent court irrespective of the country in which it was issued.

Recognition and enforcement may be refused only on the grounds stated in Article 17 I. Sub - Articles (i) to (iv) of Article 36 (1) (a) of the Model Law constitute the first set of grounds for refusal to enforce an interim measure. Further, an interim measure will not be recognised if the court finds that the grounds set forth in Article 36 1 (b) (i) or (ii) apply to the interim measure in question. Article 36 1 (b) (i) provides for refusal to enforce if the subject matter of the dispute is not capable of settlement by arbitration under the laws of the enforcing State and Article 36 (1) (b) (ii) provides for the public policy ground.

Comments on the 2006 Amendments to the Model Law:

The UNCITRAL has moved boldly to try and address the limitations and hurdles in the way of an arbitral tribunal in relation to interim measures. Though a new approach was warranted, I have some reservations on the amendments. I may elaborate my reasons as follows:

(i) To begin with Article 17 (2) states that the interim measure can take any form i.e. it can be in the form of an order simpliciter or in the form of an award. To my mind, these are two completely different types of orders and cannot be treated

in the same breath or be made subject to the same set of rules. An interim order can of course be in the form of an interim award but then an award is a final pronouncement on the issues it determines. It cannot be called a "temporary measure" which the arbitral tribunal may modify or alter as it wishes as it goes along. Once pronounced it becomes final and the arbitrators become *functus officio* in relation to that issue. They cannot retrace their steps. Further, setting aside or enforcement of an award (final or interim) is already a subject matter of Articles 34 and 36 of the Model Law. There cannot be another (parallel) provision i.e. Article 17 (H) and (I) on the same subject. There cannot be two provisions for enforcement of the same award.

Thus interim measures which take the form of an interim award ought not to have been included in the new Article 17 scheme.

(ii) I also find the provisions for *ex parte* interim orders to sit uneasily with the role and standing of an arbitral tribunal in the eyes of the parties. Arbitration is not a dispute resolution mechanism by impersonal judges (akin to a court). The tribunal is a creation of the parties who perceive it as an amiable forum. It is out of character to expect the tribunal to receive a secretive communication from one party and pass binding orders thereon. It would be an embarrassment if later they have to turn around and reverse their decision (after hearing the other side). It certainly will not be the best start-off for any arbitration. Further an *ex parte* order by the tribunal (though "binding") is not capable of being enforced in court under Article 17 C (5). It will have to undergo a waiting period

of up to 20 days and if the order is maintained (after hearing the opposite side) the resultant order will be subject to enforcement by court. An *ex parte* order is usually warranted in rare cases where the aggrieved party cannot afford to lose any time. The process of issuance of an exparte order (first provisionally and then finally) renders the whole exercise of doubtful value and perhaps in the interest of efficiency and costs it may have been better to leave the subject of an *ex parte* orders to the courts.

(iii) Further, I find the enforcement provisions (Article 17 I) to be too drastic. For all practical purposes, it clothes an interim measure with the same vigour as a final award (but the two are not the same). A final award is based on merits and evidence and follows the full legal process (including an obligation to give reasons). An interim measure is not and it is anomalous to give an interim measure the same standing and as a final award with little discretion with the court except to enforce, as it is obliged a final award.

(iv) Under the Model Law if a challenge on bias is turned down by the arbitral tribunal one can appeal by way of an interim recourse) to court (under Article 13). It is for this reason that a challenge on the ground of arbitrator's bias is not a ground for setting aside an award under Article 34 or for resisting enforcement under Article 36. However, in relation to interim measures, it should have been included in Article 17 I. Now one may have a situation that there is no adequate opportunity to challenge an interim measure on the ground of bias.

(v) The amended Model Law seeks to achieve what the New York Convention never attempted to i.e. give interim orders passed in another State the same enforceability as a final order.

For the above reasons I apprehend that the amended Model Law may not find the widespread favour which the 1985 version did. In India, courts are zealous of their role in dispensation of justice. The system is not very tolerant of the doors of the court being shut as Article 17 I seeks to. We still have to come to terms with Article 34 of the Model Law (which does not allow a challenge on merits in relation to a final award). A 2003 Indian Supreme Court decision[1] (which has consistently been followed since) allows a final award to be challenged on merits. I therefore see little hope of Article 17 I being adopted as part of Indian law.

PART II [Indian law and practice]:

On 20th of January 1996 by way of a special Ordinance, India promulgated a new Arbitration Act[2] (Act). It is essentially based on the 1985 Model Law and the 1976 UNCITRAL Arbitration Rules with very few departures.

In relation to interim measures the Act follows Article 17 but adds an interesting twist. While it does not create any mechanism for enforcement of the tribunal's interim measures, a provision is made for an appeal to court from an order of the tribunal "granting or refusing

[1] ONGC v. Saw Pipes Ltd; (2003) 5 SCC 705
[2] The Arbitration & Conciliation Act, 1996 (26 of 1996)

to grant an interim measure". This creates a grey area. A party is technically obliged to appeal if it feels aggrieved by the interim order but it is not stated as to what will be the consequence if it simply chooses to disobey it. At the same time if the succeeding party wishes to enforce it, there is no enabling mechanism for it to do so. The succeeding party would necessarily be driven to start a second round of litigation - this time going to a court and hoping that the court would endorse what the tribunal ordered or at least accept the tribunal's findings as a *prima facie* basis for an interim order of protection in the same manner and to the same extent as ordered by the tribunal. Clearly this is an unsatisfactory state of affairs.

Court mechanism:

Like the Model Law the Indian Act also enables an approach to a court for interim relief. Resort to court has its pros and cons. To begin with one has to take ones case to a forum which presumably the parties wished to avoid in the first place by having an arbitration clause. Further, one may have to involve another set of lawyers, either because the competent court is in another seat, or the arbitration bar is distinct from the court bar.

When approached, the court may be minded to clarify that its order is interim in nature and would not bind the arbitral tribunal from holding otherwise on merits but nevertheless when a court decides an issue (even though *prima facie*) in a certain manner it may impact the final decision or compromise independent decision making by the tribunal. The High

Court of Delhi has held[3] that if resort is made to both an arbitral tribunal and the courts for an interim measure and there is a conflict or an overlap, the order of the court will have primacy. This is on the principle that a court is a higher judicial forum. Thus having to go to a court has its complications.

The upside of resort to court is that it is effective and expeditious in a manner that an arbitral tribunal's order can never be and can also be directed to third parties if needed. Therefore resort to court may well be necessary and it is important to have a strong provision empowering the courts as well to grant interim measures.

Section 9 of the Indian Arbitration Act is based on the Article 9 of the Model Law but it takes it further. It empowers the Court beyond what Article 9 does. The Model Law enables a party to approach a court for an interim measure of protection before or during the arbitral proceedings. The Indian Act goes further by enabling an approach to court before, during or even *after* the arbitral award is delivered (but before its enforcement by court). If there is a recourse to court before commencement of arbitration, the applicant must satisfy the court that it intends to take recourse to the arbitration proceedings within a short period of time and can be put to terms in this regard by the court.[4] In other words the law discourages a party from taking an interim order before the arbitral proceedings commence and then keep the arbitration in abeyance. The other departure the Indian Act makes from the Model Law is that it extensively sets out the types of interim measures of protection the court may pass. These include:

[3] National Highways Authority of India (NHAI) v. China Coal Construction Group Corporation; decision dated 23rd January 2006 of High Court of Delhi.

[4] Sundaram Finance Ltd. v. M/s NEPC India Limited; AIR 1999 SCC 565

- The preservation, interim custody or sale of any goods which are the subject matter of the arbitration 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;
- Authorising 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;
- Appointment of a Receiver; and
- The residuary power to pass "such other interim measure of protection as may appear to the court to be just and convenient".

Section 9 then goes on to clarify that the court shall have the same power to pass an interim order as it has in relation to in any other proceeding before it.

Accordingly one may briefly explain the general provisions in India in matters of grant of temporary injunctions and interlocutory orders. Under Indian law[5], courts have wide power to grant such orders (including Mareva injunctions and Anton Piller Orders). An application in this regard is dealt with on the basis of affidavits (i.e. without the need for any oral evidence). Indian courts are liberal in matters of granting interlocutory relief (chiefly as the main suit can take an inordinate period of time to reach conclusion and it

[5] Order XXXVIII and XXXIX of the Code of Civil Procedure, 1908

may become necessary to protect the equities in the meanwhile). It is not typical in India to ask the party safeguarded to provide a security for the measure.

The remedy is discretionary and granted on three considerations: (i) the court finds that the applicant has a good *prima facie* case in its favour; (ii) there is a balance of convenience in favour of grant of an interlocutory order (the court compares the inconvenience to either party to see which way the balance lies); and (iii) irreparable injury i.e. that which cannot be rectified by compensation in terms of money.

The court does not undertake and indeed is not expected to undertake a detailed exercise on the merits of the case. The court would also not grant an interim remedy which would in effect amount to granting the final relief or make the final relief infructuous; nor will it grant an interim relief which cannot in law be granted by way of a final relief.

An *ex parte* order can be granted in very exceptional circumstances. Essentially the court must be satisfied that the object of granting the measure would be frustrated by the process of notifying the opposite party.

Amendments on the anvil:

Over the years attempts have been made to amend the Arbitration Act (including the provisions dealing with interim measures). In 2003 at the recommendation of the Law Commission of India extensive amendments were proposed. First, it was proposed to add to and elaborate the powers of the tribunal in relation to interim measure (i.e.

modify Section 17, corresponding to Article 17 of the Model Law). Then a parallel committee proposed that interim measures of protection ordered by the arbitral tribunal be enforceable through courts. A new Section was proposed to provide *inter alia* that the courts may refuse to enforce an interim measure of protection only if it is satisfied that:

(i) there is a substantial question of law relating to any ground for refusal; or

(ii) the applicant has failed to provide appropriate security in connection with the interim measure as ordered.

However the Amendment Bill ran into trouble as there was difference of opinion on some major proposals (other than in relation to interim measures). As a result the Bill and also a subsequent attempt to amend the Act have come to naught and is not likely to be taken forward in the near future.

Conclusion:

Considering the growing significance of arbitrations in resolution of international disputes, it is only appropriate that arbitral tribunals be empowered in relation to grant of interim measures of protection. The 1985 Model Law was quite inadequate in this regard. At the same time, in my respectful view, the 2006 amendments to Article 17 propose a leap too long, especially in relation to the enforcement provisions. I apprehend that these provisions may not meet with the wide acceptance the 1985 version did (and in the absence of uniform application, the Model Law will not serve the purpose it set out to).

In my respectful view fresh proposals need to be mooted which would render the arbitral tribunal's decision binding and also enforceable. An aggrieved party should be able to resist enforcement on narrow grounds such as patent illegality, irregularity or gross unfairness of the result but to render an interim measure the same degree of a enforceability as a final award is potentially unfair and jurisprudentially inappropriate.