

## Implication of Section 17 of The Arbitration and Conciliation Act, 1996 after the promulgation of The Arbitration and Conciliation (Amendment) Ordinance, 2015

Chief Justice Warren E. Burger of US Supreme Court once said “The obligation of the legal profession is....to serve as healers of human conflicts.....we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, with the minimum stress on the participants. That is what justice is all about”.

### Pre-Ordinance Position

Section 17 of the Arbitration and Conciliation Act, 1996 (For short “**the Act**”) is an important provision, which is crucial to the working of the arbitration system, since it ensures that even for the purposes of interim measures, the parties can approach the arbitral tribunal rather than await orders from a Court.

Under Section 17 of the Act, the arbitral tribunal has the power to order interim measures, unless the parties have excluded such power by agreement. However, its efficacy has been seriously compromised given the lack of any suitable statutory mechanism for the enforcement of such interim orders.

### Judicial Pronouncements

In *Firm Ashok Traders v. Gurumukh Das Saluja*<sup>1</sup>, the Court held that “*the need for Section 9, in spite of Section 17 having been enacted is that, Section 17 would operate only during the existence on the Arbitral Tribunal and its being functional. During that period, the power conferred on the Arbitral Tribunal under Section 17 and the power conferred on the Court under Section 9 may overlap to some extent but so far as the period pre and the post arbitral proceeding is concerned, the party requiring an interim measure of protection shall have to approach only the Court of laws*”

Subsequently, in *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.*<sup>2</sup>, the Court had held that under Section 17 of the Act no power is conferred on the arbitral tribunal to enforce its order nor does it provide for judicial enforcement thereof.

In the face of such categorical judicial opinion, the Delhi High Court attempted to find a suitable legislative basis for enforcing the orders of the arbitral tribunal under Section 17 of the Act in the case of *Sri Krishan v. Anand*<sup>3</sup>. The Delhi High Court held that any person failing to comply with the order of the arbitral tribunal under Section 17 of the Act 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. The remedy of the aggrieved party would then be to apply to the arbitral tribunal for making a representation to the Court to mete out appropriate punishment. Once such a representation is received by the Court from the arbitral tribunal, the Court would be competent to deal with such party in default as if it is in contempt of an order of the

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<sup>1</sup> (2004) 3SCC 155

<sup>2</sup> (2004) 9 SCC 619

<sup>3</sup> (2009) 3 Arb LR 447 (Del)

Court, i.e., either under the provisions of the Contempt of Courts Act or under the provisions of Order 39 Rule 2A Code of Civil Procedure, 1908.

### Law Commission Report

However, the above was not a complete solution. In order to redress this situation, the Law Commission of India recommended amendments to Section 17 of the Act in its 246th Report<sup>4</sup> which would give teeth to the orders of the Arbitral Tribunal and the same would be statutorily enforceable in the same manner as the orders of a Court.

### Post-Ordinance Position

On 23 October 2015, the President of India promulgated The Arbitration and Conciliation (Amendment) Ordinance, 2015<sup>5</sup> (For short “**the Ordinance**”) which provides for amendments to the Act.

The Amendment seeks to expand the scope of Section 17 of the Act by giving the tribunal the power to provide interim measures, if applied for, even after the making of the award, but before it is enforced. It further provides that all orders passed by the tribunal under this Section, subject to any order passed in an appeal under Section 37 of the Act, shall be deemed to be an order of the Court and shall be enforceable in a manner as provided under the Code of Civil Procedure.

### Conclusion

The Ordinance has laid the step to widen the powers of the arbitral tribunal as prior to the Ordinance the powers of the arbitrators under Section 17 of the Act were limited to the tenure of the tribunal. Meaning thereby, once the mandate of the arbitral tribunal terminates, Section 17 could not be pressed into service. The party could misuse the provisions of the Act, for a party might not take an initiative to have the tribunal constituted, after obtaining an interim measure and may unnecessarily delay the process. But now, in view of the Ordinance, it will be mandatory on the part of the party who has obtained interim relief to constitute the arbitral tribunal expeditiously. There does not remain the risk of automatic vacation of the interim measure.<sup>6</sup>

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<sup>4</sup>Law Commission Report No. 246 dated August 05, 2014 available at <http://lawcommissionofindia.nic.in/reports/Report246.pdf>

<sup>5</sup>Published by Ministry of Law and Justice on 23<sup>rd</sup> October 2015 available at <http://lawmin.nic.in/la/Arbitration.pdf>

<sup>6</sup>Chapter 4 on “THE ALTERNATIVE DISPUTE REDRESSAL METHODS” available at [http://shodhganga.inflibnet.ac.in/bitstream/10603/5423/11/11\\_chapter%204.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/5423/11/11_chapter%204.pdf)