

IMPLICATIONS OF SECTION 17**I. Section 17 – Bare Text****a. Under the Arbitration and Conciliation Act, 1996:**

- (1) *Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.*
- (2) *The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).*

b. Under the Arbitration and Conciliation (Amendment) Ordinance, 2015:

1. *A party may, during the 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 the arbitral tribunal—*
- i. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*
 - ii. for an interim measure of protection in respect of any of the following matters, namely:—*
 - a. the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;*
 - b. securing the amount in dispute in the arbitration;*
 - c. 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 authorizing 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;*
 - d. interim injunction or the appointment of a receiver;*
 - e. such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.*
2. *Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.*

II. Introduction

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.

III. When can a party approach the arbitral tribunal under this section?

Interim measures are generally granted to preserve the status of the property in dispute or to prevent prejudice to any party before the commencement or during the pendency of the arbitration.¹

A party can apply to the arbitral tribunal for interim relief at the following stages:

- During the arbitral proceedings; or
- At any time after the making of the arbitral award but before it is enforced²

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 is not uncommon for parties to obtain urgent interim measures prior to commencement of arbitration and then drag their feet in commencing the arbitral proceedings. Since the interim measures are meant to be in aid of arbitration, it is sensible that interim measures are granted only in cases where parties have real intention to pursue arbitration. However, by omitting the sentence recommended by the Law Commission stating that the interim measures would lapse on the expiry of the period of 60 days, the Arbitration and Conciliation (Amendment) Ordinance, 2015 (For short “the Ordinance”) has taken the teeth out of this clause. Though, it is likely that even though it has not been specifically included, courts might interpret the provision such that non-adherence will amount to vacation of the interim protection.³

IV. When can the arbitral tribunal grant interim relief under this section?

Under Section 17 of the Act, the arbitral tribunal has the power to order interim measures of protection, unless the parties have excluded such power by agreement.

Before the promulgation of the Ordinance, the power of the arbitrators under Section 17 of the Act was limited only during the tenure of the tribunal. Meaning thereby, once the mandate of the arbitral tribunal terminates, Section 17 could not be pressed into service.

V. In what manner is the order of the arbitral tribunal enforceable under this section?

¹ Article on “ Interim Reliefs under the Arbitration and Conciliation (Amendment) Ordinance, 2015” available at <http://blog.ipleaders.in/interim-reliefs-arbitration-conciliation-amendment-ordinance-2015/#ixzz3sfhgPb2I>

² Section 17 of the Arbitration and Conciliation (Amendment) Ordinance, 2015

³ Research Paper on the topic “An Analysis of the Amendments” by Economics Law Practice available at http://www.moneycontrol.com/news_html_files/news_attachment/2015/ELP%20Analysis%20-%20Amendments%20to%20Arbitration%20&%20Conciliation%20Act%201996.pdf

In *Sundaram Finance Ltd v. NEPC India Ltd.*⁴, the Hon'ble Supreme Court observed that though Section 17 of the Act gives the arbitral tribunal the power to pass orders, the same cannot be enforced as orders of a court and it is for this reason only that Section 9 gives the court power to pass interim orders during the arbitration proceedings. Subsequently, in *M.D. Army Welfare Housing Organization v. Sumangal Services Pvt. Ltd.*⁵, 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 Hon'ble 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*⁶. The Hon'ble 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 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 (for short "CPC").

The Law Commission in its report felt that the above judgment of the Hon'ble Delhi High Court was not a complete solution and recommended amendments to Section 17 of the Act which would make orders of the Arbitral Tribunal enforceable in the same manner as the Orders of a Court. Keeping those suggestions in mind the Ordinance remedied the enforceability of interim measures under Section 17.⁷

The Ordinance has laid the step to widen the powers of the arbitral tribunal as prior to the Ordinance such powers were limited to only passing of an interim order, but now this power has been extended to enforcement of the Order and is to be treated as an enforceable decree like that of final award.

VI. Conclusion

The efficacy of Section 17 of the Act was seriously compromised due to lack of any suitable statutory mechanism for the enforcement of interim orders of the arbitral tribunal. The new section lays down that any order passed by the arbitral tribunal under Section 17 will be deemed to be an order of the court for all purposes and be enforceable under CPC as if it were an order of the court. Hence, now the powers of arbitral tribunal to grant interim measures are similar to those of the court under Section 9 of the Act.

⁴ (1999) 2 SCC 479

⁵ (2004) 9 SCC 619

⁶ (2009) 3 Arb LR 447 (Del)

⁷ Article on "Interim Reliefs under the Arbitration and Conciliation (Amendment) Ordinance, 2015" available at [Interim Reliefs under the Arbitration and Conciliation \(Amendment\) Ordinance, 2015 - iPLEADERS http://blog.iPLEADERS.in/interim-reliefs-arbitration-conciliation-amendment-ordinance-2015/#ixzz3ttKzgFIX](http://blog.iPLEADERS.in/interim-reliefs-arbitration-conciliation-amendment-ordinance-2015/#ixzz3ttKzgFIX)