

INTERIM MEASURES OF PROTECTION IN AID OF FOREIGN-SEATED ARBITRATIONS: JUDICIAL MISADVENTURES AND LEGAL UNCERTAINTY

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Interim measures of protection are important in an arbitral procedure to preserve the rights of the parties to a dispute. These become of particular relevance when the parties seek them in a country that is beyond the place of arbitration. The Arbitration & Conciliation Act, 1996, by virtue of proviso to Section 2(2), empowers parties to a foreign seated arbitration to seek interim reliefs from Indian Courts. However, the law provides that parties can contract out of such provision. To determine parties' intention, when there is no express clause or an agreement to that effect, a principle of implied exclusion is used, which usually works to the disadvantage of parties to foreign-seated arbitration. The authors undertake an examination of Indian case laws to show that the judicial task of deciphering such implied intent through an arbitration clause, particularly in cases relating to interim relief, is anchored in a mistaken understanding of the objective of the Arbitration & Conciliation Act. Legal practice concerning the grant of interim reliefs in foreign arbitrations in common law jurisdictions of England and Singapore is also examined. Further, the authors deal with the underlying issues regarding enforcement of emergency arbitrators' orders in India and then conclude with suggestions.

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I. INTRODUCTION

Like any traditional litigation process, a private dispute resolution process such as arbitration seeks to safeguard parties' rights during the course of the arbitral process,¹ to make the final award meaningful and effective. This objective is achieved through the mechanism of interim measures of protection that are granted to parties to a dispute. These interim measures are temporary and have the positive effect of not only compelling parties to behave in a way that is conducive to the success of the proceedings but also ensuring that an eventual, final award can be implemented.² The need for such measures is supported by the argument that a final award might be of little or no value if a recalcitrant party removes assets from the jurisdiction, destroys the subject matter of dispute or, in other cases, transfers funds out of the jurisdiction before the judgement. It is, therefore, not surprising that interim measures are noted to be 'at least as important as or even more important than an award'.³

Implementation of interim measures depends not only upon the mere grant of such interim orders by the arbitral tribunal or Court, but also on their enforceability, especially in jurisdictions other than the place of arbitration.⁴ An interim measure ordered by a foreign Court or foreign-seated arbitral tribunal is generally not enforceable in the jurisdiction outside the seat. Moreover, there is no effective recourse that can be pursued if a party declines to be bound by such an order.⁵ Thus, domestic Courts of the said jurisdiction must intervene and assist in implementing such interim measures and rescue the arbitration process itself.⁶

Apart from Article 17 of the revised edition of the UNCITRAL Model Law on International Commercial Arbitration⁷ ("UNCITRAL Model Law"), there are no other uniform standards that govern municipal Courts of a country when they are faced with the issue of enforcement of interim orders issued in support of foreign-seated arbitrations. Article 17 of the UNCITRAL Model Law is specifically designed to support the enforcement of interim arbitral measures in relevant national

¹ Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2014) 2427.

² Stephen M. Ferguson, 'Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results', (2003) 12 Int'l Trade L. J. 55 <<https://core.ac.uk/download/pdf/232783391.pdf>> last accessed 12 September 2021.

³ V.V. Veeder, 'Provisional and conservatory measures', *Enforcing arbitration awards under the New York Convention: Experience and Prospects*, vol 2 (United Nations Publication) 21.'

⁴ When assets or evidence are located in foreign jurisdictions and not in the country of the seat of arbitration.

⁵ Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 356.

⁶ See Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (OUP 2009) [7.01].

⁷ United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006* (2006) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed 23 July 2020.

jurisdictions. It states that an interim arbitral measure, no matter how styled ‘shall be recognized as binding and.... enforced upon application to the competent Court, irrespective of the country in which it was issued.’⁸ The UNCITRAL Working Group on Arbitration, in its thirty-second session at Vienna, highlighted the ‘practical importance’ of having an effective regime for enforcement of interim measures and that these measures were not ‘dealt with in many legal systems in a satisfactory way’.⁹ The commission recognized that it was equally important to enforce such measures not only at places where arbitration was actually conducted but also outside them.¹⁰ This development was necessary as the number of cases in which the parties sought interim measures before the tribunals had been on the rise.¹¹

Part II of the Arbitration and Conciliation Act, 1996 (‘ACA’)¹² regulates the enforcement of foreign arbitral awards in India. India is a signatory to the New York¹³ and the Geneva¹⁴ Conventions. Therefore, Courts in India are obligated to enforce foreign awards provided that all conditions are met¹⁵. However, before 2015, there was no express provision in the ACA that facilitated the enforcement of an interim measure in India issued by a Court or an arbitrator in case of a foreign-seated arbitration..

In order to make interim reliefs available to the parties to a foreign-seated arbitration, the Indian legislature, through the Arbitration and Conciliation (Amendment) Act, 2015 (‘2015 Amendment’), added a proviso to Section 2(2)¹⁶ that allowed Section 9 (provision relating to interim measures, etc. by Court) to be applicable in support of foreign-seated arbitrations. The 246th Report of the Law Commission of India, which suggested the amendment to Section 2(2), also provided the objective of

⁸ James E Castello and Rami Chahine, ‘Enforcement of Interim measures’, (Global Arbitration Review) <<https://globalarbitrationreview.com/chapter/1178692/enforcement-of%E2%80%89-interim-measures>> accessed 5 July 2020.

⁹ Report of the Secretary General' in United Nations General Assembly 'Settlement of Commercial Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement' (14 January 2000) A/CN.9/WG.II/WP.108 <<https://undocs.org/en/A/CN.9/WG.II/WP.108>> accessed 20 July 2020

¹⁰ *ibid* [82].

¹¹ *ibid* [104].

¹² Arbitration and Conciliation Act, 1996 (hereafter ‘ACA’).

¹³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958).330 UNTS 38.

¹⁴ Convention on the Execution of Foreign Arbitral Awards, Geneva (26 September 1927).

¹⁵ The award must be from a country which is a signatory to either the New York or the Geneva Conventions and it should be made in a territory that has been notified as a convention country by the Central Government based on the presence of reciprocal provisions; See ACA (n 12), s. 44

¹⁶ ACA (n 12), s 2(2) proviso: ‘Provided that subject to an agreement to the contrary, the provisions of s 9, 27 and clause (a) of sub-s (1) and sub-s (3) of s 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of part II of this Act’.

the amendment. It stated that a party may strip away its assets when the seat of the arbitration is abroad, and its assets are located in India. In such scenarios, there would be an absence of an ‘efficacious remedy’, as the other party, which obtains an interim order from a foreign Court, would not be able to get it enforced directly by filing an execution petition¹⁷. The only way, then, in which the other party can seek an interim relief is if a ‘judgment’ of a foreign Court holding the other party for contempt of the Court is enforced under the Code of Civil Procedure (‘CPC’). This remedy is not entirely effective as it will only be available after the other party defaults on the foreign order.¹⁸Hence, the changes made to Section 2(2) are in line with the objective of the 2015 Amendment and assist parties to a foreign-seated arbitration to get interim reliefs in India.

In order to ensure party autonomy, the proviso to Section 2(2) states that parties can contract out of such provision. To this effect, the Law Commission in the 246th Report intended the parties to have an ‘express agreement’ to exclude the applicability of Section 9. However, the legislature, while drafting the provision, dropped the word ‘express’ from its language. This omission has led to the proviso to Section 2(2) falling prey to the regressive theory of implied exclusion, where the Courts decide whether the parties have expressly or *impliedly* excluded the applicability of Section 9 through an arbitration clause. The authors, in this article, seek to prove that the judicial task of deciphering this implied intent through an arbitration clause is anchored in a mistaken understanding of the objectives of the ACA and the 2015 Amendment. The principle of implied exclusion is a relic of the pre-*BALCO*¹⁹ period, and Indian Courts should desist from its application. Instead, they should purposively interpret the 2015 amendment, and thereby ensure that interim awards granted in a foreign-seated arbitration are conveniently enforced in India.

In this connection, Part II of the article will deal with the principle of implied exclusion, or the ghost of implied exclusion that looms over parties who choose to seek interim relief from Indian Courts in assistance of foreign-seated arbitrations. For this purpose, besides looking into the circumstances that led to the genesis of the rule of implied exclusion, the article will also analyse recent Indian cases on this issue to critically evaluate the legal position in Part III. The next section, Part IV, will consider the legal practice employed in common law jurisdictions including England and Singapore in the above

¹⁷ An execution petition would not qualify as a ‘judgment’ or ‘decree’ for the purposes of sections 13 and 44A of the Code of Civil Procedure (‘CPC’) that provides a mechanism for enforcing foreign judgments. See Law Commission of India, *Amendments to the Arbitration and Conciliation Act* (Law Com No 246, 2014) , [41] (hereafter ‘Report No. 246’)

¹⁸ *ibid.*

¹⁹ The infamous case of *Bhatia International v. Bulk Trading* got overruled by the Supreme Court in *Bharat Aluminium Co. v Kaiser Aluminium Technical Service* (2012) 9 SCC 552 [hereafter, ‘*BALCO*’] wherein it was held that s. 2(2) was effectively a declaration of doctrine of territoriality, and thereby made Part-I applicable only to arbitrations seated in India.

context. Further, Part V will explain the underlying issues regarding the enforcement of orders of emergency arbitrators ('EA'). Finally, the paper will conclude with suggestions for the future of Indian law and policy governing the grant of interim reliefs in aid of foreign-seated arbitrations.

II. THE GENESIS OF IMPLIED EXCLUSION AND ITS PROBLEMS

The theory of implied exclusion finds its genesis in the (in)famous case of *Bhatia International v. Bulk Trading*²⁰ ('*Bhatia*'). It has been employed to decide the applicability of Part-I of the ACA to pre-*BALCO* foreign-seated arbitrations. Post the 2015 Amendment, it has been used to decide on the applicability of provisions of sections 9 and certain others²¹ to foreign-seated arbitral proceedings.

At this stage, it is necessary to understand the circumstances under which the Supreme Court of India propounded the principle of implied exclusion in the *Bhatia* judgment in 2002. The relief sought in *Bhatia* was the issuance of an interim injunction for restraining the transfer/alienation of assets located in India. The governing agreement, in the case, had stipulated that the arbitration was to be held in Paris and the International Chamber of Commerce ('ICC') rules. Before the 2015 Amendment, Section 9 confined issuance of Court-ordered reliefs only to arbitrations where the place of arbitration was in India. The Court recognised that such a provision in the present case will leave the party remediless. It, thus, retained the freedom of the parties to approach the Indian Courts under Section 9 unless parties, expressly or impliedly, excluded it by agreement.²²

However, this well-intentioned decision of the Court came with the theory of implied exclusion. The Court reasoned that since the legislature had not 'specifically' provided that the provisions of Part I of ACA applied to international commercial arbitrations held out of India, the intention of the legislature was to allow parties to exclude Part-I or any provision by an 'express or implied' agreement. Not only did the Supreme Court go against the basic scheme of the ACA in reaching this erroneous conclusion,²³ but it also read an apparent conflict in a place where none had existed.²⁴

²⁰ *Bhatia International v. Bulk Trading* (2002) 4 SCC 105 (Supreme Court)

²¹ ACA (n12), s 27 (1)(a), s 37(3).

²² KS Harishankar, 'Supervisory Jurisdiction of Indian Courts in Foreign Seated Arbitration: The Beginning of a New Era or the End of Bhatia Doctrine?', (2013) 3 The Arb Brief 56 <<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1034&context=ab>> accessed 12 September 2020.

²³ See *BALCO* (n 19).

²⁴ Vidhu Gupta, 'Stretching The Limits Of Statutory Interpretation: Critical Review *Bhatia International v Bulk Trading*,

Moreover, there was no strait-jacket formula to conclude either the implied or express exclusion of Part-I. Thus even afterwards, for pre-*BALCO* arbitrations, there was a steady trend where most cases held Part-I to be excluded by implication. Such a conclusion was reached on the basis of facts and circumstances particular to each case, with emphasis upon the juridical seat of arbitration, institutional rules, and governing law of the arbitration agreement.²⁵

Furthermore, the Supreme Court, in a pre-*BALCO* arbitration, held that the principle of implied exclusion of Part-I is 'too well-settled' and 'with good reasons' to allow the Court to take any other view.²⁶

The case laws in Part III of the article show how the theory of exclusion by necessary implication, which is anchored in an illogical understanding of the objective of the ACA, has been relied on by the Indian Courts for interpreting the terms 'subject to an agreement to the contrary' mentioned under the proviso to Section 2(2). As mentioned above, under the theory, the Courts look for a presence of a foreign seat of arbitration to read an implied agreement between the parties to exclude Part-I of the ACA or any of its provisions. Such an act results in a logical inconsistency where the proviso to Section 2(2) mandates providing interim relief in aid of foreign-seated arbitrations, but the theory provides that a foreign seat law would be one of the determinative factors in reading exclusion by necessary implication. The theory of implied exclusion, propounded in *Bhatia*, is hence restored to the extent of deciding the applicability of Section 9 in foreign-seated arbitrations. Although there have not been a plethora of judgments on this issue, a distinction can still be sketched out in the rationale applied by the Courts. Hence, a grey area exists and it requires immediate intervention so to ensure the ambitious pro-arbitration regime that India is committed to develop.

In *Raffles Design Int'l India Pvt. Ltd. v Educomp professional Education Ltd. & Ors.*²⁷ the aggrieved petitioner approached a Singapore-seated SIAC tribunal as per the agreement between the parties²⁸.

(2010) 5 Nalsar Stud. L. Rev 140 <<http://www.commonlii.org/in/journals/NALSARStuLawRw/2011/6.html>> accessed 12 September 2021.

²⁵ The arbitral agreement in *Dozco India (P) Ltd. v Doosan Infracore Co. Ltd.* (2011) 6 SCC 179 stipulated place of arbitration in Seoul and rules applicable as per ICC rules of arbitration. The Court found this sufficient to hold that parties intended to have Seoul only as the seat of their arbitration, thereby impliedly excluding application of Part-I; In *Reliance Industries Limited and Anr v Union of India* (2014) 7 SCC 603 where London was chosen as the seat of the arbitration and the arbitration agreement was to be governed by the laws of England, the Court held that a combination these factors meant that parties had expressly excluded Part-I; In *Videocon Industries Ltd. v Union of India and Anr* (2011) 6 SCC 161 the fact that arbitration agreement was to be governed by the laws of England led to the conclusion by the Court that Part-I was excluded; In *Harmony Innovation Shipping Ltd. v Gupta Coal India Ltd. and Anr* (2015) 9 SCC 172 London was decided as the seat of arbitration after analysing the terms in its agreement and on that basis Part-I was excluded.

²⁶ *Eitzen Bulk A/S and Ors. v Ashapura Minechem Ltd. and Ors.* (2016) SCC OnLine SC 523 (Supreme Court)

²⁷ *Raffles Design Int'l India Pvt. Ltd. v Educomp professional Education Ltd. & Ors* (2016) SCC OnLine Del 5521 (Delhi HC) (hereafter, '*Raffles*').

²⁸ *ibid* [64]-[65].

However, pending the constitution of the tribunal, the petitioner obtained an interim relief from an emergency arbitrator. The respondent acted in contravention of the emergency award and, consequently, the petitioner sought interim relief before the Delhi High Court.

On the issue of whether the parties had impliedly excluded the application of any provisions of Part-I, the Court took into consideration the objective behind the addition of proviso to Section 2(2) by the 2015 Amendment and questioned ‘whether an agreement between the parties that a foreign law would be applicable to the arbitration, implicitly excludes the applicability of Section 9 of the Act’.²⁹ The Court came to the conclusion that it does not, and, by a conjoint reading of the proviso to Section 2(2) and the SIAC Rules,³⁰ inferred that it was open for the parties to approach national Courts (including Courts other than Singapore) to seek provisional relief before the constitution of an arbitral tribunal.³¹ However, the Court held that it could not enforce interim measures that were ordered by an arbitral tribunal seated outside its jurisdiction, as no provision in the ACA provided for the same. But, the Court held that it can still award a similar relief on merits under a separate Section 9 application.³²

Another case here is *Ashwani Minda v U-Shin Ltd. and Others*³³. The applicant, in this case, sought interim relief under a Section 9 petition before the Delhi High Court. Like *Raffles*, the applicant, in this case, approached an EA. However, unlike *Raffles*, the relief sought was not granted by the EA. On the issue of whether there was an exclusion of applicability of Section 9 by the parties, the Court first threw light on the arbitration clauses and decided it was so. The arbitration clause is as follows:

[...] 9.5. In case of failure to reach a settlement, such disputes, controversies or differences shall be submitted to the arbitration under the Commercial Rules of the India Commercial Arbitration Association to be held in India if initiated by YUSHIN, or under the Rules of the Japan Commercial Arbitration Association (JCAA) to be held in Japan if initiated by JAY.³⁴

The Court stated since the arbitration was initiated by JAY, the above clause shows the parties’ intention to exclude Part-I by choosing Japan and JCAA as the seat and the institutional rules

²⁹ *ibid* [85].

³⁰ Singapore International Arbitration Centre Rules 2016, r 26.3. Rule 26.3 of SIAC: A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these rules [rule 30.3 of SIAC rules, 2016 is similarly worded to rule 26.3.].

³¹ In a similar case, *Aitreyia Limited v Dans Energy Pvt Ltd & Ors.* (2012) SCC OnLine Del 5585 the Delhi High Court had allowed a petition for s 9 as the agreement between the parties allowed them to approach any Court of competent jurisdiction for a suitable interim relief.

³² *ibid* [100]-[101].

³³ *Ashwani Minda v U-Shin Ltd. and Others* (2020) SCC OnLine Del 1648 (Delhi HC) (hereafter, ‘*Ashwani Minda*’).

³⁴ *ibid* [46].

respectively. Further, the Court reasoned that since the JCCA rules entailed a ‘detailed mechanism for seeking interim and emergency measures’, including deeming an emergency relief to be an interim relief once the arbitral tribunal was duly instituted, the parties were bound by any such emergency relief if they had opted for the same.³⁵ Hence, the Section 9 petition was not held maintainable.

The decision in *Ashwani Minda* case was appealed before a division bench of the Delhi High Court.³⁶ The division bench, however, did not go into the question of implied exclusion and left the question to be answered in future proceedings.

In *Ashwani Minda*, the learned Single Judge adopted a regressive approach. The judgment distinguished the case from *Raffles* on the basis of two factors: i) The applicable rules in *Raffles* (SIAC) allowed the parties to approach Indian Courts, and ii) in *Raffles*, there was no clause in the agreement that excluded the applicability of Section 9.³⁷ In the view of the authors, this reasoning does not hold water. The first reason provided- that SIAC rules allow approaching Indian Courts and JCAA rules do not as it provides an elaborate mechanism for seeking interim reliefs – hinges on the choice of institutional rules. This does not indicate the parties’ intention to impliedly exclude the application of proviso of 2(2) in any way. The authors say so as the very purpose of amending 2(2) was to provide parties to a foreign-seated arbitration (governed or not governed by a type of institutional rule) the option of interim relief(s) if the assets or properties were to be situated in India.³⁸

The second reason- there being no clause in *Raffles* that excluded the applicability of Section 9- logically means that there was a clause in the relevant agreement in the *Ashwani Minda* Case, which expressly or impliedly barred the application of Section 9. However, there can be no conclusive determination from the arbitration clause in *Ashwani Minda* case (mentioned above) that the proviso to Section 2(2) was implicitly sought to be barred by the parties.

In *Archer Power Systems Private Limited v Kohli Ventures Limited and Ors*,³⁹ the relevant clause in the agreement expressly conveyed the intention to exclude the applicability of the *complete* ACA.⁴⁰ The arbitration was to be governed by the ICC rules and was seated in London.⁴¹ By virtue of such an

³⁵ Commercial Arbitration Rules (Japan Commercial Arbitration Association), art 77.5

³⁶ *Ashwani Minda v U-Shin Ltd. and Others* (2020) SCC OnLine Del 721 (Delhi HC)

³⁷ *Ashwani Minda* (n 34) [61].

³⁸ Report No. 246 (n 17).

³⁹ *Archer Power Systems Private Limited v Kohli Ventures Limited and Ors* (2017) SCC OnLine Mad 36458 (Madras HC) [hereafter, ‘*Archer*’].

⁴⁰ *ibid* [8(d)(ii)]. (‘The Indian Arbitration Act will not apply to the Arbitration Proceedings as the law applicable to such Arbitration shall be British law. To enforce the decision of Arbitrator the parties shall be free to take support of Indian Courts and Judicial system in terms of international law.’)

⁴¹ *ibid* [11(r)].

agreement, the interim relief under Section 9 was not granted since the proviso to Section 2(2) was deemed to be impliedly excluded. However, a later statement in the same clause depicted that parties had allowed the operation of provisions of Part-II of the ACA, for supporting the enforcement of the final award in India. The Court made an interesting observation that '[...] if a section 9 application is filed in the instant case, post award, the dynamics and dimensions of applicable law may change'.⁴² This meant that if the final foreign award was sought to be executed in India, any deliberation concerning the grant of an interim measure could have concluded differently. This aggravates complexity and introduces an unnecessary distinction with respect to pre-award and post-award interim measures. The ramifications of not granting an interim award at both the contemplated stages are similar when it comes to the risk of the rights of claimant being prejudiced or the subject matter getting dissipated.

III. ADVOCATING FOR A PURPOSIVE INTERPRETATION OF PROVISO TO SECTION 2(2) OF ACA

As discussed by cases in the previous section of this paper, the approach of mechanically inferring implied exclusion of Section 9 when the seat was located in a foreign nation and the choice of curial law was not Indian law, was finally not followed by the Bombay High Court.⁴³ The Court held that as there was 'an absence of a specific agreement to the contrary', the operation of provisions of Section 9 wasn't excluded, notwithstanding the fact that it was a foreign-seated arbitration.⁴⁴ The only significant asset of the counterparty to the claim in the present case was a helicopter located within the jurisdiction of the Court. The Court allowed the petition and highlighted that such a stand was important 'to prevent dissipation and diversion of assets'.⁴⁵ Thus, the Court did not analyse the arbitration agreement between the parties to decide whether there was any implied exclusion of Section 9 at all.

A similar approach was seen in the case of *Actis Consumer Grooming Products Limited v Tigaksha Metallics Private Limited & Ors.*⁴⁶ In the case, the Himachal Pradesh High Court, while deciding upon its jurisdiction to grant an interim relief for assisting an arbitration being conducted in Geneva (and chosen institutional rules being LCIA), stressed on the fact that as subject matter of the dispute was

⁴² *ibid* [48].

⁴³ *Aircon Beibars FZE v. Heligo Charters Pvt. Ltd* (2018) SCC OnLine Bom 1388 [hereafter, '*Heligo*'].

⁴⁴ *ibid* [15].

⁴⁵ *ibid* [16].

⁴⁶ *Actis Consumer Grooming Products Limited v Tigaksha Metallics Private Limited & Ors.* (2020) SCC OnLine HP 2234, (Himachal Pradesh HC) [hereafter, '*Actis*'].

located within its territory, it was well within its power to entertain the application.⁴⁷ Thus, the Court did not take upon the task of deciphering any contrary intention, having the effect of impliedly excluding the proviso to Section 2(2), from the terms in the agreement. The reasoning of the Court was—

Part-I of the Arbitration Act shall have no applicability in present case, but in aforesaid facts and circumstances, for insertion of proviso to Section 2(2), w.e.f. 23.10.2015, Sections 9, 27, 31(1)(a) and 37(3) of the Arbitration Act are applicable in present case. The property, subject matter of the arbitral proceedings is situated within jurisdiction of this High Court. Therefore, this Court has jurisdiction to entertain the present petition, filed under Section 9 of the Arbitration Act.⁴⁸

From a perusal of these two cases (*Heligo* and *Actis*), it is seen that an approach complementary to the objective of the amendment was employed. The Courts pro-actively lent their support to protect assets and subject matter falling within their realms, thereby eliminating any chance of detriment being caused to them.

Interestingly, the Delhi High Court in *Goodwill Non-Woven (P) Limited v Xcoal Energy & Resources LLC*⁴⁹ went one step ahead.⁵⁰ In the instant case, the petitioner's (Indian Entity) claim was for the refund of a certain amount remitted under a contract towards the respondent (Foreign Entity). As there were chances that the respondent would obstruct satisfaction of any decree which may be passed in favour of the petitioner, the petitioner moved the Court under Section 9 of the ACA to secure the amount in dispute through a bank guarantee which would be issued by a nationalised bank in India. The respondent contended that the proviso to Section 2(2) was merely an asset-based jurisdiction and Courts in India did not possess the power to grant interim reliefs when there were no assets of the counterparty located within its territory. The Court rejected the contention of the respondents. It held that the nature of reliefs enlisted under Section 9 'do not presuppose existence of asset(s) in India'⁵¹ and that Section 9 petition was held maintainable.⁵² It further explained that if the Indian party succeeded in this arbitration, it could conveniently invoke such a bank guarantee in satisfaction of the arbitral award.⁵³ Hence, the interpretation extends the scope of proviso to even those cases where there

⁴⁷ *ibid* [31]-[32].

⁴⁸ *ibid* [32].

⁴⁹ *Goodwill Non-Woven (P) Limited v Xcoal Energy & Resources LLC* (2020) SCC OnLine Del 631 (Delhi HC)

⁵¹ *ibid* [48, 49]. Few instances highlighted by the Court were- availability of an asset in case of appointment of a guardian for a minor or securing the amount in dispute by directing the foreign party to deposit the same in Court, securing the amount in dispute in arbitration like directing the foreign party to furnish a bank guarantee in favour of the Indian party etc.

⁵² *ibid* [50].

⁵³ *ibid* [49].

are no assets of a counterparty to the claim located in India. There was no contention by the respondents that any agreement between the parties impliedly excluded the operation of proviso to Section 2(2).

It can be seen that there are divergent opinions of the Indian Courts on the grant of interim reliefs in aid of foreign-seated international commercial arbitration.

In the opinion of the authors, the approach of the Courts in *Heligo* and *Actis* puts forward the correct reasoning as it advances the objective of the 2015 Amendment. The Courts in these two cases avoided a remediless situation for the parties and took into consideration the fact that preservation of the subject matter (located in India) was essential. Even in *Raffles*, the Court awarded an alternative by allowing the parties to apply for the relief separately. Hence, real justice was sought to be done instead of a ‘cut-and-dried’ approach as taken by Courts in other instances.

In cases like *Ashwani Minda* and *Archer*, as noted above, the Court clearly did not consider the purpose for which the amendment to Section 2(2) was brought, which was to not leave parties remediless when properties or assets may be in India. It embraced the theory of implied exclusion, similar to what was employed by Courts in the *Bhatia* regime. While the principle favouring the implied exclusion of Part I helps parties in pre-*BALCO* arbitrations to exclude the applicability of Part I, the same rule does not work in their favour when Courts gather an implied intention to exclude the applicability of Section 9 as well. The objective of the 2015 Amendment, as iterated above, was to make Section 9 available in foreign seated arbitration which logically requires the Court to take an assumption in favour of including the applicability of Section 9 in such arbitrations. It is thus incumbent upon the Supreme Court to address this situation cohesively by laying down a clear and uniform position regarding grant of interim reliefs in foreign-seated arbitrations.

IV. CROSS-JURISDICTIONAL ISSUES AND THE WAY FORWARD

The explanatory note to the 2006 revisions to the UNCITRAL Model Law states that ‘the existence of an arbitration agreement does not infringe on the powers of the competent Court to issue interim measures and that the party to such an arbitration agreement is free to approach the Court with a request to order interim measures’.⁵⁴ This has given rise to a ‘free-choice model’ where parties are free to

⁵⁴United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, *With amendments as adopted in 2006* (2006) 23 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed 23 July 2020..

choose either the Courts or arbitral tribunals for interim reliefs. However, in order to curb judicial intervention when an arbitral tribunal has been constituted and to protect party autonomy, the ‘Court-subsidiarity model’, which reflects a pro-arbitration attitude, has come to the fore. It allows national Courts to provide reliefs only when the arbitral tribunal has neither been fully constituted nor has it been able to entertain such requests.⁵⁵ Further deviating from the aforementioned model, many jurisdictions have embraced a ‘flexible Court-subsidiarity model’ where the national Courts are empowered to provide reliefs even after the arbitral tribunal is in place; though, in narrow circumstances.⁵⁶

After the 2015 Amendment introduced Section 9(3) in the ACA, India has gone from adopting a free-choice model to following a flexible Court-subsidiarity approach. Under Section 9(3) of the ACA, Indian Courts are proscribed to entertain an interim relief application unless the remedy sought by an arbitral tribunal proves to be inefficacious. In the following part, the authors will take the examples of two other jurisdictions- England and Singapore- that follow a similar flexible model of Court subsidiarity,⁵⁷ and throw light on the method(s) adopted by these jurisdictions to tackle the issue of providing interim reliefs in foreign-seated arbitrations, without giving rise to problems in the conflict of jurisdictions.

A. England

Under Section 44 of the (English) Arbitration Act, 1996, Courts in England are, subject to strict limitations, authorized to issue provisional remedies with respect to arbitral proceedings.⁵⁸ A party is to approach the Court directly only in cases of urgency⁵⁹ and the Court may act only to the extent that the tribunal has no power or is unable for the time being to act effectively.⁶⁰ Section 44 could be exercised even where the seat of the arbitration is outside England & Wales⁶¹, with the rider that when arbitration with a foreign seat makes it inappropriate⁶² to grant relief, the Courts can refuse to grant

⁵⁵ France and Brazil follow this model. See William Wang, ‘International Arbitration: The Need for Uniform Interim Measures of Relief’ (2003) 28 *Brook J. Int’l L.* 1059, 1085.

⁵⁶ Rachael Kent and Amanda Hollis, ‘Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration’ in Dora Ziyeva (ed), *Interim and Emergency Relief in International Arbitration* (Juris Publishing 2015).

⁵⁷ Jan K. Schaefer, ‘New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German, and Hong Kong Law Compared’ [1998] *EJCL*.

⁵⁸ Guy Pendell, ‘England and Wales’ in Lawrence W. Newman and Colin Ong (eds), *Interim Measures in International Arbitration* (Juris Publishing, 2014).

⁵⁹ Arbitration Act 1996 (United Kingdom), s 44 (3) [hereafter ‘English Arbitration Act’]

⁶⁰ *ibid*, s 44 (5).

⁶¹ *ibid*, s 2(3). Also See Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996) 280-281.

⁶² Robert Merkin states that ‘inappropriateness depends on two factors: (a) whether English law has been chosen as the procedural law; and whether the only hope of assistance is provided by English Courts; or (b) where although the arbitration has no connection with England, there is evidence in England which needs to be preserved, or one of the parties has assets

such relief. Accordingly, local Courts have developed a test to determine appropriateness – the primary requirement of which is to demonstrate a link with the English jurisdiction for parties in a foreign seated arbitration to get interim relief.

In *Econet Wireless Ltd v VEE Networks Ltd and Ors*⁶³, the respondents filed an application to set aside a freezing injunction ordered in favour of the claimant. While the forum of the arbitration in the above case was Nigeria, the dispute was to be resolved in accordance with the UNCITRAL Rules. The Court noted that the respondents had no connection with the English jurisdiction and their assets weren't located within the jurisdiction either.⁶⁴ Thus, it ordered the injunction to be lifted. The Court went on to say that power of an English Court is a 'long-arm' jurisdiction and the parties seeking relief have to justify any application that is made to an English Court rather than the Court at the seat of arbitration.⁶⁵

The above principle is recognized in a catena of cases.⁶⁶ In *Mobil Cerro Negro v Petroleos de Venezuela*, the claimant made an application for a freezing order in order to assist the New-York seated arbitration. Rules of Conciliation and Arbitration of the ICC were chosen by the parties to resolve the dispute. The High Court observed:

[...] this Court will only be prepared to exercise discretion to grant an application in aid of foreign litigation for a freezing order affecting assets not located here if the respondent or the dispute has a sufficiently strong link here or...there is some other factor of sufficient strength to justify proceeding in the absence of such a link. (emphasis supplied).⁶⁷

The Court declined to grant a freezing order and suggested that the appropriate place for the plaintiff to seek a freezing order was Venezuela, where most of its assets were situated. Moreover, the

within the jurisdiction which can be frozen by means of Mareva Injunction'. See Robert Merkin, *Arbitration Act 1996* (Lloyds Commercial Law Library 2000) 102.

⁶³ *Econet Wireless Services Ltd v Vee Networks Ltd* [2006] EWHC 1568 (Comm).

⁶⁴ *ibid* [16].

⁶⁵ *ibid* [19]. See, generally, Milo Molfa, Adam Grant et al., 'Challenges in the Taking of Evidence in Arbitrations Seated in Mainland China' (2019) 36 J Intl Arb 315 <https://www.clearygartlieb.com/-/media/files/joia_challenges-in-the-taking-of-evidence-in-arbitrations-seated-in-mainland-china-pdf.pdf> accessed 18 July 2020.

⁶⁶ *Company 1 v Company 2* [2017] EWHC 2319 (QB); *Petrochemical Logistics Ltd & Axel Krueger v PSB Alpha AG & Konstantinos Gherisos*, [2020] EWHC 975 (Comm); *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC [54]; *Commerce & Industry Co. of Canada and Another v Certain Underwriters at Lloyds of London*, [2002] 2 All ER (Comm) 204. It is noted that where there is little or no contact with the forum in which a provisional measure is sought, state Courts are generally reluctant to grant such measure.

⁶⁷ *Mobil Cerro Negro v Petroleos de Venezuela* [2008] 1 Lloyd's Rep 684 [119] (emphasis added).

observation shows that the English Court stepped in to provide interim relief only when there was a sufficient link with the English jurisdiction.

Satisfying the test for sufficient connection depends on the facts of any given case⁶⁸ and various factors are weighed in to provide relief in foreign-seated arbitrations. Some of these factors are:

- a) Defendant/Respondent has assets within the English jurisdiction.⁶⁹
- b) Defendant/Respondent is a resident or domiciled in England. Proving nationality alone has not been held to be a sufficient connection⁷⁰; instead, a long-term connection with the jurisdiction has been sought by the Courts.
- c) Governing law of arbitration is English law.⁷¹
- d) The Court of the seat of arbitration is seized of the matter and could more appropriately grant the relief being sought than the English Court.⁷²
- e) Risk of dissipation of the subject matter of the dispute.⁷³

While the first three factors are relevant in deciding the appropriateness of issuing relief in a foreign-seated arbitration, the last two factors relate to satisfying the tests mentioned under Sections 44(3) and 44(5) of the Act, i.e. of urgency, power of the arbitrator and effectiveness of the arbitrator's order.

A conspectus of the decisions and factors laid above reflects that the English Court gives regard to all the circumstances of the case and particularly focuses on whether there are any links between the dispute and England⁷⁴. In contrast, Indian Courts, as seen in Part 2, anchor their decisions of granting or not granting interim relief in the parties' choice of a foreign seat of arbitration and arbitral rules.

The scope of an English Court in granting interim orders is limited to matters of urgency and which are necessary to preserve the assets or evidence. Nonetheless, the principles employed in deciding the

⁶⁸ James Carter and others 'A jurisdiction too far: The English Commercial Court declines to continue freezing injunctions in support of foreign and English seated arbitrations' (DLA Piper, 26 June 2020) <<https://www.dlapiper.com/en/chile/insights/publications/2020/06/the-english-commercial-court-declines-to-continue-freezing-injunctions/>> accessed 18 July 2020.

⁶⁹ The English Courts have issued relief in cases when there were no assets located within the jurisdiction when the seat of the arbitration was London. See *Cetelem SA v Roust Holdings Limited* [2005] EWHC 300 (QB); *Belair v Basel* [2009] EWHC 725 (Comm); *U&M Mining Zambia Ltd v Konkola Copper Mines Plc* [2014] EWHC 3250 (Comm).

⁷⁰ *Petrochemical Logistics Ltd* (n 67) [58].

⁷¹ *Company 1* (n 67) [90].

⁷² *ibid* [89]-[92]. Also See Tom Yates and Daniel Relton, 'English Court considers when it is appropriate to grant injunctive relief in aid of a foreign seated arbitration' (Global Arbitration News, 17 January 2018) <<https://globalarbitrationnews.com/english-court-considers-when-it-is-appropriate-to-grant-injunctive-relief-in-aid-of-a-foreign-seated-arbitration/>> accessed 19 July 2020.

⁷³ *Petrochemical Logistics Ltd* (n 67) [42], [49]; See *Macleish Littlestone Cowan v Hajibassi* [2006] All ER (D).

⁷⁴ Yates (n 74).

issuance of an interim measure can guide the Indian Courts to tackle issues of granting interim reliefs in foreign-seated arbitration.

Interestingly, the 176th Law Commission of India's Report of 2001⁷⁵, which was issued an year before the *Bhatia* case (and thus before the test of implied exclusion), recommended Section 2(2) of the ACA to be suitably amended so that provisions of Sections 9 and 27 are applicable to international arbitrations where the place of arbitration is either outside India or is not specified in the agreement.⁷⁶ The suggestion was along the lines of Section 2(3) of the (English) Arbitration Act⁷⁷, and one could only imagine how this amendment would have shaped the arbitration landscape in India had it seen the light of the day

⁷⁵Law Commission of India, *The Arbitration and Conciliation (Amendment) Bill, 2001* (Law Com No 176, 2001)

⁷⁶ *Ibid*, 28 [2.1.7].

⁷⁷ English Arbitration Act (n 61), S. 2(3). Section 2(3) is as follows: "The powers conferred by the following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined—

(a)section 43 (securing the attendance of witnesses), and

(b)section 44 (Court powers exercisable in support of arbitral proceedings);

but the Court may refuse to exercise any such power if, in the opinion of the Court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so."

B. Singapore

In Singapore, the International Arbitration Act ('IAA') governs international arbitrations. Section 12A, inspired by Article 17J of the 2006 amendments to the UNCITRAL Model Law,⁷⁸ was introduced to the IAA through the International Arbitration (Amendment) Act, 2009. It empowered Singapore Courts to lend curial assistance in support of arbitration as it has for *in relation to an action or a matter in the Court*. In line with Section 44 of the (English) Arbitration Act 1996⁷⁹, Courts' powers under 12A are also limited. A Court intervenes in cases of urgency and acts to the extent where the arbitral tribunal has no power or is unable for the time being to act effectively.⁸⁰ Courts have the discretion to refuse interim orders in support of a foreign arbitration if they consider it to be 'inappropriate'.⁸¹

The 'inappropriate' test has been criticized for its uncertainty and ambiguity.⁸² In this regard, the Ministry of law, in its 'Consultation Paper on the International Arbitration (Amendment) Act, 2009 Bill', claimed Section 12A standard as an 'added safeguard to give the Court sufficient flexibility to deal with complicated international disputes'⁸³. It further clarified in a response that the discretion of Courts to determine appropriateness will be guided by the principle of comity.⁸⁴ The Ministry of Law has avoided enunciating the principle of comity in the legislation. However, the said principle, which requires that a jurisdiction recognizes and respects the jurisdiction of foreign and transnational legal orders, would mean that the Singapore Courts exercise caution in granting interim relief orders in aid of those foreign arbitrations that would involve concerns of comity with Courts of foreign nations.

Before the incorporation of Section 12A, the position of Singapore Courts on this issue was laid down in *Swift-Fortune Ltd v Magnifica Marine SA*. The Singapore Court of Appeal had held that Singapore Courts do not have the power 'to grant interim measures, including Mareva interlocutory relief, to assist foreign arbitrations.'⁸⁵

⁷⁸ UNCITRAL Model Law (n 7), art 17J.

⁷⁹ Ministry of Law (Singapore) 'Consultation Paper on the Draft International Arbitration (Amendment) Bill 2009' (2009) <<https://www.mlaw.gov.sg/files/news/press-releases/2009/07/linkclick17e0.pdf>> accessed 20 July 2020 [3(a)].

⁸⁰ International Arbitration Act, 1994, s 12A (4)-(6) ['hereafter IAA']

⁸¹ *ibid*, s 12A(3).

⁸² Mahdev Mohan, 'The New International Arbitration (Amendment) Bill – A Broader Framework for Interim Relief or Just a Tune-Up?' (2010) 22 Sing Ac LJ 299, 303; See Ronald Wong, 'Interim Relief in Aid of International Commercial Arbitration – A Critique on the International Arbitration Act' (2012) 24 Sing Ac LJ 501, 523.

⁸³ Consultation Paper (n 81) para 4.

⁸⁴ Ministry of Law (Singapore) 'Responses to Public Feedback Received on International Arbitration (Amendment) Bill' (2009) <<https://www.mlaw.gov.sg/files/news/announcements/2009/09/linkclick1e3a.pdf>> accessed 21 August 2020.

⁸⁵ *ibid* [59].

This position was statutorily reversed when Section 12A was introduced in the IAA. The Ministry of Law explained that a justiciable right before a Singapore Court is not a prerequisite⁸⁶ for a plaintiff to claim an interim relief.⁸⁷ It is worth noting here that departure from the requirement of a ‘justiciable/recognizable cause of action under Singapore law’⁸⁸ reflects Singapore’s commitment towards providing curial support in aid of foreign arbitrations as it is very much possible that the jurisdictions-where the cause of action arises, where the arbitration takes place and where the location of assets or evidence is – are three different countries.

In the case of *Five Ocean Corporation v Cingler Ship Pte Ltd*,⁸⁹ the Singapore High Court considered an application for an order of sale of cargo on board a vessel in aid of a Singapore-seated arbitration. The Court determined the presence of dual requirements of urgency and necessity⁹⁰ pursuant to Section 12A (4) of IAA and stated that such situations existed⁹¹ and granted the application. Though in this particular arbitration, the seat was located in Singapore itself, the judgment went on to explain the scope and reasons behind the incorporation of Section 12A. Section 12A can be employed by Singapore Courts in assisting foreign seated arbitrations was clearly stated: :

The main legislative intention behind the enactment of s 12A was to give the Court powers over assets and evidence situated in Singapore and to make orders in aid of arbitrations that were seated in Singapore and overseas.⁹²

While the above case of 2015 portrays the intention behind the enactment of Section 12A, the then Law Minister of Singapore in 2009 had addressed one of the important reasons behind allowing interim orders to be passed by Singaporean Courts in aid of foreign arbitration. He remarked that non-

⁸⁶ Responses (n 85) 4. See Explanatory statement to the International Arbitration (Amendment) Bill 2009 <<https://www.mlaw.gov.sg/files/news/announcements/2009/09/linkclick83db.pdf>> accessed 21 August 2020, 8.

⁸⁷ *Swift Fortune* (n 86) [96]: ‘[...] Section 4(10) of the Civil Law Act of Singapore (which provides for injunctive orders by Courts) does not confer any power on the Court to grant a Mareva injunction against the assets of a defendant in Singapore unless the plaintiff has an accrued cause of action against the defendant that is justiciable in a Singapore Court’. Also See *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854.

⁸⁸ Responses (n 85) 4

⁸⁹ *Five Ocean Corporation v Cingler Ship Pte Ltd* [2015] SGHC 311.

⁹⁰ IAA (n 82) s12A (4) : ‘If the case is one of urgency, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as the High Court or Judge thinks necessary for the purpose of preserving evidence or assets’.

⁹¹ *Five Ocean Corporation* (n 91) [56]. Deteriorating health of the crew members on board the vessel, lack of fresh supplies, overheating of the cargo, etc. were taken into consideration.

⁹² *ibid* [39] (emphasis added).

enforcement of foreign arbitral tribunal's orders in Singapore make a case for allowing limited Court intervention by making an application under section 12A.⁹³

Similarly, the lack of enforceability of orders passed by a foreign-seated tribunal was one of the main reasons behind justifying grant of interim order(s) by an Indian Court in cases where the seat of the arbitration is outside India.⁹⁴ An Indian Court should, therefore, heed the purpose behind the 2015 Amendment and rule accordingly in cases involving grant of interim reliefs.

In the context laid down above, it can be safely concluded that the two most popular destinations for international commercial arbitration – England and Singapore – have made interim measures of protection available to parties in a foreign seated arbitration, subject to necessary juridical requirements of the respective jurisdictions. India, a common law country, with its arbitration law dating back to more than two decades, has made substantial progress to aid international commercial arbitration by introducing the 2015 Amendment to the ACA. However, the repercussions of the theory of implied exclusion, propounded in *Bhatia* case, are still being felt by the Indian Judiciary.

V. THE CASE OF EMERGENCY ARBITRATORS

The orders of not only a foreign Court or a foreign tribunal, but even those of emergency arbitrators face uncertainty of enforcement in India. An emergency arbitrator is a person, usually appointed by the arbitral institution involved, who awards or orders interim measures that have effect until the formation of a tribunal.⁹⁵ These emergency arbitrators have become an increasingly popular alternative⁹⁶ for parties to seek interim relief and are chosen over Court proceedings which may, in some cases, be excessively lengthy.⁹⁷ Moreover, provision for emergency arbitrators limits the intervention of Courts.

⁹³K Shanmugam, Law Minister, 'Second Reading Speech on the International Arbitration (Amendment) Bill' (19 October 2009) <<https://www.mlaw.gov.sg/news/parliamentary-speeches/second-reading-speech-by-law-minister-k-shanmugam-on-the-international-arbitration-amendment-bill>> accessed 21 August 2020 [8]. It may be noted that other cases where the Court can exercise such power 'include a party applying to Court for relief before the arbitral tribunal has been fully or properly constituted; a party applying to Court for relief against a non-party to the arbitration, which an arbitral tribunal has no power over; and where the arbitral tribunal is unable to hear an urgent application for interim relief sufficiently quickly'.

⁹⁴ Report No. 246 (n 17).

⁹⁵ Nikhil J. Variyar, 'Tribunal Ordered Interim Measures And Emergency Arbitrators: Recent Developments Across The World And In India' (2015) 4 Ind J. Arb. L. 34, 36.

⁹⁶ The International Chamber of Commerce, art 29; Hong Kong International Arbitration Centre, sch 4; Singapore International Arbitration Centre, sch 1; Stockholm Chamber of Commerce, app II; Swiss Chambers of Arbitration Institution, art 15 (7), and London Court of International Arbitration, art 9B. These contain provisions regulating appointment and decision making of the emergency arbitrator.

⁹⁷ Rania Alnaber, 'Emergency Arbitration: Mere Innovation or Vast Improvement' (2019) 35 Arb Intl 441.

It resolves the inconvenience a party may face with the laws of the country where the interim measures are to be sought and enforced.⁹⁸

While UNCITRAL Model Law contains provision 17H for recognition and enforcement of interim measures, it does not include emergency arbitrators within the definition of the arbitral tribunal. This non-inclusion not only leaves open the question of whether an emergency arbitrator falls within the ambit of the definition,⁹⁹ but also makes it unclear whether the UNCITRAL Model Law allows for an order of an emergency arbitrator to be enforced. In India, the 246th Report recommended including an emergency arbitrator within the definition of an arbitral tribunal¹⁰⁰ when the arbitration is conducted under the rules of an institution providing for the appointment of an emergency arbitrator. However, this recommendation was not given effect in the 2015 Amendment to the ACA.

Thus, orders passed by a foreign arbitral tribunal, a foreign Court in aid of international commercial arbitration, and reliefs ordered by Emergency Arbitrators are not enforceable under the current legislative framework of India. But, we have seen how in *Raffles* case, the Court observed that it can award a similar interim relief (granted by the foreign tribunal) under a separate petition under Section 9. In *Plus Holdings Ltd. v Xeitgeist Entertainment Group Ltd. & Ors.*¹⁰¹ the Bombay High Court noted that the petitioner's rights *in regard to the film in question* were *sufficiently recognized in the Emergency Award*, and thereby proceeded to grant an *ad interim* injunction in the petitioner's favour. Though the Section 9 petition was considered *de novo*, the Court reasoned that the emergency award still held a persuasive value. However, such instances don't reduce the importance of an effective enforcement regime, which is required to address the lacuna once and for all.

VI. CONCLUSION

In normal circumstances, the apt forum for seeking interim reliefs would be Courts of the seat of arbitration. However, when assets are located in a different jurisdiction, a party often has no remedy

⁹⁸ Variyar (n 98); See Patricia Louise Shaughnessy, 'Chapter 32: The Emergency Arbitrator' in Patricia Louise Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator* (Kluwer Law International, 2017) 339-348.

⁹⁹ UNCITRAL Model Law (n 7) art 17H: 'An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent Court irrespective of the country in which it was issued, subject to the provisions of article 17I'.

¹⁰⁰ ACA (n 12) s. 2(1)(d).

¹⁰¹ *Plus Holdings Ltd. v Xeitgeist Entertainment Group Ltd. & Ors* (2019) SCC OnLine Bom 13069 (Bombay HC)

but to approach the Courts of that country.¹⁰² The current legal framework in India is not well-equipped to deal with such situations. There is no set of uniform and established principles that guide the Indian Courts while dealing with questions of enforcement of foreign interim orders. Moreover, when a relevant law of the country where a party seeks to enforce an interim order does not recognise such orders, a party may have to directly apply before the municipal Court of that country as per the applicable arbitration law.

In India, the 2015 Amendment provided a remedy and allowed parties to approach the Indian Courts to seek interim reliefs in aid of foreign-seated arbitrations, provided that the arbitral award from such arbitrations is enforceable and recognised under the provisions of Part II of the ACA. However, due to the omission of the word 'express' in the phrase 'subject to an agreement to the contrary' of the proviso to Section 2(2) of the ACA by the legislature, the Courts in India came to rely on the theory of implied exclusion to decide whether an implied exclusion of Section 9 of the ACA can be read into the arbitration agreement. This adjudication was done by analysing the law of the country in which the arbitration is seated, institutional rules applicable to the arbitration, and the law governing the arbitration agreement.

The application of the theory of implied exclusion in cases related to the grant of interim reliefs under the proviso to section 2(2) has, thus, breathed new life into an uncertainty in a similar way as the rulings in the *Bhatia* judgment- regarding the implied exclusion of Part-I of the ACA in foreign-seated arbitrations- did.

This uncertainty could be avoided if the Courts in India desist from going back to the pre-*BALCO* period and consider the scheme of the ACA, the objective behind the 2015 Amendment, and the purpose of granting interim reliefs in a foreign-seated arbitration. Certain principles, which guide other jurisdictions, can help the Indian Judiciary lay down a more structured policy to govern the grant of interim reliefs in aid of foreign-seated arbitrations. These are as follows:

- a) English Courts are inclined to grant interim relief when assets are situated in their jurisdiction and there is an adequate risk of dissipation of assets. When the assets are not located, they focus on establishing a sufficient link between the parties, the contract or the arbitration agreement with the English jurisdiction. This approach is holistic and considers all the circumstances when dealing with an application concerning a request for grant of interim relief. India should consider adopting this approach. This could be done by the Judiciary which reads the same

¹⁰² Chris Parker, 'Court-ordered Interim Relief in Support of 'Foreign' Arbitrations in Hong Kong, Singapore and England' (2007) 9 Asian Disp. Rev. 82.

approach into the existing provisions. Alternatively, it could be done by the Legislature by introducing specific explanations via amendments under relevant Sections of the ACA.

- b) Singapore recognises that the arbitrator would not be able to act effectively when faced with cases of enforcement of foreign arbitral tribunal's order. It allows interim orders to be passed by its Courts in aid of foreign arbitration. Section 9(3) of the ACA allows for limited intervention of Indian Courts after an arbitral tribunal has been constituted, in circumstances where the remedy rendered by the arbitral tribunal would be inefficacious. As noted above, a foreign tribunal's order providing interim relief would not be enforceable in India, thereby rendering it ineffective. Thus, the principle underlying the requirements under Section 9(3) of the ACA should be made applicable in cases when relief is sought in aid of a foreign-seated arbitration. This can be done by allowing the parties to move an application under Section 9(3), thereby providing teeth to the foreign arbitrator-ordered interim measures.

The issue could be effectively resolved if the legislature considers rectifying its mistake by adding the word 'express' in the proviso to Section 2(2) of the ACA. Such an approach would run concurrently with the scheme and objective of the current Indian arbitration regime.

An efficient and final resolution of this issue can also be achieved by the international community at large. Akin to the New York Convention, a convention can be drafted that will harmonise and streamline the treatment and enforcement of interim measures by different nations. The authors believe that such a move will bring more stability and predictability to the practice of international commercial arbitration worldwide.