INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION – A COMPARATIVE REVIEW OF THE INDIAN EXPERIENCE, BY AJAR RAB, FOREWORD BY PROF. DR. STEFAN M. KRÖLL; PUBLISHED BY KLUWER LAW INTERNATIONAL, 2022, ISBN 9789403537351, PP. 706, PRICE €179.00

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Ajar Rab's *Interim Measures in International Commercial Arbitration – A Comparative Review of the Indian Experience*[1] is a one of a kind in academic literature on international arbitration in India. The author provides an extensive commentary on the interim measures used in international arbitration in India, offering a detailed examination of all reported Indian judgements from 1993 to 2022 concerning the subject matter.

The author critically examines the extant Indian regime against the international best practices and the United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration ["**Model Law**"].[2] He provides various insights throughout the book and concludes with suggested provisions relating to interim measures in the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"].

The need for interim measures is growing as arbitration is taking longer to finish and is becoming more complex each passing day. Even with the increasingly pro-arbitration stance of the judiciary, interim measures still form one of the areas of judicial interference. There is a need for significant legislative changes to strengthen the framework surrounding interim measures. The book has significant contemporary relevance with the release of the Draft Arbitration and Conciliation Amendment Bill, 2024[3] ["**Draft Amendment Bill**"] and the suggestions of Dr. T. K. Vishwanathan Committee ["**Vishwanathan Committee Report**"].[4]

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[1] Ajar Rab, *Interim Measures in International Commercial Arbitration – A Comparative Review of the Indian Experience*, (Kluwer Law International, 2022).

[2] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

[3] Draft Arbitration and Conciliation (Amendment) Bill, 2024, Department of Legal Affairs, (18 October 2024).

[4] Report of the Expert Committee to examine the Working of the Arbitration Law and recommend reforms in the Arbitration and Conciliation Act 1996 to make it alternative in the letter and spirit (March, 2024). Available at: https://www.livelaw.in/pdf_upload/report-of-the-expert-committee-members-on-arbitration-law-2-526205.pdf.

The review begins by summarizing the book, (**I**) and then delves into a recent debate along with the author's perspective, (**II)** it examines other key contributions, (**III**) and concludes with final thoughts. (**IV**)

I. STRUCTURE AND OVERVIEW OF THE BOOK

This comprehensive and well-structured work, is divided into a total of IV Parts and X Chapters. The author discusses Part I in VI Chapters, starting off by laying down the four corners of interim measures (Chapter I). He notably points out that the term 'interim' is often used interchangeably with other terms such as 'provisional', 'protective', and 'interlocutory' due to lack of academic discussion. To classify these measures, the author relies on two grounds – *first*, the time period and *second*, the nature and objective of the measure.

The author, then briefly discusses the history of interim measures in Indian arbitration (Chapter II) before moving on to court-ordered interim measures before arbitration proceedings. In Chapter III, the author reviews the court's power under Section 9 of the Act and the applicable standards in Indian arbitration. He finds that Indian law aligns more with the English law, rather than the Model Law. He then analyses the Supreme Court ["**SC**"] judgements[5] affirming the application of Code of Civil Procedure, 1908 ["**CPC**"] and Specific Relief Act, 1963 ["**SRA**"] to the Section 9 proceedings and argues for a guiding provision to change the position of law.

In Chapter IV, the author delves into the powers of courts during and after the commencement of arbitration proceedings. He cautions the readers about the judicial problem of demarcating the line for court assistance and intervention. The author then discusses the interim measures after the passing of the award but before enforcement and explains how there is no practical position wherein a losing party or a third party would be entitled to an interim relief under Section 9.

The author in Chapter V discusses the development surrounding interim measures in aid of foreign seated arbitrations and the various legislative challenges therein. The author concludes Part I by discussing the highly debated Anti-Suit ["**ASI**"] and Anti-Arbitration Injunctions

[5] *Adhunik Steels Ltd. v. Orissa Manganese and Mineral (P) Ltd.* (2007) 7 SCC 125; *Arvind Construction Company Pvt. Ltd. v. Kalinga Mining Corporation* (2007) 6 SCC 798.

(Chapter VI) by highlighting several concerns including the conflict between the New York Convention and the Model Law and the muddy standards of granting AAIs.

Part II of the book discusses tribunal-ordered interim measures wherein Chapter VII discusses the scope, standards, and procedure of these interim measures. He advocates for various safeguards including the duty of full disclosure, security for interim measures and regime for costs and damages due to interim measures.

In Chapter VIII, the author discusses the relief of security of costs which he argues must fall within the exclusive powers of an arbitral tribunal. He argues for the addition of an express provision in Section 17 of the Act which recognizes the tribunal's power to order security for costs, albeit with certain safeguards. The author also discusses the interrelationship of security for costs and third-party funding.

The author ends Part II by discussing the power of the tribunal to issue ASIs (Chapter IX). He discusses the different views on the source of power and appropriateness of an ASI but concludes by stating that there is a growing trend in favour of ASIs. He discusses whether an ASI should be recorded as an interim order or an interim award and explains how an ASI in the form of an interim award is likely to be set aside under Section 34(2)(b)(ii) on public policy grounds.

Part III of the book deals with the enforcement of interim measures (Chapter X). The author argues, contrary to popular conception, that the moral authority of the arbitral tribunal may not suffice for the enforcement of interim measures. He refers to various jurisdictions to show that enforcement of orders is done with court assistance. The author then proposes an effective enforcement mechanism by relying on Articles 17H and 17I of the Model Law added by the 2006 Revisions. Part IV (Chapter XI) of the book offers the author's suggestions and is examined later.

II. RAB ON COURT'S POWER UNDER SECTION 9(3)

The debate around the power of the court to grant interim measures during the arbitral proceedings has recently gained traction in the past year due to the Vishwanathan Committee Recommendations and the Draft Amendment Bill. Both the recommendations aim to reduce court intervention but differ in their approach to doing so.

During the pendency of arbitral proceedings, courts have concurrent powers to issue interim measures under Section 9(3). However, the courts cannot *entertain* an application unless the remedy under Section 17 is *inefficacious*. Due to the interpretation of the term '*entertain*' in *Arcelor Mittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.*,[6] the scope of Section 9(3) has widened leading to a larger pendency of Section 9 applications.

The SC held that *'entertain'* meant *'to consider the issues raised by application of mind'*.[7] Hence, once an application under Section 9 has been entertained, before the constitution of a tribunal, the bar under Section 9(3) shall not apply. This view renders the arbitral tribunal incapable of hearing the parties on the subject matter of the application and increases court intervention. Thus, the Vishwanathan Committee suggested replacing '*entertain'* with '*proceed with'* in Section 9(3).[8] While the suggestion solves the problem raised in *Arcelor Mittal,* it does not deal with the uncertainty in judicial interpretation of the term "*efficacious*".

The Draft Amendment Bill, in an attempt to reduce court intervention, seeks to completely oust the power of the courts from entertaining any application during the arbitral proceedings.[9] This approach seems to be excessive as it may in certain cases, lead to denial of access to justice.[10] The insights and suggestions by the author help in addressing these issues.

The author points out that it has been widely recognized that concurrent jurisdiction of the courts is not only acceptable but also necessary due to limitations of the arbitral process.[11] However, the power of the court must be restricted to adhere to the principle of 'court-subsidiarity'.[12]

The author suggests restricting the intervention of the courts only to cases where *"the arbitral tribunal has no power, or is unable for the time being to act effectively."* He relies on the English Arbitration Act[13] and the Singapore International Arbitration Act[14] which provide for

[6] *Arcelor Mittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.,* (2022) 1 SCC 712.
[7] *Id.*
[8] *Supra* note 4, at p. 43.
[9] *Supra* note 3, at p. 7.
[10] Luis Enrique Graham, *Interim Measures: Ongoing Regulations and Practices (A View from the UNCITRAL Arbitration Regime),* in A. van den Berg (ed.), *50 Years of the New York Convention* 562 (2009).
[11] *Supra* note 1, at p. 102.
[12] *Id.,* at p. 104.
[13] English Arbitration Act, 1996, S. 44(5).
[14] Singapore International Arbitration Act, 1994, S. 12(A)(6).

the same phrase. The use of such phrasing reduces ambiguity and judicial discretion. It encompasses the cases wherein the arbitral tribunal is unable to function due to death, illness, or challenge to arbitrator,[15] as well as cases where third-party rights are involved.[16]

A similar suggestion was made to the UNCITRAL Working Group to limit the court intervention to "*circumstances where either the arbitral tribunal was unable to issue interim measures or could not (for whatever reason) function in that regard effectively.*"[17] This was suggested to reduce uncertainty in the interaction between the concurrent powers of courts and arbitral tribunals. The author's suggestion draws the line between court interference and court assistance, offering a middle ground between the existing provision and the proposed changes in the Draft Amendment Bill.

The author also suggests a transitory provision obligating the court to refer any pending Section 9 applications to the arbitral tribunal upon commencement of arbitral proceedings. This provision not only resolves the problem presented by *Arcelor Mittal,* but goes a step further from the Vishwanathan Committee recommendation, to establish a transfer mechanism. The author's views on Section 9(3) provide guidance for future legislative action. He provides for a balanced solution to preserve the primacy of the arbitral process while overcoming its limitations.

III. NOTABLE ARGUMENTS AND CONTEMPORARY RELEVANCE

In a rather unconventional way, the author concludes his book in the form of suggested provisions (Part IV - Chapter XI) to streamline the law on interim measures in India and align it with the Model Law. The depth and scholarship of his suggestions can be seen through recent developments in the Indian arbitration landscape. He has suggested robust changes for court as well as tribunal-ordered interim measures. This section of the review will discuss some of his most pertinent arguments.

[15] *Energo Engg. Projects Ltd. v. TRF Ltd.,* 2016 SCC OnLine Del 6560.
[16] *State Bank of India v. Ericsson India Pvt. Ltd.,* 2018 SCC 16 617.
[17] Comm'n on Int'l Trade L., Rep. of the Working Group on Arb. and Conciliation on the Work of Its Forty-Third Session, ¶ 103 U.N. DOC. A/CN.9/589 (Oct. 12, 2005).

A. Interim Measures by Court

The author recommends a mechanism for automatic vacation of interim order granted before the constitution of an arbitral tribunal if the directions by the court to take effective steps to commence arbitration are not followed. The Vishwanath Committee Report proposed addition of section 9(2A) giving effect to the author's recommendation.[18] This provision would restrict parties from abusing the process and would increase the accountability of the person seeking the interim relief.[19]

The author argues for recognition of wider powers of courts under Section 9 and independence from procedure under CPC and SRA. The author makes an argument for providing legislative guidance on exclusion of the applicability of domestic procedural laws by referring to the adoption of Article 17J of the Model Law by New Zealand. The SC in *Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited*.[20] has held that technicalities of CPC should not restrict the court from providing relief under Section 9. This case broadened the powers of the court under Section 9 and falls in line with the author's contention. However, an express provision would go a long way in ensuring that courts under Section 9 refrain from sticking with procedural technicalities.

B. Powers of the tribunal

The author proposes the inclusion of the tribunal's power to modify, suspend or terminate interim measures granted under Section 9 in line with Article 17D of Model Law[21] as tribunals are better suited to make decisions in the interest of parties. The author makes a case for appeal against Section 9 orders to be presented before the arbitral tribunal, in case the arbitral proceedings have commenced. The present regime allows an appeal against Section 9 order under Section 37(1)(b).[22] Giving partial effect to this suggestion, the Draft Amendment Bill acknowledges the power of the tribunal to modify, confirm or vacate the Section 9 order and has proposed its addition in section 17(da).[23]

[18] *Supra* note 4, at p. 44.
[19] Law Commission of India, Report No. 176th – Arbitration and Conciliation (Amendment) Bill, 2001, (12 September 2001), available at: https://lawcommissionofindia.nic.in/cat_arbitration/.
[20] *Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited.*, 2022 SCC OnLine SC 1219.
[21] *Supra* note 2, Art. 17D.
[22] Arbitration and Conciliation Act 1996, s. 37(1)(b).
[23] *Supra* note 3, at p. 7.

The author suggests recognition of emergency arbitration by adding emergency arbitrator to the definition of the arbitral tribunal. Recognition of emergency arbitration has been long overdue in India since the 246th Law Commission recommendation[24] and this step is critical to secure parties' interests before the arbitral tribunal is constituted.[25] The Vishwanathan Committee Report[26] and Draft Amendment Bill[27] have given effect to this suggestion by adding a definition of emergency arbitration in proposed section 2(ea) and procedure in section 9A.

The author has repeatedly stressed in his work that there must be sufficient safeguards to the grant of interim measures. Hence, he proposes the addition of express power of the tribunal to require security from the requesting party for interim measures requested. The author also suggests recognizing the power of the arbitral tribunal to order costs and damages resulting from any measure granted, if the tribunal determines that such measure should not have been granted. He also suggests prompt disclosures of all facts, circumstances and material changes. Incorporation of these measures as a legislative directive would discourage frivolous applications and prevent abuse of process.

C. Other Arguments

The author has proposed an enforcement regime for interim measures of protection, section 17A and section 17B, based on Articles 17H and 17I of the Model Law. Moreover, the author suggests increasing the powers of the tribunal to impose costs and damages under Section 17 on the defaulting party to ensure compliance without resorting to judicial assistance. These measures would go a long way in ensuring the enforcement of interim order, which currently lacks any independent mechanism.

To strengthen the enforcement of awards and give meaning to the provision for stay on award in Section 36(2), the author proposes that Section 9 should not apply. He argues that Section 9 should not become an alternative to Section 34 proceedings and if a grant of stay is rejected under Section 36(2), the award must become final and enforceable.

[24] Law Commission of India, Report No. 246 - Amendments to the Arbitration and Conciliation Act, 1996 (5 August 2014), available at: https://lawcommissionofindia.nic.in/cat_arbitration/.
[25] *Rajvansh Singh and Saksham Barsaiyan*, An Emergency Arbitrator is an Arbitrator...Is There a Need for Statutory Recognition Post-Amazon?, 5 IALR (2023) 47.
[26] *Supra* note 4, at p. 42.
[27] *Supra* note 3, at p. 3,5.

The author's effort throughout the book is to align Indian law with the Model Law. The majority of the author's contentions and basis of provisions stem from the 2006 Model Law revisions and their implementation in other jurisdictions. One line of criticism that can be drawn to the author's work could be its overreliance on the 2006 revisions as they are not adopted by India and India was not a part neither an observer of the Working group which proposed the 2006 revisions.[28] The author has not extensively covered the mechanisms used by countries that have not adopted the 2006 revisions. Despite these potential concerns, the scholarly merits of the author's contributions remain profound.

IV. CONCLUSION

This book is a welcome addition of critical scholarly contribution to the understanding of the law of interim measures in India. The author's contribution goes beyond mere documentation, highlighting practical challenges and proposing substantial legislative reforms. The author gives invaluable inputs on harmonizing and making interim measures efficient in India. The appeal of this book lies in its forward-looking approach, anticipating and influencing legal developments. Several suggestions of the author have already found resonance in the Vishwanathan Report and the Draft Amendment Bill, this only goes to show the intellectual rigour of his work. As India strategically positions itself as a global arbitration hub, the author's work provides indispensable guidance for legislators, practitioners, and academicians alike.

[28] UNCITRAL Yearbook, A/CN.9/SER.A/2006, Volume XXXVII (2006), at 415.