

# JUDICIAL INTERVENTION IN INTERNATIONAL ARBITRATION

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*Domestic laws of different countries adopt varying approaches on how much power of adjudication can be vested in tribunals which function outside the States' monopoly in administering justice. This is reflected in varying positions adopted in different jurisdictions on the permissibility and scope of intervention by domestic judiciary in international commercial arbitrations. Indian judiciary has taken an expansionary stance in respect of its power of intervention. This article analyses this expansionary outlook of the Indian judiciary in the context of interim measures and argues that the same poses a hindrance to the growth of the institution of international commercial arbitration in India.*

## I. INTRODUCTION

Arbitration is increasingly becoming a more popular mode of dispute resolution due to several factors – its consensual nature, dispute resolution by non-governmental decision-makers, flexibility as compared to most court proceedings and a binding award capable of enforcement.<sup>1</sup> It is generally accepted that arbitration is international if it consists of parties belonging to different jurisdictions.<sup>2</sup> It is therefore designed in such a way that disputes are resolved neutrally applying internationally neutral procedural rules, often selecting a seat of arbitration which is native to neither of the parties.<sup>3</sup>

The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards<sup>4</sup> (*hereinafter* New York Convention) which has been ratified by 144 countries,<sup>5</sup> makes it obligatory for Member Nations to enforce both

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<sup>1</sup> GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1 (2001).

<sup>2</sup> UNCITRAL Model Law on International Commercial Arbitration, 1985 (*hereinafter* Model Law), Article 1.3.

<sup>3</sup> ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 1-42 (2004).

<sup>4</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U. N. T. S. 38.

<sup>5</sup> United Nations Commission on International Trade Law, *Status: Convention on Recognition and Enforcement of Foreign Arbitral Awards*, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (Last visited on September 2, 2009).

agreements to arbitrate as well as arbitration awards.<sup>6</sup> To ensure uniformity in national arbitration statutes, the Model Law was adopted by the United Nations Commission on International Trade Law (*hereinafter* UNCITRAL) in 1985<sup>7</sup> and legislations based on the same have been enacted in over sixty countries.<sup>8</sup> Model Law provides for judicial intervention under certain circumstances,<sup>9</sup> such as interim measures of protection,<sup>10</sup> appointment of arbitrators<sup>11</sup> and setting aside, recognition and enforcement of arbitral awards.<sup>12</sup> Most modern arbitration legislations narrowly limit the power of national courts to interfere in the arbitration process, both when arbitral proceedings are pending and in reviewing ultimate arbitration awards.<sup>13</sup>

Thus, a degree of uncertainty enters into the international arbitral process, due to the subjectivity of municipal court decisions. Parties seeking to settle their disputes through arbitration, choose to do so only if there is an assurance of non-governmental decision-makers of their choice and other advantages as mentioned above. If there is a lack of uniformity and added uncertainty across the world, it could have serious implications for international commerce.

This article seeks to address one aspect of this judicial intervention in the Indian context – that in the case of interim injunctions as provided in Article 9 of the Model Law and § 9 of the Indian Arbitration and Conciliation Act, 1996 – and compare the same with the position widely accepted in most Model Law jurisdictions of the world. There are several other points on which Indian courts differ in their stance on arbitration, such as their position on public policy;<sup>14</sup> however, the same is beyond the scope of this article.

First, we will demonstrate the global trend in interim measures by municipal courts during pending arbitrations and scholarly opinion on the same. Second, the article will show the position of the Indian judiciary and thereby exhibit the vast disparity in standards. Finally, the repercussions of these judicial pronouncements on Indian and international commerce will be analysed.

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<sup>6</sup> New York Convention, Article II.

<sup>7</sup> Adopted on June 21, 1985 at the UNCITRAL's 18th Annual Session.

<sup>8</sup> United Nations Commission on International Trade Law, *Status: UNCITRAL Model Law on International Commercial Arbitration*, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (Last visited on September 2, 2009).

<sup>9</sup> See Model Law, Article 5: "In matters governed by this law, no court shall intervene except where so provided in this Law".

<sup>10</sup> See Model Law, Article 9: 'It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.'

<sup>11</sup> See Model Law, Articles 11, 13, 14.

<sup>12</sup> See Model Law, Articles 34-36.

<sup>13</sup> *Supra* note 1, 3.

<sup>14</sup> See generally *Renusagar Power Plant Co. Ltd. v. General Electric Co.*, AIR 1994 SC 860; *ONGC v. Saw Pipes Ltd.*, AIR 2003 SC 2629.

## II. GLOBAL PERSPECTIVE ON INTERIM MEASURES BY THE JUDICIARY

The very nature of an arbitration agreement mandates that parties have their own choice of arbitrators or an arbitral institution, their own choice of law including choices – albeit with certain inevitable limitations – as to the law governing the capacity of parties to enter into an arbitration agreement, the law governing the arbitration agreement, the law governing the arbitration itself (the *lex arbitri*), the substantive law or proper law of the contract and the law governing recognition and enforcement of the award.<sup>15</sup> In the absence of express choice of any of these laws by the parties to the arbitration, the same may be decided by the tribunal<sup>16</sup> or the arbitral institute.<sup>17</sup> *Lex arbitri* generally deals with issues such as the appointment and qualifications of arbitrators, extent of judicial intervention in the arbitral process, the procedural conduct of the arbitration and the form of any award.<sup>18</sup> *Lex arbitri* thus also governs the law governing interim measures.<sup>19</sup>

In this part, we shall outline the legal position of a few countries of the world and certain arbitral institutes with respect to *lex arbitri* and the law governing interim measures in case of international commercial arbitrations.

### A. MUNICIPAL LAWS IN VARIOUS JURISDICTIONS

Some countries recognise the distinction between domestic and international arbitration based on an assumption that in case of the latter category of arbitrations, the sums at issue are likely to be larger and the parties would be better able to look after themselves.<sup>20</sup> Therefore, they have introduced a code of law specifically designed for international commercial arbitrations. Switzerland,<sup>21</sup> France,<sup>22</sup> Singapore<sup>23</sup> and Colombia<sup>24</sup> are some such countries which have special codes for international arbitrations alone.

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<sup>15</sup> *Supra* note 3, ¶ 2-04.

<sup>16</sup> Arbitration Rules of the United Nations Commission on International Trade Law, December 15, 1976, G. A. Res. 31/98, Article 16(1): ‘Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration’.

<sup>17</sup> Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce, 1998 (*hereinafter* ICC Rules), Article 14.1: ‘The place of arbitration shall be fixed by the Court unless agreed upon by the parties’.

<sup>18</sup> *Supra* note 1, 43; *supra* note 3, ¶ 2-10.

<sup>19</sup> *Smith Ltd v. H. International*, [1991] 2 LLOYD’S REP. 127, 130.

<sup>20</sup> *Supra* note 3, ¶ 2-09.

<sup>21</sup> See Swiss Private International Law Act, 1987 (consisting of 23 Articles).

<sup>22</sup> See French Code of Civil Procedure, Book IV, Title V – International Arbitration (consisting of 16 Articles).

<sup>23</sup> See International Arbitration Act (Chapter 143A, 2002 Ed, Statutes of the Republic of Singapore).

<sup>24</sup> Law 315 of September 12, 1996 on International Arbitration (consolidated in Decree

## 1. Position under the law of Singapore

In Singapore, which has adopted the Model Law, the judiciary has outlined a marked difference between international and domestic arbitration. In the *Swift-Fortune* case,<sup>25</sup> the High Court of Singapore held that due to the territorial effect of the legislation, it had no power to make orders to assist a foreign international arbitration except in limited situations covered by § 6(3)<sup>26</sup> and 7(1)<sup>27</sup> of the International Arbitration Act<sup>28</sup> (*hereinafter* IAA). In the subsequent *Front Carriers* case,<sup>29</sup> the High Court disagreed with the ruling in the above case and held that the Court had the power under the IAA to assist, by way of interim measures, international arbitration both in Singapore as well as those held abroad. Justice Belinda Ang explained that § 12(1)<sup>30</sup> of the IAA spells out in detail the interim measures of protection which an arbitral tribunal may make, which are

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1818/98) consists of 5 Articles and states in Article 2: “All matters relating to international arbitration shall be governed by this Law and, in particular, by the provisions of treaties, conventions and protocols and other international agreements signed and ratified by Colombia, which shall prevail over the provisions of the Code of Civil Procedure”.

<sup>25</sup> *Swift-Fortune Ltd v. Magnifica Marine SA*, [2006] 2 SING. L. R. 323.

<sup>26</sup> See IAA, § 6(3): “Where a court makes an order under sub§ (2), the court may, for the purpose of preserving the rights of parties, make such interim or supplementary orders as it may think fit in relation to any property which is the subject of the dispute to which the order under that sub§ relates.”

<sup>27</sup> See IAA, § 7(1): “Where a court stays proceedings under § 6, the court may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest, order —

(a) that the property arrested be retained as security for the satisfaction of any award made on the arbitration; or

(b) that the stay be conditional on the provision of equivalent security for the satisfaction of any such award.”

<sup>28</sup> Chapter 143A, 2002 Revised Edition, available at [www.bizcn-sg.org.sg/int-arbi-act.doc](http://www.bizcn-sg.org.sg/int-arbi-act.doc) (Last visited on February 9, 2010).

<sup>29</sup> *Front Carriers Ltd v. Atlantic & Orient Shipping Corporation*, [2006] 3 SING. L. R. 854.

<sup>30</sup> See IAA, § 12(1): “Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for —

(a) security for costs;

(b) discovery of documents and interrogatories;

(c) giving of evidence by affidavit;

(d) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;

(e) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;

(f) the preservation and interim custody of any evidence for the purposes of the proceedings;

(g) securing the amount in dispute;

(h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(i) an interim injunction or any other interim measure.”

remedies aimed at assisting in the just and proper conduct of arbitration. Orders from arbitral tribunals are given coercive effect with the High Court's leave under § 12(6)<sup>31</sup> of the Act. § 12(7)<sup>32</sup> of the Act gives effect to Article 9 of the UNCITRAL Model Law and it forms the basis upon which the High Court may order interim measures by applying its own domestic law. Under the first part of this Article, a request for interim protection is not incompatible with an arbitration agreement and the request can be made to a court in a country which is different from the seat of arbitration. Interim measures are not contrary to the intentions of the parties to an arbitration agreement since they support and promote the outcome of arbitration.<sup>33</sup> In the appeal from the former case, the Singapore Court of Appeal, resolving the conflict between the earlier High Court decisions discussed above, clarified the scope of § 12(7) of the IAA in relation to the question of whether a Singapore court can grant a Mareva injunction<sup>34</sup> as an interim relief in aid of a foreign arbitration that was instituted based upon an international arbitration agreement that did not stipulate Singapore as the seat of the arbitration.<sup>35</sup> The Court of Appeal dismissed the appeal and held that: (i) § 12(7) of the IAA does not apply to foreign arbitrations, but it applies to an international arbitration where Singapore is stipulated as the seat of arbitration;<sup>36</sup> (ii) § 12(7) of the IAA does not provide an independent source of statutory power for the court to grant relief under § 12(1) of the IAA.<sup>37</sup> The court further noted that the power is drawn from § 4(10)<sup>38</sup> of the Civil Law Act<sup>39</sup>, which was the source of its power to grant interim

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<sup>31</sup> See IAA, § 12(6): "All orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction."

<sup>32</sup> See IAA, § 12(7): "The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part applies, the same power of making orders in respect of any of the matters set out in sub§ (1) as it has for the purpose of and in relation to an action or matter in the court."

<sup>33</sup> Warren B. Chik, *Recent Developments in Singapore on International Commercial Arbitration*, 11 SING. Y.B. INT'L L. 337 (2007).

<sup>34</sup> *Mareva Compania Naviera SA v International Bulkcarriers SA*, [1975] 2 LLOYD'S REP 509 (A Mareva injunction is a temporary injunction that freezes the assets of a party pending further order or final resolution by the Court. It is so named after the famous case in the United Kingdom, which allowed such a remedy). .

<sup>35</sup> *Swift-Fortune Ltd v. Magnifica Marine S. A.*, [2007] 1 SING. L.R. 629.

<sup>36</sup> *Id.*, ¶¶ 40-58.

<sup>37</sup> § 12(1) of the IAA lists the powers of an arbitral tribunal including the power to make interim injunctions. § 12(7) of the IAA provides that in relation to these powers the High Court has the same powers in respect of arbitration as to a court action. The court agreed with earlier judgment that it was unlikely that Parliament intended § 12(7) to apply to foreign arbitrations when it did not confer such power to grant Mareva injunctions in aid of foreign court proceedings unless there were express words to that effect.

<sup>38</sup> Civil Law Act, § 4(10): "A Mandatory Order or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made."

<sup>39</sup> Chapter 43, 1999 Revised Edition, available at [http://statutes.agc.gov.sg/non\\_version/cgi-](http://statutes.agc.gov.sg/non_version/cgi-)

injunctions in court proceedings,<sup>40</sup> but that provision does not confer power upon the court to grant a Mareva injunction against a defendant's assets in Singapore unless the plaintiff has a cause of action against the defendant that is justiciable in a Singapore court,<sup>41</sup> which was not the case on the facts in the *Swift-Fortune* case.

## 2. English law on international arbitration

English Courts<sup>42</sup> have the statutory power to award anti-arbitration injunctions but will only do so in exceptional circumstances and only where it is clear that the arbitration proceedings have been wrongly brought.<sup>43</sup> In a recent case of *Weissfisch v. Julius*,<sup>44</sup> an action was brought before the English High Court seeking a declaration that the arbitration agreement providing for Swiss law and a Swiss arbitral seat was void and an injunction restraining the sole arbitrator under the agreement from acting as such. The only connection of the dispute with England was that the arbitrator was an English lawyer within the jurisdiction of the court. The court rejected the application, *inter alia*, on the ground that the arbitration agreement expressly stated that disputes should be resolved by the sole arbitrator, with his seat in Switzerland and governed by Swiss law. Therefore, any issues as to the validity of the arbitration agreement were required "to be resolved in Switzerland according to Swiss law."<sup>45</sup> Thus, we can see that here the English Courts clearly and cogently refused jurisdiction in favour of the perceived will of the parties to the arbitration agreement. In another case, *Elektrim S.A. v. Vivendi Universal S.A.*,<sup>46</sup> the claimant sought an injunction to restrain the respondent from pursuing an arbitration being conducted before the London Court of International Arbitration (*hereinafter* LCIA). Refusing the injunction to restrain the LCIA proceedings, the court held that under the Arbitration Act, "the scope for the court to intervene by injunction before an award" had been "very limited."<sup>47</sup> The court also held that even if the claimant could establish that some right had been infringed or was threatened by the continuation of the London

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<sup>40</sup> Along with § 18(1) of the Supreme Court of Judicature Act, Chapter 322, 1999 Revised Edition: "The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore."

<sup>41</sup> See generally *Karaha Bodas Co LLC v. Pertamina Energy Trading Ltd*, [2006] 1 SING.L.R. 112 and *Siskina v. Distos Compania Naviera SA*, [1979] AC 210 (holding that a Singapore court has no power to grant Mareva relief in respect of Singapore assets of a foreign defendant if the only purpose of such relief is to support foreign court proceedings).

<sup>42</sup> United Kingdom has incorporated the Model Law in the Arbitration Act, 1996.

<sup>43</sup> See The Arbitration Act, 1996, § 72(1) and The Supreme Court Act, 1981, § 37.

<sup>44</sup> *Weissfisch v. Julius*, [2006] EWCA (Civ) 218.

<sup>45</sup> *Id.*

<sup>46</sup> *Elektrim S. A. v. Vivendi Universal S. A.*, [2007] EWHC 571 (Comm.).

<sup>47</sup> *Id.*

arbitration or that continuation of the arbitration was otherwise vexatious or oppressive, the court would not grant an injunction under § 37 of the Supreme Court Act because that would be contrary to the parties' agreement to refer disputes under the investment agreement to LCIA arbitration. Moreover, since the arbitrators had previously refused to stay the LCIA arbitration and the court had "no express power under the Arbitration Act to review or overrule those procedural decisions in advance of an award by the LCIA arbitrators", to do so under § 37 of the Supreme Court Act "would undermine the principles of the 1996 Act." This case again goes on to demonstrate the deference of English courts towards arbitral tribunals and proceedings and respect for their autonomy.

### 3. Switzerland

The Swiss legal system, too, does not seem to favour anti-arbitration injunctions. Most of the powers to grant interim relief are vested with the arbitration tribunal.<sup>48</sup> In *Air (PTY) Ltd. v. International Air Transport Association*,<sup>49</sup> the Court of First Instance of the Canton of Geneva ruled that anti-suit injunctions, including anti-arbitration injunctions, are contrary to the Swiss legal system,<sup>50</sup> particularly because they have been found to contradict the principle of 'Competence-Competence',<sup>51</sup> a well-established principle in Swiss law.<sup>52</sup>

### 4. France

It seems possible for French courts to order a party to stay its proceedings before a foreign court,<sup>53</sup> although the French *Nouveau Code de Procédure Civile*<sup>54</sup> (hereinafter NCPC) does not contain explicit mention about provisional measures available from courts. However, Article 1458 of the NCPC, which applies to both domestic and international arbitrations, provides that if a

<sup>48</sup> Swiss Private International Law Act, 1987 Article 183: "1. Unless otherwise agreed by the parties, the arbitral tribunal may issue provisional or conservatory orders if requested by one of the parties. 2. If the opposing party does not voluntarily comply with the order issued by the arbitral tribunal, the latter may seek the assistance of the court, which shall apply its own law. 3. The arbitral tribunal or the court may grant provisional or conservatory measures subject to the receipt of adequate security from the requesting party."

<sup>49</sup> Tribunal de Première Instance [TPI] [Court of First Instance] May 2, 2005, Case No. C/1043/2005-15SP (Switz.), translated in 23 A.S.A. BULL. 739 (2005).

<sup>50</sup> *Id.*, 747.

<sup>51</sup> PHILIPPE FOUCHARD *et al.*, INTERNATIONAL COMMERCIAL ARBITRATION ¶ 397 (Emmanuel Gaillard and John Savage eds., 1999); BORN, *supra* note 1, 85; HOWARD M. HOLTZMANN and JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY ¶ 478; STEPHEN SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 2 (1987); Model Law, Article 16(1).

<sup>52</sup> *Lot Fédérale du 18 Décembre 1987 sur le droit international privé* (Swiss Private International Law Act of December 18, 1987), Article 186(1).

<sup>53</sup> JULIAN D. M. LEW, CONTROL OF JURISDICTION BY INJUNCTIONS ISSUED BY NATIONAL COURTS, IN INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 185, 201 (Albert Jan van den Berg ed., 2007).

<sup>54</sup> New Code of Civil Procedure.

dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a state court, it shall declare itself incompetent unless the arbitration agreement is manifestly null and void, but this issue must be raised by the party. Here, too, with limited exceptions, the court leaves it to the arbitral tribunal to determine the validity and extent of the arbitration.

## 5. Sweden

The general practice in Sweden, along the lines of Switzerland, is for courts not to interfere with the arbitration process in line with its philosophy that the basis of arbitration is, and has always been, that of freedom of contract, trust in the arbitrators, and recognition of the advantages of a single, privately administered dispute settlement mechanism.<sup>55</sup> However, a single exception to this rule, as in the case of France, relates to the validity of the arbitration agreement and despite recognition of the ‘Competence-Competence’ rule, this does not preclude a Swedish court from ruling on the validity of the arbitration agreement if requested by one of the parties.<sup>56</sup>

## 6. Germany

The German<sup>57</sup> position varies slightly from the aforementioned countries. § 1033 of the *Zivilprozessordnung*<sup>58</sup> (*hereinafter* ZPO) states that it is not incompatible with the arbitration agreement for the courts to order interim measures in matters involving the dispute<sup>59</sup>. This provision is more in the nature of a declaration and the nature and the extent of the jurisdiction available to the courts can be read from §§ 914 to 945 of the ZPO, which deal in general with interim measures of protection.<sup>60</sup> This is consistent with the traditional German view that interim relief can be granted only by the courts. German Law does not even require the place of the main proceeding to be in Germany. Even if arbitration has not started at the time of filing for the interim relief, if the parties convince the court that the final award is enforceable in Germany and there is an immediate

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<sup>55</sup> Julian D. M. Lew, *Does National Court Involvement Undermine the International Arbitration Process?*, 24 AM. U. INT’L L. REV. 489, 509 (2009); *New Arbitration Regime in Sweden*, 10 WORLD ARB. & MEDIATION REP. 154, 155 (1999).

<sup>56</sup> *Id.*, 155.

<sup>57</sup> Germany has adopted the UNCITRAL Model Law into its Code of Civil Procedure.

<sup>58</sup> German Code of Civil Procedure, Book Ten.

<sup>59</sup> ZPO, § 1033: “**Arbitration agreement and interim measures by court:** it is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject-matter of the arbitration upon request of a party.”

<sup>60</sup> J. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2.2 ELECTRONIC JOURNAL OF COMPARATIVE LAW (August 1998), available at <http://www.ejcl.org/ejcl/22/art22-2.html> (Last visited on August 31, 2009).

need for relief, it would be granted.<sup>61</sup> Here, the courts are given wider powers and discretion to interfere in the arbitration process and in an arbitration agreement. This approach, however, will not affect a foreign arbitrator seated in a place outside Germany. It only renders the award unenforceable in Germany.

## 7. The Netherlands

Article 1022<sup>62</sup> of the Netherlands Arbitration Act<sup>63</sup> provides for interim measures of protection by the Court and authorizes parties to approach the district court for necessary orders. It specifies that such an approach is not contrary to the arbitration agreement.<sup>64</sup> Further it provides for interim measures from the Courts even in cases where the seat of arbitration is outside Netherlands.<sup>65</sup> This position of Dutch law is similar to German law.

## 8. Austria

Article 585 of the Austrian Arbitration Law, 2006<sup>66</sup> duplicates Article 9 of the Model Law. This statute is quite recent and not much case law is available on the same. However, authors have noted that this new law would give national and international arbitration proceedings a new framework and attract more parties to Austria as a venue for arbitration proceedings.<sup>67</sup>

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<sup>61</sup> Eric Schwartz & Jurgen Mark, *Provisional Measures in International Arbitration – Part II: Perspectives from the ICC and Germany*, 6 WORLD ARB. & MEDIATION REP. 52, 56 (1995).

<sup>62</sup> Netherlands Arbitration Act, Article 1022: “**Arbitration Agreement and Substantive Claim before Court; Arbitration Agreement And Interim Measures By Court:** 1. A court seized of a dispute in respect of which an arbitration agreement has been concluded shall declare that it has no jurisdiction if a party invokes the existence of the said agreement before submitting a defense, unless the agreement is invalid. 2. An arbitration agreement shall not preclude a party from requesting a court to grant interim measures of protection, or from applying to the President of the District Court for a decision in summary proceedings in accordance with the provisions of Article 289. In the latter case the President shall decide the case in accordance with the provisions of Article 1051.’

<sup>63</sup> *Wetboek van Burgerlijke Rechtsvordering* (Dutch Code of Civil Procedure), Book Four, December 1, 1986.

<sup>64</sup> *Id.*

<sup>65</sup> Netherlands Arbitration Act, Article 1074: “**Foreign Arbitration Agreement and Substantive Claim before Dutch Court; Foreign Arbitration Agreement and Interim Measures by Dutch Court:** 1. A court in the Netherlands seized of a dispute in respect of which an arbitration agreement has been concluded under which arbitration shall take place outside the Netherlands shall declare that it has no jurisdiction if a party invokes the existence of the said agreement before submitting a defence, unless the agreement is invalid under the law applicable thereto. 2. The agreement mentioned in paragraph (1) shall not preclude a party from requesting a court in the Netherlands to grant interim measures of protection, or from applying to the President of the District Court for a decision in summary proceedings in accordance with the provisions of Article 289.’

<sup>66</sup> Austrian Code of Civil Procedure, Chapter 4, July 1, 2006.

<sup>67</sup> Nikolaus Pitkowitz, *The New Austrian Arbitration Act: Austria Finally Implements the UNCITRAL Model Law on International Arbitration*, Graf, Maxl & Pitkowitz (2005).

## B. INSTITUTIONAL RULES

Most of the institutional rules have some form of provisions to support the aid of courts for arbitration.<sup>68</sup> The major concern for parties to arbitration agreement is that their approach to the Courts for interim relief might be seen as a breach of the agreement itself. Rules of the International Chamber of Commerce, American Arbitration Association and World Intellectual Property Organization (*hereinafter* WIPO) make it abundantly clear that such an approach will not be considered to be a violation of the agreement to arbitrate.<sup>69</sup> LCIA and the International Centre for Settlement of Investment Disputes (*hereinafter* ICSID) rules only have a general provision that allows parties to approach judicial authorities for interim relief.<sup>70</sup> § 20.2 of the Arbitration Rules of the German Institute of Arbitration (DIS Arbitration Rules, 1998) also duplicates Article 9 of the UNCITRAL Model Law. These institutional rules do not differ much in their

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<sup>68</sup> Gregoire Marchac, *Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 134 (1999); Kelda Groves, *Virtual Reality: Effective Injunctive Relief In Relation To International Arbitrations*, 1(6) INT. A. L. R. 188 (1998).

<sup>69</sup> ICC Rules, *supra* note 17, Article 23(2): 'Before the file is transmitted to the Arbitral Tribunal and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.'

*International Arbitration Rules of the American Arbitration Association, Article 21(3): 'A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.'*

*WIPO Arbitration Rules, October 1, 2002, Article 46(d): "A request addressed by a party to a judicial authority for interim measures or for security for the claim or counter-claim, or for the implementation of any such measures or orders granted by the Tribunal, shall not be deemed incompatible with the Arbitration Agreement, or deemed to be a waiver of that Agreement."*

<sup>70</sup> LCIA Arbitration Rules, January 1, 1998, Article 25.3: "The power of the Arbitral Tribunal under Article 25.1 shall not prejudice howsoever any party's right to apply to any state court or other judicial authority for interim or conservatory measures before the formation of the Arbitral Tribunal and, in exceptional cases, thereafter. Any application and any order for such measures after the formation of the Arbitral Tribunal shall be promptly communicated by the applicant to the Arbitral Tribunal and all other parties. However, by agreeing to arbitration under these Rules, the parties shall be taken to have agreed not to apply to any state court or other judicial authority for any order for security for its legal or other costs available from the Arbitral Tribunal under Article 25.2."

ICSID Rules of Procedure for Arbitration Proceedings, April 10, 2006, § 39(5): "Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests."

recognition of courts' power to grant interim measures pending arbitration, except for a few instances. LCIA Rules require 'exceptional circumstances' for court intervention after the constitution of the tribunal, whereas the ICC rules just require 'appropriate circumstances'.<sup>71</sup> LCIA Rules also prohibit parties from approaching national courts for provisional measures on security for costs, which have been made available from the tribunal itself.<sup>72</sup>

It is clear from the way the rules of the institutions have been setup that all of them recognize the parties' right to approach the courts for interim relief, albeit with some reservations. The problem with all these provisions is that the role of the competent judicial authority is not well-defined and thus one can see the disparity in the standards of judicial interference in different jurisdictions, as discussed in the earlier paragraphs.

### C. PROPOSED CHANGES TO THE MODEL LAW

The importance of the UNCITRAL Model Law can be seen in its adoption by a large number of countries of the world.<sup>73</sup> The provision in the Model Law regarding interim measures by domestic courts<sup>74</sup> is wide in scope and according to the UNCITRAL Working Group, remains silent on the scope of interim measures that courts can order.<sup>75</sup>

The UNCITRAL Working Group on Arbitration was provided an agenda in 2000 to discuss and propose changes, if any, needed to introduce uniform rules on certain issues concerning settlement of commercial disputes including interim measures of protection.<sup>76</sup> The Group when dealing with the interim measures issue noted various factors, including the need for a harmonized regime, enforcement of interim awards and possible need for change.<sup>77</sup> The Working Group has discussed draft proposals for court-ordered interim measures. In its Forty-Fourth session<sup>78</sup> in January 2006, the Working Group laid down the proposed

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<sup>71</sup> See *supra* text accompanying notes 69-70.

<sup>72</sup> *Id.*

<sup>73</sup> *Supra* note 8.

<sup>74</sup> Model Law, Article 9.

<sup>75</sup> United Nations Commission on International Trade Law Working Group on Arbitration, 32<sup>nd</sup> Session, Report of the Secretary General, *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*, ¶ 72, U.N. Doc. A/CN.9/WG.II/WP.108 (January 14, 2000).

<sup>76</sup> United Nations Commission on International Trade Law Working Group on Arbitration, 32<sup>nd</sup> Session, *Provisional Agenda*, U.N. Doc. A/CN.9/WG.II/WP.107 (January 17, 2000).

<sup>77</sup> United Nations Commission on International Trade Law, *Report of the Working Group on Arbitration on the work of its 32<sup>nd</sup> Session* (Vienna, 20 – 31 March 2000), ¶¶ 67-72, U.N. Doc. A/CN.9/468 (April 10, 2000).

<sup>78</sup> United Nations Commission on International Trade Law Working Group on Arbitration, 44<sup>th</sup> Session, *Settlement of Commercial Disputes: Interim Measures of Protection – Note by the Secretariat*, U.N. Doc. A/CN.9/WG.II/WP.141 (December 5, 2005).

provisions for interim measures both by the Tribunal and the court.<sup>79</sup> The Working Group has also suggested that States might consider placing the provision for court-ordered interim measures along with provisions enacting Article 9 of the Model Law.<sup>80</sup> A further change suggested is a reference to this proposed provision within Article 1.2, which would then not exclude the applicability of this provision, if the place of arbitration is outside the territory of the State.<sup>81</sup>

Considering the varying positions of the legislations and courts in various jurisdictions and proposed changes in the mother document, the UNCITRAL Model Law, in the next Part we attempt to critically analyse the Indian law on international commercial arbitration and compare it to the present international standard. We also look at the efficacy of the present regime in the context of international commercial arbitration.

### III. INTERIM MEASURES BY COURTS IN INTERNATIONAL COMMERCIAL ARBITRATION: THE INDIAN EXPERIENCE

The Arbitration and Conciliation Act, 1996 (hereinafter, the “Act”) is an attempt to implement the Model Law<sup>82</sup> and to create a pro-arbitration legal regime in India, something which was a mere illusion under the Arbitration Act, 1940, upon which Desai, J.<sup>83</sup> said:

“[T]he way in which the proceedings under the Act are conducted and without exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical,] accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for the expeditious disposal of their disputes has by the decisions of the Courts been clothed with ‘legalese’ of unforeseen complexity.”

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<sup>79</sup> *Id.*, 6: § 5 – Article 17 undecies – **Court-ordered interim measures:** The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration.

<sup>80</sup> *Id.*, 8.

<sup>81</sup> *Id.*

<sup>82</sup> See *R.M. Investment & Trading Co. Pvt. Ltd. v. Boeing Co.*, (1994) 4 SCC 541; *Sundaram Finance Ltd. v. NEPC India Ltd.* (1999) 2 SCC 479; *Malaysian Airlines Systems Bhd (II) v. STIC Travels (P) Ltd.* 2000 (7) SCALE 724; *Rashtriya Ispat Nigam Ltd. v. Verma Transport Company*, (2006) 7 SCC 275; *Gas Authority of India Ltd. v. Ketji Construction (I) Ltd.*, (2007) 5 SCC 38; *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.* (2007) 5 SCC 510.

<sup>83</sup> *Guru Nanak Foundation v. Rattan Singh & Sons*, AIR 1981 SC 2075, 2076-77, *per* Desai J.

The Act seeks to minimise judicial interference in arbitration.<sup>84</sup> However, a closer analysis of various judicial interpretations, especially in the realm of International Commercial Arbitration reveals that such purpose has not been fulfilled.

It is through an astute examination of the interpretation of § 2(2) of the Act that the extent of judicial intervention can be observed. § 2(2)<sup>85</sup> of this Act is in consonance with the principle that arbitral procedure is governed by the *lex arbitri*.<sup>86</sup> This section clearly states that Part I of the Act is applicable where the place of arbitration is in India.

A prominent Delhi High Court decision first declared the scope of § 2(2) as being wide enough to include arbitrations even taking place outside India.<sup>87</sup> However, this was far from what could be taken as a settled point of law in this regard. The Calcutta High Court<sup>88</sup> departed from this exposition and stated that § 2(2) of the Act restricts the applicability of Part I of the Act to arbitrations in India. The Delhi High Court had taken a view analogous to the above, in the case of *Kitchnology N. v. Unicorn Gmbh Rahn*.<sup>89</sup> Yet, conflict in elucidation was evident, since even within the Delhi High Court, different outlooks emerged. The view that it took in the *Dominant Offset* case was followed by them in *Suzuki Motors Corporation v. Union of India*,<sup>90</sup> *Olex Focas Pvt. Ltd v. Skoda Export Company Limited and Another*<sup>91</sup> and also by the Single Bench decision in *Marriott International Inc. v. Ansal Hotels*.<sup>92</sup> This Single Bench decision was overruled by the Division Bench which restricted the applicability of Part I to only Indian territory.<sup>93</sup> The Bombay High Court opined on similar lines and constrained the applicability of § 2(2) of this Act.<sup>94</sup> The Andhra Pradesh High Court has endorsed the view that “the very fact that § 11(9)<sup>95</sup> of Part I

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<sup>84</sup> The Act, § 5: “Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”

<sup>85</sup> *Id.*, § 2(2): “This Part shall apply where the place of arbitration is in India.”

<sup>86</sup> *See supra* text accompanying notes 18-19.

<sup>87</sup> *Dominant Offset Pvt. Ltd. v. Adamovske Strojitrny A.S.*, AIR 2000 Del 254.

<sup>88</sup> *East Coast Shipping Limited v. M.J. Scrap Pvt. Ltd.*, 1997 (1) HN 444.

<sup>89</sup> *Kitchnology N. V. and Another v. Unicorn Gmbh Rahn and Another*, 1999 (1) ARB. L.R. 452 (Delhi).

<sup>90</sup> *Suzuki Motors Corporation v. Union of India*, 1997 (2) ARB. L. R. 477 (Delhi).

<sup>91</sup> *Olex Focas Pvt. Ltd v. Skoda Export Company Limited and Another*, 2000 C.L.C. 382 (Delhi).

<sup>92</sup> *See infra* note 99, ¶ 12.

<sup>93</sup> *Marriott International Inc. v. Ansal Hotels*, AIR 2000 Del. 377.

<sup>94</sup> *Jindal Durga Ltd v. Noy Vallesina Engineering SpA.*, 2002 (2) ARB. L. R. 323.

<sup>95</sup> The Act, § 11(9): “In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.”

applies to an international commercial arbitration, is in itself sufficient for ruling out the suggestion that no part of Part I can apply to such arbitrations.”<sup>96</sup> Notably, the Supreme Court had itself indirectly ruled in *Thyssen Stahlunion GmbH v. Steel Authority of India Ltd.*<sup>97</sup> that Part I must be applied restrictively. Thus, such contradictions and irregularities pointed out to an urgent need for clarifying the point of law in this regard.

In an effort to settle the somewhat confused position of law, a three-judge Bench in *Bhatia International v. Bulk Trading S. A.*<sup>98</sup> gave its verdict.

In this case, the contract entered into had an arbitration clause providing for arbitration as per the ICC Rules. A sole arbitrator was appointed by the ICC on request of the respondent and the parties agreed for arbitration to be held in Paris. Thereafter, the respondent filed an application under § 9<sup>99</sup> of the Act in the District Court of Indore, for obtaining an order of injunction restraining the appellant from transferring its business assets and properties located in India. The appellant opposed the application by contending that Part I of the Act, which contains § 9, applies only to arbitrations conducted in India. Dismissing this objection, the lower court admitted the application of Part I of the Act. The appellant then filed a writ petition before the Madhya Pradesh High Court which was dismissed on October 10, 2000. Hence, an appeal was made to the Supreme Court against this judgment of the High Court to decide whether an Indian court can provide interim relief under § 9 of the Act in cases where an international commercial arbitration is held outside India.

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<sup>96</sup> *Cultor Food Science Inc. v. Nicholas Piramal India Ltd.*, 2001 (6) ALT 706.

<sup>97</sup> *Thyssen Stahlunion GMBH v. Steel Authority of India Ltd.*, AIR 1999 SC 3923.

<sup>98</sup> *Bhatia International v. Bulk Trading S.A.*, AIR 2002 SC 1432.

<sup>99</sup> The Act, § 9: “A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with § 36, apply to a Court –

(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 authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.” (Emphasis supplied)

The Supreme Court, in essence, ruled that Part I of the Act which gives effect to the UNCITRAL Model Law and confers power on the court to grant interim measures, applied even to arbitration held outside India. Its decision spelt out that arbitrations held in India would necessitate the application of the provisions of Part I with deviation permitted only to the extent of the derogable provisions of Part I. In cases of international commercial arbitrations held outside India provisions of Part I would apply unless the parties by agreement, express or implied, excluded all or any of its provisions.<sup>100</sup> The Supreme Court reasoned that if the Act provides that Part I is applicable to India, it is not tantamount to being applicable either 'only' in India or being inapplicable if it is out of India.<sup>101</sup>

An analysis of the principles of statutory construction and interpretation will reveal flaws in the Court's reasoning. According to the rule of literal construction of a statute, the words of a statute are first understood in their literal and natural sense unless it results in an absurd interpretation.<sup>102</sup> Furthermore it is presumed that the statutes are not intended, in the absence of contrary language, to operate on events taking place outside the territories.<sup>103</sup> In the ruling of *J.K. Cotton Mills Spinning and Weaving Mill Co. Ltd v. State of U.P.*<sup>104</sup>, it was observed: "In the interpretation of statutes, the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect." This principle has been acknowledged in numerous decisions.<sup>105</sup> Thus, § 2(2) of the Act, in its plain and unambiguous meaning excludes the application of Part I of the Act to international arbitrations when the place of arbitration is outside India. Justice R. C. Lahoti, speaking for the Supreme Court, held in *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc.*<sup>106</sup> that it is implicit in the language of the Act that Part I "will not apply where place of arbitration is not in India".

There are four main reasons that the Apex court listed to justify their opinion in the *Bhatia* case. In their view, the judgment would have to support wider applicability of Part I of the Act to avoid the following irregularities in law:

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<sup>100</sup> *Supra* note 98, ¶ 32.

<sup>101</sup> *Supra* note 98, ¶ 27.

<sup>102</sup> *M.P. Khan v. Govt. of A.P.*, (2004) 2 SCC 267; *State of Himachal Pradesh v. Pawan Kumar*, AIR 2005 SC 2265.

<sup>103</sup> *Jagir Kaur v. Jaswant Kaur*, AIR 1963 SC 1521; *BBC Enterprise Ltd. v. HI-Tech Extra vision Ltd.*, (1991) WLR 11, ¶ 8 (HL).

<sup>104</sup> *J.K. Cotton Mills Spinning and Weaving Mill Co. Ltd v. State of U. P.*, AIR 1961 SC 1170.

<sup>105</sup> *See Aswini Kumar v. Arabinda Bose*, AIR 1952 SC 369; *Nathi Devi v. Radha Devi Gupta*, AIR 2005 SC 648; *Ghanshyamdas v. Regional Assistant Commissioner*, AIR 1964 SC 766.

<sup>106</sup> *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc.*, (2003) 9 SCC 79. (This case was regarding the appointment of arbitrator under § 11(4) of the Act and heard by a single judge of the Supreme Court being the designated judge appointed by the Chief Justice of India under the Act. The decision was passed after the decision in *Bhatia International*).

a) A lacuna would be created in the law of arbitration as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention. It would mean that there is no law in India, governing such arbitrations.<sup>107</sup>

b) It would lead to an atypical situation wherein Part I of the Act would apply to Jammu and Kashmir in all international commercial arbitrations but would not apply to the rest of India if the arbitration takes place outside India.<sup>108</sup>

c) There would be a conflict between sub-section (2) of § 2, on one hand and sub-sections (4) and (5) on the other. Further sub-section (2) would also be in conflict with § 1 which provides that the Act extends to the whole of India.

d) It would leave a party remediless in international commercial arbitrations which take place out of India as the party would not be able to apply for interim relief in India even though the properties and assets are in India.<sup>109</sup>

This decision can be proven as unsatisfactory if each of these irregularities is examined with reasonable prudence and rationality.<sup>110</sup>

With regard to the first problem of the creation of a legal lacuna, the law relating to awards in such non-convention countries has been laid down by the Apex Court, before the enactment of this Act, in the case of *Badat and Company, Bombay v. East India Trading Company*.<sup>111</sup> It has been held that an award given in a non-convention country is enforceable in India on the same grounds and in the same circumstances in which it is enforceable in England under the common law on grounds of justice, equity and good conscience. This can be done by bringing a suit, provided the agreement to arbitrate was made within the limits of the jurisdiction of Indian Court and the award is final and binding. Since the present Act of 1996 has not altered that position of law, the argument that there would be no law existing in India governing awards in non-convention countries does not hold ground.

With regard to the second flaw pointed out by the Court in *Bhatia*, the Act is made applicable to the State of Jammu and Kashmir only for international commercial arbitrations due to the special position of that State under the Constitution of India. Article 370 of the Constitution requires consultation with the State Government before certain laws are made applicable to the State.<sup>112</sup>

<sup>107</sup> *Supra* note 98, ¶ 14.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> JUSTICE R.S. BACHAWAT, *LAW OF ARBITRATION & CONCILIATION* 1436 (K.K. Venugopal ed., 2005); *See also* O. P. MALHOTRA, *THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION* (2002).

<sup>111</sup> *Badat and Company, Bombay v. East India Trading Company*, AIR 1964 SC 538.

<sup>112</sup> Article 370 of the Constitution of India: (1) Notwithstanding anything in this Constitution,—  
(a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

Further, the Indian Arbitration Act, 1940, which covered domestic arbitration, governed the whole of India, except the State of Jammu and Kashmir. The Jammu and Kashmir Arbitration Act of 1946 covered domestic arbitration in the State of Jammu and Kashmir. The Foreign Awards (Recognition and Enforcement) Act, 1961, which gave effect to the New York Convention, was made applicable to the whole of India, including the State of Jammu and Kashmir. Thus, the law governing domestic arbitration in the State of Jammu and Kashmir was the Jammu and Kashmir Arbitration Act, 1946, while the law governing international commercial arbitration in that State was the 1961 Act. The Parliament, by enacting the Arbitration and Conciliation Act, 1996, repealed the Indian Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961, but not the Jammu and Kashmir Arbitration Act. The 1996 Act, therefore, did not cover domestic arbitration for the State of Jammu and Kashmir, but covered international commercial arbitration. If the above analysis is accepted,<sup>113</sup> the Supreme Court erroneously relied upon the Act's limited application to the State of Jammu and Kashmir for holding that Part I of the Arbitration and Conciliation Act, 1996 applied outside India.

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(b) the power of Parliament to make laws for the said State shall be limited to –

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

*Explanation.*—For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(c) the provisions of article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

<sup>113</sup> *Supra* note 110.

In the third presumable anomaly, the Supreme Court finds a conflict between § 2(2) on the one hand and sub-sections (4) and (5) of § 2 on the other. It resolves the conflict by saying that:

“[T]he words “every arbitration” in sub-section (4) of § 2 and the words “all arbitrations and all proceedings relating thereto” in sub-section (5) of § 2 are wide. Sub-sections (4) and (5) of § 2 are not made subject to sub-section (2) of § 2. It is significant that sub-section (5) is made subject to sub-section (4) but not to sub-section (2). . . . the Legislature has purposely omitted to add viz. “Subject to provision of sub-section (2). However read in the manner set out hereinabove there would also be no conflict between sub-section (2) of § 2 and sub-sections (4) and/or (5) of § 2.”<sup>114</sup>

However, the court overlooked the fact that the phrase “every arbitration” mentioned in § 2(4) cannot and should not be interpreted in isolation. When we read the entire sub-section, we realise its true object.<sup>115</sup> The sub-section mentions “every arbitration under any other enactment”. It thus explicitly refers to all statutory arbitrations and not every arbitration, whether taking place within India or outside. As stated earlier, § 2(5) cannot be read as that which gives Part I ample scope to even govern arbitrations outside India. This interpretation of the court actually renders § 2(2) as a mere surplus or that which is of no relevance, which of course is not true.

With regard to the fourth incongruity of the party being left remediless, the principle of party autonomy as stated under § 20(1) of the Act gives them freedom of choice with regard to the place of arbitration. Where the parties are fully aware of the provisions to choose the place of arbitration outside India, agreeing to go outside jurisdiction of Indian courts, after due deliberation and knowledge, they cannot complain against the award.

A possible solution to this conflict in international commercial arbitrations held outside India lies in the interpretation of § 28<sup>116</sup> of the Act. It lays down rules and regulations governing domestic arbitrations and international commercial arbitrations, limiting it to only those where the place is India. § 28 is

<sup>114</sup> *Supra* note 98, ¶ 22.

<sup>115</sup> *Balram Kumawat v. Union of India*, (2003) 7 SCC 628; *Union of India representing South-Eastern Railways v. Amarendra Nath*, AIR 1967 Cal 119.

<sup>116</sup> The Act, § 28: “(1) Where the place of arbitration is situate in India, –

(a) in an arbitration other than an international commercial arbitration, the arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration, –

(i) the arbitral Tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

within Part I of the Act and does not attempt to frame any rule for any arbitration held outside India. It can be thus concluded that this is evidence of the fact that Part I of the Act is itself limited to arbitrations within India.

Relying on its own judgment in the *Bhatia* case, the Apex Court in a recent ruling, *Venture Global Engineering v. Satyam Computer Services Ltd. and Another*,<sup>117</sup> ruled that a foreign award was amenable to challenge under § 34 on a construction that Part I of the Act applies to foreign awards. It was only in a case where the parties specifically chose to exclude the application of Part I of the Act that such challenge would not be available.

The *Bhatia* decision has attracted denigration even from the international experts in this field. Rt. Hon. Lady Justice Mary Howarth Arden DBE, Lord Justice of Appeal, UK at the second Conference on Dispute Resolution on 13<sup>th</sup> September, 2003 on Arbitration and the Courts organised by the International Centre for ADR observed as follows:

“This ruling calls for a number of observations. First it goes much further than the Law Commission’s recommendation, which was not that the whole of Part I should apply to international commercial arbitration, but only the power to grant interim measures. This much is permitted by UNCITRAL Model Law. Second, the application of Part I to arbitrations outside India is not consonant with party autonomy. If the parties choose to arbitrate under ICC Rules in Paris, they have chosen that the arbitration shall be conducted under ICC Rules and subject to the supervisory jurisdiction of the French Courts. Third, taken literally, the *Bhatia* decision seems to undermine India’s adherence to the New York Convention.”<sup>118</sup>

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(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws/rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral Tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral Tribunal shall decide *ex aequo et bono* or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) In all cases, the arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

<sup>117</sup> *Venture Global Engineering v. Satyam Computer Services Ltd. and Another*, AIR 2008 SC 1061.

<sup>118</sup> Pawan Agarwal, *Interim Measures of Protection in Arbitration- An Analysis*, THE CHARTERED ACCOUNTANT, December 2004, available at [http://icai.org/resource\\_file/10962dec04p715-722.pdf](http://icai.org/resource_file/10962dec04p715-722.pdf) (Last visited on August 7, 2009).

#### IV. CONCLUSION

The ruling by the Supreme Court of India in the *Bhatia* case could have disastrous consequences for commercial agreements and foreign awards passed thereon by opening up the floodgates for challenge. The object of the Act is to facilitate international commerce and business, to ensure finality of foreign awards and to minimise judicial interference, particularly when awards have been passed by international commercial experts. This judgment however has the contrary effect as it makes even internal arbitrations subject to domestic law.

It is our understanding that to overcome the grave apprehension of the obstacle of court interference, this Act came into force. It is lamentable that with these judicial interpretations, the very object of this Act has been reduced to a deplorable nullity. Unless the Indian courts resist the appeal to intervene in arbitrations, it will always portray a picture of distrust amongst the potential foreign investors having any kind of trade relations with India while incorporating an arbitration clause.

There exists an urgent need to repair the situation. Apart from the obvious need to restrict applicability of Part I of the Act to any sort of international arbitration, certain changes need to be brought about even within § 9 of the Act to minimize delays and unnecessary interventions. Provisions contained in § 9 regarding availability of interim relief even before the arbitration proceedings commence may be misused by a party, especially if made applicable even to international arbitrations. It may so happen that after obtaining an interim order from the court it may not take initiative to have an arbitral tribunal constituted.

A solution to this as proposed by the Amendment Bill of 2003<sup>119</sup> seeks to introduce sub-sections (4) to (6) in the existing § 9 as follows: As per sub-section (4), where a party makes an application under sub-section (1) for the grant of interim measures before the commencement of arbitration, the Court shall direct the party in whose favour the interim measure is granted, to take effective steps for the appointment of the arbitral tribunal in accordance with the procedure specified in § 11, within a period of thirty days from the date of such direction. As per sub-section (5), the Court may direct that if the steps referred to in sub-section (1) are not taken within the period specified in sub-section (4), the interim measure granted under sub-section (2) shall stand vacated on the expiry of the said period; provided that the court may, on sufficient cause being shown for the delay in taking such steps, extend the said period. In sub-section (6), where an interim measure granted stands vacated under sub-section (5), the Court may pass such further direction as to restitution as it may deem fit against the party in whose favour the interim measure was granted under this section.

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<sup>119</sup> The Arbitration and Conciliation (Amendment) Bill, 2003.

Thus, if the Amendment Bill is passed, it will be then mandatory on the part of the party who has obtained interim relief from a court to constitute the arbitral tribunal expeditiously. Failure to do so, a party may run the risk of automatic vacation of the interim measure.

Furthermore, the system of dual agency for providing relief needs to be abolished or some enforcement mechanism must be provided for enforcement of the interim measures of protections ordered by the Arbitral Tribunal. It would be better that application of interim measures is put to the arbitral tribunals as they are seized of the subject matter under disputes. Only when a party is not able to get relief from the arbitral tribunal, it should be allowed to approach the domestic Courts. This will be in line with the objectives of the Act to minimise the intervention of the Court in arbitral proceedings.

The dilemma of the Indian situation, evidently, has its roots in the failure to adopt different standards for foreign and domestic awards. It is because of this lack of clarity that the judiciary has been unable to demarcate standards for domestic and foreign awards. In our opinion, a useful solution to this problem can be sought in international practice.

As noted earlier, some countries do follow separate standards for domestic and international arbitrations. There are conflicting policy interests that underlie the question of whether to extend court assistance in granting interim relief and the concomitant supervision and enforcement of such orders.<sup>120</sup> Not extending it to arbitrations held overseas may encourage arbitrations to be held in countries such as Singapore and arbitration agreements would provide as such. This may also result in forum-shopping, which is not to be encouraged. A seat of arbitration is selected for its neutrality, which has no relation with the commercial relationship between the parties. To promote international commerce and amicable resolution of disputes, the authors suggest that domestic court interference should be limited and not extend to arbitrations held overseas. This would also encourage and facilitate holding of arbitrations in India. For this very reason, places like Singapore are fast growing as centres of arbitration. If one is to follow the example of Singapore, courts in India should not cross the fine line between assistance and interference and should endeavour to have a pro-arbitration stance. This would, eventually, attract more parties to India and select it as a venue of arbitration. Arbitral institutions in India along with arbitrators and other associated persons would also benefit, encouraging the growth of commerce and business in India.

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<sup>120</sup> *Supra* note 33, 341.

