INDIA AS HUB OF INTERNATIONAL COMMERCIAL ARBITRATION: A LONG WAY TO GO

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Abstract—*With several amendments to the Arbitration and Conciliation Act 1996 and the progressive approaches of the Judiciary in the interpretation of the Act, it seems that the dream of making India as hub of international commercial arbitration has come to be true. Also, the legislative efforts to popularize the institutional arbitration has been seen another milestone achieved in the process. This article acknowledges the recent arbitration related developments in India and reviews the law and judicial approaches and argues that we still need to walk a long way to materialize the dream. To substantiate the view, this article focuses two emerging issues of international commercial arbitration which are yet to be streamlined for the proper application in an appropriate situation so that it reduces the chance of arbitration being sabotaged by a party. One of such areas is the grant of anti-arbitration injunction by the national court. It appears from the case laws that until recently the Indian Courts have been issuing such injunctive relief in a haphazard manner without having recourse to the legal premise under which the injunction is to be granted. An attempt has been made to discern the situation which will warrant the grant of anti-arbitration injunction and determine the limits of the power of the court within the contours of legislative framework. The article also delves into the issues regarding the enforceability of emergency arbitral awards in view of the recent Delhi High Court decision in the case of Amazon Com NV Investment Holdings LLC v. Future Coupons Pvt Ltd.*

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I. INTRODUCTION

It has been 25 years since the Government of India had enforced the Arbitration and Conciliation Act, 1996 (Hereinafter the Act) with the desirability of keeping pace with the global development on this field of law and with the dream of making this sub-continent as hub of international commercial arbitration. Three consecutive amendments[1] to the Act have helped in reshaping the law on arbitration in India and there is no doubt that the said amendments were meant to address the problems which we faced in the working of the 1996 Act. The misadventure created by the Judiciary in the interpretation of the Act has been slowed down and with the acknowledgement of the true spirit of the legislation, the Indian courts have started to be recognized to be progressive. Also, the task of streamlining the institutionalization of commercial arbitration with the 2019 Amendment Act vis a vis setting up of Arbitral Council of India[2] is applauded in the arbitration community in India and many of us see these developments as achieving the final milestone for the ultimate victory. Indeed, the progress is applaudable; but a closer look on the various aspects, which contribute to the development of this area of law and help a country coming out to be a favorite destination of commercial arbitration, will lead to the conclusion that it is too early for the leisurely contemplation of the scenery. In one of my previous articles, I had argued that the three major areas which need considerable attention for any country to become a favorite destination of commercial arbitration are (I) growth of world class arbitral institutions committed to conduct as well as encourage arbitration as the best alternative to litigation (II) a committed judiciary which must ensure least judicial intervention in the conduct of the arbitration and also (III) a well drafted legislation in which the arbitration to be conducted.[3] These distinct attributes need to be reviewed in order to discern the journey which requires to be undertaken for achieving the dreams of having the best suited arbitration

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1 The Arbitration and Conciliation (Amendment) Act, 2015, The Arbitration and Conciliation (Amendment) Act 2019 and the Arbitration and Conciliation (Amendment) Act 2021.

2 The Arbitration and Conciliation (Amendment) Act 2019 has introduced a new Part to the existing Act (Part I-A) which provides provision for the establishment of Arbitration Council of India. Some of the important functions of the Council shall be, inter alia, to recognize professional institutes providing accreditation to arbitrators, to review the grading of the arbitral institutions and arbitrators, to hold workshop training etc. in the area of commercial arbitration, to promote institutional arbitration by strengthening arbitral institutions, etc.

3 "The Challenges and Prospects of International Commercial Arbitration", RMLNLU Journal (2017) Vol. 9, p. 87.

friendly environment in our country. In this article, I have made an attempt to review the judicial journey on the interpretation of the law of arbitration on two specific areas (i) as anti-arbitration injunction and (ii) emergency arbitration. The areas are chosen on the basis of my personal contemplation of the relevance of the subject matters and do not correspond to any preview to the exclusivity of the issues at hand.

II. THE JUDICIARY & THE ARBITRATION LAW IN INDIA

A. Anti-Arbitration Injunction

The power of the national court to enjoin arbitration proceedings or restraining the parties to initiate arbitration is one of the most debated issues in the contemporary international arbitration. The existence of competing principles in support and against issuing of anti-arbitration injunction and the varied practices in different jurisdiction in relation to the power of the national court to issue the same has put the matter in the area of grey.[4] Before we delve into the discussion regarding the justifiability, permissibility etc. of issue of anti arbitration injunction, it is pertinent to comprehend a situation under which a court, generally, is approached to issue such injunction. A Swiss company enters into a contract with an Indian company for the purchase of certain machines. The contract contains arbitration clause which states that the dispute in relation to the contract shall be arbitrated by the Singapore International Arbitration centre (SIAC), Singapore. Disputes being arisen between the parties, the parties enter into negotiations and thereby come up with a settlement which constitutes a standalone agreement but no arbitration clause therein. Subsequently one of the parties, supposedly the Swiss company, initiates arbitration with SIAC. The Indian company may refuse to take part in the arbitration proceedings as the Indian company firmly believes that settlement agreement being in existence between the parties and there being no arbitration clause in the settlement agreement, there cannot be any arbitration. Under these circumstances, the Indian company may apply before the Indian court seeking an injunction to restrain the ongoing of the foreign arbitration.

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[4] The courts in some civil law Jurisdictions viz. France, Switzerland have generally refused to grant anti-arbitration injunction by giving importance to the universally recognized principle of 'competence competence' and the courts of the said jurisdictions are of this opinion that to the extent the Arbitral Tribunal does have the jurisdiction to decide the jurisdictional issues, the national courts should not be permitted to decide the same issues in order to decide whether to grant the anti-arbitration injunction. Some other courts in civil law jurisdictions (Indonesia, Brazil) have contemplated the power of the court to issue the anti arbitration injunction well within the contours of the respective legislations. On the other side of the spectrum, the courts in the common law jurisdictions (England and Wales, US, Hongkong, India among others) have generally envisaged the issue of the anti-arbitration injunction within the permitted limitation of the court under the relevant statutes of the respective jurisdiction.

The pursuit of such anti-arbitration injunctions is historically common and the Indian courts have consolidated its authority to issue such injunction in numerous cases.

i. ***The Justification for the Anti-arbitration Injunction:*** A very recent decision of the Delhi High Court in *Bina Modi* v. *Lalit Kumar Modi*[5] will illustrate the point. Lalit Kr Modi had initiated arbitration over the property disputes in the family. Dr. Bina Modi who is the wife of Lt. Industrialist K K Modi, had filed suit for anti arbitration injunction with the contention that there was a trust deed between the family members and the disputes arising out of a family trust deed was not arbitrable. The Division Bench held, "….. It is a settled position that the court would have jurisdiction to grant anti arbitration injunction where the party seeking the injunction can demonstrably show that the agreement is null and void, inoperative or incapable of being performed." The court, accordingly, approved the application on the basis that disputes arising out of a family trust deed is not arbitrable, i.e. issues arising under the Trusts Act cannot be the subject matter of arbitration. This can be the beginning point of the discussion as to the justification of anti-arbitration injunction issued by the national court. Given the fact that an anti-arbitration injunction can either be used as a convenient mode of sabotaging an arbitration or it could be extremely useful and intuitively justifiable under certain circumstances, it is submitted that the objections which pertain to the jurisdiction of the arbitrator (In the above illustration, the subject matter of the arbitration not being arbitrable, the tribunal shall lack jurisdiction to arbitrate) shall be considered to be the grounds when the court should exercise its power of issuing anti arbitration injunction. On the contrary, objections on the ground that the arbitration proceedings are 'vexatious' 'oppressive' etc should be dealt with utmost circumspection. It is to be noted that the refusal to grant anti arbitration injunction is generally founded on the principle of *competence competence*[6] and in the mandates given to the court under the Convention for the Recognition and Enforcement of Foreign Arbitral Award (New York Convention, 1958).[7] In fact, the compatibility of anti arbitration injunction within the contours of the New York

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5 2020 SCC OnLine Del 1678.

6 The negative effects of the principle of competence competence bar the court to rule on the validity of the arbitration agreement. Jurisdiction like France has expressly mandated the negative effects of the competence principle and thereby has abstained from issuing anti arbitration injunction. For details, follow The Comparative Law of International arbitration (Sweet & Maxwell) p. 387.

7 It is often argued that the grant of anti arbitration injunction is in violation of the obligations under the New York convention, 1958. Under the Convention, the courts of the contracting states are under an obligation to give due recognition to the arbitration agreement and to refer the dispute to arbitration (Art. II of the Convention). See *Saipem SPA* v. *People's Republic of Bangladesh,* (ICSID Case No. ARB/05/07).

Convention, 1958 is a long debated issue.[8] Be that as it may, analysis of case laws will show that the justifiable and consistent approach of the national court in relation to the grant of anti arbitration injunction may be considered an appropriate remedy in a given situation. In the light of the foregoing contentions, let us examine the role of the Indian courts in issuing anti arbitration injunction in the context of a foreign seated arbitration.

ii. The Legal Premise under which the Indian Courts to exercise the power: The simple question to be put here is whether the Arbitration and Conciliation Act 1996 does contemplate the power of the national court to grant anti arbitration injunction? Two important decisions of the Supreme Court deserve attention on this note. In *Chatterjee Petrochem Co.* v. *Haldia Petrochemicals Ltd.*[9] , in relation to the power of the Indian court to grant anti arbitration injunction in an international commercial arbitration whose juridical/legal seat was outside India, the Court applied the ratio of Bhatia International case[10] and rejected the argument that section 5 of the Act which is in Part I of the Act and which bars the intervention by Judiciary authority in arbitration agreement, will not be applicable to such agreement which is subject to the provisions of the New York Convention, 1958 i.e. an agreement falling under Part II of the Act. In this case the suit for anti arbitration injunction was filed under section 9 of the Civil Procedure Code 1908 and it was argued that the Calcutta High Court by the exercise of its ordinary original jurisdiction does have the authority to grant such interim injunctive relief. The Supreme Court did not approve such contention on the basis of the fact that every citizen does have an inherent right to bring a suit of civil nature 'unless the suit is barred by Statute'. Following the dicta laid down in Bhatia and *Venture Global Engg.* v. *Satyam Computer Services Ltd.*[11] the court applied section 5 of the Act to the agreement at hand and held that section 5 puts a bar on the court to intervene if it is not expressly referred in the Act. There being no such provision which expressly empowers the Court to grant anti arbitration injunction in the Act, the Court cannot exercise

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[8] Taking clue from the argument that Art, II (3) of the New York Convention mandates the court to refer the matter for the arbitration and thereby does not contemplate anti arbitration injunction, the other school has argued that the power to enjoin arbitration is a concomitant of the power of the court to compel the parties to arbitration. The use of the expression that the court shall refer the parties to arbitration unless the agreement is ' null and void' 'inoperative' or 'incapable of being performed' has been interpreted that on finding the arbitration agreement invalid, the court shall not refer the parties to arbitration and the prohibition may come out in the form of anti-arbitration injunction.

[9] (2014) 14 SCC 574.

[10] *Bhatia International* v. *Bulk Trading SA,* (2002) 4 SCC 105. The Supreme Court applied Pt. I of the Act to a foreign seated arbitration and thereby ignored the principle of territoriality which is envisaged under the scheme of UNCITRAL Model Law on International Commercial Arbitration, 1985.

[11] (2008) 4 SCC 190.

such authority under the Act. Soon thereafter, the Supreme Court in *World Sports Group (Mauritius) Ltd.* v. *MSM Satellite (Singapore) Pte. Ltd.*[12] took a different stand and upheld the power of the Indian court to grant anti arbitration injunction in a foreign seated arbitration. The case is in relation to the broadcasting of IPL Media Rights. Disputes arose between the appellant and the respondent after the respondent rescinded the Facilitation Deed on the ground that it was voidable on account of misrepresentation and fraud. While the respondent filed a suit for the recovery of amount and declaration of the facilitation deed to be void, the appellant invoked the arbitration clause of the Deed and initiated arbitration in Singapore under the aegis of ICC. The respondent filed an application for the temporary injunction against the appellant from continuing with the ICC arbitration. The appellant's contention was primarily focused on the language of section 45 of the Act which states that "…….. refer the parties to arbitration , unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Therefore a challenge as to the voidness of the underlying contract (not the arbitration agreement) must be decided by the arbitral tribunal in the light of the principle of *competence competence.* The Court in this case dealt in detail the scope of section 45 of the Act and held that the Court can decline the reference of the arbitration only when the said agreement is null and void, inoperative and incapable of being performed. The Court although dismissed the High Court's finding which allowed the anti arbitration injunction, had acknowledged the power of the court to issue such injunctive relief. The Court held that under section 9 read with section 20 of CPC, the High Court had the jurisdiction to try such suit of declaration for injunctive relief, but the Court is under an obligation to follow the mandate of the legislature in sections 44 & 45 of the Arbitration and Conciliation Act 1996. Therefore such anti arbitration injunction would be possible only when the court finds the agreement null and void, inoperative and incapable of being performed.[13] The departure from the Chatterjee Petrochem is evident and unlike Chatterjee petrochem, the Court does not consider section 5 of the Act to be relevant for determining the issue.

iii. Balancing the Competing Interests: In the jurisdictions where the power of the court to issue anti arbitration injunction has been recognized, it should be exercised in the cases where the arbitral tribunal does lack the jurisdiction.[14] Reference may be had to the decision of the Delhi Court in *McDonald's India (P) Ltd.* v. *Vikram Bakshi*[15] where the

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[12] (2014) 11 SCC 639.

[13] *Id.,* at 24 and 25.

[14] Lim Wei Lee, "Anti Arbitration Injunction: Black & White or Shades of Grey?" in Gourab Banerjee, Pramod Nair et al. (eds.) International Arbitration and the Rule of Law: Essays in Honour of Mr Fali Nariman (Permanent Court of Arbitration) pp.425-437.

[15] 2016 SCC OnLine Del 3949 : (2016) 232 DLT 394.

court found that such anti arbitration injunction shall be granted only when the parties can demonstrably show that the agreement is null and void, inoperative or incapable of being performed (or, on a parity of reasoning, does not exist). To illustrate the situation further, a decision of the Supreme Court deserves mention. In *Swiss Timing Ltd.* v. *Commonwealth Games 2010 Organising Committee*[16], the Supreme Court while dealing the arbitrability issue of fraud, the Court found ".....wherever a plea is taken to avoid arbitration on the ground that the underlying contract is void, the Court is required to ascertain the true nature of the defence. Often the terms 'void' and 'voidable' are confused and used loosely and interchangeably with each other...."[17] The Court referred some of the relevant statutory provisions in the Contract Act 1872. Sec 2(g) of the Contract Act says that "an agreement not enforceable by law is said to be void." Section 2(j) of the Act states that "a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable." The court very rightly explained that where the Court can come to the conclusion that the contract is void just by giving a meaningful reading of the document itself, without receiving any evidence, it would be a justified situation to decline reference to arbitration. Although such situations are few viz., where the contract is entered by a minor, where the consideration of the contract is forbidden by law or the object of the contract is to indulge into any immoral activities etc. Some good examples of these types of contracts would be contract for running a prostitution racket, smuggling drugs, human trafficking etc. Similarly a wagering contract (except betting on horse racing) would also fall in this category. The court distinguished these aforementioned types of voidness from those as contemplated in section 2(j) of the contract Act. The latter shall include absence of free consent, unsoundness of mind or the consent is being vitiated as it has been obtained by coercion, undue influence, fraud or misrepresentation etc. Such a contract becomes void only when the party who is claiming lack of free consent is able to prove the same and thereby renders the contract void. The Court was of this opinion that claims falling in this category should be dealt by the arbitrator and not by the court. This observation of the court may be useful in determining the cases when a plea for injunction should be upheld by shutting the gate of arbitration. This would reduce the reckless enjoining of foreign seated arbitration proceedings by the Indian Courts. In fact until recently, the Indian Courts have issued such injunctions haphazardly, without even examining the source of compatibility of this power within the purview of the Indian legislation.[18] Reference may be had to *Union of India* v.

[16] (2014) 6 SCC 677.

[17] *Supra* note 12, para 26.

[18] Sharad Bansal and Divyanshu Agrawal, "Are Anti-Arbitration Injunctions a Malaise? An Analysis in the Context of Indian Law", William W. Park (ed.), Arbitration International; Oxford University Press 2015, Vol. 31 Issue (4) pp. 613-629.

Dabhol Power Co.[19]. The Delhi High Court held that the Court does have the power to restrain foreign seated arbitration if the said proceedings are found to be oppressive and it calls for interference. The Court simply had put the ratio of Bhatia International[20] without much analysis of the source of the power of the court to issue such injunction of a foreign seated arbitration. The same trend is followed in another decision of the Delhi High Court in *Bharti Televentures Ltd.* v. *DSS Enterprises (P) Ltd.*[21] In majority of the cases the Indian courts issuing such injunctions have been the court of the place of residence of the party who is requesting the injunction and not being in the capacity of a supervisory court of the arbitration and have failed to examine the situation as to why the arbitral tribunal of the off-shore arbitration was not competent to decide the issue. An unguided and uncontrolled anti arbitration injunction shall run counter to the ethos and principles of the New York Convention.[22] This may bring some disrepute to the national court of the country as divesting itself from a pro arbitration approach. On this note, recent decision of the Calcutta High Court in *Devi Resources Ltd.* v. *Ambo Exports Ltd.*[23] deserves attention. Since the BALCO judgment (2012)[24] Indian Courts have started to depart from its narrower approaches towards the interpretation of the arbitration law in India (Unnecessary intervention in the conduct of arbitration) and opted to go with a pro arbitration approach. Keeping in line with this pro-arbitration approach, the Calcutta High Court in Devi Resources Ltd had refused to restrain the enforcement of a foreign arbitral award which was delivered in violation of anti arbitration injunction.[25] The interest-

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19 2004 SCC OnLine Del 1298.

20 *Supra* note 10.

21 2005 SCC OnLine Del 862 : (2005) 123 DLT 532.

22 Art. II of the Convention states that each Contracting State shall give due recognition to an arbitration agreement.

23 2019 SCC OnLine Cal 7774.

24 *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

25 The appellant (a Hong Kong based company) and the respondent (a company incorporated under the Indian law), in this case at hand, entered into a purchase contract which was to be governed by English law and any dispute was to be referred to arbitration by the London Maritime Arbitration Association. Disputes being arisen and the Indian based company having filed a suit before the Indian court in this regard, the appellant moved an application under S. 45 of the Act for reference of the matter for arbitration. Respondent argued against the existence of the arbitration agreement saying that a settlement agreement had been entered which constituted a standalone agreement with no arbitration clause. During the subsistence of the proceedings, the appellant initiated arbitration and appointed arbitrator. The respondent sought an injunction for restraining the continuation of the proceedings. The court had issued an interim anti-arbitration injunction. However, the foreign seated tribunal proceeded with the evidence available with it in spite of the continuance of the interim order of the Indian Court and gave an award in favour of the appellant. The appellant moved to vacate the interim injunction of the court which was followed by the appellant's application for the enforcement of the arbitral award. The enforcement petition was dismissed as the award was obtained during the period of the stay of interim injunction but interestingly the court subsequently vacated the interim anti-arbitration injunction.

ing question came up for consideration was whether an arbitral award was liable to be refused to be enforced on the ground that the award was obtained in violation of an interim stay of arbitration although the interim injunction was subsequently vacated. The Calcutta High Court had addressed this issue in the continuation of the pro arbitration approach and upheld the enforcement of the arbitral award despite the fact that the arbitration proceedings took place while the interim stay against the proceedings was subsisting. For the matter of anti arbitration injunction the court carved out an exception to the general rule.[26] Although we have celebrated the decision considering a pro arbitration approach and minimal intervention of the court but an analysis of the judgment will tell the other story of the side. The implication of the judgment would be legitimizing the violations of (anti-arbitration) injunctions without any consequences. From these catena of cases, it is evident that the jurisprudence in relation to the appropriate circumstances of grant of anti arbitration injunctions and the consequences of such injunction is yet to be given a determinate shape.

B. Emergency Arbitral Award

India is still in the process of developing the jurisprudence in the area of recognition of Emergency Arbitrator within the ambit of the law and the enforceability of the award of an Emergency Arbitrator. The arbitral institutions in India viz., Delhi International arbitration Centre of Delhi High Court, Mumbai Centre for International Arbitration have contained Rules in relation to the appointment of the emergency arbitrator. As the appointment of the emergency arbitrator is sought before the constitution of the arbitral tribunal and is entrusted to address interim reliefs which the parities intend to seek on an extreme emergency basis, certain issues raises serious concern regarding this mode of arbitration. The relationship between the Emergency Arbitrator and the arbitral tribunal determines how an emergency arbitration proceeds. There are jurisdictions which consider emergency arbitrator as a placeholder for the arbitral tribunal.[27] As a result, the statutory limitation of liability as applicable to an arbitrator does also apply to the emergency arbitrator and this opens up the possibility of the challenging the jurisdiction as well as the award of an emergency arbitrator. It is significant to note that the enforcement of the emergency arbitral award would depend whether the law of the country where the emergency award is to be enforced has contained any such provision to that effect. Laws in Singapore, Hong Kong have made expree amendments in their

[26] General rule: 'notwithstanding an order of injunction being subsequently vacated or set aside whether at the same level or higher-acts done in derogation of the injunction during its subsistence would be regarded as void acts'. Para 58 of the judgment.

[27] Japan Commercial Arbitration Association states that an order of the emergency arbitrator shall be deemed to be an order of the Arbitral Tribunal. The International Arbitration Act of Singapore does specify that an emergency arbitrator falls within the definition of Arbitral Tribunal and thereby the emergency arbitrator steps into the shoes of an Arbitral Tribunal.

respective laws to make the award of an emergency arbitrator enforceable. For the countries where any such provision is lacking, like In India, the question remains open as to the enforceability of the emergency arbitrator's award.

In relation to the issue of the enforceability of the emergency arbitrator award in India, the Delhi High Court in *Raffles Design International India (P) Ltd.* v. *Educomp Professional Education Ltd.*[28] did not allow the enforcement of such order in India and held that emergency arbitral award cannot be enforced under the Indian Arbitration Act in the absence of any provision similar to Art. 17H of the UNCITRAL Model Law on International Commercial arbitration, 1985.

Art. 17H (1) of the UNCITRAL Model Law: "An interim measure issued by an arbitral tribunal shall be recognized as binding and enforced upon an application to the competent court, irrespective of the country in which it was issued, subject to the provisions of Art 17(I)."

The Court concluded that the Arbitration and Conciliation Act 1996 does not contain any provision parimateria to Art.17(H) of the Model law and also section 17 of the Indian Act which talks about the enforcement of the interim measure of arbitral tribunal cannot be extended to an arbitration proceedings held outside India. Under these circumstances, the emergency award was not held to be enforceable in India. But a very recent decision of the Delhi High Court, in *Amazon Com NV Investment Holdings LLC* v. *Future Coupons (P) Ltd.*[29] takes an opposite stand and approves the enforceability of an award of emergency arbitration in India. Relying on section2 (6), 19(2) & 2(8) of the Act and also holding that sec 17 of the Act does not prohibit the parties of not choosing any institutional Rules which allow recourse to emergency arbitration, the Court upheld the enforcement of emergency arbitrator's award. These two decisions of the Delhi High Court have two different and opposite conclusions on the issue at hand.

This shows that some changes in the existing law are required to give the legal sanctity of the enforcement of emergency arbitrator's award. It is submitted that the changes are twofold; one recourse would be by reconsidering the recommendation in the 246th Law Commission's Report wherein it was proposed to bring the emergency arbitrator within the definition of the arbitral tribunal. This will place the emergency arbitrator at par with the arbitral tribunal and thereby facilitate the enforcement mechanism, especially for the international commercial arbitration taking place within India. Also amending the existing provision of section 17 of the Act and to incorporate a provision similar to Art.17(H) of the UNCITRAL Model Law would facilitate the

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[28] 2016 SCC OnLine Del 5521.
[29] 2021 SCC OnLine Del 1279.

enforcement of any such interim emergency award which may originate in any other country outside India.

III. CONCLUDING REMARKS

The paper has attempted to show that even after several amendments to the Arbitration and Conciliation Act 1996 and considerable demonstration of the pro arbitration approach by the Judiciary, India still needs a long way to go for making this sub-continent as hub of commercial arbitration. The law on arbitration is developing at fast pace in order to address the need of the business communities. The legislature as well as the Judiciary must take acknowledgment of these developments in such a way so that the law while facilitating the business communities in holding international arbitration also does not go against the fundamental principles of international arbitration law.