
**THE INTERIM AWARD PUZZLE IN THE INDIAN
ARBITRATION REGIME: FUTURE COURSE**

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Abstract

The grant of Interim Awards is a lesser opted method but not a novel concept in Indian arbitration proceedings, with its use being traced back to the inception of the Arbitration & Conciliation Act, 1996 itself. This seemingly straightforward provision however, suffers from uncertainties which obstruct the pro-arbitration atmosphere currently prevailing in Indian courts. As the jurisprudence on the subject is limited, this article reviews the judicial treatment of the provision until now in the context of pragmatic realities like costs, possibility of use of the provision as a delay tactic, and the limited statutory prescription. In the light of the recent observations of the Supreme Court in the Bhadra Products case, which recommended to the Parliament to club the challenge of interim award with the final award under Section 34 to avoid 'piecemeal challenges' and reduce costs. It becomes necessary to evaluate the far-reaching consequences of taking away of such recourse from parties at the interim stage. In addition, the article also questions the considerable discretion of the tribunal and subsequently the courts, upon which the application of the provision relies. The article also touches upon the peripheral issue of the grant of interim award on admitted liability and whether it is permitted to contract out of Section 31(6) of the Act. Considering the deficiency of discussion on the aforesaid provision in the 246th Law Commission Report recommendations and Arbitration & Conciliation (Amendment) Act 2018, this article explores the need and extent to which the interim award provisions should be amended for a greater degree of certainty, uniformity and compliance with international standards.

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I. Introduction

“Arbitral award” is defined in Section 2(1) (c)¹ of the Arbitration and Conciliation Act, 1996 (“the Act”) as including an “interim award”, also occasionally fashioned as a “partial award”. Sub-section (6) of Section 31 of the Act empowers the Arbitral Tribunal to make an interim award on “*any matter with respect to which the Tribunal may make a final arbitral award*”². There are broadly two ways in which an interim award takes effect; an interim arbitral award is can be in its essence a final award, as it conclusively determines the rights and liabilities of parties on an issue and is binding upon them³, and interim in the sense that it is made at the interim stage⁴ wherein the arbitral tribunal has *not* become *functus officio* and secondly, if the form of the award is such that it is intended to have effect only so long as the final award is not delivered, it will have the force of the interim award and it will cease to have effect once the final award is made⁵. It is a common method used by tribunals to delineate the issues (like jurisdiction, liability, applicable law, etc.) in dispute and, where appropriate, determine some issues at an early stage of the proceedings⁶. A 2012 survey by the Queen Mary University in collaboration with White and Case LLP found that partial or interim awards are issued in one third of international arbitral proceedings⁷, highlighting the need to exact its principles in the domestic

¹ Arbitration & Conciliation Act 1996 § 2(1)(c).

² Arbitration & Conciliation Act 1996 § 31(6).

³ *Satwant Singh Sodhi v. State of Punjab*, (1999) 3 SCC 487, ¶6.

⁴ *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181, ¶¶68-70.

⁵ *Satwant Singh Sodhi v. State of Punjab*, (1999) 3 SCC 487, ¶6.

⁶ Harsh Hari Haran, *Do Parties Need Recourse against Interim Awards?*, WOLTERS KLUWER ARBITRATION (Oct. 3, 2018, 11 AM), <http://arbitrationblog.kluwerarbitration.com/2018/09/06/parties-need-recourse-interim-awards/>.

⁷ Queen’s Mary, White & Case LLP, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, p. 38, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf.

arbitration regime. It is important to differentiate an interim award under the Act from an interim/partial award granted by an emergency arbitrator in some international and institutional arbitrations. Under the Act, an interim arbitral award can be challenged under Section 34 of the Act by the virtue of it being included in the definition of an ‘arbitral award’. Additionally, an arbitrator has the discretion to submit more than one interim awards⁸. The grant of interim awards in India thus stands on two unstable pillars; uncertain components of an interim award and, its fluctuating judicial treatment.

II. Compositional Uncertainty: Determining the Nature of Interim Award

The Indian arbitration regime *vis-a-vis* the Act, provides for submission and the subsequent challenge of an interim award, however, it neither defines what constitutes an interim award nor provides clarity on the fine line separating such an award from an interim *measure* under Section 9 and Section 17 of the Act. Determining the nature of the ‘award’ becomes necessary while accurately identifying the statutorily mandated recourse against it, as a jurisdictional award and an interim measure attract challenge under Section 34⁹ and Section 37¹⁰ of the Act, respectively.

The Hon’ble Supreme Court seems to have indicated that one of the tests for an order to partake the character of an award or an interim award is that the decision must be of a dispute or claim

⁸ ONGC v. Anil Construction Co., AIR 2000 Guj 284.

⁹ Wording of Section 34 provides that recourse against an ‘arbitral award’ may be made only by an application for setting aside the award in accordance with sub-section (2) and (3) of Section 34. Since, sub-section (c) of Section 2 provides that an arbitral award shall include an interim award, it is necessarily concluded that an interim award can also be challenged only under Section 34 of the Arbitration Act.

¹⁰ Clause (b) of sub-section (1) of Section 37 and clause (b) of sub-section (2) of Section 37 provide for appeal against orders granting or refusing to grant any interim measure under Section 9 and Section 17 of the Act respectively.

arising out of, or relating to, the agreement.¹¹ It has been observed that it would not be conducive to interpret the decision of the Joint Arbitration Committee with regard to the venue to be an interim award, conferring a right of challenge to an aggrieved person under Section 34 of the Act.¹² By an interim award, the arbitrator has to decide a part of the dispute referred to him; he may determine some of the issues or some of the claims which form a part of the dispute.¹³ Where the tribunal merely recorded the finding that a majority of the shareholders did not want a division of the properties of the company, such statement of factum did not constitute an interim award. Thus, in such circumstances, it was held that it was not an appropriate stage for filing of an application under Section 34 of the Act.¹⁴

Difference between “interim award” and “decision on jurisdiction”

Another contentious issue raised in this regard have been cases wherein interim awards have been made on seemingly jurisdictional issues thereby raising questions of their treatment either as an award under Section or an interim award under Section 31(6) of the Act. After grappling with the issue of limitation in *NTPC vs. Siemens*¹⁵, the Supreme Court has recently ruled in *M/s Indian Farmers Fertilizer Co. vs. M/s Bhadra Products*¹⁶, that an award on the issue of limitation is to be treated as an interim award and can be challenged under Section 34¹⁷ of the Arbitration Act. The Supreme Court held that as long as the award finally decides an issue between the parties, it was an

¹¹ *Sanshin Chemicals Industry v. Orientals Carbons & Chemicals Ltd.*, (2001) 3 SCC 341.

¹² *Id.*

¹³ I A. WADHWA & A. KRISHNAN, JUSTICE RS BACHAWAT’S LAW OF ARBITRATION 1684 (6 ed. Lexis Nexis 2018).

¹⁴ *Deepak Mitra v. D.J. Aild.*, AIR 2000 All 9.

¹⁵ *National thermal Power Corporation Ltd. v. Siemens Atkiengesellschaft*, (2007) 1 Arb LR 377.

¹⁶ *M/s Indian Farmers Fertilizer Co. v. M/s Bhadra Products*, 2018 SCC Online SC 38, ¶16, 29.

¹⁷ Arbitration & Conciliation Act 1996 § 34.

interim award binding on the parties¹⁸. Further, the issue of limitation was distinguished from a *jurisdictional* issue in the sense that issues of jurisdiction are the ones which are solely prescribed under Section 16 of the Act, such as, questions of validity of an arbitration agreement, constitution of the arbitral tribunal, and whether the subject matter of dispute is covered under the arbitration clause, and hence, in the present case the drill under Section 16 could not be followed. In *Noida Toll Bridge Co. Ltd. vs. Mitsui Marubeni Corporation*¹⁹, it was held by the court that a decision of the arbitral tribunal which is not concerned with the competence of the tribunal, but deals with a legal infirmity attributed to the claim in itself, is an interim award and cannot be taken as a decision on the jurisdiction. Therefore, a decision of the arbitral tribunal that an unregistered partnership firm is entitled to make claims before it and the statutory bar under Section 69 of the Partnership Act, 1932 is inapplicable, was held to be an interim award and not a decision on the jurisdiction of the tribunal.²⁰

Difference between “interim award” and “interim measure”

It is pertinent to note that, an interim measure has to be differentiated from an interim award by examining the object of the order and degree of conclusiveness of rights and liabilities of the parties. An interim order is in the nature of an interim measure of relief granted for the preservation of certain rights of the parties.²¹ An interim award passed ostensibly under Section 17,

¹⁸ Naval Sharma, Shriya Luke, *India: Interim Award On Limitation Can Be Challenged Under Section 34 Of The Arbitration & Conciliation Act 1996*, MONDAQ (7 Oct., 2018, 12 PM) <http://www.mondaq.com/india/x/667478/trials+appeals+compensation/Interim+award+on+limitation+can+be+challenged+under+Section+34+of+the+Arbitration+Conciliation+Act+1996>.

¹⁹ *Noida Toll Bridge Co. Ltd. v. Mitsui Marubeni Coporation*, (2005) 3 Arb LR 234.

²⁰ *Id.*

²¹ Adya Pandey, *Tracing the Steps of Emergency Arbitration in India*, THE WORLD JOURNAL ON JURISTIC POLITY, 1, 5(2017).

but with no intention of providing protection of the subject matter, cannot be taken to be as an order of interim relief²². Even though the arbitrator states that the award is made under Section 17 and also awards security, it does not affect the nature of the award as an award contemplated to be an interim award under Section 31(6).²³ A mandatory award directing payment of certain sums by one party to the other based on a prima facie determination on the *lis*, but not being in the nature of a final determination of the rights of the party, has been held to be an interim award, falling within ambit of Section 31(6).²⁴ An interim arrangement differs from both, an interim award and an interim measure in the sense that it is intended to have force till the time proceedings are subsisting and any such arrangement provided for in arbitration proceedings has been held to have ended with the final disposal of the proceedings.²⁵

Therefore, from the above discussion, it can be inferred that the terms of reference, conclusiveness of substantive rights and the proximity of the issue with the contract will have bearing on the question of determining the nature of a decision as an interim award. The decision in *Bhadra Products*²⁶ has also to a great extent differentiated jurisdictional awards from interim awards. Despite the encouraging developments, it can be observed that the precedential parameters set are extremely subjective, which can be swayed in either direction. Considerable reliance has to be placed upon the wisdom of the tribunal and the court in dealing with the intricate issues of orders, awards and jurisdiction.

²² 1 A. WADHWA & A. KRISHNAN, JUSTICE RS BACHAWAT'S LAW OF ARBITRATION 1686 (6 ed. Lexis Nexis 2018).

²³ *Asian Electronics Ltd. v. M.P. State Electricity Board*, (2007) 3 MPLJ 203 (DB).

²⁴ *Supra* note 23.

²⁵ *Nand Singh v. Hazoor Singh*, (1996) Supp Arb LR 453 (Del).

²⁶ *M/s Indian Farmers Fertilizer Co. v. M/s Bhadra Products*, 2018 SCC Online SC 38, ¶20-28.

III. Judicial Treatment of Interim Awards: Special Focus on Discretion, Recourse and Enforceability

Discretion of the Tribunal: How much is too much?

With respect to the scope and threshold of judicial interference, the Courts have frequently respected the arbitral tribunal's discretion in the grant of an interim award. The Bombay High Court has held that it is 'reasonable' and 'moderate' and in interest of both the parties to order the consortium of lenders to wait for arbitrators to pass the interim award to claim their monies.²⁷ The Court further clarified that if the interim award was not in favour of the debtor, the lenders would be at liberty to immediately take steps to enforce the pledged security of 20,00,000 shares of the company without further referring the matter to the Court.²⁸ It is a recognized principle, both as a matter of authority and as a matter of principle that the arbitral tribunal has the complete discretion to decide whether or not to pass an interim award.²⁹ Hence, a notice of motion in arbitral appeal was dismissed as there was no question of law raised by the manner in which the majority arbitrators exercised their discretion and there was no basis on which the exercise of their discretion could be challenged.³⁰

It can be observed that in the absence of any agreement to the contrary, the arbitrators have considerable discretion in the grant and subject matter of the interim award which, consequently can cause lesser uniformity and certainty, lowering the attractiveness of India as a seat of arbitration. To counter this, the Courts have

²⁷ Kalyan Sangam Infratech Ltd v IDBI Bank Ltd, 2015 SCC OnLine Bom 2055.

²⁸ Lenders can claim dues only after passing of Interim Award, SCC (Oct. 5, 2018, 5 PM) <https://blog.scconline.com/post/2015/05/06/lenders-can-claim-dues-only-after-passing-of-interim-award/>.

²⁹ 1 A. WADHWA & A. KRISHNAN, JUSTICE RS BACHAWAT'S LAW OF ARBITRATION 1689 (6 ed. Lexis Nexis 2018).

³⁰ Ex mar BV v. National Iranian Tanker Co., (1992) 1 LLOYD'S REP 169.

obligated the arbitral tribunal to make the award only after ‘proper hearing’, barring exceptional cases where they can properly find that they are not satisfied that the defence or set-off is made in good faith, or where there is a sum properly due on the basis of the respondent’s own figures.³¹ Guidelines of the aforesaid nature, not amounting to directions may provide a useful guide to regulate the tribunal’s conduct and avoid the uncertainties that accompany ever-fluctuating discretion.

The Enforcement-Stay Interplay

An interim award can be enforced in accordance with Section 36 of the Act in accordance with the provisions of the Code of Civil Procedure, 1908 (‘Code’) as a decree of the Court. In the context of a final arbitral award, there is no automatic stay on the operation of the award, if there is an application to set aside award under Section 34 pending with the Court. However, in the context of interim awards, it is important to note the judgment of *V. Raghavan vs. Dr. R. Venkitapathy*,³² wherein the Madras High Court noted that, what is contemplated under Section 36 of the said Act is only the postponement of the enforcement of the award and not the stay of further proceedings by the Arbitral Tribunal pursuant to an interim award. Hence, it seems that pendency of the proceedings before the Court under Section 34, challenging the interim award cannot stall the Arbitral Tribunal from passing the final award. However, this remains a grey area in absence of any precedent which lays down a definite position.

Right time to challenge: Countering the ‘piecemeal challenge’ argument

Despite the pro-arbitration atmosphere prevailing in the judicial sensibilities, the future discourse in this regard may be altered in view of the observations of the Supreme Court in the *Bhadra*

³¹ I A. WADHWA & A. KRISHNAN, JUSTICE RS BACHAWAT’S LAW OF ARBITRATION 1688 (6 ed. Lexis Nexis 2018).

³² *V. Raghavan v. Dr. R. Venkitapathy*, 2015 SCC OnLine Mad 8514.

Products case³³, wherein Justice Nariman opined for the Parliament to make a provision so that all interim awards may be consolidated with the final award, a combined challenge to which may be filed under Section 34 of the Act, thereby avoiding the ‘piecemeal challenge’ trend and reducing costs. This recommendation, if adopted, will effectively take away the right of the suffering party from approaching the Court on substantive issues until the final award has been rendered, by the time the parties may have suffered irreparable harm on account of execution of the interim award. Additionally, the arbitration proceedings in such a scenario will proceed on the foundation of the decided interim award, without addressing the opposing arguments in Court and would ultimately reduce the ambit of hearings on further related issues. In the hypothetical situation where, in an arbitration arising from a construction contract, a contractor claims damages for wrongful termination of the contract and payment for work done and the employer counter-claims for costs incurred in engaging a replacement contractor, an interim award holding that the contract was validly terminated, would greatly reduce the scope of the damages hearing.³⁴ In light of these pressing disadvantages, the counter-argument of costs reduction and unnecessary delay given by the Supreme Court may not be able to adequately safeguard the rights of the parties. Therefore, a balance must be struck to rectify the possible drawbacks highlighted by the Court.

IV. Interim Award on Admitted Liability & Possibility of Contracting out

The principles for passing an interim award on admissions are akin to the principles followed by courts in passing a judgment on

³³ *M/s Indian Farmers Fertilizer Co. v. M/s Bhadra Products*, 2018 SCC Online SC 38, ¶29.

³⁴ *Supra* note 6.

admissions under Order XII Rule 6 of the Code.³⁵ In the *Numero Uno*³⁶ case, the court has held that pendency of counter claim does not denude the arbitrator of the power to pass an interim award in the original suit/claim if such an interim award is otherwise justified which inter alia included interim awards made on admitted liability. No interference would be permissible only because the defendant has made a counter claim or because some areas of dispute, independent of the area covered by the interim award, remains to be resolved.³⁷ The court further went on to hold that in the event that the counter claim is successful, adjustments can be made to the final award after considering the amount already awarded in the interim award.³⁸

Contracting out of an interim award

The power of making an interim award as conferred under Section 31(6) of the Act and under Section 27 of the Arbitration and Conciliation Act, 1940 (‘the 1940 Act’) seems to be similar with the difference that Section 27 of the 1940 Act³⁹ opened with the words “unless a different intention appears in the arbitration agreement...”. The omission of these words should not be construed so as to deprive the parties of their right to agree to a single award to be made covering all disputes. It seems that it would be possible by virtue of Section 19(2) of the Act, which states that parties are free to agree on the procedure to be

³⁵ *Numero Uno International Ltd. v Prasar Bharti*, 2008(1) ArbLR 446(Delhi) ¶1.

³⁶ *Numero Uno International Ltd. v Prasar Bharti*, 2008(1) ArbLR 446(Delhi) ¶7.

³⁷ Yaman Kumar, Gunjan Chhabra, *Award On Admitted Liability In Arbitration Proceedings*, (Oct. 11, 2018, 3 PM) <http://www.mondaq.com/india/x/485728/Arbitration+Dispute+Resolution/Interim+Award+On+Admitted+Liability+In+Arbitration+Proceedings>.

³⁸ *Supra* note 35.

³⁹ Arbitration Act 1940 § 27.

followed by the arbitral tribunal in conducting proceedings, the parties may choose to *rule out* an interim award by agreement.⁴⁰

Notwithstanding the above proposition, an interim award cannot go against the contract provisions.⁴¹ An interim award directing the owner to execute the sale deed even when the apartments were not complete was held to be without jurisdiction where according to the contract owners were bound to execute the sale deed only after the owner's share of apartments were completed in all respects.⁴² Therefore, whilst it is possible to exclude Section 31(6), i.e. impose a complete/partial restriction on grant of interim awards by virtue of an agreement to the contrary, arbitrator/court will not be permitted to go beyond the contract in case the parties have not made such agreement to the contrary.

V. Conclusion

Although some principles in respect of dealing with interim awards has been laid down by the Courts, we observe that crucial issues remain to be determined and applied at the discretion of the tribunal and the Court on a case to case basis. The recommendation by way of parting words in *Bhadra Products* are extreme inasmuch as taking away the right of the parties to recourse at the interim stage and do not appear to be the appropriate solution. The concern of the Court in making such a recommendation is valid as the parties do incur significant time and costs in dealing with challenges to interim awards also posing threat to the efficacy of newly introduced Section 29A which imposes a time limit of one year to complete arbitration proceedings and grant the final award with the possibility of only a one-time extension of six months if the parties mutually consent. However, the solution is when both, the tribunal and

⁴⁰ I A. WADHWA & A. KRISHNAN, JUSTICE RS BACHAWAT'S LAW OF ARBITRATION 1682 (6 ed. Lexis Nexis 2018).

⁴¹ *Id.*

⁴² V.N. Krishna Rao v. Turnkey Constructions Pvt. Ltd., AIR 2004 NOC 350 (Kant).

court adopt a standardized discretionary approach. As mentioned earlier, it may be useful if the Supreme Court lays down some guidelines for tribunal and lower courts as and when such a case comes before it for adjudication. If the nature of the contract makes it beneficial to render a single award, parties should be encouraged to specifically opt out of Section 31 (6) and expressly bar the grant of interim awards if any arbitration proceedings ensue, to avoid unnecessary costs and delays. As far as amendment of the Act goes, Section 36 may be amended to include provisions for enforcement of interim award and stay of arbitration proceedings pending such enforcement. Consequently, Section 29A, which as mentioned earlier provides for a one-year time limit to issue the final award may also be amended to provide for concessions wherein an interim award is granted, so as to avoid dissolution of the tribunal on expiry of the prescribed time period. To reduce delays, it would be beneficial to provide for an expeditious hearing to the challenge to the interim award; it may be useful to amend Section 34 of the Act to such extent. Strict adherence of the precedents should be adopted so that there is no interference with the finality of the interim award. Although the amendments would increase the degree of certainty, judicial certainty will prevail only when the tribunal and the Courts conform to precedents, adopt a pro-arbitration approach and *suo moto* deploy all possible methods to reduce costs and delays.