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## The Standard of Review of Interim Orders of an Arbitral Tribunal Seated in India: A Significant Step Towards Certainty

Sharad Bansal (Bombay High Court) · Wednesday, November 21st, 2018

### Background

The Indian [Arbitration and Conciliation Act, 1996](#) (“Act”) provides, in Section 37(2)(b), for an ‘appeal’ from an arbitral tribunal’s order on interim/provisional measures (“interim order”). It, however, does not stipulate the standard of review that the court must apply while reviewing an interim order. *Sans* any prescribed legislative standard, courts have two alternatives available: test interim orders on the same grounds as those applicable for annulment of awards, laid down in Section 34 of the Act; or treat Section 37(2)(b) proceedings as an appeal and assess the legality of interim orders on merits.

Discussion on the applicable legal standard in court decisions rendered under Section 37(2)(b) is sparse and loose. While some judgments simply observe that the scope of courts’ interference in interim orders passed by arbitral tribunals is limited (*Subhash Chander Chachra v. Ashwani Kumar Chachra*), others have conducted a full-blown enquiry on merits to test the legality of the tribunal’s interim orders (*Sanjay Gambhir v. BDR Builders and Developers Pvt. Ltd., Intertoll ICS Cecons O & M Co. Pvt. Ltd. v. National Highways Authority of India, NTPC Ltd. v. Jindal ITF Ltd.*). A third category of decisions applies the same standard of review to Section 37(2)(b) proceedings as that applicable to appeals against a court’s order on provisional measures (*A. Jayakanthan v. J.R.S. Crusher*).

### The Supreme Court’s Judgment in *National Highways Authority of India v. Gwalior Jhansi Expressway Limited*

Recently, the Supreme Court of India in *National Highways Authority of India v. Gwalior Jhansi Expressway Limited* dealt with a challenge to an interim order of an arbitral tribunal which was subsequently upheld by the High Court under Section 37(2)(b). As in the earlier decisions concerning ‘appeals’ against interim orders under Section 37(2)(b) of the Act, the Court did not dwell on the standard of review for interim orders. Even the parties’ submissions (as noted in the Court’s judgment) did not address this issue. The Court nevertheless set aside the interim order on the basis that the arbitral tribunal’s approach and ruling were in contravention of the *fundamental policy of Indian law*.

According to Explanation 1 to Section 34(2)(b)(ii) of the Act, introduced through a legislative amendment in 2015, ‘fundamental policy of Indian law’ constitutes one of the three elements of the

public policy of India. As in other jurisdictions, breach of public policy is one of the grounds for setting aside an *arbitral award*. It may, therefore, be argued that the Supreme Court in *Gwalior Jhansi Expressway Limited* assessed the legality of the arbitral tribunal's interim order on the same grounds as those applicable for setting aside of arbitral awards. The application of the 'fundamental policy of Indian law' standard necessarily excludes any possibility of review on merits, since Explanation 2 to Section 34(2)(b)(ii) mandates that "*the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute*".

### **The appropriate standard of review for appeals against interim orders**

The Supreme Court's application of the 'fundamental policy of Indian law' standard cannot be said to conclusively resolve the issue, as the Court did not take into account the provisions of the Act while applying this standard. Nor did it comment on the other grounds available for setting aside an interim order under Section 37(2)(b). A party challenging an interim order under Section 37(2)(b) can rely on two textualist arguments in support of a broader standard of review: First, Section 37(2) uses the term 'appeal', as opposed to the phrase 'setting aside' used in Section 34 (for 'awards'). Second, 'appeal' in Section 37(2) is common to Section 37(2)(a) and Section 37(2)(b). Section 37(2)(a) concerns an appeal against an order of an arbitral tribunal declining its jurisdiction, which would require a review on merits. Arguably, therefore, it should have the same connotation in Section 37(2)(b). Nonetheless, for reasons submitted below, it is submitted that the Court's approach in *Gwalior Jhansi Expressway Limited* is preferable.

A full review of an interim order by a court is an invitation to all losing parties to seek recourse under Section 37(2)(b) of the Act and is plainly against the objective behind the amendments made to Sections 9 (power of courts to grant interim reliefs) and 17 (power of an arbitral tribunal to order interim measures) of the Act in 2015. Section 17(1) now empowers an arbitral tribunal to pass all orders which a court may pass and Section 17(2) provides teeth to a tribunal's interim orders by making them enforceable in the same manner as an order of a court. Once an arbitral tribunal has been constituted, courts can grant interim relief under Section 9 only in exceptional circumstances.

The Law Commission of India's 246<sup>th</sup> Report, which recommended these amendments, stated that the modifications were aimed at reducing the role of courts in the grant of interim measures once an arbitral tribunal is in place. The Supreme Court's decision in *Gwalior Jhansi Expressway Limited* is aligned with this intent. Courts in subsequent cases can rely on purposive interpretation to follow this approach, notwithstanding the textualist arguments against it highlighted above.

Testing the legality of an interim order and an arbitral award on the same grounds is also in consonance with the provisions of the [UNCITRAL Model Law on International Commercial Arbitration](#) ("Model Law"). Although the Model Law does not provide any recourse against interim orders, it lays down the grounds on which recognition or enforcement of an interim order may be denied (Article 17I(1) of the Model Law). These grounds are identical to the grounds for refusal and enforcement of awards (a few additional grounds specific to interim orders are also included). In fact, Article 17I(2) of the Model Law specifically states that "[t]he court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure". Thus, one finds that under Model Law, the approach regulating review of awards and interim orders is consistent and an enquiry into the merits of the case is discouraged.

### **Conclusion**

The issue concerning the applicable standard of review of an interim order assumes particular significance after the 2015 legislative amendments to the Act since, save in exceptional circumstances, parties are bound to approach the arbitral tribunal for seeking interim relief. *National Highways Authority of India v. Gwalior Jhansi Expressway Limited* takes the appropriate stance on this subject and is the latest addition to a series of judgments of the Supreme Court of India seeking to minimize court intervention in arbitration proceedings.

(The author would like to thank Mr. Sulabh Rewari for his comments on the piece.)

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