THE APPLICABLE STANDARDS FOR GRANTING INTERIM INJUNCTIONS IN INDIA-SEATED INTERNATIONAL COMMERCIAL ARBITRATIONS

Michael Hwang[*] *& Akash Srivastava*[†]

Abstract

With the rise in the international recognition and legitimacy of international arbitration, parties in international commercial arbitrations have increasingly started to request interim injunctions from arbitral tribunals instead of knocking on the doors of domestic courts for assistance. However, there has been considerable debate regarding the standards that tribunals should apply when determining whether interim injunctions should be granted. This article specifically focuses on the standards that India-seated tribunals should adopt in international commercial arbitrations. The authors first examine the standards as adopted by Indian courts when granting interim injunctions, in comparison to the standards adopted in most other common law jurisdictions, before positing that these are the appropriate standards to be adopted by India-seated tribunals in international commercial arbitrations.

I. Introduction

The importance of an arbitral tribunal's power to grant interim injunctions is well known. It helps the tribunal to safeguard parties' rights and preserve the matter until a final decision is rendered. Injunctions, in simple terms, require or refrain a person from doing something, such as transferring or selling goods by imposing a stay on the sale, or preserving or changing the status quo.[1]

This power of the tribunal—being a matter of procedure—is normally regulated by the *lex arbitri*, otherwise known as the law of the seat. However, the issue regarding the applicable standards for granting interim injunctions in international commercial arbitration is still widely debated. Even though most institutional rules allow tribunals to grant interim relief, they usually do not prescribe the standards that tribunals should adopt.[2]

That said, parties can expressly stipulate in their agreement the criteria that would govern the grant of an interim injunction and most seats will recognise such choice by virtue of recognizing the

[*] Michael Hwang (michael@mhwang.com), Senior Counsel (Supreme Court of Singapore), BCL, MA (Oxford), Honorary LLD (Sydney), International Arbitrator (based in Singapore). The first author has previously written on local standards being the applicable standards for granting interim injunctions in Singapore-seated international commercial arbitrations. *See* Michael Hwang, *The Applicable Standards for the Granting of Interim Injunctions in International Commercial Arbitrations Seated in Singapore,* 1 SING. ARB. J. 30 (2021). This article suggests a similar approach to the task of ascertaining applicable standards for India-seated international commercial arbitrations.

[†] Akash Srivastava (akashsrivastava.adv@gmail.com) is an India-qualified lawyer, with an LL.M. in International Arbitration and Dispute Resolution from the National University of Singapore.

1 ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 186 (2005) [*hereinafter* "YESILIRMAK"].

2 International Chamber of Commerce (ICC) Arbitration Rules 2021, art. 28; International Centre for Dispute Resolution (ICDR) International Arbitration Rules 2021, art. 27; Singapore International Arbitration Centre (SIAC) Rules 2016, rule 30; Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, art. 23; London Court of International Arbitration (LCIA) Arbitration Rules 2020, art. 25. Albeit purely in the context of investor-state arbitration, a different approach is taken in the proposed amendments to the ICSID Rules under Rule 47, laying down the procedure and circumstances under which interim relief would be provided by a tribunal. *See* International Centre for Settlement of Investment Disputes, *Proposals for Amendment of the ICSID Rules* 54–55 (Working Paper No. 4, 2020).

principle of party autonomy.[3] However, this is not usually the case in practice. While parties may often expressly provide in their commercial agreements for certain contractual provisions to be capable of enforcement by injunctions, they do not normally spell out the standards for the granting of interim injunctions, unless the counsel for the parties, after commencement of the arbitration, expressly agree between themselves to request the tribunal to apply particular standards.

In this article, the authors will only discuss the applicable standards for "*interim injunctions*" which term will also include "*interlocutory injunctions,*" and no other forms of provisional relief, which may require separate consideration of the applicable standards.

This article, in Part II, explores the standards adopted by Indian courts when granting interim injunctions. Part III examines and critically evaluates international standards. Finally, in Part IV, the article concludes by making a case for Indian local standards to also be applicable to India-seated tribunals when granting such injunctions in international commercial arbitrations.

II. Interim Injunctions in India

A. Relevant provisions for granting interim injunctions

Indian courts have the power to grant interim or temporary injunctions under Order 39 of the Code of Civil Procedure, 1908 ["**CPC**"] when the disputed property runs the risk of being wasted, alienated, or damaged. The courts are also empowered to grant interim injunctions in support of arbitration proceedings under Section 9(1)(ii)(d) of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"].[4]

The power to grant interim injunctions has also been provided to arbitral tribunals seated in India under Section 17(1)(ii)(d) of the Arbitration Act.[5] That said, the legislation does not expressly provide the standards that should be adopted by arbitral tribunals when granting such injunctions. In cases where parties have expressly agreed upon the applicable standards for granting interim injunctions (which are not in conflict with the mandatory rules of the seat of the arbitration), the tribunal will be required to adopt the standards so agreed. This would be in consonance with Section 19(2) of the Arbitration Act, which states that "*parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings*." However, as pointed out earlier, such agreement is rarely (if ever) seen in practice.

Under Section 19(3) of the Arbitration Act, the tribunal conducts the proceedings in the manner it considers appropriate, and thus, in the absence of an express agreement between the parties

---

3 Christopher Boog, *The Laws Governing Interim Measures in International Arbitration*, *in* CONFLICT OF LAWS IN INTERNATIONAL COMMERCIAL ARBITRATION 427 (Franco Ferrari & Stefan Kröll eds., 2019) [*hereinafter* "Boog"] ("Consistent with the principle of party autonomy (and subject to any mandatory provisions of law), the parties are free to agree on either the law governing the prerequisite for granting interim relief or to stipulate directly or indirectly such prerequisite. Where the parties have agreed on a specific law or set of rules to apply, such agreement prevails.").

4 Arbitration and Conciliation Act, No. 26 of 1996, § 9(1)(ii)(d) (India) [*hereinafter* "Arbitration Act"] ("Interim measures, etc., by Court (1) 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 section 36, apply to a court – (ii) for an interim measure of protection in respect of any of the following matters, namely – (d) interim injunction or the appointment of a receiver.").

5 Arbitration Act, § 17(1)(ii)(d) ("Interim measures ordered by arbitral tribunal – (1) A party may, during the arbitral proceedings, apply to the arbitral tribunal – (ii) for an interim measure of protection in respect of any of the following matters, namely: (d) interim injunction or the appointment of a receiver.").

regarding the applicable standards, the tribunal will either apply (a) the standards adopted by national courts, i.e., "*local standards,*" or (b) "*international standards,*" which are derived from international arbitration practice and are transnational in nature.

B. Standards adopted by Indian courts when granting interim injunctions

In India, applicants seeking interim relief are generally required to establish: (i) a *prima facie case* in its favour; (ii) that the balance of convenience is in favour of granting the interim measure; and (iii) that irreparable injury would be caused to the plaintiff if the relief requested is not granted.[6]

However, most of the other common law countries follow the requirements laid down in Lord Diplock's judgment in the 1975 decision of the House of Lords in *American Cyanamid Co.* v. *Ethicon Ltd.*[7] ["**American Cyanamid**"] setting out the test for a court to grant an interim injunction:

a. there is a serious question to be tried with a real prospect of success;

b. damages will not be adequate compensation to the applicant for any losses caused if the injunction were not granted; and

c. the balance of convenience lies in favour of granting the injunction.

Lord Diplock's judgment—which substituted the "*prima facie case*" approach adopted prior to 1975[8]— was considered to be a revolutionary development in the common law of civil procedure.[9] It is important to note what exactly was the nature of the change to English (and hence Commonwealth) law on interim injunctions brought about by *American Cyanamid*. The change was mainly in the first test, which was seen as the gateway to consideration of the other two factors listed above. Lord Diplock's judgment in that case identified the then existing practice adopted by English courts with regard to the gateway test as:

> "*[T]he supposed rule that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence than is before the court at the hearing of the application the plaintiff would be entitled to judgment of a permanent injunction in the same terms as the interlocutory injunction sought.*"[10]

He then went on to say:

> "*[…] there is no such rule. The use of such expressions as "a probability", a "prima facie case?', or a strong prima facie case", in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief.* ***The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried****.*
>
> *[…]*

6 Promod Nair & Shivani Singhal, *Interim Measures*, *in* ARBITRATION IN INDIA 145, 149 (Dushyant Dave, Martin Hunter, Fali Nariman & Marike Paulsson eds., 2021) [*hereinafter* "Dave et al."].

7 American Cyanamid Co. v. Ethicon Ltd., [1975] UKHL 1 [*hereinafter* "American Cyanamid"].

8 The principal cases establishing or following the "*prima facie*" approach are set out in Lord Diplock's judgment.

9 Christine Gray, *Interlocutory Injunctions Since Cyanamid*, 40(2) CAMBRIDGE L. J. 307 (1981).

10 American Cyanamid Co. [1975] UKHL 1, ¶ 4.

> *So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff* **has any real prospect of succeeding in his claim for a permanent injunction at the trial**, *the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*"[11] (emphasis added)

In India, prior to the decision in *American Cyanamid*, courts generally followed the "*prima facie case*" test that would entail assessing the applicant's chances of success without delving into the merits.[12] When the *American Cyanamid* decision was rendered, Indian courts immediately recognised the decision and started applying it when considering requests for interim injunctions.[13] However, over time, some Indian courts became critical of the decision in *American Cyanamid* because it replaced the *prima facie case* test of the strength of the applicant's case with the concept of "*a serious question to be tried.*"[14] These Indian courts were critical of the *American Cyanamid* test because, instead of considering the facts and circumstances of each case, the "*serious question to be tried*" test entailed not evaluating the relative strength of the merits of the case as a general rule.[15] In *Gujarat Bottling*

---

11 *Id.* ¶¶ 4–5.

12 Aditya Swarup, *The Prima Facie Standard for Interim Injunctions in India,* 4 NLUD STUDENT L. J. 20, 37 (2017) [*hereinafter* "Swarup"], *citing* K.E. Mohammed Aboobacker v. Nanikram Maherchand Paramannad Maherchand, 1957 SCC OnLine Mad 133 (India) ("The plaintiff must make out a prima facie case in support of his application for the ad-interim injunction and must satisfy the Court that his legal right has been infringed and in all probability will succeed ultimately in the action."); Bishamber Nath Jaithy v. Municipal Committee, Delhi, AIR, 1926 Lah 589(3), ¶ 3 (India) ("[T]he rule that before the issue of a temporary injunction the Court must satisfy itself that the plaintiff has a *prima facie* case, does not mean that the Court should examine the merits of the case closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed. This would amount to prejudging the case on its merits. All that the Court has to see is that on the face of it the person applying for an injunction has a case which needs consideration and which is not bound to fail by virtue of some apparent defect."); Gopal Krishan Kapur v. Ramesh Chander, 1973 R.L.R. 542, ¶ 19 (India) ("The function of the Court when called upon to consider if the plaintiff has a prima facie case for the grant of an interim protection or not is to determine the limited question if the material placed before the Court would require investigation but it is not open to the Court to either subject the material to closer judicial scrutiny for the purpose of deciding if on account of any inherent characteristics of the situation or the probabilities, the plaintiff may not succeed in his contention. Such an investigation would be clearly a transgression of the limits of the functions of the Court and would be both unreasonable and unfair because the suit being at a preliminary stage."); *see also* Seth Banarsi Dass Gupta v. B.B. Bindal, 1981 SCC OnLine Del 150 (India).

13 Purna Investments v. Southern Steelmet Alloys, 1977 SCC OnLine Kar 136, ¶ 10 (India) (the High Court of Karnataka opined that an applicant needed to prove that he had "a serious question to be tried" instead of a "strong prima facie" case); *see also* Gobind Pritamdas Malkani v. Amarendra Nath Sircar, 1978 SCC OnLine Cal 169, ¶ 16 (India); Amal Kumar Mukherjee v. Clarian Advertising Service Ltd., 1979 SCC OnLine Cal 240, ¶ 8 (India).

14 Lord Diplock rejected the "prima facie case" test, and replaced it with "a serious question to be tried," observing, among other things, that "[i]t is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations." *See* American Cyanamid, [1975] UKHL 1.

15 *See, e.g.,* Amar Talkies v. Apsara Cinema, ILR 1982 MP 462, ¶ 473 (India) ("It is a settled principle that a temporary injunction can be granted if the plaintiff has a prima facie case, the balance of convenience is in plaintiff's favour and the plaintiff would suffer an irreparable injury if the injunction is not granted. Recently, the House of Lords in [American Cyanamid], has held that there was no rule of law that the Court was precluded from considering whether, on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a prima facie case or a probability that he would be successful at the trial of the action. All that was necessary was that the Court should be satisfied that the claim was not frivolous or vexatious, i.e. that there was a serious question to be tried. This case clearly made a departure from the settled rule that the plaintiff has to make out a prima facie case […]. But the decision of the House of Lords has since been criticised, distinguished and explained in several cases by the Court of Appeal […]. Therefore, the case has to be read in the light of the peculiar circumstances of that case.").

Co. Ltd. v. *Coca Cola Co.*,[16] the Supreme Court of India pronounced that courts would grant interlocutory injunctions by applying the following tests:

> "*(i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.*"[17]

Subsequently, in *Colgate Palmolive Ltd.* v. *Hindustan Unilever Ltd.*,[18] the Supreme Court of India opined that, when considering requests for interim injunctions, the courts could assess the strength of the applicant's case on the basis of the evidence on record, without delving into unresolved and contested factual issues. The effect of this judgment was that eventually this exception (of assessing the strength of the case) became the norm with various subsequent judgments of the Supreme Court of India extending it.[19] For instance, in *M. Gurudas* v. *Rasaranjan*[20] ["**Gurudas**"], the Supreme Court clarified that an applicant seeking an interim injunction would be required to:

a. establish a *prima facie* case, which would be determined as a finding on fact;

b. have a favourable balance of convenience; and

c. prove that irreparable injury—which normally cannot be compensated in terms of money—would be caused if the request is not granted.

---

16 Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545, ¶ 43 (India).

17 *Id.* ¶ 43 ("The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the discretion the court applies the following tests — (i) whether the plaintiff has a *prima facie case*; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies. [See: Wander Ltd. v. Antox India (P) Ltd. [1990 Supp SCC 727], (SCC at pp. 731-32.)] In order to protect the defendant while granting an interlocutory injunction in his favour the court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial.").

18 Colgate Palmolive Ltd. v. Hindustan Unilever Ltd. (1999) 7 SCC 1 (India).

19 Swarup, *supra* note 12, at 45, *citing* Sree Jain Swetambar Terapanthi v. Phundan Singh, (1999) 2 SCC 377 (India) (if an interim injunction is granted without considering the *prima facie case* standard, it could be reversed); S.M. Dyechem Ltd. v. Cadbury (India) Ltd., (2000) 5 SCC 573 (India) (the Supreme Court examined the strength of the parties' case instead of the American Cyanamid principles).

20 M. Gurudas v. Rasaranjan, (2006) 8 SCC 367, ¶¶ 18–19, 21 (India).

The above test inscribed in *Gurudas* is still valid in India.[21] This was clarified by the Madras High Court in *Flywheel Logistics Solutions Pvt. Ltd.* v. *Hinduja Leyland Finance Ltd.*,[22] where the court reiterated:

> "*[…] there can, therefore, be no quarrel that the Tribunal, like a Court under Section 9(1) is, therefore, legally mandated to test the case of the applicant with reference to the well-known parameters of a) prima facie case b) balance of convenience and c) irreparable loss before granting an order of injunction.*"[23]

Despite the general acceptance of the *American Cyanamid* test throughout the common law world, the above-mentioned test as set out in *Gurudas* gradually became the general practice in India.[24] The approach of Indian courts in this regard shifted from considering "*a serious question to be tried,*" which it did in the early days of recognizing *American Cyanamid*, to considering the *prima facie case* threshold of the strength of the case. In a way, Indian courts have returned to the pre-*American Cyanamid* legal space, where Indian courts were of the opinion that "*injunctions are too frequently issued,*"[25] and it was "*difficult for the Court to pass an order on the application for a temporary injunction without to a certain extent prejudging the case […],*"[26] owing to the many frivolous suits that were filed in courts.[27]

The "*prima facie case*" test has been applied by Indian courts for a number of decades and has slowly become a part of Indian jurisprudence. The test is also internationally recognized and has been applied by tribunals when granting interim injunctions, for instance in International Chamber of Commerce ["**ICC**"] Case No. 9301 and ICC Final Award No. 5804.[28] However, it is not clear (for lack of a sufficient body of consistent case law) how widely this test has been adopted in international commercial arbitrations (as opposed to International Centre for Settlement of Investment Disputes ["**ICSID**"] or International Court of Justice ["**ICJ**"] cases). In the authors' view, for reasons to be explained in the remainder of this article, the *prima facie case* test is the appropriate standard to be applied by India-seated tribunals when granting interim injunctions,

---

21 *See* Seema Arshad Zaheer v. Municipal Corporation Of Greater Mumbai, (2006) 5 SCC 282, ¶ 30 (India) ("The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff : (i) existence of a *prima facie case* as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and (iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands".); Mandali Ranganna v. T. Ramachandra, (2008) 11 SCC 1, ¶ 21 (India) ("While considering an application for grant of injunction, the court will not only take into consideration the basic elements in relation thereto viz. existence of a *prima facie case*, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties".).

22 Flywheel Logistics Solutions Pvt. Ltd. v. Hinduja Leyland Finance Ltd., 2020 SCC OnLine Mad 20614, ¶ 30 (India).

23 *Id.* ¶ 28.

24 Dave et al., *supra* note 6, at 149 *citing* Gujarat Bottling Co. Ltd v. Coca Cola (1995) 5 SCC 545 (India); *see also* Best Sellers Retail (India) Pvt. Ltd. v. Aditya Birla Nuvo Ltd., (2012) 6 SCC 792, ¶¶ 26, 29–30 (India); Kishoresinh Ratansinh Jadeja v. Maruti Corporation, (2009) 11 SCC 229, ¶ 36 (India); Morgan Stanley Mutual Fund v. Kartik Das, (1994) 4 SCC 225, ¶¶ 36–38 (India).

25 Ismail v. Tayaballi Essaji, 1929 SCC OnLine Sind JC 30, ¶ 44 (India).

26 Vithal v. Dawoo, 1928 SCC OnLine MP 156 (India), *cited in* Swarup, *supra* note 12, at 25.

27 Swarup, *supra* note 12, at 24–26.

28 YESILIRMAK, *supra* note 1, at 178, *citing* ICC Interim Award no. 9301 of 1997 (unpublished); ICC Final Award 5804 of 1989, 4(2) ICC INT'L. CT. ARB. BULL. 76 (1993).

provided such tribunals believe that the standards applied by Indian courts should be applied by Indian arbitration tribunals without modification.

It is beyond the remit of this article to discuss in full the respective differences between the *American Cyanamid* test and the Indian test for granting interim injunctions in court cases. What is important to note is that, depending on whether the main thesis of this article is accepted, vis-à-vis that tribunals seated in India should apply Indian standards for granting injunctions in arbitration cases rather than any other interim standards, tribunals and counsel in India-seated arbitrations should focus on the question: what are Indian standards for purposes of granting interim injunctions in arbitration (as opposed to court) cases? Should they be the standards applied in Indian courts, or some other standards unique to arbitration?

III. International Standards for Granting Interim Injunctions

A. Examining international standards

A differing approach from that of the authors also exists. According to this view, when considering applications for interim injunctions, tribunals should not look at local standards—which are applicable to court-ordered interim injunctions—as they are irrelevant in this regard, but should instead consider certain *sui generis* sources of law, which are derived from international sources, i.e., previous arbitral awards on similar issues and academic commentaries.[29]

This view has largely been propounded by Gary Born. He notes that generally, "*most international arbitral tribunals will order provisional measures only where the party requesting such relief has made showings of (a) a risk of serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment of the merits.*"[30] However, it is pertinent to note that he moves on to recognise that some tribunals require the claimants to establish a *prima facie case* and a favourable balance of hardships.[31]

Born has explored the facets of these so-called international standards, and discussed the reasons why these standards should be applied by tribunals. He has written:

> "*An international arbitral tribunal is not a national court and its powers, and the standards for exercising those powers, are not coterminous with national courts. Rather, the arbitrators' remedial authority, and the standards it should apply in exercising that authority, are defined by sui generis sources of law developed for, and applicable to, international arbitration.*
>
> *[…]*
>
> *These international sources are consistent with the parties' reasonable expectations, because they ensure that (a) a single, uniform standard will be applied to requests for provisional measures in an arbitration; (b) a single, uniform standard will apply to the same sorts of requests regardless what the seat of the arbitration may be; and (c) the standard for provisional relief will be tailored to international arbitral procedures, rather*

[29] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2645–66 (3d ed. 2021) [*hereinafter* "BORN"]. Some other commentators have put forth similar views. *See* Boog, *supra* note 3, at 409–458. However, Boog's preferred application of international standards is different from the approach of Born, as will be explained later.

[30] *Id.* at 2650.

[31] *Id.* ("Stated generally, most international arbitral tribunals will order provisional measures only where the party requesting such relief has made showings of (a) a risk of serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment of the merits, while some tribunals also require the claimant to establish (d) a *prima facie case* on the merits; (e) a *prima facie case* on jurisdiction; and (f) a balance of hardships weighing in its favour."); *see also* Stephen Benz, *Strengthening Interim Measures In International Arbitration*, 50(1) GEO. J. INT'L L. 143, 151–64 (2018).

than to the procedures of a national court system. This approach also reduces the importance of choice-of-law questions and encourages uniform results, both of which are important objectives of the arbitral process."[32]

He also notes that the absence of any expressly laid out standards from the national arbitration legislations is indicative of the fact that the source of such standards is not the *lex arbitri* but some other legal sources.[33] He believes that these standards are not "*logically connected*" to the *lex arbitri,* and that parties opt for a particular seat for reasons of practical convenience and neutrality, and rarely intend that this choice will have an impact on the substantive standards for granting any provisional relief.[34] In his opinion, prescribing any substantive standards "*binding on arbitral tribunals seated on local territory is unnecessary and unwise,*" because it would threaten the development of "*better-formulated*" and "*more nuanced*" international standards.[35]

Christopher Boog also favours the adoption of international standards, noting that it is a "*business-oriented approach*" that fosters "*uniform results, providing a degree of legal certainty and predictability and ultimately buttressing the parties' trust in the arbitral procedure.*"[36] In his opinion, "*standards for granting interim relief in international arbitration are to be determined pursuant to the following cascade: (i) mandatory provisions of law; (ii) the law chosen by the parties; (iii) international arbitration standards; and, (iv) in exceptional cases, the lex causae to the extent that it specifies standards for granting interim relief.*"[37]

In particular, Boog argues in favour of treating Article 17A of the 2006 Edition of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ["**Model law**"][38] as a codification of "*international standards*" for the granting of interim injunctions.[39] Article 17A(1)(b) (sets out the applicable test for the granting of an interim measure: "*There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the directions of the arbitral tribunal in making any subsequent determination.*"

---

32 *Id.* at 2646–47.

33 *Id.*

34 *Id.*

35 *Id.* at 2648.

36 Boog, *supra* note 3, at 428; *see also* Nathalie Voser, *Interim Relief in International Arbitration: The Tendency Towards a More Business- Oriented Approach*, 1 DISPUTE RES. INT'L. 171, 184 (2007) ("recent developments in international arbitration show a growing tendency to apply a more business-oriented approach and thus to depart from the strict and formal requirements of the state courts.").

37 *Id.* at 426–27.

38 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 17 A, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) ("Conditions for granting interim measures (1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that: (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination. (2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate." (emphasis added)). Note that the underlined words above more closely resemble the American Cyanamid test of "a serious question to be tried," instead of the "prima facie case" test or the standards propounded by Born. *See supra* note 32 and accompanying text.

39 Boog, *supra* note 3, at 428–29.

This approach of adopting international standards has seen increasing acceptance in the international arbitration community, and it is now not uncommon for parties to seek injunctions on the basis of these standards. That said, for purposes of this article, the question remains whether local standards are the appropriate standards to be applied in determining the grant of interim injunctions in India.

B. A critique of international standards

While the idea of a set of uniform international standards may sound attractive at first blush, the authors suggest that, not only are there significant difficulties in defining and applying these standards in practice, but their application may also lead to uncertain and unpredictable outcomes.

As a preliminary point, the authors respectfully disagree with the contention that there is no logical connection between the standards for granting interim injunctions and the law of the arbitral seat. The seat is normally carefully chosen by the parties' legal advisers, keeping in mind that the *lex arbitri* governs all matters of arbitral procedure (including the legal remedies for interim relief, the most common of which would be interim injunctions). In view of this, there is certainly a "*logical connection*" between the *lex arbitri* and the standards for granting injunctions. The *lex arbitri* determines the procedures to be applied to arbitrations which are seated in a chosen country, and all parties who choose the seat will (in the vast majority of cases) have been advised of the significance of that choice in respect of all matters relating to arbitration enacted by the law of the seat.

It is also pertinent to note that, unlike most investor-state arbitrations (which encompass public international law considerations not normally applicable to international commercial arbitrations), the proceedings and decisions in most international commercial arbitrations are confidential, and thus there is the practical difficulty of accessing the sources of case law to formulate these international standards. The only consistent source (in limited numbers) is the anonymised ICC reports of procedural orders of ICC tribunals, which rarely cite authority for the principles the tribunals apply, since these orders concern interlocutory applications, and are not awards determining issues on the merits.

Furthermore, unlike the standards adopted by local courts, there is limited consensus on what constitutes international standards. Considered by some commentators as reflecting "*the standard for the granting of interim relief applied by many national courts and arbitral tribunal,*"[40] Article 17A of the Model Law is often classified as "*generally accepted legal principles,*"[41] and provides the only available published standards with some international standing. In support of the same, Boog has argued that "*[n]ational arbitration rules drafted on the basis of these harmonized standards may well serve as a valid foundation for determining the prerequisites for ordering interim measures in an international arbitration.*"[42]

---

40 JACOB GRIERSON & ANNET VAN HOOFT, ARBITRATING UNDER THE 2012 ICC RULES: AN INTRODUCTORY USER'S GUIDE 161 (2012).

41 Shahla Ali & Tom Kabau, *Article 17A Conditions for Granting Interim Measures*, *in* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY 343, 344 (Ilias Bantekas, Pietro Ortolani, Shahla Ali, Manuel A. Gómez & Michael Polkinghorne eds., 2020); *see also* Alan Tsang, *Transnational rules on interim measures in international courts and arbitrations*, INT'L. ARB. L. R. 35 (2011).

42 Boog, *supra* note 3, at 429.

Notwithstanding the above, these standards have only been adopted by a few Model Law jurisdictions,[43] and even some commentators who are in favour of applying international standards, such as Born, note that this formula "*makes no provision for parties' agreements on the standard of proof, omits any reference to urgency, unduly focuses "irreparable" harm on monetary damages (as distinguished from non-monetary relief), imposes a single standard for differing types of interim relief and omits reference to security for costs.*"[44] For these and other reasons, unlike Boog, Born does not advocate using Article 17A of the Model Law to fix the standards for granting interim injunctions (and possibly not even for other interim measures). These differences perhaps raise the question of whether there are any truly internationally accepted standards that are regularly and consistently applied by arbitral tribunals in granting interim relief.

In summary, the lack of access to past arbitral procedural orders and awards (which are even rarer, owing to the fact that awards rarely grant interim injunctions and normally grant permanent relief), and the lack of consensus as to what constitutes international standards, together indicate that there is a practical difficulty in formulating international standards. The usual source of case law on interim injunction would be reports of cases from the ICJ (which deal with issue of public international law, rather than private international law), reports of ICSID tribunals (which deal with investment treaty law cases), or the anonymised ICC reports of commercial cases (which tend to lack context and not examine issues of legal principle in depth when deciding procedural issues).

In addition to the issue of formulating these standards, the problem regarding their application is also relevant, since different injunctions are applicable in different situations and accordingly, one set of standards cannot be applied to every situation. For instance, there are exceptions to the *American Cyanamid* standard even where that standard is the default rule. An application for a *Mareva* injunction is judged by the standard of "*a good arguable case,*"[45] which is higher than the American Cyanamid "*serious question to be tried*" standard, since it imposes a comparatively heavier burden on the injuncted party.[46] In a similar vein, injunctions restraining parties from calling on performance bonds have a significantly higher threshold, as compared to other injunctions, since they are callable on demand subject only to production of one or more specific certification of certain facts, and are also considered to be much less susceptible to restraint by injunction, as they are generally considered (at least by common law courts) to be the "*life-blood of international commerce.*"[47] Thus, a tribunal needs to determine the standards and the burden of proof that an applicant must demonstrate to be granted an injunction. This determination is included in the tribunal's reasoning in its decision, but since these decisions are confidential in international commercial arbitration, other arbitral tribunals will rarely be able to derive any guidance in this regard. That said, these are of course examples from the England & Wales jurisprudence, which

---

43 According to one study on the adoption of the revised art. 17, out of the 111 territories surveyed, 13 territories have adopted in full, two territories have mostly adopted, nine territories are similar and nine territories are similar in parts. *See* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 803–810 (4th ed. 2019).

44 Born, *supra* note 32, at 2648, fn. 266.

45 A "good arguable case" has been defined as "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success." *See* Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co. [1984] 1 All ER 398 (Eng.).

46 Polly Peck International Plc v. Nadir [1992] EWCA Civ 3 (Eng.).

47 *See* Ouais Group Engineeer & Contracting v. Saipem SPA [2013] EWHC 990 (Comm) ¶ 45 (Eng.), and other cases cited in Michael Hwang, *The Applicable Standards for the Granting of Interim Injunctions in International Commercial Arbitrations Seated in Singapore*, 1 SING. ARB. J. 30, ¶ 24 (2021).

may not necessarily lead to similar findings by Indian courts that still follow the *prima facie case* test. However, the factual scenarios described here are situations which are likely to be considered by the Indian courts, and local standards will emerge to provide standards which the Indian courts will deem appropriate to meet Indian commercial circumstances, and accordingly guide India-seated tribunals. Notwithstanding this, it is clear that it would take significant research to find a consistent pattern of international jurisprudence in the area of international commercial arbitration to find similar guidance from decided cases.

In view of the above, it is clear that adopting these so-called international standards, instead of local standards, would likely lead to unpredictability and uncertainty. This would in turn lead to the tribunal applying whatever standards it deems appropriate, and possibly arriving at an outcome that would depart from the parties' expectations.

However, two observations may be made to show that the differences between:

i. Indian standards;
ii. English (i.e. American Cyanamid) standards; and
iii. International standards

are not in fact as stark as portrayed above.

First, one thing that may be said in favour of international standards (from the Indian viewpoint) is that these standards appear to require a stronger threshold of scrutiny of the strength of the Applicant's case (whether the Applicant is the Claimant or the Respondent). Such cases, as have been reported from international tribunals, seem to emphasize the term "*prima facie*" in terms of the strength of the Applicant's case, which is (at least at first sight) stronger than the *American Cyanamid* test of "*a serious case to be tried.*" It may be that Indian tribunals will find more affinity with international standards in terms of the "*prima facie*" test than the English case law based on *American Cyanamid*. Indeed, the likelihood is that Indian tribunals will (at least in the earlier stages of development of Indian jurisprudence in this field) follow the pronouncements of the Indian Supreme Court on the *prima facie case* test, which will then make them more closely attuned to international standards than to English case law. So, whether or not Indian tribunals declare that they are applying international standards or Indian standards, they may in fact be applying the same test in practice.

Second, there is also another way of comparing international standards with Indian standards and the *American Cyanamid* test. Taking a look at Boog's approach of using the Model Law (2006 Edition) to reflect "*international standards,*" Article 17A(b) states that one of the critical elements that need to be satisfied to qualify for interim relief is as follows:

> "*There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*"

This formulation does not look too far away from the *American Cyanamid* test of "*a serious question to be tried*" and appears as to be less stringent test than a "*prima facie case.*" Hence, the adoption of the Model Law test is arguably consistent with *American Cyanamid*, and also consistent with Boog's

version of international standards (although Born strongly argues against the recognition of Article 17A of the Model Law as being representation of international standards).[48]

IV. Conclusion: Making a case for the application of local standards in India-seated international commercial arbitrations

Apart from the issues concerning international standards as described above, the authors believe that, in India-seated international commercial arbitrations, there is a strong case to be made for applying the local standards of the law of the seat.

First, it is pertinent to note that in India, prior to the Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Amendment**"], Section 17(1) of the Arbitration Act did not provide tribunals with the specific power to issue interim injunctions, but instead provided that "*[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.*"

In 2014, the Law Commission of India ["**Law Commission**"] observed as follows:

> "*Section 17 is an important provision, which is crucial to the working of the arbitration system, since it ensures that even for the purposes of interim measures, the parties can approach the arbitral tribunal rather than await orders from a Court. The efficacy of section 17 is however, seriously compromised given the lack of any suitable statutory mechanism for the enforcement of such interim orders of the arbitral tribunal.*"[49]

In this regard, the Law Commission recommended the addition of the words "*any order issued by the arbitral tribunal under this section shall be deemed to be an Order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an Order of the Court,*" and additionally, recommended providing explicit power to the tribunal to grant interim injunctions.[50]

The recommendations were accepted by the 2015 Amendment. Section 17(1)(ii)(d) of the Arbitration Act now empowers a tribunal to grant interim injunctions in arbitral proceedings, and Section 17(2)[51] makes the orders of a tribunal enforceable in the same way as an order of the court under the CPC.

Section 17(1)(ii)(e) of the Arbitration Act further provides that "*the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.*" It is noteworthy that, although pursuant to Section 19(1) a tribunal is not bound by the Indian Evidence Act of 1872 or the CPC, the Law Commission did note that the changes made to Section 17 of the Arbitration Act were to "*provide the arbitral tribunal the same powers as a civil court in relation to grant of interim measures.*"[52]

On the basis of the above, it is clear that the Law Commission's recommendations were modelled on the powers of Indian courts to grant interim injunctions and (by implication) the principles

---

48 BORN, *supra* note 32, at 2648-49.

49 Law Commission of India, The 246th Report on the Amendments to the Arbitration and Conciliation Act, 1996, ¶ 46, *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf [*hereinafter* "246th Report"].

50 *Id.* at 51.

51 Arbitration Act § 17(2) ("Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.").

52 246th Report, *supra* note 49, at 51.

applied by Indian courts in granting such injunctions, since the remedy of interim injunctions in arbitration is not given to India-seated tribunals by Indian common law. The authors have earlier described how the issue of interim injunctions was the subject of a specific recommendation by the Law Commission of India in 2014, which was implemented by the Indian legislature by the introduction of sections 17(1)(ii)(d) and 17(2) of the Arbitration Act. Thus, it would be within the reasonable expectation of both the parties and the tribunal to exercise that power in the same manner that the courts would exercise it.

In addition to the applicability of local standards on the tribunal's power to grant interim relief, they are also applicable on the power of the courts to grant interim relief under Section 9 of the Arbitration Act. In this regard, the Indian Supreme Court in *Adhunik Steels* v. *Orissa Manganese and Minerals Pvt. Ltd.*[53] held that this power was not "*totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection*."[54] Subsequently, the Gujarat High Court in *Essar Oil Ltd.* v. *United India Insurance Co.*[55] reiterated the view of the Supreme Court of India, by conducting "*a detailed analysis of the very possibility of incorporating other statutes which are supplementary to the Arbitration Act, building up the argument that where there is a procedural need or lacunae, other acts can be interpreted in furtherance of the Act*."[56] The fact that there is a procedural need and a lacuna regarding the applicable standards for granting interim injunctions under the Arbitration Act may be a practical reason for India to adopt the well-known principles set out under the CPC for the granting of interim injunctions by India-seated arbitrations.

Second, the *prima facie case* test is globally recognized and has been relied upon by tribunals when considering requests for injunctions.[57] In this regard, it has been noted by Redfern and Hunter that "*[t]raditionally, arbitrators have looked to concepts common to most legal systems in the granting of such measures – such as the need to establish a prima facie case on the merits and the risk of serious and irreparable harm*."[58] Thus, the *prima facie* test itself is possibly a candidate with sufficient international standing to qualify as an archetypal form of international standard, especially to parties, counsel and arbitrators coming from civil law countries.

Third, there are also clear practical benefits to applying the standards prescribed by the arbitration law of the seat, such as greater legal certainty, transparency and predictability. Unlike arbitration proceedings—where the awards and orders are inaccessible, owing to their confidential nature—court judgments are public, and thus both the parties and tribunal will possess a clear view of the standards to be applied to the particular types of interim injunctions, and to the particular circumstances. Applying a set of well-known and well-established standards holds immense practical benefits, since, by definition, applications for interim injunctions in arbitrations will be filed under circumstances of urgency. Counsel will be briefed and given little time to prepare their applications to the tribunal, most of which will be occupied with taking instructions on the factual

53 Adhunik Steels v. Orissa Manganese and Minerals Pvt. Ltd., (2007) 7 SCC 125 (India).
54 *Id.* ¶ 21.
55 Essar Oil Ltd. v. United India Insurance Co., 2014 SCC OnLine Guj 6737 (India).
56 Sarthak Malhotra & Sujoy Sur, *Standards Applicable To Interim Reliefs In India: A Comprehensive Analytical Investigation*, 5(1) INDIAN J. ARB. L., 183, 192 (2016).
57 YESILIRMAK, *supra* note 1, at 178, *citing* ICC Interim Award no. 9301 of 1997 (unpublished); ICC Final Award 5804 of 1989, 4(2) ICC INT'L CT. ARB. BULL. 76 (1993).
58 REDFERN & HUNTER ON INTERNATIONAL ARBITRATION 315 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015).

history of the case leading up to the need for an interim injunction, and preparing the application papers. Little time will be available for the counsel involved to undertake legal research on the proper international standards applicable for interim injunctions (unless they have had previous experience of making such applications applying such standards). If they were to undertake urgent research on the appropriate international standards, they would have to read, for example, over a hundred pages of text from Born's treatise (and many of the citations of authorities in the footnotes). On the other hand, if the counsel instructed are based in India, they will be familiar with the standards adopted by Indian courts for the granting of interim injunctions. This may well be why the legislature has not sought to set out such standards in the Arbitration Act, in the expectation (and wish) that, since India-seated tribunals are given the same powers of issuing interim injunctions (as described earlier) as the courts, it would be natural for India-seated tribunals to apply Indian standards when granting interim injunctions (which is an Indian remedy with Indian characteristics, such as departing from the *American Cyanamid* principles).

Adopting Indian standards would give both counsel and tribunals the benefit of having the accumulated knowledge and experience contained in the vast Indian jurisprudence on the subject. This will inform and enable relevant submissions, which will be easily understood and more likely to be appreciated by the tribunal in terms of simplicity and understanding of the law. Tribunals can also be assured that the crux of most disputes—the facts—will be the focus of arguments. Moreover, the applicant party would effectively be armed with a better view of the relative strength of its case and the predictability of the outcome of its application for an interim injunction.

The authors neither contend that the standards applied by Indian courts should mandatorily be applicable to all international commercial arbitrations seated in India, nor that the parties cannot contract out of these standards. Instead, they submit that, on the basis of the discussion above, especially the use of the term "*interim injunction*" in Section 17(1)(ii)(d) of the Arbitration Act (which is a term not derived from international arbitration rules but from domestic court practice), Indian standards are mandatory in the sense that it was clearly the legislative intention that these standards should be applicable by default in the absence of an express agreement between the parties to apply international standards (or indeed any other standards).