ENFORCEMENT OF EMERGENCY ARBITRATION: INDIAN STANDPOINT

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ABSTRACT

In recent years, international arbitration has gained popularity as a method that is both effective and popular for the resolution of conflicts. The parties may now be required to either wait for the arbitral tribunal to be created or approach the courts for an interim relief under Section 9 of the Arbitration and Conciliation Act. The emergency arbitration is necessary so that the parties can protect their assets and evidence, which would otherwise be destroyed or altered. The inability to award temporary relief prior to the establishment of the arbitral panel was one of the few drawbacks of traditional arbitration, which led to the development of emergency arbitration as a solution. Emergency arbitration has seen a lot of use, but despite its numerous advantages, issues with the enforcement of the decisions made by the emergency arbitrator have kept it from being the go-to forum for parties seeking temporary relief prior to the creation of the tribunal. This is despite the fact that emergency arbitration has a lot of benefits to offer. The same is true in the country of India. The Achilles' heel of arbitration, as it has been frequently referred to, is the fact that parties are required to turn to national courts when urgent arbitral relief is not attainable. This runs counter to the parties' primary goal in selecting arbitration in the first place, therefore it is commonly referred to as "the Achilles' heel of arbitration." Even though emergency arbitration is not a novel concept for Indian courts, there is a lack of clarity in the legislation regarding how the award of emergency arbitration can be legally enforced. In light of this, the following section will continue to explore various aspects of Indian arbitration law as well as the observations made by the court in order to gain an understanding of the position that emergency arbitration holds in India.

Introduction

It is not possible to emphasise enough the benefits of arbitration as a dispute resolution process, including party autonomy, confidentiality, and swift procedures. However, even if the parties choose to arbitrate their differences, there may be circumstances in which the parties are threatened with immediate irreparable harm, such as a risk of resource depletion prior to the appointment of the arbitral tribunal. In order to safeguard their assets and evidence that would otherwise be lost or altered, the parties may now have to wait for the arbitral tribunal to be established or ask the courts for an interim relief under Section 9 of the Act. The parties may decide that waiting until the arbitral tribunal is established is not an appropriate course of action since at that point, they would be exposed to an immediate risk of harm. Even though the second option, asking courts for temporary relief under Section 9 of the Act, is frequently used by parties, it has its own set of issues because the very reason the parties choose arbitration as the dispute settlement mechanism may have been to prevent court proceedings in the first place in order to take advantage of the above-mentioned benefits of arbitration. Therefore, the issue continues, and a postponed cure could leave the harmed party helpless and occasionally in an unsalvageable predicament. The 'Pre-Arbitral Referee' technique was suggested as a remedy to this issue by the International Chamber of Commerce ["ICC"] in 1990[1].The procedure's main goal was to give immediate pro tem or conservatory measures to a party or parties who couldn't wait for the establishment of an arbitral tribunal.It was called "an excellent idea that hasn't worked so far," 2 There was probably relatively little uptake, presumably because the method was presented separately from the ICC rules as a completely voluntary initiative. The International Centre for Dispute Resolution of the American Arbitration Association ["ICDR-AAA"] first introduced provisions for emergency arbitration in 2006[2], London Court of International Arbitration ["LCIA"],[3] Arbitration at Stockholm Chamber of Commerce ["SCC"][4], International Chamber of Commerce ["ICC"][5], Singapore Int'l Arbitration Court ["SIAC"][6] and Hong Kong International Arbitration Centre ["HKIAC"][7]. However, despite the mixed response to the ICC "Pre Arbitral Referee" procedure and after acknowledging the need for In reality, nations like Hong Kong, New Zealand, Bolivia, and Singapore explicitly

[1]Pre-Arbitral Referee Rules by ICC.
[2] ICDR-AAA Rules (2006), art. 37.
[3] Even though article 9 provided for expedited formation of arbitral tribunal, LCIA amended its rules in 2014 to include provisions for emergency arbitrators, art. 9B in LCIA Rules.
[4] SCC RULES (2010), Appendix II (Jan 1, 2010).
[5] ICC RULES OF ARBITRATION (2012), art.29, Appendix V
[6] SIAC RULES (2013), art. 26(2), sched.
[7] HKIAC Administered Arbitration Rules (2013), art. 23.1, sched. 4

incorporated provisions for emergency arbitrations into their respective arbitration acts. The effectiveness of an emergency arbitration is based on the maxims Fumus boni iuris, which means that there must be a plausible chance that the party asking it would prevail on the merits, and periculum in mora, which states that if the request is not granted right away, the loss cannot and will not be made up for in damages. The article's primary goal is to examine the Indian approach to emergency arbitration. It is followed by a conclusion and recommendations for embracing this newcomer.

Emergency Arbitration: the necessity

In the past, parties to international arbitration agreements did not have access to arbitration to maintain the status quo, protect assets, prevent tampering with evidence, or request other temporary reliefs pending the properly constituted of an arbitral tribunal.4 Therefore, in order to obtain immediate interim or provisional relief prior to the formation of an arbitral tribunal, the parties were forced to turn to their national courts, which had the drawbacks of confidentiality loss, delays, and reliance on local procedural laws that they had initially sought to avoid by choosing arbitration.5

The alternative was to postpone the creation of an arbitral tribunal, which, in situations needing urgent reliefs, reduced the value of requesting an urgent relief itself.

As a result, international arbitral institutions in contemporary jurisdictions adopted (in various forms) a "arbitrator" to whom the parties might petition for urgent interim reliefs prior to the formation of an arbitral tribunal. This reduced the participation of national courts in the arbitral procedure.

The worldwide Centre for Dispute Resolution ("ICDR"), the worldwide arm of the American Arbitral Association ("AAA"), was the first organisation to include Emergency Arbitrator provisions in its rules.

In 2006, the The International Centre for Dispute Resolution ("ICDR") first proposed the idea of an emergency arbitrator.[8] The concept of an Emergency Arbitrator was later introduced by the world's most renowned arbitral institutions, including the International Chamber of Commerce ("ICC")[9], the London Court of International Arbitration ("LCIA")[10], the Singapore

[8] *Supra 2*
[9] *Supra 5*
[10] *Supra 3*

International Arbitration Centre ("SIAC")[11], the Stockholm Chambers of Commerce ("SCC")[12], and the Hong Kong International Arbitration Centre ("HKIAC")[13] to deal with urgent cases that required the immediate intervention of an independent arbitrator. The rules of arbitral organisations in India, including the Mumbai Centre for International Arbitration ("MCIA")[14] and the Delhi International Arbitration Centre ("DIAC")[15] (among others), provide for the appointment of an Emergency Arbitrator to handle urgent interim relief requests in emergency situations.

As can be seen, the emergence of an Emergency Arbitrator is a relatively recent phenomenon that has gained favour with the world's most renowned arbitration institutions due to its capacity to offer parties to an arbitration agreement prompt and effective interim relief before the formation of the arbitral tribunal. The concept of an Emergency Arbitrator without a doubt addresses a number of issues that are related to approaching national courts in situations where a party is desirous of obtaining interim relief on an urgent basis. While some shortcomings of an Emergency Arbitrator may be experienced on a case-by-case basis (such as, non-binding effect on third parties, non-availability of an ex-parte relief), there is no doubt that the concept of an Emergency Arbitrator addresses these issues.

The Aim And Powers Of The Emergency Arbitral Tribunal

Providing immediate pro tem or conservatory measures to a party or parties who are unable to wait for the creation of an arbitral tribunal is the goal of EA. A side must have a chariot with two wheels in order for an Emergency Arbitration to be effective.

> Fumus boni iuris - A reasonable chance that the party making the request would prevail on the merits;
>
> Periculum in mora - refers to the situation in which the loss would not and could not be made up for through financial compensation.

According to the terms of an arbitration agreement or institutional regulations, the fundamental purpose of emergency arbitration is to resolve disputes when there is no arbitral tribunal in place or when it would take too long to establish one. Due to a number of other flaws in the

[11] *Supra 6*
[12] Arbitration Rules of the Arbitration Institute of the SCC 2017, app. II
[13] *Supra 7*
[14] Mumbai Centre for International Arbitration Rules 2016, r. 14.
[15] Delhi International Arbitration Centre (Arbitral Proceedings) Rules 2018, r. 14

system, including lack of trust in the national courts to provide urgent reliefs, leaks of private information, inflated litigation costs, etc. Emergency Arbitration spreads like a promise. Once a party decides to seek the remedy of Emergency Arbitration , several steps must be irrefutably taken, but two main ones are:

- Filing of documentation proving that the opposing parties were served with the application.
- Payment of the chosen fee schedule in accordance with the schedule for each centre where the arbitration is to take place with the implicit understanding that the application of Emergency Arbitration would be restricted to signatories to the Arbitration agreement or their successors.
- Only for a predetermined amount of time can interim measures or conservatory relief be granted in an emergency arbitration. For all intents and purposes, it performs duties that are comparable to, if not identical to, those of an ad hoc tribunal, which has been established for a specific purpose and would be quickly disbanded once that goal has been fulfilled or the time period allotted for the decision of these matters has passed. When it comes to emergencies, the majority of arbitration rules worldwide adopt a "opt-out" policy, which means that these provisions would only not be fully applicable if the parties' agreement specifically excluded "Emergency Arbitrator Provisions."
- An Emergency Arbitrator is an arbitrator selected specifically to serve in an Emergency Arbitration. Following the issuance of the Interim Order, the Emergency Arbitrator performs the following duties and ceases to exist
- A schedule for the evaluation of the application for emergency relief must be established by the Emergency Arbitrator as soon as practicable, but in any case within two business days of appointment.
- All parties will have a reasonable opportunity to be heard under this schedule. It may provide that in lieu of a formal hearing, procedures will take place by telephone conference or based on written submissions.
- The emergency arbitrator may never actually hear from or interact with the parties due to tight deadlines, with the exception of a few crucial clarifications. Instead, he will make his decision based only on the documents and written submissions that have been submitted to him.

- Even though deadlines differ according to different international arbitration standards, an emergency arbitration typically takes eight to ten days from the date of application to the date of award.
- The Emergency Arbitrator shall have all the rights and authority granted to the Arbitral Tribunal by these Rules, including the right to decide on his own jurisdiction. He or she may also order any party to take any temporary protective measures that he or she deems appropriate in light of the dispute's specific circumstances.
- The types of interim orders include asset freezing orders, both mandatory and prohibitory injunctions, orders for the preservation and inspection of evidence, preventive orders to avoid misusing confidential information or intellectual property, and anti-suit injunctions.

Despite the fact that the emergency arbitrator's order is not legally binding on the arbitral tribunal with regard to any question, issue, or dispute that has not yet been resolved, the interim order must be definitively changed, discharged, or revoked, in whole or in part, by a subsequent order or award issued by the arbitral tribunal upon request from any party or on its own initiative.

Position in India on Emergency arbitration

The Arbitration and Conciliation Act, 1996 (referred to simply as "the Act") is the piece of legislation that governs arbitration in India. Only arbitrations that take place in India fall under the purview of Part I of the Act (sections 2 to 43), with a few clauses serving as exceptions[16]. In contrast, Part II of the Act applies to international awards and controls the implementation of those awards in India in accordance with the New York Convention. In accordance with Section 9 of the Act, which is also applicable to arbitrations that are seated in a foreign country, the court is authorised to take interim measures before to the invocation of arbitration, during the course of the arbitration procedure, and even after the award has been rendered (but only prior to the enforcement of the order and only at the request of the prevailing party).

Nevertheless, the Act does not recognise Emergency Arbitration processes or Emergency Arbitration award in an express manner. An interim award is considered to be part of the

[16] By virtue of proviso to section 2(2) of the Act: section 9 (interim measure of protection), section 27 (court's assistance in taking evidence), section 37(1)(a) (appeal from an order refusing to enforce an arbitration agreement) and section 37(3) (no right of a second appeal) from Part I also apply to foreign seated arbitrations.

definition of an arbitral award under the Act[17], but the language is silent on the legal standing of decisions reached during Emergency Arbitration proceedings. In its 246th report, the Law Commission of India suggested adding an "Emergency Arbitrator" to the definition of an "Arbitral Tribunal" in order to advocate the recognition of emergency arbitration in India[18]. This recommendation was included in the Law Commission of India's recommendation to recognise emergency arbitration in India[19]. However, the 2015 Amendment did not take this advice into account and did not implement it. After that, a High Level Committee was established to review the institutionalisation of the arbitration mechanism in India. In its report to the government of India, the committee reaffirmed the need for recognition of Emergency Arbitration and recommended amendments to the definition of an arbitral award as well as the insertion of a definition of a "Emergency Award."[20] Nevertheless, not a single one of these suggestions has been put into action up until this point.

The classification of an Emergency Arbitration judgement as either a "order" or a "award" carries with it a number of repercussions, which brings up a separate problem. For instance, in accordance with the Rules of the SIAC, the Emergency Arbitration decision is regarded as an award[21]. One could make the case that EPA rulings are analogous to temporary measures and should not be afforded the character of an award because they are subject to modification and rescindment by the arbitral tribunal and, as a result, are not definitive determinations of problems between the parties. The necessary clarification on the aforementioned aspect is crucial from the perspective of the enforcement of an Emergency Arbitration decision when the party refuses to comply, i.e. will such a decision be enforced as an award or an interim measure by the national courts. This clarity is essential from the point of view of the enforcement of an Emergency Arbitration decision when the party refuses to comply. Therefore, the issue of the enforcement of an interim "order" as opposed to a "award" passed

[17] Section 2(1)(c) of the Act
[18] Section 2(1)(d) of the Act.
[19] The Commission has, therefore, recommended the addition of Explanation 2 to section 11(6A) of the Act with the hope that High Courts and the Supreme 10 Court, while acting in the exercise of their jurisdiction under section 11 of the Act will take steps to encourage the parties to refer their disputes to institutionalised arbitration. Similarly, the Commission seeks to accord legislative sanction to rules of institutional arbitration which recognise the concept of an "emergency arbitrator" – and the same has been done by broadening the definition of an "arbitral tribunal" under section 2(d).
[20] Recommendations 1. Clause (c) of sub-section (1) of section 2 of the ACA may be amended to add the words "an emergency award" after the words "an interim award". 2. Clause (d) of sub-section (1) of section 2 of the ACA may be amended to add the words "and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator;" after the words "…panel of arbitrators". 3. An emergency award may be defined as "an award made by an emergency arbitrator".
[21] Rule 1.3: "Award" includes a partial, interim or final award and an award of an Emergency Arbitrator.

under Emergency arbitration processes is another ongoing concern that requires the attention of the legislative branch.

Despite the fact that the amended Arbitration and Conciliation (Amendment) Act does not include the term "Emergency Arbitration," a new initiative has emerged through which arbitration institutions are attempting to incorporate the term "Emergency Arbitration" in their rules and are creating concurrent procedures thereof. The Indian arbitral institutions have constructed rules that are largely equivalent to the top international arbitration institutional rules, despite the fact that they are not statutorily sufficient (in the area of an expressly omitted provision). Following are some significant organisations and their associated regulations:

- "Emergency Arbitration" is a provision in Part III of the arbitration rules of the Delhi International Arbitration Centre (DAC4) of the Delhi High Court. A comprehensive explanation of the appointment, process, duration, and powers of an Emergency Arbitrator is provided in Section 18A, which also lists "Emergency Arbitrator."
- The provisions of EA and Emergency Arbitrator are listed in Appendix V of Article 29 of the "Arbitration and ADR Rules" by the Court of Arbitration of the International Chambers of Commerce-India.
- The terms of EA and Emergency Arbitrator are listed in International Commercial Arbitration (ICA) under Section 33 with Section 36(3) effective as of January 1, 2014.
- The provisions of EA and Emergency Arbitrator are listed in Part IV, Section 20 r/w Schedule A and Schedule D of the Madras High Court Arbitration Centre (MHCAC) Rules, 2014.
- The terms of EA and Emergency Arbitrator are listed in Section 3 of the Mumbai Centre for International Arbitration (Rules) 2016 with effect from June 15, 2016.

The Approach Indian Court On Emergency Arbitration

There aren't many legal precedents on the Emergency Arbitration because the Act doesn't explicitly mention it. The Amazon-Future ruling is the most recent instance of how Indian courts have taken a pro-arbitration stance over the years and implicitly enforced awards made by Emergency Arbitrators.

Below are some further important cases involving the enforcement of Emergency Arbitration:

In the case of BALCO[22], the Supreme Court of India ruled that Indian courts' ability to provide temporary relief in connection with arbitrations with foreign seats is prospectively barred.

In the case of HSBC[23], the Bombay High Court determined that the parties' agreement was executed prior to the BALCO ruling (in which the Supreme Court determined that Part I of the Act would not apply to international commercial arbitration) and granted interim relief to the Petitioner under Section 9 of the Act in accordance with the Emergency Arbitrator's award.

In the historic case of Raffles[24], the Delhi High Court ruled that the Emergency Arbitrator's verdict cannot be enforced under the Act and that the court should not take it into account when providing interim measures. The parties will, however, always have the choice to apply to the court for temporary reliefs under Section 9 of the Act.

Contrarily, in the case of Ashwani Minda[25], the Division Bench of the Delhi High Court rejected the Section 9 Application on the grounds that the party had failed to obtain the same relief before the Emergency Arbitrator and that the applicants were not entitled to a second chance because they had already failed to indirectly enforce the Emergency Arbitrator's award.

In terms of emergency arbitration, the most recent ruling by the Supreme Court in the case of Amazon NV Investment Holdings ("Amazon") V. Future Coupons Limited[26] represents a sea change in Indian law. The Supreme Court of India ruled in this decision that an emergency arbitration verdict is enforceable in India. The court also ruled that an Emergency Arbitrator is covered by Section 2(1)(d) of the Act's definition of an arbitral tribunal, and that an Emergency Arbitrator's decision is equivalent to one made by an arbitral tribunal that has been properly established.

In the case at hand, the Supreme Court addressed two questions: first, whether an award made by an Emergency Arbitrator in connection with institutional arbitration qualifies as an order under Section 17(1) of the Act; second, whether an appeal may be brought against a decision to enforce an Emergency Arbitrator's order under Section 17(2) of the Act.

[22] Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc. ("BALCO"), (2012) 9 SCC 552
[23] HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd & Ors., Arbitration Petition No. 1062/2012 dated January 22, 2014
[24] Raffles Design International India Private Limited and Ors. v. Ducomp Professional Education Limited and Ors. 2016 (6) ARBLR 426 (Delhi)
[25] Ashwani Minda and Ors. v. U-Shin Ltd. and Ors, 2020 (4) ArbLR 256 (Delhi)
[26] Amazon NV Investment Holdings ("Amazon") V. Future Coupons Limited (2022) 1 Supreme Court Cases 209

In order to answer the first question, the Supreme Court examined the Act's provisions and determined that if a party has agreed to have a dispute arbitrated, the arbitral institution that the parties have chosen will serve as the arbitral tribunal and its rules will be followed, including those pertaining to the Emergency Arbitrator. According to Section 2(1)(d) of the Act, a "arbitral tribunal" is "a sole arbitrator or a panel of arbitrators." The Act's Sections 2(6) and 2(8) make it plain that parties are able to designate any person, including an institution, to decide disputes between them and that party autonomy is limited by agreements. Therefore, the Supreme Court decided that Section 17(1) does not exclude the application of any rules of arbitral institutions that the parties may have agreed to and authorises parties to request interim reliefs before the arbitral tribunal. An "arbitral tribunal" as defined under Section 2(1)(d) would not apply, and it was further ruled that Section 9(3)'s arbitral tribunal would be similar to Section 17(1)'s arbitral tribunal, which would include an Emergency Arbitrator appointed in accordance with institutional rules.

The Supreme Court determined that no changes were made to Section 37(2) (b) to bring it into compliance with Order XLIII, Rule 1(r), after analysing Section 37 and reading it with the revised Sections 17 and 9. Only appeals from an order granting or refusing to give any interim measure under Section 17(1) were still permitted under Section 37. In reality, the phrase "subject to any orders passed in appeal under Section 37..." in Section 17(2)'s introductory clause reveals the legislature's understanding that orders rendered in an appeal under Section 37 are solely relevant to Section 17(1). For instance, if an appeal against a decision denying an injunction is permitted, subsection (2) of Section 17 will thereafter take effect, enforcing the decision made in the appeal. Additionally, the legislature did not alter the granting or denial of any measure under Section 9 to conform it to Order XLIII, Rule 1(r), as required by Section 37(1)(b). It follows from this that there is no basis for an appeal under Section 37 of the Act against a judgement enforcing a decision of an Emergency Arbitrator made under Section 17(2) of the Act.

Conclusion

These decisions demonstrate the divergent approaches taken by Indian courts while using Section 9 of the Act. Therefore, it is unclear if emergency orders with foreign seats may be enforced. More recently, the Delhi High Court ruled in Ashwani Minda v. U-Shin Limited that a party could not request interim relief under Section 9 of the Act after requesting emergency arbitration and failing to receive the same temporary relief from the arbitrator. A party may

enforce a foreign emergency award under Section 9 of the Act, the Delhi High Court concluded in the more recent case of Shanghai Electric Group Co, Ltd. v. Reliance Infrastructure Ltd.[27]

Therefore, it appears that there is a legislative gap in Indian law that affects emergency arbitration processes, notably the enforcement of emergency arbitrations with foreign seats.

Implementing the recommendations of the 246th Report and the Srikrishna Report by giving emergency arbitration statutory recognition could perhaps remove the confusion surrounding emergency arbitration proceedings. This would be in accordance with the Supreme Court's ruling in the case of Amazon-Future Retail and would allow the execution of decisions of emergency arbitral tribunals in emergency arbitrations with Indian seats. Making India a centre for international commercial arbitration will also be aided by this.

The proviso to Section 2(2) of the Act may be changed in order to apply Part II of the Act's interim measures provisions (Section 17 of the Act) to foreign-seated emergency arbitrations. This would be in accordance with UNCITRAL Model Law Articles 17H and 17I, which recognise and enforce interim orders issued by arbitral tribunals with foreign seats. This would also put an end to the argument over whether an emergency arbitration ruling should qualify as a "award" for purposes of the New York and Geneva Conventions, meaning it should be final and enforceable in order to be enforced in accordance with Part II of the Act.

Despite this, there are covert ways to make emergency arbitrators' rulings enforceable while legislative action is pending. In the case of emergency arbitration with an Indian seat, parties may either apply for an interim order under Section 17(2) of the Act to have the emergency order enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (CPC), which are similar to those of a court order, or they may begin contempt proceedings under Section 27(5) of the Act against the party disobeying the emergency arbitrator's ruling. If the applicability of Section 9 of the Act has not been expressly excluded by the parties, the parties may: (i) file a petition for interim measures under Section 9 of the Act; (ii) where Section 9 of the Act has not been expressly excluded, file a civil suit under the applicable provisions of CPC seeking the same relief that is the subject of the emergency arbitration; or (iii) file contempt proceedings under Section 27(5). However, the necessity for immediate legislative action regarding emergency arbitration still exists.

[27] Shanghai Electric Group Co, Ltd. v. Reliance Infrastructure Ltd 2022 SCC OnLine Del 2112