



GRAVITAS LEGAL

Emergency Arbitration in India – Need for a statutory legislation

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Emergency Arbitration is the mechanism for granting urgent pro tem or interim reliefs or measures to a party that cannot wait for the formation of an Arbitral Tribunal. The proceedings of this type of arbitration are conducted by an Emergency Arbitrator either with the consensus of the parties or according to the agreement executed between the parties.

The efficacy of an Emergency Arbitration, survives on the following legal maxims:

- i. ***Fumus boni iuris*** – the reasonable possibility that the claimant party will succeed on merits; and
- ii. ***Periculum in mora*** – if the urgent relief is not granted immediately, the loss would not and could not be compensated by way of damages.¹

The Emergency Arbitration tribunal is founded with the sole objective of passing the emergency award and becomes *functus officio thereafter*. The essence of Emergency Arbitration is the passing of the interim award in a timely manner. In the event that the emergency award is not passed within the stipulated period, the complete procedure is rendered infructuous. This mode of arbitration manifests potential because of the innumerable defects in the Indian judicial system such as inflated litigation cost, leakage of confidential information, lack of assurance in the national courts to grant urgent reliefs etc.²

¹ India—parties cannot apply to courts after emergency arbitration (Ashwani Minda v U-Shin) <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/200626_A_India_parties_cannot_apply_to_courts_after_emergency_arbitration.pdf> accessed on June 1, 2021

² <<https://www.mondaq.com/advicecentre/content/3958/Emergency-Arbitration-In-India-Concept-And-Beginning#:~:text=The%20Emergency%20Arbitrator%20shall%20have.subject%20matter%20of%20the%20dispute.>> accessed on June 4, 2021

Over the years, many international arbitration institutions like the Singapore International Arbitration Centre (SIAC), the International Centre for Dispute Resolution of the American Arbitration Association (ICDR/AAA) the Stockholm Chamber of Commerce (SCC), London Court of International Arbitration (LCIA), the Swiss Chambers Arbitration Institution (SCAI), the Netherlands Arbitration Institute (NAI), the Hong Kong International Arbitration Centre (HKIAC) and the International Chamber of Commerce (ICC) have adopted the concept of Emergency Arbitration. However, as the arbitration jurisprudence of India is ambiguous about the recognition and enforceability of emergency awards, the parties have had to time and again resort to the Indian courts for interim relief thereby, defeating the entire purpose of Emergency Arbitration.

The article discusses the existing gaps in the Emergency Arbitration law in India and the necessity for a statutory recognition.

The History of Emergency Arbitration in India

To recognize Emergency Arbitration in India, the Law Commission had in its 246th Report³ proposed amendments to the Arbitration and Conciliation Act, 1996 (**Act**) to ensure that rules prescribed by arbitral institutions such as the SIAC Arbitration Rules, or ICC Rules or any other rule which provide for an appointment of an Emergency Arbitrator are given a legal recognition.

Even though the 2015 Amendments made Section 9 of the Act applicable to foreign seated arbitrations (subject to an agreement to the contrary)⁴ and significant amendments were made to Section 17 of the Act, by which an order issued by an arbitral tribunal was deemed to be an order of the court and would be enforceable in the same manner. Nonetheless, the absence of a similar modification in the Part II of the Act, addressing enforcement of foreign awards, led to interim orders passed by arbitral tribunals seated outside India as non-enforceable in our country.

The recommendations in the 246th Report were expected to embrace this global revolution and create provisions for appointment of emergency arbitrators. However, both the Arbitration and Conciliation Amendment Act, 2015 and the Arbitration and Conciliation Amendment Act, 2019 have failed to incorporate all the suggestions of the Law Commission and accordingly, the Act has failed to provide an enabling provision for Emergency Arbitration. These lacunas⁷ in the Act have now raised convolutions before various High Courts of India and the Supreme Court of India.

While the term “Emergency Arbitration” has not been statutorily recognised under the Act, various arbitration institutions in India such as the Mumbai Centre for International Arbitration (**MCIA**), Delhi International Arbitration Centre (**DIAC**), International Commercial Arbitration (**ICA**) Madras High Court Arbitration Centre rules, 2014 (**MHCAC**), have over the years implemented the provisions of Emergency Arbitration similar to the rules adopted by

³ The Law Commission's 246th Report dated 05.08.2014

<https://lawcommissionofindia.nic.in/reports/report246.pdf> accessed last on June 10, 2021

⁴ **Kartikey Mahajan and Sagar Gupta**, ‘Uncertainty of enforcement of emergency awards in India’ <<http://arbitrationblog.kluwerarbitration.com/2016/12/07/uncertainty-of-enforcement-of-emergency-awards-in-india/>> accessed on June 05, 2021

prominent international arbitration institution. Nevertheless, these Indian institutions are not jurisdictionally capable of providing the essential relief of enforcement of such awards as, only the courts of India are vested with this jurisdiction under Section 9 of the Act.

Judicial Approach

India has very limited cases dealing with Emergency Arbitration. Over the years, the courts in India have adopted a pro arbitration approach and have indirectly enforced the award passed by the Emergency Arbitrator.

In the landmark case of *HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited and Ors. (HSBC)*⁵, the Bombay High Court had granted interim relief to the petitioner under Section 9 of the Act in sync with the award of the Emergency Arbitrator and held that the agreement between the parties was executed before the BALCO⁶ judgment.

Whereas, the Delhi High Court in the landmark case of *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education*⁷ held that the award passed by the Emergency Arbitrator cannot be enforced under the Act. Nonetheless, it was ordered that the parties always have the option to approach the court for interim reliefs under Section 9 of the Act. The Delhi High Court also clarified that the Court shall not consider the award passed by the Emergency Arbitrator while granting the interim measures.

On the contrary, in *Ashwani Minda and Ors. v U-Shin Ltd. and Ors.*⁸ the Division Bench of the Delhi High Court affirmed the decision of the Single Judge wherein the court had indirectly enforced the award of the Emergency Arbitrator and rejected the Section 9 Application on the ground that as the party has failed to obtain the same relief before the Emergency Arbitrator, it is not open for the applicants to take a second bite at the cherry.⁹

Nevertheless, the recent battle between Amazon and Future Retail might be a turning point in the Indian Legal Landscape as regards Emergency Arbitration. The main issue for consideration in this case is that Future Retail had cracked a deal with Reliance Industries which was per se a restricted company as per the agreement signed between Amazon and Future Retail in 2019. An Emergency Award was ruled in favour of Amazon and a stay was put on the Future – Reliance deal. Future Retail being aggrieved by the decision of the Emergency Arbitrator approached the Delhi High Court. Subsequently, the Delhi High Court held that Future Retail was not entitled any interim relief as the same contentions were put by Future Retail before various statutory and regulatory bodies and that these bodies should continue to proceed in accordance with law.¹⁰ Pursuant thereto, Amazon filed an application under Section 17(2) of the Act for the enforcement of the emergency award. The Court upheld the legitimacy of the award of the Emergency Arbitrator holding it to be a valid order under Section 17(1) of the Act and further held that the same was enforceable under Section 17(2) of the Act. Consequently, Future Retail being disappointed by the order, approached the Division

⁵ *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd & Ors.*, Arbitration Petition No. 1062/2012 dated January 22nd, 2014.

⁶ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc. (“BALCO”)*, (2012) 9 SCC 552 the Supreme Court held that Part I of the Act would not be applicable to international commercial arbitration

⁷ *Raffles Design International India Private Limited and Ors. vs. Ducomp Professional Education Limited and Ors.* 2016 (6) ARBLR 426 (Delhi)

⁸ *Ashwani Minda and Ors. v U-Shin Ltd. and Ors.*, 2020(4)ArbLR256(Delhi)

⁹ *ibid*

¹⁰ *Amazon NV Investment Holdings (“Amazon”) Versus Future Coupons Limited* decided on March 18, 2021 by the Delhi High Court

Bench of the High Court which further directed a stay on the implementation of the status quo order passed by the learned Single Judge. The proceedings are now pending before the Supreme Court of India wherein the special leave petition filed by Amazon is being examined. The Supreme Court of India has however, permitted NCLT to continue assessing the merger in the interim but constrained NCLT from taking any final decision.

These case laws highlight the voids in the Legal System of India as regards the Emergency Arbitration and indicate how laws of various international arbitral institutions impede its legitimacy and enforceability in India.

Towards an Arbitration Powerhouse

Through the years, the courts of India have transformed the Indian legal landscape by indirectly adapting and embracing Emergency Awards passed in foreign seated arbitrations. The Indian Judiciary has proved that the order of the court in an application for interim measures is largely dominated by the awards delivered by Emergency Arbitrators around the globe. However, a statutory recognition of the emergency awards in India is still awaited.

It is anticipated that Emergency Arbitration has the potential to make India a global arbitration hub. It can help India strengthen its arbitration landscape and minimise judicial intervention in the arbitration mechanism to a major extent. The concept of Emergency Arbitration has proven to be more efficient, less time consuming and trusted worldwide. It is felt that if Emergency Arbitration is legitimised in India it will accelerate India's journey towards becoming a leading arbitration destination in the world.



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