

## EMERGENCY ARBITRATION IN INDIA<sup>1</sup>

### 1. BACKGROUND & INTRODUCTION

- 1.1. In the past decade, the concept of emergency arbitration (“**Emergency Arbitration**”) has brought a new dimension to international commercial arbitration. Various international arbitration institutions like the American Arbitration Association- International Center for Dispute Resolution (“**AAA-ICDR**”), International Chamber of Commerce (“**ICC**”), Hong Kong International Arbitration Center (“**HKIAC**”), etc. have incorporated rules relating to emergency arbitral proceeding to provide an immediate relief prior to the formation of the arbitral tribunal. However, despite global recognition, India does not recognize emergency arbitration. Indian arbitration framework neither defines nor expressly prescribes such proceedings which also hinders the enforcement of Emergency Arbitral Awards (“**Emergency Award**”). However, recent rulings of the Delhi High Court and the Bombay High Court allowing enforcement of Emergency Award has again brought the legal position of Emergency Arbitration into the spotlight. This article aims at discussing the status, recognition, and enforcement of Emergency Arbitration in India.
- 1.2. Emergency Arbitration is a procedure to seek interim relief prior to the formation of an arbitral tribunal. It is also an alternative to court-ordered interim measures. In an emergency arbitral proceeding, an Emergency Arbitrator (“**EA**”) is appointed to grant interim reliefs that are so urgent that waiting for the constitution of the arbitral tribunal may cause grave and irreparable loss to the aggrieved party. Historically, the parties have two options to obtain an interim relief i.e., either to approach the competent courts or to wait till the constitution of the arbitral tribunal. However, Emergency Arbitration has emerged as a preferred option by parties seeking pre-tribunal or pre-trial interim reliefs who hesitate to approach the competent courts for the reasons of urgency, confidentiality, litigation cost, or uncertainty of getting favorable and effective relief.

### 2. LEGAL FRAMEWORK OF EMERGENCY ARBITRATION ACROSS THE WORLD

- 2.1. The UNCITRAL Model Law defines ‘arbitration’ as *any arbitration whether or not administered by a permanent arbitral tribunal*. Thus, though indirectly, the Model Law allows the inclusion of emergency arbitration.
- 2.2. Many international arbitration institutions have introduced provisions for the emergency arbitration proceeding to meet the need for emergency interim relief within their framework. The International Center for Dispute Resolution (“**ICDR**”) was the first international arbitration institution to provide arbitration rules for emergency arbitration (“**Arbitration Rules**”) in 2006, followed by Singapore International Arbitration Centre (“**SIAC**”) in 2010, ICC in 2012, HKIAC in 2013,

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<sup>1</sup> <https://dalaw.in/?p=2752>



London Court of International Arbitration (“LCIA”) in 2014, Stockholm Chamber of Commerce (“SCC”), etc.

- 2.3. However, due to inconsistent enforcement procedures, the major concern of the parties involved, is the enforceability of the award passed by an EA. Considering the same, few countries have taken a forward step by amending their arbitration legislation to give recognition to the Emergency Arbitration and to allow effective enforcement of the Emergency Awards, such as below:
  - i. *Singapore*<sup>2</sup> amended its International Arbitration Act to include EA within the definition of the arbitral tribunal.
  - ii. *Hong Kong*<sup>3</sup> has amended its arbitration legislation to enforce relief granted by EA.
  - iii. *Netherlands*<sup>4</sup> has amended Dutch Arbitration Act to ensure enforceability of interim awards granting provisional relief.
  - iv. *New Zealand*<sup>5</sup> and *Bolivia*<sup>6</sup> have also amended their national laws to provide specific provisions relating to Emergency Arbitration.

### 3. REQUIREMENTS OF EMERGENCY ARBITRATION PROCEEDING

- 3.1. The first requirement for seeking emergency relief is the existence of a contract containing an institutional arbitration clause. On the basis of the terms of the clause, a party may make an application to the chosen arbitration institution for the appointment of a sole and temporary EA.
- 3.2. To initiate emergency arbitration, a party is required to establish through their application that:
  - a. *Fumus boni iuris*: the likelihood of success on the merit of the case; and
  - b. *Periculum in mora*: that if urgent relief is not granted, the party would suffer grave and irreparable loss.
- 3.3. On being satisfied with the abovementioned factors, the arbitration institution may appoint an EA on the basis of the agreement of the parties. Further, the party is required to serve a notice to the other party. Thereafter, EA commences the proceeding to address the claim of emergency relief by giving reasonable opportunity to all the parties to be heard. On the basis of the oral and written submissions, EA may grant such interim relief. The Emergency Arbitration proceeding is required to be completed as per the timeline provided by the Arbitration Rules. Usually, it takes eight to ten days to conclude an emergency arbitration. By the virtue of Arbitration Rules, the EA has been

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<sup>2</sup> International Arbitration Act 2002, c 143A, Art 2(1) as revised by Act 12 of 2012 with effect from 1 June 2012

<sup>3</sup> Arbitration Ordinance 2011, c 609, Arts 22A and 22B, as amended by the Arbitration (Amendment) Ordinance 2013 with effect from 19 July 2013.

<sup>4</sup> Dutch Arbitration Act 2015, Arts 1043b (2) and 1043b (4).

<sup>5</sup> New Zealand Arbitration Act 1996, Art 2(1), as amended on 17 October 2016, with effect from 1 March 2017

<sup>6</sup> Bolivian Conciliation and Arbitration Law no 708, Arts 67–71



vested with the authority to rule on his own jurisdiction. Once the EA concludes the proceeding and passes the award, his functions become *functus officio*. Further, the award passed by an EA remains 'interim binding' till the formation of an arbitral tribunal, and it may be amended by a subsequent award of the arbitral tribunal.

#### 4. THE LEGAL POSITION OF EMERGENCY ARBITRATION IN INDIA

4.1. In India, the Arbitration and Conciliation Act 1996, as amended ("**Act**") governs all kinds of arbitration proceedings. The provisions relating to interim relief are provided under Section 9 and Section 17 of the Act. Section 9 lays down the provision for obtaining interim relief from the competent court at any time prior to the enforcement of an arbitral award. While, under Section 17, interim relief can be obtained from arbitral tribunal only after its composition. However, the Act does not provide any provision for Emergency Arbitration.

4.2. In 2014, the Law Commission of India through its 246<sup>th</sup> Law Commission Report recommended to amend the definition of 'arbitral tribunal' under Section 2(1)(d) of the Act. The recommendation was intended to encourage institutional arbitration and to reduce the judicial interference of the court by giving statutory recognition to the appointment of an EA. The Proposed Section reads as follows:

*"Section 2(d): "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators 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."*

However, the recommendation of the Law Commission was not incorporated in the Arbitration & Conciliation (Amendment) Act of 2015.

4.3. Even though the Indian legislator does not give statutory recognition to the Emergency Arbitration, the Indian arbitration institutions have inserted the term 'Emergency Arbitration' in their Rules and provided procedures thereof. For instance,

- i. Delhi International Arbitration Center has included the term 'Emergency Arbitration' in Part III of its Arbitration Rules;
- ii. Court of Arbitration of the International Chambers of Commerce-India under Article 29 of the 'Arbitration and ADR Rules' r/w Appendix V lays down provisions of EA and Emergency Arbitration;
- iii. International Commercial Arbitration under Section 33 r/w Section 36(3), provides the provisions of EA and Emergency Arbitration;
- iv. Madras High Court Arbitration Centre Rules, 2014, under Part IV, Section 20 r/w Schedule A and Schedule D provides the provisions of EA and Emergency Arbitration;



- v. Mumbai Centre for International Arbitration (Rules) 2016, under Section 3 provides the provisions of EA and Emergency Arbitration.

4.4. However, the issue pertaining to enforceability for an award of EA whether passed by Indian or foreign arbitration Institution still subsists in India.

## 5. ENFORCEMENT OF EMERGENCY ARBITRATION IN INDIA

5.1. As discussed, Indian legislation has not given legal recognition to emergency arbitration which makes enforcement of emergency arbitral awards quite difficult in India. However, Indian courts have paved a way for the parties by allowing them to initiate a proceeding under Section 9. The pro-enforcement approach of Indian courts has been seen in several judgements, and few are listed below:

5.1.1. Hon'ble Bombay High Court in *HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited and Ors.*,<sup>7</sup> allowed the enforcement of emergency award passed by SIAC by filing an application under Section 9. The court enunciated that:

*"21. As regards the Petitioner's right to obtain reliefs under Section 9 in the present case, the same is based on two premises. First, the emergency arbitrator has passed an interim award dated 28th May 2012 holding that protective orders are required to be passed. The said interim award has not been challenged by the Respondents. The issue therefore has been decided by a competent forum and this decision has become final and binding on the parties. On the basis of the principles of issue estoppel the said decision is binding and the Respondents are not entitled to re-agitate the question as to whether the Petitioner is entitled to any protective order. The second premise is that independently of the interim award passed by the Arbitral forum, the Petitioner has made out a case for grant of reliefs under Section 9 of the Indian Arbitration Act" any protective order. The second premise is that independently of the interim award passed by the Arbitral forum, the Petitioner has made out a case for grant of reliefs under Section 9 of the Indian Arbitration Act"*

5.1.2. Similarly, in *Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors.*<sup>8</sup>, the parties entered into an agreement consisting of an arbitration clause governing by the law of Singapore. They resorted to EA as per SIAC for an interim relief which was granted and enforced under Singapore Laws. Thereafter, an application under Section 9 was filed by the party who obtained the relief to restrict the opponent party from disobeying the relief granted by the EA. The Delhi High Court allowed the application and observed that:

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<sup>7</sup> MANU/MH/0050/2014

<sup>8</sup> MANU/DE/2754/2016



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*“99. In the circumstances, the emergency award passed by the Arbitral Tribunal cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit. 100. However, in my view, a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. Needless to state that the question whether the interim orders should be granted under section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal. Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted.”*

5.1.3. Recently, in *Future Retail v Amazon.com Investment Holdings*<sup>9</sup>, the Delhi High Court dealt with the legality of emergency arbitration and upheld the emergency award passed by the EA under SIAC Rules. The Court held that:

- i. the authority of a party to take recourse of emergency arbitrator cannot be invalidated merely because it does not strictly fall within the definition of an “Arbitral Tribunal” under section 2(1)(d) of the Act. Further, the ambit of Section 2(1)(a) and Section 2(1)(d) is wide enough to include an emergency arbitrator.
- ii. an emergency arbitrator’s authority to act is implied from the agreement to arbitrate between the parties and there is nothing in the Act which prohibits the contracting parties from obtaining emergency relief from an emergency arbitrator appointed as per rules agreed to between the parties. Thus, the order of emergency arbitrator cannot become *prima facie* invalid.
- iii. section 2(6) and section 19(2) give complete freedom to parties to authorize an institution to determine the disputes between them and also agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- iv. an emergency arbitrator is an arbitrator for all intents and purposes and under section 17(1) of the Act, it has the same power to make interim orders, as the court has. Further, such interim order is enforceable under section 17(2) of the Act in the same manner as if it was an order of the court. Consequently, the interim order would also be appealable under section 37 of the Act.

## 6. DHWAJ & ASSOCIATES COMMENTS

A global surge in the inclusion of Emergency Arbitration has emerged as a turning point in international arbitration law. Emergency arbitration is considered as a welcome addition to the dispute resolution which enables the parties to seek urgent relief within the arbitration institutional framework. From the above discussion, it is evident that India still needs to bring a legislative

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<sup>9</sup> C.S. (Comm) 493 of 2020



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recognition to Emergency Arbitration which would surely pave its way for becoming a preferred arbitration hub. Though the rulings of Indian courts have brought a much-needed encouragement to the concept of Emergency Arbitration but whether a statutory change will be brought or not is something we all look forward to.

**\*“The content of this Article does not necessarily reflect the views/opinions/position of Dhwaj & Associates but remain solely those of the author(s). For any further queries or follow up please contact Dhwaj & Associates at [info@dalaw.in](mailto:info@dalaw.in)”**