



IN DEPTH ANALYSIS OF EMERGENCY ARBITRATION- THE INDIAN POSITION VIS-À-VIS THE GLOBAL POSITION

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Abstract

Emergency Arbitrator, although a relatively new concept in the field of international arbitration, is a formidable weapon for the parties seeking interim emergency reliefs. However, there are certain aspects of it which are making it weak and not letting the parties enjoy the benefits of the same. This article analysis the concept of Emergency Arbitration.

The first part of the article provides for the rules of different Arbitral Institutions, Indian and foreign, revolving around Emergency Arbitration. The next part discusses the various lacunae in the concept of Emergency Arbitration. In the same part there is a detailed discussion of the enforcement issue of the decisions given by an Emergency Arbitrator including the author's opinion as to how enforcement can be done under the existing laws of India.

The article concludes with the recommendation of the best way forward to strengthen this concept, by way of national legislative amendments and international instrument.

I. INTRODUCTION

Arbitral tribunal's power to order interim measures of protection are essential for the

smooth functioning of the arbitration process. It is indeed necessary to ensure that a party is prevented from taking any step during the continuance of the proceedings so as to prejudice the interests of the other party.¹ Earlier such power to grant interim relief was only with the ordinary courts, an option which is mostly frowned upon by the parties. Approaching courts defeat the very purpose for which the parties choose arbitration in the first place, such as their intention to keep the matter confidential or engaging technical experts as arbitrators. Besides, parties have to go through slow and cumbersome process of the courts and in case of international arbitration the complexities involved are even more from engaging a local counsel to going through foreign court's procedures.

Many countries, realising the same, have incorporated in their laws arbitrator's power to grant interim relief. In fact, UNCITRAL Model Law on International Commercial Arbitration was amended in 2006 to include a detailed provision on arbitrator's power to grant interim relief.² Indian law also recognizes arbitrator-ordered interim relief as provided in the Arbitration and Conciliation Act, 1996 (hereinafter referred

¹Laurie E Foster & Nathalie Holme Elseberg, "Two New Initiatives for Provisional Remedies in International Arbitration: Article 17 of the UNCITRAL Model Law on International Commercial Arbitration and Article 37 of the AAA/ICDR International Dispute Resolution Procedures", *Transnational Dispute Management*, highlights the fact that interim measures are necessary for the effectiveness of international arbitration.

²United Nations Convention on International Trade Law (UNCITRAL) Model Law On International Commercial Arbitration 1985 (Model Law), as amended in 2006 (Model Law 2006").



to as “the Act”)³. However, such power becomes meaningless in situations requiring a prompt interim relief prior to the constitution of the arbitral tribunal, for example a situation where in order to prevent the dissipation of assets an immediate injunction is required. Earlier, parties were left with only two options either to approach the courts⁴ or wait long enough for constitution of the arbitral tribunal. In order to tackle such situations many arbitral institutions around the world have framed rules for emergency arbitrators who are entitled to order interim measures for protection. It seems that now emergency arbitration, relatively a new concept in the field of arbitration, has given a party seeking an urgent interim relief a viable and a quicker option. The Emergency Arbitrator is only entitled to pass interim decision until the constitution of the Arbitral Tribunal. It, however, cannot decide the merits of the case which is for the main arbitrator to decide.

II. INTERNATIONAL POSITION

Many Arbitral institutions around the globe have adopted rules specific to emergency arbitrators. Presently, institutions such as the International Chambers of Commerce (hereinafter referred to as “ICC”), the Singapore International Arbitration Centre (hereinafter referred to as “SIAC”), the London Court of International Arbitration (hereinafter referred to as “LCIAI), the Hong Kong International Arbitration Centre

(hereinafter referred to as “HKIAC”), the Swiss Chambers’ Arbitral Institution, the International Centre for Dispute Resolution, the Stockholm Chambers of Commerce, among others, provide rules for emergency arbitrators. Some of the institutions are discussed below in detail.

It was ICC which had, in the year 1990, first started a method to provide for emergency reliefs which was called “Pre-Arbitral Referee Procedure”.⁵ This method is still in continuance, however, not so much popular among parties because of the opt-in approach. In 2012, ICC rules of arbitration were amended and now Article 29(2) lays down a procedure for seeking urgent interim or conservatory relief. Two significant features of ICC emergency arbitrator provision are:

1. *Opt-out approach* - The procedure is automatically applicable on the parties unless the parties have agreed to the contrary.⁶
2. *‘Order’ not ‘award’* - Article 29.2 of the ICC Rules of Arbitration provide: “The emergency arbitrator’s decision shall take the form of an order.” Thereby keeping it out of the purview of the New York Conventions 1958.

SIAC introduced emergency arbitrator provision back in 2010 and thereby became the first arbitral institution in Asia to do so. Rule 30.2 of the SIAC Rules 2016 provide for the appointment of emergency

³ Section 17 of the Act enumerates certain circumstances under which interim may be ordered.

⁴ Section 9 of the Act gives wide powers to the Courts to grant interim relief to parties to arbitration.

⁵1 BORN, Gary, International Commercial Arbitration. 2nd edition. London: Kluwer Law International, 2014, p. 2450:

⁶29.6.(a), ICC Rules of International Arbitration.



arbitrator. Furthermore, SIAC has made significant revision in its rules in 2016 to improve the efficiency of emergency arbitration, these are :

1. Time frame of appointment of emergency arbitrator has been revised to one day which, earlier, was one business day under SIAC Rules 2013.
2. Time frame for issuance of order or award is set at maximum of 14 days from the date of appointment of emergency arbitrator.⁷

Besides Singapore International Arbitration Act was amended to expand the meaning of “arbitral tribunal”, bringing emergency arbitrator under it.

Prior to 2014, LCIA rules provided only for expedited formation of arbitral tribunal in case of exceptional urgency.⁸ Presently, Article 9B of the LCIA rules (2014) provide for emergency arbitration as well. The appointment of emergency arbitrator shall be within three day of the receipt of the application by the registrar.⁹ The final decision may be in the form of order or award and shall be given in no more than 14 days from the date of appointment of the arbitrator.¹⁰ It has to be noted that after the recent and surprising judgement of the English High Court in *Gerald Metals SA v Timis & Ors*¹¹ the parties’ options have been restricted, that is to say, if the seat of arbitration is London and the party requires an urgent relief and his case falls within the rules of LCIA, he must seek such relief from

the expedited tribunal or the emergency arbitrator and the court shall not have the power to, nor will entertain such a case.

HKIAC 2013 Administered Arbitration Rules (HKIAC Rules) make an explicit mention that a party may apply for urgent-interim relief prior to the constitution of the arbitral tribunal¹² and sets out the procedure, therein.¹³ Unlike ICC, HKIAC Rules do not provide for application for the appointment of emergency arbitrator before the notice of arbitration.¹⁴ The emergency arbitrator shall be sought to be appointed within 2 days of receipt of application and the application deposit.¹⁵ Decision shall be rendered within 15 days of receipt of file by the emergency arbitrator.¹⁶

III. INDIAN POSITION

The Arbitration and Conciliation Act, 1996 provide for powers of the courts and the arbitral tribunal to grant interim relief . Section 9 provide power of the arbitral tribunal to order interim relief and Section 17 provide for power of the courts to order interim relief. However the Act does not mention or recognise emergency arbitrator.

The Law Commission of India in its 246th Report remarked that the Arbitration and Conciliation Act, 1996 neither encourages nor discourages parties to opt for institutional arbitration. In order the further the growth of arbitration and to strengthen the regime of institutional arbitration in

⁷ Schedule 1 of SIAC Rules 2016.

⁸ Article 9 of LCIA Arbitration Rules (1998).

⁹ Article 9.6 of LCIA Arbitration Rules (2014).

¹⁰ Article 9.8 of LCIA Arbitration Rules (2014).

¹¹ [2016] EWHC 2327 (Ch) [2016]

¹² Article 23.1, HKIAC Rules.

¹³ Schedule 4, HKIAC Rules.

¹⁴ Schedule 4(1), HKIAC Rules.

¹⁵ Schedule 4(5), HKIAC Rules.

¹⁶ Schedule 4(12), HKIAC Rules.



India, the Law Commission proposed amendments to the Act. One such amendment sought to give legislative sanction to the concept of an “emergency arbitrator”. It proposed to broaden the definition of “Arbitral Tribunal” under Section 2(d) of the Act so as to include emergency arbitrator within it. Similar changes were made in the Singapore International Arbitration Act which added emergency arbitrator to the definition of Arbitral Tribunal.

Surprisingly the proposal of the Law Commission report were not incorporated in the Arbitration and Conciliation (Amendment) Act, 2015. Interestingly, According to the SIAC Annual Report-2016 India was the second to only Singapore with maximum number of parties resorting to emergency arbitration in SIAC from 2010 to 2016. Despite the need of legal sanction to emergency arbitration in India and present Government’s rigorous efforts to promote institutional arbitration in India, it, indeed, is a surprising move.

Although the the Act failed to take any steps towards recognising the international trend of Emergency Arbitration, many arbitration institutions in India have indeed felt the need and purpose of the same. These institutions have have made the necessary changes in their rules to provide for the appointment of Emergency Arbitrator. Following are some leading arbitration institutions in India :

1. **The Delhi International Arbitration Centre** (hereinafter referred to as “DAC”) - Part III-A of the DAC (Arbitration Proceedings)

Rules provide for Emergency Arbitrator. Section 18A lays down the appointment procedure, powers and other rules relating to emergency arbitrator. The emergency arbitrator shall be appointed within two days of receiving the request and the order shall be passed within seven business days of the appointment of the emergency arbitrator.

2. **NaniPalkhivala Arbitration Centre** (hereinafter referred to as “NPAC”) - Rule 20-A of rules of arbitration for NPAC provide for the rules relating to emergency arbitrator. The emergency arbitrator shall be appointed within one business day of the receipt of the application by the registrar.¹⁷ The decision of the Emergency Arbitrator may be in the form of an award or an order and must furnish reasons for his decision.¹⁸

3. **Mumbai Centre for International Arbitration** (hereinafter referred to as “MCIA”) - Rule 14 of the MCIA Rules provide for Emergency Arbitrator. An application has to be made to the registrar for the appointment of an emergency arbitrator which shall be accompanied with certain documents.¹⁹ The Emergency Arbitrator shall be appointed within 1 business day of the receipt of application by the registrar.²⁰ The emergency relief sought shall be

¹⁷Rule 20-A (ii), Rules of Arbitration for NPAC.

¹⁸ Rule 20-A (vi), Rules of Arbitration for NPAC.

¹⁹Rule 14.1, MCIA Rules.

²⁰Rule 14.2, MCIA Rules.



decided within 14 days of Emergency Arbitrator's appointment (time can be extended in exceptional circumstances.²¹ The decision can be in the form of an order or an award.²² In order to make the process cost effective, the Emergency Arbitrator's fee is capped at 20% of the sole arbitrator's maximum fees but it cannot be less than ₹300,000.

- 4. International Commercial Arbitration** (hereinafter referred to as "ICA")- Rule 33 of the ICA Rule of International Commercial Arbitration (effective from 1st April, 2016) provide for Emergency Arbitration. Rules provide for immediate appointment of Emergency Arbitrator and in no case later than seven days from the date of receipt of fees by the registrar.²³ It is the duty of the registrar to make sure that the decision is made within thirty days from the date of the appointment of the Emergency Arbitrator.²⁴ The decision may be in the form of an order or an award and shall be binding on the parties.²⁵

IV. WHAT PLAGUES EMERGENCY ARBITRATION ?

- 1. Institutions require mandatory notice to be served on another**

party for the institutions of EA proceedings—Some arbitral institutions require notice to be served on a third party and do not entertain ex-party proceedings. This, in turn, would provide enough time to a third party to prepare to get away with the liability, if any, of an Emergency Arbitrator's decision. As the name suggests, EA would be of no use if it cannot meet the Emergency.

- 2. Limited powers to make orders against third party** —Emergency Arbitrator's power to grant interim relief is as limited as that of powers of an Arbitrator. Therefore, he has limited or no powers to grant orders against a third party, in which case, remedy can be sought by way of courts.

- 3. Enforcement Issue.**

- 4. Uncertainty of status of emergency arbitrator.**

- 5. Not a final award.**

The last three issues being interconnected and of very high importance are discussed together at length. The decisions given by an Emergency Arbitrator can be in the form of an order or an award. ICC provides for the decision to be in the form of an award.²⁶ Whereas, institutions like LCIA and SIAC provide that the decision of an emergency arbitration can be in the form of an order or an award²⁷. Indian institutions like NPAC

²¹Rule 14.6, MCIA Rules.

²²Rule 14.7, MCIA Rules.

²³ Rule 33.4, ICA Rule of International Commercial Arbitration.

²⁴Rule 33.6, ICA Rule of International Commercial Arbitration.

²⁵Rule 33.9, ICA Rule of International Commercial Arbitration.

²⁶Article 29.2, ICC Rules of Arbitration.

²⁷ Article 9.8 of LCIA Arbitration Rules (2014); Schedule 1 of SIAC Rules 2016.



and MCIA provide that the decision can be in the form of an order or an award.²⁸

Global Position

SIAC Rules, 2010 introduced the provision for Emergency Arbitrator and empowered it to provide interim relief. However, the Singapore International Arbitration Act did not recognize Emergency Arbitrator within the definition of Arbitral Tribunal. This caused a great deal of confusion with regard to the enforcement of the decision of an Emergency Arbitrator. However Singapore amended its law so as to include Emergency Arbitrator within the definition of Arbitral Institution which has put a rest on the controversy and thereby, recognizing the awards passed by an emergency arbitrator and making them enforceable in Singapore. Hong Kong also introduced an amendment in Arbitration Ordinance to make Emergency Awards enforceable.²⁹

Position in India

Indian law has not amended the definition of Arbitral Tribunal so as to include Emergency Arbitrator within its scope in spite of the fact that the Law Commission in its 246th report recommended to do so. This has left us in the same position as that of Singapore before the amended act.

There are not many judgements by the Indian Courts on Emergency arbitration. Delhi High Court came across this issue in Raffles Design International India Private

Limited & Ors. v. Educomp³⁰, where the laws of Singapore governed the arbitration agreement. An interim award was passed by an Emergency Arbitrator. In order to enforce the same in India, an application under Section 9 was filed. The Court mentioned Article 17H of the UNCITRAL Model Law which provides for enforcement of an interim measure and observed that the Indian Arbitration Act does not have a provision for the enforcement of interim orders granted by an Arbitral Tribunal situated outside India. And thus, such emergency awards are not enforceable under the Act, however, the remedy can be availed by

filing a suit.

In another case before the Bombay High Court, titled HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd & Ors³¹, in the proceedings under Section 9 of the Indian Arbitration Act, the Court gave the relief similar to what the Emergency Arbitrator had given.

It is pertinent to mention that the approach taken by the courts in these cases is different than the one taken by the author, to be discussed hereinafter. Although, these judgements reinforce the Judiciary's support towards arbitration, the judgements do not offer much help to the question of enforcement and the confusion does not settle.

IV. Legal Status of an Emergency Arbitrator.

It is important to find out the legal status of an emergency arbitrator. We need to see

²⁸Rule 20-A (vi), Rules of Arbitration for NPAC; Rule 14.7, MCIA Rules.

²⁹Part 3-A of the Arbitration Ordinance, Can be accessed at <https://www.elegislation.gov.hk/hk/cap609?pmc=0&m=0&pm=1>, last visited on 1st October, 2018.

³⁰ (2016) 234 DLT 349

³¹ 2014 SCC OnLine Bom 929.



whether emergency arbitrator is part of the arbitral tribunal or a different concept altogether. This question is of practical importance since if it is part of the arbitral tribunal then it can be governed by the existing laws in India, otherwise not.

There are certain characteristics of emergency arbitrator like it cannot give a decision on the merits of the dispute but it can pass an interim order/award on an issue which needs to be expeditiously dealt with. Secondly, an award passed by the emergency arbitrator is not a final award but an interim relief pending the constitution of the main arbitral tribunal. However, generally arbitral tribunals are empowered to give a decision on the merits of the dispute which can be final in nature. Prima facie, it cannot be said that the features of an emergency arbitrator are different than of an arbitral tribunal. Generally accepted definition of arbitration provides that arbitration is a process by which parties, consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard.³² This definition is broad enough to include emergency arbitration within the definition of arbitration.

The broad characteristics of “arbitration” may be summed up as following –

- Arbitration is a voluntary process. The parties to the dispute by an agreement oral or written refer the dispute to arbitration.

- Arbitration enables the parties to tailor the procedure as per their own requirements. They are at the liberty to choose the place where and the time at which the proceedings shall take place. Besides, the parties can also choose the arbitrator.
- Arbitration, usually, does not take place publicly and is a private affair.
- There is no procedural or evidentiary laws which govern the arbitration process. .
- Arbitration awards are binding in nature. Awards can only be challenged on limited grounds.
- More often than not, arbitration is a confidential process. It is this reason only that attracts parties to opt for arbitration.

On a bare perusal of the characteristics it can be safely said that Emergency Arbitration shares the same characteristics of that of any other arbitration. The process is voluntary since parties are subjecting themselves to the rules of a particular institution voluntarily, it is private and confidential process, not governed by any laws and the procedure can be tailor made by the parties.

On the surface we can thus say that the Emergency Arbitrator is nothing but a part and extension of the main Arbitral Tribunal.

IV.II Pre-Arbitral Referee

Pre-Arbitral referee procedure which shared characteristics with an emergency arbitration was introduced by the ICC in the 1990s. Paris Court of Appeal in Congo case discussed the status of an award passed by pre-arbitral referee. It was held by the Court that pre-arbitral referee procedure is not

³² Born, Gary, International Commercial Arbitration (Kluwer Law International, 2009) at p 216.



arbitration in literal sense but a contractual arrangement between the parties and the decision passed by it cannot be said to be an award under New York Convention.³³

V. TRACING EMERGENCY ARBITRATION IN THE INDIAN ARBITRATION LAW

The concept of emergency arbitration is not explicitly provided in the Indian Arbitration and Conciliation Act, 1996 (the Act). The question arises if the same can be traced in the Act impliedly and in order to do so we must have a look at the definitions provided in the Act.

The term Arbitration is defined as—“arbitration means any arbitration whether or not administered by permanent arbitral institution.”³⁴ Arbitral Tribunal is defined as—“arbitral tribunal” means a sole arbitrator or a panel of arbitrators.³⁵ Arbitral Awards is defined as—“arbitral award” includes an interim award.³⁶ International Commercial Arbitration is defined as— “international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and....³⁷

None of these definitions are comprehensive enough to render any help. The Halsbury Law of England defines arbitration as - “Arbitration is a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it. The decision of the arbitral tribunal is usually called an award.”³⁸

It is a well accepted rule interpretation of statutes that where the language of the statute is plain and simple, the words must be given their ordinary, literal and grammatical meaning. However, in the recent times, the courts have departed from the literal rule of interpretation. In fact, the Supreme Court of Canada took the view that the modern approach to statutory interpretation involves a “textual, contextual and purposive analysis of the statute or the provision in question.”³⁹ Indian Supreme Court too has provided that interpretation should be preferred which best harmonises with the object of the statute.⁴⁰ In the same way, in the author’s view, while interpreting the definition of arbitral tribunal u/s 2(d) of the Act, Emergency Arbitrator should be included within it to bring about a harmony with the object the Act.

³³Republic of Congo v. Société Total Fina Elf E&P Congo, Paris Court of Appeals, 1ere chambre, section C (2003).

³⁴ Section 2(1)(a), The Indian Arbitration and Conciliation, Act, 1996.

³⁵ Section 2(1)(d), The Indian Arbitration and Conciliation, Act, 1996.

³⁶ Section 2(1)(c), The Indian Arbitration and Conciliation, Act, 1996.

³⁷ Section 2(1)(f), The Indian Arbitration and Conciliation, Act, 1996.

The definition of Arbitral Tribunal provided under Section 2(d) of the Act provides that an Emergency Arbitrator means a sole

³⁸Halsbury's Laws of England, 5th Edition (2008), Book 2, "Arbitration"

³⁹Re Rizzo&Rizzo Shoes Ltd., 1998 1 S.C.R. 27

⁴⁰New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar, AIR 1963 SC 1207



arbitrator or a panel of arbitrators. Thus, what needs to be seen is whether Emergency Arbitrator is an Arbitrator or not and whether the process of Emergency Arbitration is arbitration or not. Once again, the definition of Arbitration in the Act does not really defines arbitration but it only ascertains certain meaning to it so as to include ad hoc as well as institutional arbitration.

In such a case we need to proceed with the general definition of both Arbitration and Arbitral Tribunal. We need to employ purposive interpretation to reach to conclusion whether, in fact, Section 2(d) does or does not include emergency arbitration.

V.I Purposive interpretation of the Act

The statutory interpretation of a provision is never static but always dynamic. Though the literal rule of interpretation, till some time ago, was treated as the golden rule, it is the doctrine of purposive interpretation which is predominant, particularly in those cases where literal interpretation may not serve the purpose or lead to absurdity.⁴¹ Even the Mimamsa Rules of Interpretation, which are India's traditional rules of interpretation, provides for possibility of deviation from the literal interpretation in exceptional cases.⁴² Meaning of a word depends upon the object it seeks to achieve.⁴³ In case there exists two or more meanings to a word, the one which

gives effect to the purpose of the statute must be given effect to.⁴⁴

Thus, in order to ascertain whether the definition of Arbitral Tribunal is wide enough to include Emergency Arbitration or not, in the author's view, we need to resort to purposive interpretation since literal interpretation of the statute would not serve the purpose of the statute.

Then what is the purpose of the Act? In order to find the purpose of the statute we need to see the intrinsic sources. A perusal of the preamble to the Indian Arbitration and Conciliation Act, 1996 would make it clear that the purpose for enacting the the Act was to provide for a unified law on Arbitration and thus, the law was⁴⁵ inspired and adopted from UNCITRAL Model law on International Commercial Arbitration.⁴⁶ Arbitration is dispute resolution mechanism which is not confined to or limited by territorial limits. The success of Arbitration is dependent on the very fact that there is uniformity with the laws of other countries. If this were not the case, a person can easily circumvent his liability in one jurisdiction by not complying with an award passed by an arbitrator in another jurisdiction. This is also true for avoiding other complications of various such as fate of an interim award/order in another jurisdiction or, perhaps, other procedural complications.

⁴⁴Nathi Devi v. Radha Devi Gupta, 2005 2 SCC 271.

⁴⁵Preamble, Indian Arbitration and Conciliation Act, 1996.

⁴⁶United Nations Convention on International Trade Law (UNCITRAL) Model Law On International Commercial Arbitration 1985 (Model Law), as amended in 2006 (Model Law 2006").

⁴¹Shailish Dairyawan v. Mohan Balkrishna Lulla, (2016) 3 SCC 619.

⁴²Mimamsa Rules of interpretation, MarkandeyKatju.

⁴³MCD v. Qimat Rai Gupta, 2007 7 SCC 309.



If uniformity of the law was the purpose behind enacting the Act, it becomes very much necessary to be in tune with the present developments in the field of ADR. After all, ADR is a dynamic process and not static. It is a relatively new field of law which is, with the advent globalisation, changing its course. It, therefore, becomes important to help it find the ocean it seeks than confine it to ponds.

Now the law in Singapore explicitly provides that the definition Arbitral Tribunal includes Emergency Arbitrator.⁴⁷ It recognises that Emergency Arbitrator is part of the Arbitration Tribunal. Thus, this makes enforcement of the award by a domestic emergency arbitrator in lines with any other award. Therefore, having employed purposive construction on the same, we must interpret Arbitral Tribunal incurring in Section 2 of the Act to include Emergency Arbitrator within it.

Interpretation of the Section in this way does not interfere with the provisions of the rest of the Act. In fact, the definition of Arbitral Award, unlike the Singapore Arbitration Act, does not provide that the Award must be a decision on the substance of the dispute.⁴⁸ It only provides that Award includes an interim Award.⁴⁹ Therefore, a decision on a preliminary issue to prevent dissipation of assets or otherwise by an Emergency Arbitrator is an Award under Section (1) of the Act.

The arbitration proceedings conducted by an Emergency Arbitration can be said to be arbitration in the accepted sense of the word. Such interpretation is also backed by the definition of arbitration occurring in Section 2(1)(a) of the Act.⁵⁰ Arbitration is defined in wide terms in that section.

Thus, the upshot of the preceding discussion is that Emergency Arbitrator has a place in the Indian Arbitration and Conciliation Act, 1996. The enforcement of the same can be like any other interim relief by an Arbitral Tribunal.⁵¹ This would make the award by an EA to be deemed to be an order of the Court⁵², whose non-compliance can lead to Contempt of Court Act.⁵³ However in case of a foreign emergency award, enforcement in India will have to be seen on a different footing.

V.II Enforcement of Foreign Emergency Award

Foreign awards come within the purview of Convention on the Recognition and Enforcement of Foreign Arbitral Awards also known as the New York Convention (hereinafter referred to as "the Convention") provided that both the countries, one in which the award is passed and the other in which it is sought to be enforced, are party to the Convention. Since the enforcement of foreign awards is governed by New York Convention, it has to

⁵⁰Supra note 29 at page 7.

⁵¹Section 17, Indian Arbitration and Conciliation Act, 1996.

⁵²*Ibid.*

⁵³Alka Chandewar v. ShamshulIshrar Khan, (2017) 16 SCC 119

⁴⁷Section 2(1), International Arbitration Act.

⁴⁸Id. At page 12.

⁴⁹Supra note 31 at page 8.



been seen in its context. There appears to be four different scenarios, they are-

1. Award passed in India	1.1 Enforceable in a country party to the Convention.	1.2 Enforceable in a country not party to the Convention.
2. Award enforceable in India	2.1 Passed in a country party to the Convention.	2.2 Passed in a country not party to the Convention.

In situation 2.2, the enforceability would be governed by the national laws of India. Thus, the above-mentioned discussion would come into play to determine the enforceability. In situation 1.2, the enforceability of the award would depend upon the national laws of the foreign country. This would, in turn, mean that if the national laws of the country recognises emergency tribunal and the enforcement of emergency award, it would be enforceable in that country. It is pertinent to mention that, since most of the countries have adopted Model Law 2006, enforceability can be on the same lines. (as discussed above).⁵⁴ For situation 1.1 and 2.1, it has to be seen in the light of the Convention, that is to say the status of Emergency Arbitration under the Convention.

V.II. New York Convention and Emergency Awards

⁵⁴ Legislation based on the Model Law has been adopted in 80 States in a total of 111 jurisdictions. The list of countries can be accessed at, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html, last visited on 29th October, 1993.

Under the New York Convention the definition of Arbitral Tribunal is not provided for. The two basic requirements, need to be mentioned, for the enforcement of awards under the New York Convention are 1. Awards must be final and binding.⁵⁵

The New York Convention specifies the word ‘award’, rather than order or direction. Furthermore, the award must be final and binding. There are arbitral tribunals which provide that the decision of the Emergency Arbitrator can be in the form of an award, order or direction⁵⁶ and the EA is only entitled to give interim relief pending the constitution of the Arbitral Tribunal.

District Court of New York was seized with a matter involving award by an EA, in the case of *Yahoo! Inc. v Microsoft Corporation*⁵⁷. The Court held that the decision given by the Emergency Arbitrator was sufficiently final, since to reach at a decision the emergency arbitrator has to go through the merits of the case. This would mean that the decision is final and binding in as much as the interim relief by the EA is concerned.

This precedent is helpful for the enforcement of Emergency Arbitrator’s decision under the New York Convention.

V. CONCLUSION

⁵⁵ Article V, item 2, ‘e’, New York Convention

⁵⁶ ICC Rules provide that the decision can only be in the form of an order, rules of SIAC and LCIA provide that the decision can be in the form of an order or an award.

⁵⁷ *Yahoo! Inc v Microsoft Corporation*, United States District Court, Southern District of New York, 13 CV 7237, October 21, 2013



At present, parties shy away from choosing EA and are opting to go to the courts. Those who choose EA comply with the orders not because of fear of any laws but not to invite the irk of the subsequent Arbitral Tribunal which shall deal with the matter on its merits.

Even though the author argues that EA can be traced under the Act by way of purposive interpretation, the best way forward is still an amendment in the Act as recommended by the Law Commission. It is surprising that Emergency Arbitrator finds no mention in the Arbitration and Conciliation (Amendment) Bill, 2018.⁵⁸ An amendment in the Act would make the enforceability of an award by an Emergency Arbitration clear and certain and this would, in turn, instil confidence in the parties to opt for this provision, a step forward toward in making India a hub of international arbitration. Since the other alternative option, to visit the courts under section 9 of the Act, is not a road which parties are willing to take. This road is paved with delays since the courts are already over-burdened with litigation.⁵⁹

The avant-garde by Singapore, amending legislation to give a statutory recognition to Emergency Arbitrator, is soon becoming the trend with countries like Hong Kong joining the bandwagon. The push for making India an international arbitration hub requires India to adapt to changes in this field,

offering the best practices. This is important since India it will be a huge step forward for inviting investments in India.⁶⁰ This would further have a progressive effect on institutional arbitration in India, which needs to be popularised and aligned with international standards.⁶¹

On a global stage, it is high time to work on a Convention for the enforcement of interim awards, orders, directions including decision of an Emergency Arbitrator, which can help member countries to achieve uniformity, since uniformity is a sine quo-non for the success of international arbitration as a dispute settlement mechanism.⁶²

⁵⁸ Arbitration and Conciliation (Amendment) Bill, 2018, Can be accessed at <http://164.100.47.4/BillsTexts/LSBillTexts/PassedLoksabha/100-C_2018_Eng.pdf>, last visited on 21st September, 2018.

⁵⁹ Report no. 246, Amendments to the Arbitration and Conciliation Act, 1996, Law Commission of India

⁶⁰ Lise Johnson, Brooke Skartvedt Gūven, and Jesse Coleman, Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get us There?, can be accessed at <http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/>, last visited on 3rd October, 2018.

⁶¹ Ninth Report on the Arbitration and Conciliation (Amendment) Bill, 2003, Departmental Related Committee on Personnel, Public Grievances, Law and Justice, can be accessed at <http://164.100.47.5/rs/book2/reports/personnel/9threport.htm#intro>, last visited on 3rd October, 2018..

⁶² Perloff, Saul, The ties that bind: The limits of autonomy and uniformity in International Commercial Arbitration, Can be accessed at [https://www.law.upenn.edu/journals/jil/articles/volume13/issue2/Perloff13U.Pa.J.Int'lBus.L.323\(1992\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume13/issue2/Perloff13U.Pa.J.Int'lBus.L.323(1992).pdf), last visited on 3rd October, 2018