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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

EMERGENCY ARBITRATION IN INDIA : **NEED OF THE HOUR.**

AUTHORED BY - ANUPRIYA YADAV¹

The concept of emergency arbitration has gained popularity throughout the world. Arbitration is considered as a preferred mode of dispute resolution in commercial issues so sometimes these issues demand urgent remedy. Sometimes it becomes necessary to get the interim relief in a dispute, for the parties. Emergency arbitrator plays a very crucial role in providing the interim relief to the parties, either with their consent or as per the agreement between them. This concept though is not present in the Indian Arbitration & Conciliation Act, 1996, but various developments have taken place in this regard to inculcate this concept. Law Commission in its 246th report has recommended it. India has adopted the pro-arbitration approach and has indirectly enforced the Emergency arbitration. There is requirement of certain amendments to increase its effectiveness. This article will focus upon the concept of emergency arbitration, its historical background and developments in India.

Key words: Emergency arbitration, institution, relief, new mechanism, rules

Introduction

The concept of Emergency Arbitration is emerging as a relief in the cases of urgent matters. In the gamut of a sound and systematized International Arbitration, an emergency relief is often described as an "Achille's Heel".² Over the years the concept of emergency arbitration was being recognised and adopted throughout the world. Arbitration as a mode of dispute resolution has gained popularity because of its speed, confidentiality and party autonomy but the dynamic developments in this field increase its benefits. Earlier the parties have only the option of court to seek interim relief before the constitution of arbitral tribunal. Emergence and development of emergency arbitration has helped the parties to get the interim relief with recourse to the court system. This concept is considered as significant for countries like India, where there is continuous interference by the domestic courts.

¹ Assistant Professor, Amity Law School, Amity University Lucknow Campus

² India: Arbitration, Litigation and Conciliation, <https://www.mondaq.com/advicecentre/content/3958/Emergency-Arbitration-In-India-Concept-And-Beginning>

Meaning

The emergency arbitration includes the process where parties can get before hand interim relief prior to the constitution of the arbitral tribunal. It generally includes concise and speedy hearings. Parties in a dispute agree to this on their own. The parties opt for this process in order to preserve the issue of the dispute. Parties seeks this relief on urgent basis. The types of relief claimed by this process includes preservation orders, freezing orders, mareva injunctions and general injunctive relief.

The definition for emergency arbitration has not been mentioned in the Arbitration & Conciliation Act, 1996 nor it is being contained in any of the latest amendments But various arbitral institutions contains the procedure related to the emergency arbitration. Such as SIAC rules, ICC rules of Arbitration have described the concept in an elaborative manner.

In India also various arbitral institutions contains the procedure related to the emergency arbitration such as Delhi International Arbitration Centre, Nani Palkhivala Arbitration Centre, Mumbai Centre for International Arbitration.

Scope:

This helps the parties to get the immediate relief without compromising the benefits of arbitration. This platform helps the parties in seeking interim relief by providing them a forum till the time the tribunal is created. The principle of emergency arbitrator is governed by the two maxim:

1. *Fumus boni iuris*. Reasonable possibility that the requesting party will succeed on merits,
2. *Periculum in mora*. If the measure is not granted immediately, the loss would not and could not be compensated by way of damages.

Emergency arbitration process proliferates because of various kinds of the flaws in the system such as lack of confidence, lack of confidentiality, heavy litigation cost. Whenever the parties chose arbitration as a mode of dispute resolution their common interest is to reduce the procedural delays, constraints and the domestic courts requirements.

Earlier attempts have been taken to provide relief to the parties timely and to resolve their disputes. Various arbitral institutions have taken many initiatives to provide timely relief to the parties such as 'summary arbitral proceedings' for providing relief by Netherlands Arbitration Institute (NAI) or 'expedited formulation of the arbitral tribunal' by London Court of International Arbitration

(LCIA) or 'Pre-Arbitral Referee Procedure' by International Court of Dispute Resolution (ICDR).³

Nature of Emergency Arbitration Proceedings.

The powers of Emergency Arbitrator starts from the time, the powers are delivered to the arbitral tribunal under the law. The powers include assets seizing order, injunctions, preservation order, evidence etc. The whole process usually takes around few weeks from, making an application for the appointment of Emergency Arbitrator, to the rendering of the award. The relief that is granted through the emergency arbitrators vary across the jurisdiction and is dependent upon the nature of the case, emergency arbitrators while dealing with international arbitration requires that the parties in need of the relief should establish:

- A risk of serious or irreparable harm to the party seeking relief;
- An element of urgency;
- That there is no prejudgement on the merits;
- That the balance of convenience weighs in its favour.⁴

Powers of Emergency Arbitrator.

Various functions are being performed by the Emergency Arbitrator. Such as:

1. Emergency Arbitrator has to plan the way in which relief has to be granted to the parties, when demanded in the emergency as per the institutional arbitration rules under which it has been appointed.
2. This will provide an opportunity to the parties to be heard. This can also provide the platforms to the parties to proceed through the telephonic communications or by submitting written documents as an alternative.
3. In certain cases the Emergency arbitrator can deliver the award on the basis of the documents that are submitted, without hearing the parties.
4. Normally the proceedings of EA took ten to fifteen days considering various International Arbitration rules.
5. The interim orders that can be delivered may include: asset seizing, injunctions, preservation and protection of evidences, to protect the intellectual property rights and

³ Shashank Garg, Alternative Dispute Resolution,122,2018

⁴Shaneen Parikh, et. Al, The developing compass of emergency arbitration in India
<https://www.ibanet.org/emergency-arb-india>

confidential information.

6. The award by the emergency arbitrator is not considered as binding upon the tribunal.

Historical Background.

The evolution of emergency arbitrator has happened because of the gap that has existed between the dispute that has arisen and the formation of the tribunal to seek the interim relief. Before the formation of the emergency arbitrator provisions the parties used to go to the courts for seeking relief.

This concept first came into existence in 2006 by International Centre for Dispute Resolution, the international division of the American Arbitration Association (AAA). In 2012 Stockholm Chamber of Commerce (SCC) introduced the similar provisions along with the International Chamber of Commerce (ICC). In 2013, Hong Kong International Arbitration Centre and Singapore International Arbitration Centre (SIAC). In 2014 LCIA has also introduced the emergency arbitrator provisions.

There are, however, important restrictions on the emergency arbitrator's powers to interim relief. For example, since the same principles of jurisdiction apply to emergency arbitrators as to the arbitral tribunal, they are not able to grant interim orders over third parties to the eventual arbitral proceedings.⁵ This rule is expressly recognized in Article 29(5) of the revised ICC Rules, which state that the emergency arbitrator provisions apply only to signatories to the arbitration agreement or their successors.⁶

Generally in many cases the updated emergency arbitrator provisions applies to the cases automatically, when parties choose the rules, while in certain cases if the provisions are not applicable to the parties, they can specifically opt out of the arbitration agreement. This automatic inclusion/opt out feature can encourage the emergency arbitrators procedures.

In the ex-parte applications the concept of emergency arbitration is not applicable. In this the parties had to opt for national courts.

⁵ Supra N 2

⁶ Ibid

Emergency arbitration is a mode that is increasing the party autonomy and is reducing the role of national courts in arbitral proceedings. This is helping in increasing the growth of arbitration and is making arbitration one place for resolution of commercial disputes. This provision helps the parties who all are in urgency and cannot wait for normal arbitration proceedings. This also allows the parties to continue their functioning till the dispute is finally resolved.

Legal Framework dealing with the Emergency Arbitration

There are various institutional rules which provide for emergency arbitration. Such as

ICC

In ICC rules article 29(2) mentions about the application of emergency arbitration and clarifies that application will exist whether the parties applies for it or not. The decision will be delivered on the basis of the application. As per the article 29(2) the parties have to comply with the decision of the emergency arbitrator. Article 29(6) mentions of the fact that in previously entered arbitration agreement before the new rules came into existence the provisions of emergency arbitration is not applied. It also mentions about opt-out mechanisms.

LCIA

LCIA contains a two-step process for hearing before emergency arbitrator under article 9.6 of the LCIA Rules. The application for relief will be filed, on that application the LCIA court will appoint the emergency arbitrator within three days from the date of application. Article 9b of LCIA deals with the Emergency Arbitrator. Article 9.7 states that⁷

“The Emergency Arbitrator may conduct the emergency proceedings in any manner determined by the Emergency Arbitrator to be appropriate in the circumstances, taking account of the nature of such emergency proceedings, the need to afford to each party, if possible, an opportunity to be consulted on the claim for emergency relief (whether or not it avails itself of such opportunity), the claim and reasons for emergency relief and the parties’ further submissions (if any). The Emergency Arbitrator is not required to hold any hearing with the parties (whether in person, by telephone or otherwise) and may decide the claim for emergency relief on available documentation”⁸

⁷ https://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx#Article%209B

⁸ *ibid*

The order must be passed within the duration of 14 days from the date of appointment of emergency arbitrator it is mentioned in article 9.8. LCIA also gives parties the option of opt-in of the emergency arbitrator.

SCIA

An SIAC emergency arbitrator is a person appointed to hear and decide applications for emergency interim relief filed by parties before the constitution of the tribunal in a SIAC arbitration. Under SIAC rules, if an application for emergency interim relief is accepted, the President of the SIAC Court of Arbitration shall seek to appoint an emergency arbitrator within one business day.⁹

The person appointed as emergency arbitrator does not go on to become a member of the arbitral tribunal. The powers of the emergency arbitrator lapse as soon as the tribunal is constituted.¹⁰

With all the rules mentioned above for emergency arbitrator, there are still some provisions in the context of emergency arbitrator which needs to ponder upon. Such as:

- The emergency arbitrators are appointed without any application from the parties.
- The discretion to conduct the arbitral proceedings lies with the emergency arbitrator only.
- If the tribunal is constituted than the role of emergency arbitrator comes to an end.

The institutional laws should comply with the domestic laws dealing with the arbitration. In general the New York convention is being adopted by most of the states but this convention also doesn't deals with the emergency arbitration.

Emergency Arbitration in India

The Law Commission in its 246th report had suggested an amendment to be made to section 291(d) which defines, "arbitral tribunal" read as 2(1)(d) "arbitral tribunal" means a sole or a panel of arbitrators and , in case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator'. This amendment has also suggested that statutory recognition should be given to the institutional rules also which provide for an emergency arbitration such as SIAC.

⁹ <https://www.nortonrosefulbright.com/en/knowledge/publications/0c310fce/emergency-arbitrators-in-singapore>

¹⁰ *ibid*

This was to ensure that any recognition given to emergency arbitration by SIAC or ICC will be given statutory recognition in India. The amendment act of 2015 has proved to be the turning point in the history of Arbitration in India. But this amendment also has not mentioned anything about emergency arbitration. However, to give recognition to E-Arbitrations, the Law Commission Report and the BN Srikrishna Committee Report, on amendments to the Act, had proposed an amendment to incorporate the term “Emergency Award” under the definition of “Arbitral Award”.¹¹ The amendments, however, failed to incorporate the recommendations.¹²

Arbitration and Conciliation Act 1996 has provide interim relief powers to tribunal s u/s 17(1) to arbitral tribunal in the same manner as if it were an order made by the court itself.

In the absence of a provision similar to Section 17 of the Act for foreign seated arbitrations under Part II of the Act, an emergency award cannot be enforced under the Act and the only method available for enforcing the same would be to file a suit, the disposal of which could take a considerable time thereby rendering the emergency award futile. ¹³The Act is silent on the enforcement of foreign seated EAs/orders of the arbitral tribunal. Despite giving recognition to EA by several Indian arbitral institutions in their respective rules, they are not jurisdictionally capable of providing essential relief of enforcement of such awards as, only Indian Courts are vested with such jurisdiction under Section 9 of the Act.¹⁴

Various arbitration institutions in India have followed the principles of Emergency Arbitration such as Mumbai Centre for International Arbitration (MCIA), Delhi International Arbitration Centre(DIAC), International Commercial Arbitration(ICA), Madras High Court Arbitration Centre rules, 2014(MHCAC)

Judicial Approach

Madras High Court Arbitration Centre (MHCAC)(Internal Management) Rules, 2014 in rule 20 has mentioned about the interim relief by an emergency arbitrator and also mentions about the

¹¹ Sidhartha Srivastava & Yasmeen Sabir Emergency Arbitration: India and the international perspective <https://www.thehindubusinessline.com/business-laws/emergency-arbitration-india-and-the-international-perspective/article37048305.ece>

¹² ibid

¹³ Amit Vyas,Rishika Rajadhyaksha & Aditya Vyas, The Viewpoint: Enforceability of Emergency Award in India, Passed in Foreign Seated Arbitration , <https://www.barandbench.com/view-point/enforceability-emergency-award-india-passed-foreign-seated-arbitration>

¹⁴ ibid

procedure for the same. In addition to it, Delhi International Arbitration Centre (Arbitration Proceedings) Rules, Part III-A has also mentioned about it. Section 18-A of the Delhi International Arbitration Centre (DIAC), Art 29 of the Arbitration and ADR Rules of the court of arbitration of International Chamber of Commerce (ICC). Se 36(3) of International Commercial Arbitration (ICA)

The newly established Mumbai Centre for International Arbitration in rule 14 has mentioned about emergency arbitration provisions.

Indian cases in relation to the emergency arbitration are very scant. In this context one of the leading case is *HSBC PI Holdings(Mauritius Limited v. Avitel Postel Studioz Limited and ors.(HSBC)*¹⁵, in this case Bombay High court had granted interim relief to the petitioner under sec 9 of the Act in sync with the award of the Emergency Arbitrator and held that the agreement between the parties was executed before BALCO judgement.¹⁶

In the case of *Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors. (Raffles)*¹⁷

In the said matter, the Delhi High Court was dealing with an application under Section 9 of the Act, which sought interim reliefs on the lines of an award passed by the Emergency Arbitrator appointed by SIAC. The Delhi High Court vide its Order dated October 07, 2016 held that the emergency award passed by the emergency arbitrator cannot be enforced under the Arbitration Act. However, it further held that it is open to a party to approach the court under Section 9 of the Act to seek interim reliefs and that the court may grant interim reliefs to the party without considering the order passed by the emergency arbitrator.¹⁸

In the case of *Ashwani Minda Vs U-Shin Ltd*, the division bench of Delhi High Court indirectly enforced the award of the E-Arbitrator and rejected interim reliefs on the ground of refusal of identical relief by the E-Arbitrator.¹⁹

¹⁵ HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd & Ors., Arbitration Petition No. 1062/2012 dated January 22nd, 2014.

¹⁶ 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

¹⁷ 2016 SCC OnLine Del. 5521

¹⁸ Supra n 10

¹⁹ Supra n 9

Recently, the Supreme Court of India in August 21 has clarified the legal standpoint on emergency arbitration in India, in the case of *Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors.*(2021 SCC Online SC 557)(termed as '*Amazon v. Future*).

This case has clarified the validity of an emergency award in arbitration proceedings seated in India. The following two issues has been discussed under this case.

- **Issue 1:** Whether an award delivered by an emergency arbitrator under SIAC rules can be said to be an interim order made by an arbitral tribunal under sec 17(1) of the Arbitration Act; and
- **Issue 2:** Whether an order passed by an Indian Court under Section 17(2) of the Arbitration Act in enforcement of the award of an emergency arbitrator is appealable under the Arbitration Act.

Issue 1. The Supreme Court held that parties are free to authorise any person or institution under section 2(6) and 2(8) to decide their issues. So, if the party choses any institution then that institution will be tribunal and the institution rules would apply to include Emergency arbitration. Sec 9 and 17 of the Arbitration and Conciliation Act deals with the interim reliefs granted by the court and the arbitral tribunal. The term tribunal mentioned under section (3) would be like the tribunal in section 17(1), which will include Emergency arbitration under institutional rules.

Issue 2: The Supreme court held that the no appeal would against the order made under section 17((2) of the Arbitration & Conciliation Act for the enforcement of an emergency arbitration. As the amended sec 37 which deals with the appeals provides that it will only provide appeal from measure under section 17(1).

In this case Supreme Court decided that Emergency arbitration is enforceable in India and further held that the Emergency arbitration is included within the definition of tribunal as the definition of tribunal is wide enough to include emergency arbitration under its ambit. Its order will be treated as an order of a tribunal.

The Hon'ble Court also stressed on the concept of 'party autonomy' by referring to its judgment in *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.* 2020 SCC OnLine SC 479, and observed that the mere fact that the parties under the SIAC rules agreed to participate in an

emergency arbitral proceedings does not violate any mandatory provisions of the A&C Act.²⁰

The Court therefore observed that the orders of Emergency Arbitrators would be covered within the ambit of the A&C Act, owing to the fact that²¹:

- i) There was no interdict, either express or implied, against an emergency arbitrator in the A&C Act,
- ii) And rather, an emergency award could be said to be an award passed “during the arbitral proceedings” within the meaning of Section 17 of the A&C Act.

Conclusion.

Arbitration is considered as the preferred mode of dispute resolution in commercial disputes. Emergency arbitration is a recent concept to provide urgent reliefs to the parties. This concept is recognised by various arbitral institutions around the world. But in India it still remains as a grey area. The Supreme Court in the case of *Amazon v Future* has given priority to the party autonomy. This primacy of party autonomy by the Supreme Court has endorsed the concept of emergency arbitration process. This decision has paved the way for emergency arbitration awards in an Indian seated arbitration, in the same way as a decree of a court. This is the need of the hour to make India in line with the international practice of recognition and enforcement of emergency awards. This will help India strengthen its arbitration landscape and minimise judicial intervention. It should be considered as a welcome step in the Indian legislative system as it is going to make India a global arbitration hub.

²⁰ Gunjan Chhabra & Utsav Saxena, 'Emergency Arbitration in India: Recent Trends', <https://www.arbitrationcorporatelawreview.com/post/emergency-arbitration-in-india-recent-trends>

²¹ *Supra* n 17