



Case Analysis

Emergency Arbitration: India
and International Perspective

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The deliberation regarding the Emergency Arbitration and Emergency Award got impetus in the country after the dispute between Amazon and Future Group, concerning enforcement of an ‘Emergency Award’ (“EA”), was brought before the Delhi High Court. The concept of Emergency Arbitration is unknown to the Arbitration and Conciliation Act, 1996 (“Act”), however, its existence was not new for the Indian courts and various arbitration institutions established across the nation.

The EA is essentially a mechanism by which the parties can elect to obtain urgent interim relief or measure, in case where one of the parties cannot wait till the formation of the arbitral tribunal or where waiting may cause such damage or loss to the party which would be irreparable. The EA is passed by an Emergency Arbitrator either with the consensus of the parties or according to the agreement executed and thereafter, the Emergency Arbitrator vacates its office i.e., become *functus officio*.

One of the shortcomings of the arbitration tribunal is that the arbitral tribunal cannot grant any interim measure until it is formed. Thus, the parties used to take recourse to the civil courts, which in general, are easily accessible specifically under Section 9 of the Act. However, these proceedings are normally excessively lengthy and time consuming and there is no assurance of a speedy relief. Therefore, the EA plays an important role especially in international arbitrations which enables a party to obtain urgent reliefs without wasting time in the formation of the tribunal.

Advent of Emergency Arbitration in India and the Law Commission Reports:

In today’s time as well, this remains a fact that the concept of EA or Emergency Arbitration is not part of the Act. However, to give recognition to Emergency Arbitrations the Law Commission’s 246th Report¹ and the B.N. Srikrishna Committee Report² on amendments to the Act, had proposed an amendment to Section 2(d)³ of the Act, and incorporation of the term “Emergency Award” under the definition of “arbitral award” which currently only includes the “interim award” under Section 2(1) (c) of the Act. The amendments⁴ however, failed to incorporate the recommendation/s of the said reports and does not provide at all for Emergency Arbitration.

Although, after the 2015 Amendment, interim orders of India seated arbitrators, were declared to be enforceable under Section 17 of the Act. The term “only arbitration tribunal” [as has been defined in Section 2(d) of the Act] did not include the Emergency Arbitrator and there were/are no provisions similar to Section 17 under Part II of the Act.

Global Scenario:

India’s approach to the issue differs from that of developed arbitration jurisdictions such as Singapore and Hong Kong which have recognised the enforceability of orders/awards given by an Emergency Arbitrator. Singapore amended the International Arbitration Act in 2012 to broaden the definition of ‘*arbitral tribunal*’ under Section 2(1) to include Emergency Arbitrator(s). Similarly, Hong Kong also introduced the Arbitration (Amendment) Ordinance 2013. Some of the significant institutional approaches towards the Emergency Award is discussed herein the below table:

1 The Law Commission’s 246th Report dated 05.08.2014

2 <https://legallaffairs.gov.in/sites/default/files/Report-HLC.pdf> [MergedFile (legallaffairs.gov.in)]

3 Proposed amendment to “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.”

4 The Arbitration and Conciliation (Amendment) Act, 2015 and the Arbitration and Conciliation (Amendment) Act, 2019

Sr. No	Particulars	Stockholm Chamber of Commerce (“SCC”)	Singapore International Arbitration Centre (“SIAC”)	International Centre for Dispute Resolution (“ICDR/AAA”)	International Chamber of Commerce (ICC)	London Court of International Arbitration (LCIA)
i.	General	<p>In the year 2010, new Appendix II was added to the SCC Arbitration Rules, allowing a party to receive a quick order.⁵ However, prior to the appointment of Emergency Arbitrator, SCC board determines the jurisdiction over the dispute.⁶</p>	<p>Rule 26.2 and Schedule-1 which came into effect on July 1, 2010, provided that a party in need of urgent relief may make an application for emergency interim reliefs.⁷ The amendments were introduced⁸ to clarify that the awards and orders given by Emergency Arbitrators are enforceable in Singapore.</p>	<p>The ICDR Rules entitles parties to appoint an EA⁹, who shall hear requests that may be necessary for emergency relief. Article 7 entitles the parties to file an application for emergency relief.</p>	<p>ICC Rules¹⁰ sets out the procedure for obtaining urgent interim relief prior to the constitution of the arbitral tribunal. The said Provisions do not apply if (i) The arbitration agreement under the Rules was concluded before 1 January 2012; (ii) the parties have opted out of the Emergency Arbitrator Provisions; or (iii) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.¹¹</p>	<p>In the year 1998 the LCIA Rules were amended to incorporate a mechanism for inclusion of the “expedited formation” of a tribunal. Article 9A provides for the expedited formation of the tribunal.¹²</p>

5 <https://sccinstitute.com/media/194250/ea-practice-note-emergency-arbitrator-decisions-rendered-2015-2016.pdf>

6 Appendix II Article 4(2) SCC Rules 2017

7 Schedule 1 Rule 26.2 SIAC Rules (2010)

8 In the International Arbitration Act (IAA) on April 9, 2012, by Singapore Parliament

9 Article 7 ICDR Rules 2021

10 Article 29, supported by Appendix V (“Emergency Arbitrator Provisions”) of the 2021 ICC Revised Rules

11 Article 29(6) ICC Rules 2021

12 Article 9A LCIA Rules 2021

<p>ii.</p>	<p>When can a party Apply?</p>	<p>Either before the initiation of regular arbitral proceedings, or while the case is pending before the SCC, that is after a request for arbitration has been submitted but before the tribunal has formally received the case pursuant to Article 22 of the Rules.¹³</p>	<p>While filing the Notice of Arbitration or after filing the notice but prior to the constitution of the arbitral tribunal.¹⁴</p>	<p>Prior to the formation of the tribunal. The application can be submitted along with or following the submission of a Notice of Arbitration.¹⁵</p>	<p>The relief under this Rule is only available to the party that genuinely cannot wait for the constitution of an arbitral tribunal and the relief is limited to signatories to the arbitration agreement or their successors.¹⁶ The Application can be filed as per Appendix V and prior to the transmission of the file to the arbitral tribunal pursuant to Article 16.</p>	<p>If at any time prior to the formation of the Arbitral Tribunal, a party may apply for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings as the “Emergency Arbitrator”.¹⁷</p>
<p>iii.</p>	<p>Manner of conducting the proceedings:</p>	<p>After taking into consideration the urgency inherent in the proceedings, Article 23 of the Arbitration Rules will be applicable to the emergency proceedings.¹⁸</p>	<p>SIAC provides broad discretionary powers to pass such award and interim relief as the Emergency Arbitrator deems necessary, including preliminary orders that may be made pending any hearing, telephone or video conference or written submissions by the parties.¹⁹</p>	<p>The Emergency Arbitrator has the authority which is vested in the arbitral tribunal under Article 21 of the Rules, including the authority to rule on its own jurisdiction, and power to resolve any dispute.²⁰</p>	<p>The Emergency Arbitrator conducts the proceedings in the manner which the Emergency Arbitrator considers to be appropriate, taking into account the nature and the urgency of the Application.²¹</p>	<p>Article 9B (9.7) states that the emergency proceedings can be conducted in any manner as determined by the Emergency Arbitrator to be appropriate in the circumstances, taking account of the nature of such emergency proceedings.²²</p>

13 Appendix II Article 1 SCC Rules 2017
14 Rule 30.2 and Schedule 1 SIAC Rules (2016)
15 Article 7 (1) ICDR Rule 2021
16 Article 29(1) ICC Rule 2021
17 Article 9B (9.4) LCIA Rules 2021
18 Appendix II Article 7 SCC Rules 2017
19 Schedule 1 (8) SIAC Rules (2016)
20 Article 7 (3) ICDR Rules 2021
21 Appendix V Article 5(2) ICC Rules 2021
22 Article 9B (9.7) LCIA Rules 2021

iv.	Appointment to be made within?	Within 24 Hours of receipt of the application. ²³	Within one business day of receipt of the application and payment of the administration fee and deposits. ²⁴	Within one business day of receipt of the application and any challenge to his appointment must be made within one business day of the communication by the Administrator. ²⁵	The President shall appoint the Emergency Arbitrator within 2 days of receipt of the application. ²⁶	Within 3 days of the request if the LCIA court is satisfied that the circumstances justifiably require exceptional urgency. The Application must set out the specific grounds for exceptional urgency in the formation of the arbitral tribunal. ²⁷
v.	Powers vested in the Emergency Arbitrator:	The powers of the Emergency Arbitrator shall be similar to the powers set out in Article 37 (1)–(3) of the Arbitration Rules. ²⁸	Emergency Arbitrator has discretionary power to award any interim relief as the Emergency Arbitrator deems necessary, including the authority to rule on his own jurisdiction, without prejudice to the Tribunal's determination. ^{29 30}	Emergency Arbitrator has power to grant any interim measures that he deems necessary, including injunctive relief and measures for the protection or conservation of property. Any interim award or order passed by the Emergency Arbitrator shall have the identical effect as an interim measure provided under Article 27 of the ICDR Rules. ³¹	The Emergency Arbitrator shall have all the powers as provided under Appendix V of the Rules. The Emergency Arbitrator's decision shall take the form of an order. ³²	The Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement. ³³

23 Appendix II Article 4(1) SCC Rules 2017
24 Schedule 1(3) SIAC Rules (2016)
25 Article 7(2) ICDR Rules 2021
26 Appendix V Article 2(1) ICC Rules 2021
27 Article 9B (9.6) LCIA Rules 2021
28 Appendix II Article 1(2) SCC Rules 2017
29 Schedule 1(7) SIAC Rules (2016)
30 Schedule 1(8) SIAC Rules (2016)
31 Article 7 (4) ICDR Rules 2021
32 Appendix V Article 6 (1) ICC Rules 2021
33 Article 9B (9.8) LCIA Rules 2021

vi.	Time to make the EA:	Not later than 5 (five) days from the referral of the case to the Emergency Arbitrator. The time may be extended by the Board upon reasoned request. ³⁴	The Emergency Arbitrator must within two business days of appointment establish a schedule for considering the application and ³⁵ the Emergency Arbitrator shall make his interim order or Award within 14 days from the date of his appointment unless, in exceptional circumstances, the Registrar extends the time. ³⁶	The Emergency Arbitrator shall as soon as possible, and in any event within two business days of appointment; establish a schedule for consideration of the application for emergency relief. ³⁷	An Emergency Arbitrator shall make an Order within 15 days from the day when all the files were transmitted to the Emergency Arbitrator. Such time can be extended on the request of the Emergency Arbitrator or upon President's own choice if the President thinks that it is necessary to do so. ³⁸	As soon as possible in the circumstances, but not later than 14 days after the appointment. ³⁹
vii.	Effect on the EA, after the formation of regular tribunal:	The power to grant interim relief exclusively vests with the tribunal. ⁴⁰ An Arbitral Tribunal is not bound by the decision(s) and reasons of the Emergency Arbitrator. ⁴¹	Any relief granted ceases to be binding after 90 days if the tribunal is not constituted. ⁴² Once the Tribunal is constituted the Emergency Arbitrator will cease to hold his office.	No further power to act after the arbitral tribunal is constituted. ⁴³ After the constitution of the tribunal, it may affirm, reconsider, modify, or vacate the interim award or order of emergency relief issued by the Emergency Arbitrator. ⁴⁴	Under the Rules the applicant must, as a rule, file a request for arbitration within 10 days from the application, failing to do so, the Emergency Arbitration Proceedings will be terminated by the President. ⁴⁵	The order or award passed by the Emergency Arbitrator may be confirmed, varied, discharged or revoked, in whole or in part by the arbitral tribunal, once formed. ⁴⁶

34 Appendix II Article 8(1) SCC Rules 2017
35 Schedule 1(7) SIAC Rules (2016)
36 Schedule 1(9) SIAC Rules (2016)
37 Article 7 (3) ICDR Rules 2021
38 Appendix V Article 6(4) ICC Rules, 2021
39 Article 9B (9.8) LCIA Rules 2021
40 Appendix II Article 8 (1) SCC Rules 2017
41 Appendix II Article 9 (5) SCC Rules 2017
42 Schedule 1(10) SIAC Rules 2016
43 Article 7(5) ICDR Rules 2021
44 Article 7(5) ICDR Rules 2021
45 Appendix V Article 1(6) ICC Rules 2021
46 Article 9B (9.11) LCIA Rules 2021

viii.	The office of the Emergency Arbitrator terminates once the tribunal is constituted.	Yes	Yes	Yes	Yes	Yes
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Indian Judiciary’s approach towards the EA:

As there is no clear proviso under the Act concerning the EA, there are very few judicial precedents available on the 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 and the latest example is the Amazon-Future judgment. Some of the other landmark precedents regarding enforcement of EA are discussed hereunder:

The Supreme Court of India in the case of *BALCO*⁴⁷, stated that the powers of Indian courts are prospectively excluded to grant interim relief in relation to foreign seated arbitrations.

In the case of *HSBC*⁴⁸, the Bombay High Court had granted interim relief to the Petitioner under Section 9 of the Act in line with the award of the Emergency Arbitrator and held that the agreement between the parties was executed before the *BALCO*⁴⁹ judgment (wherein the Supreme Court held that Part I of the Act would not be applicable to international commercial arbitration).

The Delhi High Court in the landmark case of *Raffles*⁵⁰ has held that the award passed by the Emergency Arbitrator cannot be enforced under the Act and the court shall not consider the award passed by the Emergency Arbitrator while granting the interim measures. However, it was ordered that the parties always have the option to approach the court for interim reliefs under Section 9 of the Act.

On the contrary, in the case of *Ashwani Minda*⁵¹, the Division Bench of the Delhi High Court 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.

The latest judgment passed by the Supreme court in the matter of *Amazon NV Investment Holdings (“Amazon”) V. Future Coupons Limited*⁵² is acting as a turning point in the Indian Legal Landscape as regards Emergency Arbitration. In this judgment, the apex court held that an emergency arbitration award is enforceable in India. The court further stated that Section 2(1)(d) of the Act, which defines an arbitral tribunal, is wide enough to include an Emergency Arbitrator and that an order passed by an Emergency Arbitrator is exactly like an order of an arbitral tribunal once rightly constituted.

The Supreme Court in its above judgment dealt with two issues namely, whether an award delivered by an Emergency Arbitrator under an institutional arbitration is an order under Section 17(1) of the Act and whether an appeal can be filed against an order of enforcement of an Emergency Arbitrator’s order made under Section 17(2) of the Act.

47 Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc. (“BALCO”), (2012) 9 SCC 552

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

49 BALCO - (2012) 9 SCC 552

50 Raffles Design International India Private Limited and Ors. v. Ducomp Professional Education Limited and Ors. 2016 (6) ARBLR 426 (Delhi)

51 Ashwani Minda and Ors. v. U-Shin Ltd. and Ors, 2020 (4) ArbLR 256 (Delhi)

52 Amazon NV Investment Holdings (“Amazon”) v. Future Coupons Limited dated 18.03.2021

To address the first issue, the Supreme Court analysed the provisions of the Act and held that if a party has agreed to submit its disputes to an arbitral institution, then the arbitral institution as chosen by the parties will be the arbitral tribunal and the rules of the arbitral institution will apply to include Emergency Arbitrator. The term “arbitral tribunal” is defined under Section 2(1)(d) of the Act as “a sole arbitrator or a panel of arbitrators”. Section 2(6) and 2(8) of the Act makes it clear that parties are free to authorise any person including an institution to determine issues that arise between the parties and that party autonomy goes to the extent of an agreement. Hence, the Supreme Court held that Section 17(1) permits parties to apply for interim reliefs before the arbitral tribunal and does not exclude the application of rules of arbitral institutions that the parties may have agreed to. It was further held that Section 9(3) and Section 17 for part of the same scheme, and that an “arbitral tribunal” as defined under Section 2(1)(d) would not apply and that the arbitral tribunal spoken of in Section 9(3) would be like the “arbitral tribunal” spoken of in Section 17(1) which would include an Emergency Arbitrator appointed under institutional rules.

Dealing with the second issue, the Supreme Court analysed Section 37, read with the amended Section 17 and 9 and held that no change was made in Section 37(2) (b) to bring it in line with Order XLIII, Rule 1(r). Section 37 continued to provide appeals only from an order granting or refusing to grant any interim measure under Section 17(1). In fact, the opening words of Section 17(2), namely, “*subject to any orders passed in appeal under Section 37...*” also demonstrates the legislature’s understanding that orders that are passed in an appeal under Section 37 are relatable only to Section 17(1). For example, an appeal against an order refusing an injunction may be allowed, in which case subsection (2) of Section 17 then kicks in to enforce the order passed in appeal. Also, the legislature made no amendment to the granting or refusing to grant any measure under Section 9 to bring it in line with Order XLIII, Rule 1(r), under Section 37(1)(b). What is therefore clear from this is that no appeal lies under Section 37 of the Act against an order of enforcement of an Emergency Arbitrator’s order made under Section 17(2) of the Act.

Conclusion

While Emergency arbitration serves as a turning point for the worldwide scenario, India still awaits full statutory recognition of EA. Prima facie, taking into consideration various advantages and disadvantages, it can be safely concluded that emergency arbitration is the need of the hour which works in the interest of both the parties and thus creates a win-win strategy, which is one of the objectives behind alternative dispute resolution.

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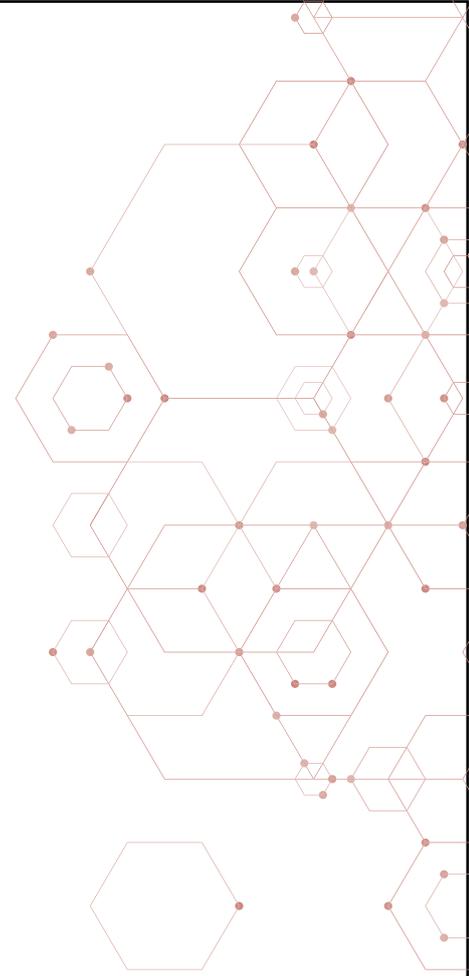
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