

THE LEGAL STATUS OF EMERGENCY ARBITRATION IN INDIA: AN ANALYSIS

Akansha Uboveja & Riddhi Daga

Year IV, Hidayatullah National Law University Year IV, Hidayatullah National Law University

Introduction

Emergency Arbitration [“EA”] is an emerging concept in the jurisprudence of Arbitration where parties can seek interim relief (for example, to protect the evidence or the assets where there are chances of them to be destroyed/lost). Even though it is a relatively new development it has been recognized by several arbitration institutions. For a long time, the status and the legal position of the EA remained unclear in India for two reasons- *firstly*, the definition of arbitral tribunal under the Arbitration and Conciliation Act, [“The 1996 Act”] doesn’t include emergency arbitrator. Consequently, parties can’t get emergency award enforced by resorting to Section 17(2) of the 1996 Act which specifies that any order of arbitral tribunal is deemed to be an order of the court and can be enforced. *Secondly*, even if emergency arbitrator is recognized as arbitral tribunal, an emergency award in a foreign-seated arbitration can’t be enforced as Part II of the 1996 Act lacks a provision similar to that of Section 17(2) of the Part I. Thus, for the time being, in the absence of any concreteness the only remedy appears to be available for the parties is to apply for interim measures under Section 9 of the 1996 Act.

Recently the issue of enforceability of emergency award in India was again brought to light when the Delhi High Court dealt the same in litigation between Future Group and Amazon. This article analyzes the legal standing of the EA in India in light of some earlier judicial pronouncements vis-à-vis Amazon-Future Group litigation.

The Concept of Emergency Arbitration

Emergency arbitration can provide interim relief to parties even before the constitution of the Arbitral Tribunal.¹ In an EA, an emergency arbitrator is mainly appointed by an arbitration institution to deal with certain urgent matters so that interim relief measures can be taken.² In India, the power to provide interim relief before the constitution of the Arbitral Tribunal is vested upon the courts as per Section 9 of the 1996 Act.

¹ Commercial Arbitration Rules of Japan Commercial Arbitration Association 2019, art 77.

² King & Spalding, The Emergency Arbitrator: Doubling As An Effective Option For Urgent Relief And An Early Settlement Tool (*JD Supra*, 20 May 2015) <<https://www.jdsupra.com/legalnews/the-emergency-arbitrator-doubling-as-an-53241/>> accessed 11 May 2021.

This also helps to bridge the time gap between the arising of the dispute and the formation of the tribunal. The tribunal is not immediately established (as it can take several weeks, if not months, to be constituted) on the same date when the dispute arises between the parties; so to cover that duration the concept of emergency arbitration becomes helpful. Following are the requisites to successfully get interim relief from Emergency Arbitrator³-

- ***Periculum in mora***: There's an immediate need for relief and if relief is not given, the party would suffer loss which one would not be able to compensate as damages.
- ***Fumus boni iuris***: A reasonable inference can be drawn that the requesting party would succeed on merit.

Statutory Provisions

The concept of emergency arbitration was recognized at the international level a long time ago, but we still lack the statutory recognition of the same in India. The Law Commission of India in its 246th report recommended incorporating it within the 1996 Act, by amending Section 2(1)(d) which defines arbitral tribunal.⁴ However, when the act was amended in 2015 the recommendation was not adopted. Thus, the statutory position of EA and award is still unclear and ambiguous in India.

Some of the Indian arbitration institution like Mumbai Centre for International Arbitration,⁵ Delhi International Arbitration Centre⁶, Madras High Court Arbitration Center,⁷ and International Commercial Arbitration⁸ have provisions to appoint emergency arbitrators. Likewise, many other international arbitration institutions like Hong Kong International Arbitration Centre,⁹ Singapore International Arbitration Centre,¹⁰ London Court of International Arbitration,¹¹ etc provide for the establishment of EA in their rules.

The UNCITRAL Model Law doesn't provide any explicit provision regarding EA, but the same can be derived from the definition of 'arbitration' under Article 2(a). It provides that arbitration is,

³ Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) [1985] UN Doc A/40/17, Annex I, art 17A.

⁴ Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Com No 246, 2014).

⁵ Mumbai Center for International Arbitration (Rules) 2016, s 3.

⁶ Delhi International Arbitration Centre (Arbitration Proceeding) Rules, r 14.

⁷ Madras High Court Arbitration Center (MHCAC) Rules, 2014, under Part IV, s 20 r/w sch A and sch D.

⁸ Rule of Domestic Commercial Arbitration and Conciliation (Indian Council of Arbitration), 2016, r 57.

⁹ Hong Kong International Arbitration Centre Administered Rules, 2018, art 23 & sch 4.

¹⁰ Singapore International Arbitration Centre Rules 2016 art 30 & sch 1.

¹¹ London Court of International Arbitration Rules, 2014, art. 9B.

“any arbitration whether or not administered by a permanent arbitral institution.”¹² Further, while initially there was no provision for EA, the International Court of Arbitration later incorporated the concept of Emergency Arbitrator under Article 29 of the Rules of Arbitrator of the ICC. The rules also provided the process pertaining to EA through Appendix V.¹³ Thus, at international level the jurisprudence regarding EA is well established.

Position of Emergency Arbitration in India

The legal position of the EA in India is dealt in two parts i.e. Pre and Post Future Group- Amazon litigation.

i. Pre Future Group- Amazon Litigation

In India, we have a limited number of judicial pronouncements when it comes to EA. The case of *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education*,¹⁴ decided by the Delhi High Court becomes a pertinent one in this aspect. Here, the shareholder agreement contained the arbitration clause where the parties decided to resort to the SIAC rules. Upon the emergence of a dispute between the parties, the petitioner filed an application for the appointment of an emergency arbitrator by invoking the SIAC rules. The emergency arbitrator ruled in petitioner favor and granted him interim relief. To enforce the same petitioner approached the Delhi High Court which held that the award passed by the emergency arbitrator cannot be directly enforced under the 1996 Act and the same is not within the scope of the 1996 Act. Further, it was observed that the parties can file a separate suit before the court and under such suit, the Court can decide whether to enforce the emergency award or not. It is pertinent to note that this was a case of foreign seated arbitration. Additionally, in the case of *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studios Ltd.*,¹⁵ it was held that any application under Section 9¹⁶ of the 1996 Act for obtaining interim relief in the case of foreign seated arbitration, will be adjudged independently of the emergency award. Thus, if EA awards are continued to be treated unenforceable without an accompanying suit it's just frustrating the reasons as to why parties chose foreign-seated arbitration in the first place.

These cases also highlighted the limitation of Section 17¹⁷ of the 1996 Act as it is not applicable to foreign seated arbitration. The same is dealt with under the Part II of the 1996 Act which lacks

¹²ibid, art 2(1).

¹³International Chamber of Commerce Arbitration Rules 2021.

¹⁴ *Raffles Design International India Pvt Ltd v Educomp Professional Education* [2016] 234 DLT 34.

¹⁵ *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studios Ltd* 2020 SCC OnLine 656.

¹⁶ The Arbitration and Conciliation Act 1996, s 9.

¹⁷ The Arbitration and Conciliation Act 1996, s 7.

any provision to enforce interim orders. However, this part being governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, the three criteria to be fulfilled as per it to enforce any award is applicable here also.¹⁸ One of the criteria is that the award must be final. However, whether the emergency award is a final one or not, continue to, remain a legal issue. On one hand, the Singapore Court of Appeal held that every award no matter at what stage of arbitration is a final and binding one,¹⁹ but on the other hand, the Southern Court of California²⁰ ruled that the decision of the emergency arbitrator is not final and thereby non-binding.

In the case of *Ashwani Minda v. U-Shin Ltd.*,²¹ where the parties had agreed to conduct arbitration proceedings as per Japan Commercial Arbitration Association rules, the Delhi High Court gave primacy to those rules only. The rules contain the only remedy of EA when it comes to interim relief, thereby excluding the jurisdiction of the courts. Therefore, even if the Emergency arbitrator had granted interim relief, such would have remained unenforceable in India due to jurisdictional exclusion of the courts. This shows the lacunae in the Indian law regarding EA.

ii. Post Future Group- Amazon Litigation

Brief Facts

This story can be traced back to August 29, 2020, when Reliance and Future Retail [“FRL”] entered into a deal worth INR 24,713 crores. Upon learning the Amazon approached Singapore International Arbitration Tribunal by invoking the provision under Rule 30²² of the Singapore International Arbitration Centre Rules, 2016 for Interim and Emergency Relief. Amazon relied upon its Shareholder agreement with Future Coupon Pvt. Ltd. [“FCPL”], the promoter firm of the FRL. The agreement contained an arbitration clause which provided that arbitration would happen according to SIAC rules.

To this effect, the emergency arbitrator granted interim relief to Amazon and thereby enjoined the Future Group from further moving ahead with the Board Resolution passed on August 29, 2020, pertaining to that deal. Further, they were also enjoined from filing or pursuing any application before any forum or agency in India regarding the said Board Resolution.

¹⁸ The Arbitration and Conciliation Act 1996, pt II.

¹⁹ *PT Perusahaan Gas Negara (Persero) TBK v CEW Joint Operation*, [2010] SGHC 202.

²⁰ *Chinmax Medical Systems v Alere San Diego* 2011 WL 2135350 (SD Cal 2011).

²¹ *Ashwani Minda & Ors v U-Shin Limited & Ors* 2020 SCC OnLine Del 721.

²² Singapore International Arbitration Centre Rules 2016, art 16.

Thereafter, Amazon informed the regulators in India (i.e. Competition Commission of India and Securities Exchange Board of India) regarding the injunction issued by the emergency arbitrator so that they do not approve the above deal. Against this FRL approached the Delhi High Court to restrain Amazon from impeding the implementation of the lawful contract on the following grounds-

- The interim award of the emergency arbitrator is not binding. The concept of the emergency arbitrator is alien to our arbitration system as not recognized in Part I of the 1996 Act.
- The emergency arbitrator is not recognized as Arbitral Tribunal, under SIAC rules and is merely considered as a preceding step before the formation of the tribunal. Section 17 of the 1996 Act²³ mentions only “arbitral tribunal.” Further, the definition clause of the arbitral tribunal under section 2(d)²⁴ does not include emergency arbitrator.
- Moreover, this concept was deliberately not included in 1996 Act even after the recommendations made by the 246th Law Commission’s Report. Thus, the Emergency award can’t be enforced.

Issues before the court

- Whether the provisions of the emergency arbitrator are valid? Whether they are contrary to the public policy of India or the mandatory requirements of the procedural law under the 1996 Act?

Judgment

The single-judge bench of Justice Mukta Gupta of the Delhi High Court observed that prima facie the case is not ‘*coram non judice*’.²⁵ Some of the points worth noting from the judgment regarding this aspect are as follows-

1. In this proceeding, the parties by exercising their autonomy agreed to a different procedural code of conduct for arbitration. Therefore, it is assumed that the parties are aware of the terms which provide for the appointment of an emergency arbitrator (EA). Court has to primarily look upon the rules that the parties agreed to and only if they contradict the public policy or compulsory provisions of the law the rules can be overlooked. The same was held in the case of *National Thermal Power Corp. vs. Singer Co. & Ors.*²⁶

²³ The Arbitration and Conciliation Act 1996, s 17.

²⁴ *ibid*, s 2(d).

²⁵ *Future Retail Ltd v Amazon.Com Investment Holdings LLC & Ors* 2020 SCC OnLine Del 1636.

²⁶ *NTPC v Singer Co & Ors* [1992] (3) SCC 551.

2. SIAC rules provide that the party can either approach the courts or seek the appointment of an emergency arbitrator for interim relief.
3. Further, the Court relied on the case of *BALCO v. Kaiser Aluminium Technical Services Inc.*,²⁷ to conclude that the parties can derogate from the provisions of Section 9 of the 1996 Act when the arbitration is International Commercial Arbitration under Section 2(2) of the 1996 Act.
4. The court also referred to the case of *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd*²⁸ to emphasize the importance of party autonomy in arbitration. One cannot expect Arbitration proceedings without having party autonomy as it is one of the core facets of the concept of arbitration. They referred the Section 2(8)²⁹ of the 1996 Act which allows the parties to select the procedural laws according to which they wish to conduct the Arbitration.
5. While dealing with the contention of the deliberate exclusion of EA by the legislature even after the Law Commission Recommendations, it was observed that merely because any recommendations of the law commission was not accepted by the Parliament we can't say that it can thwart the process of development of law by the Supreme Court. The same was concluded by referring to the judgment of. *Avitel Post Studioz Ltd.*³⁰
6. It is worth noting that Court did not go into the legality on the merits of the EA order because the same was not challenged.

Aftermath

Later, Amazon approached the same High Court to enforce the award given by the emergency arbitrator under Section 17(2) of the 1996 Act read with Order XXXIX Rule 2A of the Code of Civil Procedure, 1908. The bench of Justice Midha of the Delhi High Court granted interim relief to Amazon directing all authorities and parties to maintain the status quo on the deal until a detailed interim order on the case.³¹ It further observed that prima facie the Emergency Arbitrator is an Arbitrator, and the award is enforceable as an order of this Court under Section 17(2) of the Arbitration and Conciliation Act.

Aggrieved by this order FRL filed an appeal before the bench of Chief Justice DN Patel and Justice Jyoti Singh of the Delhi High Court. The division bench on February 8, 2021, stayed the status quo order delivered by the Justice Midha bench. The order noted that the arbitration agreement

²⁷ *BALCO v Kaiser Aluminium Technical Services Inc* [2012] 9 SCC 522.

²⁸ *Centrotrade Minerals & Metal Inc v Hindustan Copper Ltd* [2017] 2 SCC 228.

²⁹ The Arbitration and Conciliation Act 1996, s 2(8).

³⁰ *Avitel Post Studioz Ltd & Ors v HSBC PI Holdings (Mauritius) Ltd* [2020] SCC OnLine 656.

³¹ *Future Retail Ltd v Amazon.Com Investment Holdings LLC & Ors* [2021] SCC OnLine Del 1279.

was between Amazon and FCPL; thereby, FRL was not a party to the same. Amazon has appealed to the Supreme Court of India against this decision.

It remains to be seen how the events unfold in this long-stretched imbroglio of litigations and appeals. The authors hope to get some clarity regarding the legal status of the EA in India.

Conclusion: A Way Forward

It can be concluded by observing that while interpreting or applying any law the purpose behind adopting such law must be kept in mind. The whole purpose when it comes to emergency award gets vitiated when it comes to the enforceability of it in India because of the lack of statutory recognition. Moreover, speedy justice, party autonomy, and elimination of the judicial proceedings are some core facets of the concept of Arbitration. Non-recognition of the EA affects these core facets negatively. Now it is for the legislators to amend the 1996 Act to make it harmonious with the International standards, as is done by various countries like Hong Kong,³² Singapore,³³ etc. As a note of caution, the parties must be careful about the selection of institutional rules having the provision of EA till the position of EA remains fluid in India.

³² Hong Kong Arbitration (Amendment) Ordinance 2013 s 22B (1).

³³ International Arbitration (Amendment) Act 2012 (SG), s 2(1).