

EMERGENCY ARBITRATOR ORDERS: A RE-LOOK AT ENFORCEMENT IN INDIA

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Introduction

Resolution of disputes through arbitration is now commonplace in contracts around the world. It was common to have *ad hoc* arbitrations, i.e., where the arbitration tribunal decides the procedure. However, for the last two decades, parties are choosing to incorporate institutional rules as part of their arbitration agreements, in large part on account of the clear procedural mechanisms and streamlined processes tailored into these rules. A peculiarity found in several rules, which is not provided for in the Arbitration and Conciliation Act, 1996 [**“Arbitration Act”**], is the appointment of an emergency arbitrator [**“EA”**].

Who is an EA?

Simply stated, an EA is appointed at the instance of one party to provide interim relief of conservatory measure, which is so urgent that it cannot await the constitution of the arbitral tribunal in accordance with the arbitration agreement. Most major institutional rules contain provisions for the appointment of an EA.¹ Even homegrown institutions such as the Mumbai Centre for International Arbitration Rules, 2016² and the Delhi International Arbitration Centre Rules, 2018,³ have adopted rules containing EA provisions.

Our attempt

¹ International Chamber of Commerce Rules, 2021, r 29; Singapore International Arbitration Centre Rules, 2016 Rules, r 30.2 r/w Schedule 1; London Court of International Arbitration Rules, 2020, art 9B; International Centre for Dispute Resolution Rules, 2021, art 7; Hong Kong International Arbitration Centre Rules, 2018, art 23.1 r/w Schedule 4.

² Mumbai Centre for International Arbitration Rules, 2016, Rule 14.

³ Delhi International Arbitration Centre Rules, 2018, Rule 14.

In this article, we analyse the following aspects of EA provisions in the Indian arbitration landscape:

- (i) First, is an EA (not being the tribunal appointed by the parties) inherently incompatible with the arbitration, which is necessarily a creature of contract?
- (ii) Second, once armed with an EA's order, what recourse is available to a successful party against the counterparty, to ensure compliance with the order?

Effect of an EA order

Answering the first question in the negative, a Single Judge of the Delhi High Court held that the definition of “*arbitral tribunal*” under Section 2(1)(d) of the Arbitration Act is wide enough to include an EA, who was for all intents and purposes an arbitrator under the Arbitration Act.⁴ An appeal was preferred to the Division Bench against the above order, pursuant to which the above order was stayed.⁵

The Single Judge's decision stands to reason. Section 2(8) of the Arbitration Act mandates the inclusion of arbitral rules referred to in the arbitration agreement when referring to the arbitration agreement. Therefore, where parties have chosen a set of institutional rules which contains EA provisions, they should not be allowed to disavow these very rules. Singapore, for instance, amended its international arbitration statute in 2012 to include an EA in the definition of “arbitral tribunal”.⁶ India's Law Commission, in its 246th Report, pursuant to which the Arbitration Act was amended in 2015, also recommended the amendment of Section 2(1)(d) of the Arbitration Act to include an EA.⁷ However, this suggestion did not find its way into the amendment.

A Special Leave Petition was filed in the Supreme Court which was disposed of on August 6, 2021, resolving the above issue. A Bench of Justices Nariman and Gavai unequivocally held that “tribunal” as used in Part I of the Arbitration Act, would include an EA and that an EA's order is an order under Section 17(1) of the Arbitration Act.⁸ The Court also held that there was “*nothing inconsistent*” between the Arbitration Rules of the Singapore International Arbitration Centre, 2016 (being the institutional

⁴ *Amazon.com NV Investment Holdings LLC v Future Coupons Private Limited & Ors* 2021 SCC OnLine Del 1279 [144].

⁵ *Future Coupons Pvt Ltd & Ors v Amazon.com NV Investment Holdings LLC & Ors* 2021 SCC OnLine Del 4101.

⁶ International Arbitration Act, s 2(1) (c 143A).

⁷ Law Commission of India, *Report No 246: Amendments to the Arbitration and Conciliation Act 1996* (Law Comm No 20, 2014) 8, 37.

⁸ *Amazon.com* (n 4) [19]-[20].

rules chosen by the parties, which includes the EA provision) on the one hand, and the Arbitration Act, on the other.⁹ The Court also gave credence to the Law Commission's 246th Report noting that merely because a recommendation of a Law Commission Report is not followed by Parliament, it would not necessarily lead to a conclusion that such recommendation cannot form part of the statute.¹⁰

Enforcement of an EA order

The second aspect is decidedly more vexed than the first, and there are varying decisions depending on whether the arbitration is India-seated or seated outside India. Insofar as India-seated arbitrations are concerned, the *Amazon* series of judgements continue to be the guiding authorities. The Single Judge held that the EA's order was an order under Section 17(1) of the Arbitration Act and was capable of being enforced under Section 17(2) thereof.

The Supreme Court's decision affirmed the Single Judge's ruling on this aspect also and made it clear that an EA's order, being an order under Section 17(1) of the Arbitration Act is capable of being enforced as an order of the court, under Section 17(2) of the Arbitration Act.¹¹ The Supreme Court also considered the maintainability of an appeal against an order directing enforcement (under Section 17(2) of the Arbitration Act) of an EA's order. In doing so, the Court considered the question of appealability under Section 37 of the Arbitration Act, and under Order XLIII of the Code of Civil Procedure, 1908 [“CPC”].

As regards an appeal under the Arbitration Act, the Supreme Court confirmed that an order declining or granting interim relief by an EA (i.e., an order under Section 17(1) of the Arbitration Act) would be maintainable under Section 17(2) thereof.¹² However, no appeal is available under Section 37 against an order under enforcing the EA's order under Section 17(2).¹³

⁹ *Amazon.com* (n 4) [22].

¹⁰ *Amazon.com* (n 4) [27].

¹¹ *Amazon.com* (n 4) [40].

¹² *Amazon.com* (n 4) [74].

¹³ *Amazon.com* (n 4) [76].

As regards an appeal under the CPC, the Court held that no such appeal would be maintainable. The Court based its decision on the well-established principles that the Arbitration Act is a self-contained code, and that the general law (CPC) must yield to the special law (Arbitration Act).¹⁴

With respect to foreign-seated arbitrations, these are governed by Part II of the Arbitration Act. Part II contains no provision analogous to Section 17 of the Arbitration Act, which provides for the enforcement of an EA's order and is limited to the enforcement of "foreign awards".¹⁵

Therefore, strictly speaking, the only mechanism for the enforcement of an EA would be by filing a suit.¹⁶ This is less than desirable for a number of reasons. First, the purpose of an EA's order is, above all else, expediency. Suits in India are notoriously slow to progress, with courts on account of their slow disposal rate and overburdened systems – an article by *The Hindu* in September 2015, asserted that nearly thirty percent of cases filed remained pending for two to five years, with over ten percent of cases pending for over ten years.¹⁷ Keeping these statistics in mind, by the time an EA's order is "enforced" by way of a suit, it is almost certain that the main arbitral proceedings themselves would have concluded.

In some cases, courts permit parties to resort to Section 9 of the Arbitration Act, which deals with Court-ordered interim measures. While this provision falls under Part I of the Arbitration Act, it is one of a handful of sections that are made applicable to both India and foreign seated arbitrations (in the case of the latter, it may be excluded by agreement).

The Bombay High Court dealt with a case where a party filed proceedings under Section 9 of the Arbitration Act seeking the same reliefs as those granted to it by an EA's interim award. The counterparty argued that this was an abuse of process, as the Petitioner was seeking to "enforce" the EA's award through Section 9 rather than through Section 48 of the Arbitration Act (which deals with grounds on which enforcement of a foreign award can be resisted).¹⁸ The Petitioner, on the other hand, simply argued that it was making a choice to approach the Court under Section 9 of the

¹⁴ *Amazon.com* (n 4) [69]-[70].

¹⁵ The Arbitration and Conciliation Act 1996, s 44 and 53.

¹⁶ *Raffles Design International India Pvt Ltd & Anr v Educomp Professional Education Ltd & Ors* 2016 SCC OnLine Del 5521.

¹⁷ Rukmini S, 'District courts will take 10 years to clear cases', *The Hindu* (New Delhi, 27 September, 2015).

¹⁸ *HSBC PI Holding (Mauritius) Limited v Avitel Post Studioz Ltd Arbitration Petition 1062 of 2012*, Order dated January 14, 2012 [52].

Arbitration Act and was not enforcing the EA's award.¹⁹ The Petitioner succeeded, and the Court granted relief. An appeal against this order also came to be dismissed, with the appellate court holding that the existence of the EA award "[made] no difference".²⁰

A similar approach was adopted by a Single Judge of the Delhi High Court, who granted reliefs under Section 9 of the Arbitration Act. Holding that Section 9 of the Arbitration Act could not be resorted to for enforcement of an EA's award, the Court nonetheless held that it could "*independently apply its mind and grant interim relief in cases where it is warranted*".²¹ However, the converse is not true. Where a party does not succeed before the EA, it is not permitted to avail of a second opportunity before Courts under Section 9 of the Arbitration Act.²² The Division Bench in this appeal upheld this finding and distinguished *Raffles* on account of subsequent events therein, which had indicated the respondents' reluctance to comply with the EA's order, which had influenced the Court's decision to grant protective relief.²³

The availability of Section 27(5)

Section 27(5) of the Arbitration Act specifically permits Indian courts to subject a party acting in contempt of an arbitral tribunal in the conduct of the arbitral proceedings to appropriate disadvantages, penalties and punishments on the representation of the arbitral tribunal. Section 27 provides as follows.

"27. Court assistance in taking evidence.—(1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.

(2) The application shall specify—

....

¹⁹ *ibid.*

²⁰ *HSBC PI Holding (Mauritius) Limited v Avitel Post Studioz Ltd* [2014] SCC OnLine Bom 929, [28].

²¹ *Raffles Design International India Pvt.Ltd. & Anr v Educomp Professional Education Ltd & Ors* [2016] SCC OnLine Del 5521 [105].

²² *Ashwani Minda & Ors v U-shin Limited and Ors* 2020 SCC OnLine Del 1648.

²³ *Ashwani Minda v U-Shin Limited* 2020 SCC OnLine Del 721, [46] and [49].

(3) The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.

....

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.”

(Emphasis added)

Section 2(2) of the Arbitration Act makes it clear that subject to an agreement to the contrary, recourse to Section 27 is available in respect of an international commercial arbitration seated outside India. Accordingly, any violation by a person subject to the Indian Courts’ jurisdiction of an order passed by an arbitral tribunal, wherever it may be seated, is punishable as civil contempt of Court.

Any person failing to comply with an order of the arbitral tribunal is deemed to be “*making any other default*” or “*guilty of any contempt to the arbitral tribunal during the conduct of the proceedings*” under Section 27(5). The term “*contempt to the arbitral tribunal during the conduct of arbitral proceedings*” in Section 27(5) has been broadly interpreted by the Supreme Court of India to include contempt by a party of the interim orders of an arbitral tribunal.²⁴ The purpose of this provision is to give teeth to the interim orders of a tribunal.

This would require the other party is to apply to the arbitral tribunal for making a representation to the Court to meet out such punishment, penalty to the guilty party, as would have been incurred for default in or contempt of the Court. Upon the referral or representation of an arbitral tribunal, the appropriate Indian Court will be competent to deal with the party in default under the provisions of the Contempt of Court Act, 1971 and Order 39 Rule 2-A of the Code of Civil Procedure, 1908. This may include the imposition of a fine, detention in a civil prison or attachment of property, depending on the nature of contempt.

²⁴ *Alka Chandewari v Shamsul Isbrar Khan* [2017] 16 SCC 119.

In practice, though, this remedy may not be as effective as it appears. Section 27(5), by its plain language, still requires a reference by the arbitral tribunal, and the arbitral tribunal itself ought to be willing to make such a reference. Whether arbitral tribunals agree to make this reference and whether that could lead to effective sanctions for contempt of an EA's award remain to be seen. Unfortunately, this could be one of those areas where reality overtakes the law. However, the Supreme Court's decision in *Amazon* is an encouraging milestone in ensuring that remedies within the arbitral process are not rendered toothless or academic.