

EMERGENCY ARBITRATOR AWARD & India seated International Arbitrations

Emergency arbitrator concept is considered to be, one of the most effective solutions for the major problem which has been reducing the effectiveness of an International arbitration. Because one of the major challenges faced by the arbitration community was in handling emergency situations through international arbitration process. In emergencies, where the parties required some urgent interim protection, they could not wait for the formation of the arbitration tribunal to get an interim protection. The National court orders passed in many countries are not recognised and enforced in other countries. The National court orders are not supported by the above said New York convention and hence enforcement of those orders were not possible. Hence the international arbitration community invented the new mechanism of Emergency arbitrator. Emergency arbitrator is an arbitrator appointed by an arbitration institution selected by the parties, on the request of one or more parties, to hear and decide only an interim protection application. Normally, in an international arbitration, once the regular arbitration tribunal is formed, the jurisdiction of the emergency arbitrator comes to an end. Emergency arbitrators do not form part of the regular arbitration tribunal unless parties specifically consent for the same. Top arbitral institutions like ICC, SIAC, HKIAC etc., appoint emergency arbitrators within a few hours from the time of getting a request and the emergency arbitrators pass orders within a few days. Since these international awards passed by the emergency arbitrators are also considered to be an international arbitration award, the New York convention helps in the recognition and enforcement of the award.

Emergency arbitrator and Indian Legal frame work: Even though there was a lot of pressure on the government from the international arbitration community while amending the Arbitration and Conciliation Act, 1996, the Government for the best reasons known only to them, chose to not to expressly recognise the emergency arbitrator, while recently amending the Act. But many important arbitration institutions in India incorporated emergency arbitrator provisions, into their Rules. So far, no judicial verdicts have directly and effectively recognised the emergency arbitrator award, even though some emergency arbitration awards are indirectly given effect. Hence the sustainability of an emergency arbitrator award must be seen, when some such awards are challenged by the parties. The endeavour of the author is to analyse the existing legal provisions and mechanism available in India, relating to the interim protections, in the light of emergency arbitrator concept.

Interim orders granted by courts / interim orders passed by arbitration tribunals: The Arbitration and conciliation Act, 1996 provides to parties two forums for getting interim orders, the court under S.9 and from the arbitration tribunal under S.17 of the Act. Normally courts exercise the power under S.9 and grant interim orders, in case of emergency for one or more parties. But the said section can be invoked only when there is an arbitration clause between the parties and the party approaching the court is interested to initiate an arbitration proceedings. Hence Courts grant interim relief to parties when the arbitration tribunal is yet to be formed but disputes have already arisen. In some cases, interim orders are granted, after the award is passed and before the enforcement to protect a party from an irreparable loss and injury.

As per S.17 of the above said Act, arbitration tribunals are empowered to grant interim orders in case of emergency and in anticipation of an irreparable loss to one party. These are not interim awards;

they are interim orders only and hence they are appealable under S.37(2) of the Act. The original 1996 Act did not recognise interim awards for enforcement, it recognised final awards only. That means even if there are interim awards passed by the tribunal, they should be final about certain issues raised before the arbitrator, to get them enforced. Even though the new amendment to S.9 limits the powers of the court to grant an interim order after the formation of the arbitration tribunal, to a situation where court finds that circumstances exist which may not render the remedy provided under S.17 efficacious.

In a situation where the amended Act also does not provide for an express provision about the powers and enforceability emergency arbitrator and his award, and when there is a doubt about the effective enforceability of an interim order by a tribunal, in the opinion of the author, parties should choose to go for a court order when the international arbitration is seated in India and if the order is not required to be enforced in a foreign country. Indian courts act faster in giving interim orders. Hence in India seated international arbitration proceedings, if the order required is with regard to a subject matter in India, Court is the best forum for interim orders.