

## **EMERGENCY ARBITRATOR IN INDIAN SCENARIO**

**Ruhini Dey<sup>1</sup>**

The concept of Emergency Arbitration and Emergency Arbitrator is gradually finding acceptance in the Indian Jurisprudence. While many countries have already incorporated this in their arbitral procedure and rules, India also is not behind in coming forward and acknowledging its presence in the Indian Arbitration Act. Emergency Arbitration, which was earlier just an idea perhaps, found its place in reality when it was first adopted by International Centre for Dispute Resolution of American Arbitration Association (AAA) in 2006, followed by Singapore International Arbitration Centre (SIAC) and Stockholm Chambers of Commerce (SCC) in 2010; followed by the International Chamber of Commerce (ICC) in 2012; and Hong Kong International Arbitration Centre in 2013. Swiss Chambers' Arbitration Institution, London Court of International Arbitration (LCIA), International Institute for Conflict Prevention and Resolution; China International Economic and Trade Arbitration Commission, Australian Centre for International Commercial Arbitration, Kigali International Arbitration Centre, Asian International Arbitration Centre and Dubai International Finance Centre have also incorporated the provisions relating to the Emergency Arbitration in their Rules.

In our country, the provisions relating to Emergency Arbitration have been incorporated by Delhi International Arbitration Centre (DIAC); Mumbai Centre for International Arbitration (MCIA); Madras High Court Arbitration Centre (MHCAC); Nani Palkhivala Arbitration Centre; Indian Council of Arbitration; Indian Institute of Arbitration & Mediation; and Bangalore International Mediation, Arbitration and Conciliation Centre.

Rule 2.1(c) of the Rules of Delhi International Arbitration Centre (DIAC) defines 'Arbitral Tribunal' to include an Emergency Arbitrator. Rule 14 contains similar provisions for appointment of an Emergency Arbitrator as contained in Rules of SIAC. Rule 14.8 provides that an order or of an award of an Emergency Arbitrator shall be enforceable in the manner as provided in the Act. The Rules of Mumbai Centre for International Arbitration (MCIA) and Madras High Court Arbitration Centre (MHCAC) also contain similar provisions for appointment of an Emergency Arbitrator.

Emergency arbitrator is the solution when the Parties are seeking urgent interim reliefs which otherwise would take a long time to obtain in view of the fact that the arbitral procedure could not be set into motion immediately and even approaching the courts

---

<sup>1</sup> The author is Associate Lawyer in Law Senate Arbitration Law Firm having offices at New Delhi & Mumbai.

for that matter would be rather cumbersome. However, w.r.t. the Emergency Arbitrators some settled principles readily emerge : (a) An emergency arbitrator must ask himself whether the requested relief qualifies as an interim measure. He cannot grant final relief. That said there is no principle that precludes a tribunal or an emergency arbitrator from granting interim relief that might be similar to the final relief that is being requested; (b) Interim reliefs are aimed at maintaining the status quo pending the resolution of the dispute, preventing imminent harm or prejudice to the arbitral process, preserving assets, and preserving evidence; and (c) The emergency arbitrator only has the power to grant interim measures that have a temporary effect and cannot by his orders definitively resolve any dispute.

Although not many cases are being heard by Indian courts wherein a question related to these terms crop up, however, recently, a Ld. Single judge of the Delhi High Court was faced with the question as to what is the legal status of an Emergency Arbitrator i.e. whether the Emergency Arbitrator is an arbitrator and whether the interim order of the Emergency Arbitrator is an order under Section 17(1) and is enforceable under 17(2) of the Arbitration and Conciliation Act?

The case law which is under discussion in this article is *Amazon COM NV Investment Holdings LLC Versus Future Coupons Private Limited and Others [2021 SCC OnLine Del 1279]*. Several objections were considered mainly on the point that Part I of the Arbitration & Conciliation Act does not contemplate a remedy before an Emergency Arbitrator and that any order granted by the Emergency Arbitrator would not have any force of law under the Arbitration and Conciliation Act. Further it was also asserted that ‘Arbitral Tribunal’ as defined in Section 2(1)(d) of the Arbitration and Conciliation Act does not include an Emergency Arbitrator. The parties in this case had agreed to have SIAC rules for governing the procedure of arbitration.

### **Concept of Emergency Arbitrator and extent of Powers of Emergency Arbitrators**

∴

- (i) Emergency Arbitrator is a sole arbitrator appointed by the Arbitration Institution to consider the Emergency Interim Relief Application in cases where the parties have agreed to arbitrate according to the Rules of that Arbitration Institution which contain provisions relating to Emergency Arbitration. The status of the Emergency Arbitrator is based on party autonomy as the law gives complete freedom to the parties to choose an arbitrator or an Arbitral Institution. Like an Arbitrator, an Emergency Arbitrator also portrays the consensus of the parties arrived at by way of a contract.

- (ii) The powers of the Emergency Arbitrator are akin to the powers of an Arbitral Tribunal to decide the interim measures. The order/award of the Emergency Arbitrator is binding on all the parties. However, they do not bind the subsequently constituted Arbitral Tribunal and the Arbitral Tribunal is empowered to reconsider, modify, terminate or annul the order/award of the Emergency Arbitrator.
- (iii) The important characteristics of an Emergency Arbitration are that the Emergency Arbitrator has power to deal only with Emergency Interim Relief Application; the Emergency Arbitrator has to decide the Emergency Interim Relief Application within a fixed time frame of about 15 days; the Emergency Arbitrator cannot continue after formation of the Arbitral Tribunal; the Emergency Arbitrator's order/award can be reviewed/alterd by the Arbitral Tribunal; the Emergency Arbitrator order/award can be challenged where seat of arbitration is located; and ordinarily the Emergency Arbitrator will not be a part of the Arbitral Tribunal.

**Whether Arbitration & Conciliation Act, 1996, recognize the principle of Emergency Arbitration?**

- Section 2(6) of Arbitration and Conciliation Act gives complete freedom to the parties to authorise any person including an institution to determine the disputes between the parties. Section 2(8) of the Arbitration and Conciliation Act provides that where the parties have authorised an institution, the agreement shall include the Arbitration Rules of that institution.
- Section 19(2) of the Arbitration and Conciliation Act gives complete freedom to the parties to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings.
- Section 2(1)(a) of the Arbitration and Conciliation Act defines “arbitration” as any arbitration whether or not administered by permanent arbitral institution. Section 2(1)(a) is an inclusive definition which includes ad hoc as well as institutional arbitration. Section 2(1)(c) defines “arbitral award” to include an interim award. Section 2(1)(d) defines “arbitral tribunal” to mean a sole arbitrator or a panel of arbitrators.

- Section 17 of the Arbitration and Conciliation Act empowers the arbitral tribunal to pass an interim order and Section 17(2) provides that the interim order passed by the Arbitral Tribunal shall be deemed to be an order of the Court and shall be enforceable as an order of the Court.

**Observations of the Ld. Single Judge :**

- The Ld. Single judge was pleased to observe that by virtue of Section 2(8) of the Arbitration and Conciliation Act, the Rules of Singapore International Arbitration Centre were incorporated in the arbitration agreement between the parties. By incorporating the Rules of SIAC into the arbitration agreement, the parties had agreed to the provisions relating to Emergency Arbitration. The Ld. Court further opined that the Emergency Arbitrator is an Arbitrator for all intents and purposes, which is clear from the conjoint reading of Sections 2(1)(d), 2 (6), 2(8), 19(2) of the Arbitration and Conciliation Act and the Rules of SIAC which are part of the arbitration agreement by virtue of Section 2(8). Section 2(1)(d) is wide enough to include an Emergency Arbitrator.
- Under Section 17(1) of the Arbitration and Conciliation Act, the Arbitral Tribunal has the same powers to make interim order, as the Court has, and Section 17 (2) makes such interim order enforceable in the same manner as if it was an order of the Court. The Interim Order is appealable under Section 37 of the Arbitration and Conciliation Act. The current legal framework is sufficient to recognize the Emergency Arbitration and there is no necessity for an amendment in this regard. The Ld. Single Judge also relied upon the dictum laid by the Division Bench of the Delhi High Court in *Ashwani Minda v. U-Shin Ltd.*, [2020 SCC OnLine Del 721]. The judgment of the Division bench has also clearly recognized the legal status of the Emergency Arbitrator as an Arbitrator under the Arbitration and Conciliation Act by holding that a party having chosen to go to the Emergency Arbitrator and having failed in its endeavour to obtain interim relief, cannot seek the same relief in Section 9 proceedings.

Although not much is available regarding Emergency Arbitration under Indian Law, however, from the judgment discussed herein, it is discernible that this concept is slowly gaining its momentum even in the Indian scenario and the courts are also recognizing the principle without emphasizing the need to bring a significant amendment in the Act itself in this regard, which otherwise would be whole tedious procedure.