

Indian Law relating to Emergency Arbitrator

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Introduction: Prior to 2010, parties using international arbitration as the dispute resolution mechanism did not have an effective procedure relating to interim relief. The most important reason for parties opting for international arbitration is the party autonomy to select a neutral law and an arbitrator from a neutral country. The 2nd reason is enforcement of international arbitration awards in more than 100 countries using New York Convention on Recognition and Enforcement of foreign arbitration awards. The third reason is to avoid complex, un-uniform civil procedures and complex National Court systems. But prior to 2010, if a party wishes to get an interim order, prior to formation of the arbitration tribunal, it must approach the National court of the opposite party and seek interim protection. Such an option was complex, expensive and time consuming also.

Emergency Arbitrator Procedure: Hence the concept of emergency arbitrator was first introduced by The International Centre for Dispute Resolution (ICDR), the international Arm of American Arbitration Association. Singapore Arbitration Center (SIAC) was the first institution in Asia to adopt that system. Under ICC rules “any party that needs urgent interim or conservatory measures that cannot await the constitution of Arbitral Tribunal’ can apply for appointment of Emergency Arbitrator. Now all the other institutions are also having similar provisions. If a party is in an emergency and requires a protective or any other interim order and it has an institution arbitration clause in its contract, then it requires to make an application to the institution for appointment of emergency arbitrator. In its application, it requires to explain the reasons and the justification for emergency relief. Hence it is clear that in an adhoc arbitration, there cannot be any emergency arbitrator and only arbitral institutions can appoint an emergency arbitrator. The important characteristics of an emergency arbitrator are as follows:

- a. Emergency arbitrator has powers to deal with only emergency relief applications
- b. Emergency arbitrator enjoys the same powers as the regular arbitral tribunal
- c. Emergency arbitrator must complete his work within 14 days
- d. Emergency arbitrator cannot continue after the formation of the arbitral tribunal
- e. Emergency arbitrator orders can be reviewed or altered by the Arbitral tribunal
- f. Emergency arbitrator award can be challenged only in the seat of arbitration
- g. Normally emergency arbitrator will not be a part of the Arbitral tribunal

How Long it takes? Institutions like SIAC has appointed an emergency arbitrator within 24 hours from the time of request by a party and even interim relief had been granted within 3

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days also. The emergency arbitrator hears both the parties some times in a proper hearing or over phone or over video conferencing etc., Under ICC Rules an Emergency Arbitrator must make his award within 15 days from the date of appointment.

International Enforceability: One of the important reasons for opting for Emergency Arbitration is to take the support of New York Convention² to enforce those awards. It is important to note that a National Court order cannot be enforced using New York Convention. But at the same time, there is an argument that an emergency arbitrator award is not truly final and binding in accordance with Article V.1(e) of the convention. As the New York convention, has not defined “arbitral award”, whether an award rendered by an emergency arbitrator could be recognized and enforced as if it were a court order is dependent on the National legislation. Countries like Singapore and Hong Kong have expressly recognized the emergency arbitration awards by amending the arbitration laws of those countries and incorporating the necessary provisions. UNCITRAL Model Law³ Clause 17H provides for enforcement of interim awards and hence many countries which have similar provisions in their laws also recognize emergency arbitration awards under the category of interim international arbitration awards. But Indian law makers did not introduce a similar provision in Arbitration and Conciliation Act,1996. English Courts recognize emergency arbitration awards and a recent case Gerald Metals⁴ the court held that the courts can entertain application seeking interim orders in support of an arbitration case only if emergency arbitrator provision is not available or adequate powers are not with emergency arbitrators to grant an effective relief.

Enforcement of an Emergency Arbitrator award under Indian Law: Indian Arbitration law is Arbitration and Conciliation Act,1996, which was amended with effect from 23rd October 2015 by Arbitration and Conciliation (Amendment) Act,2016. Prior to the said amendment Act, Law Commission of India came out with “Report No.246 Amendments to the Arbitration and Conciliation Act” in which it recommended to the Government of India, to amend the 1996 Act, expressly recognizing Emergency Arbitrator by amending S.2 of the Act. But unfortunately, the said amending Act did not accept the recommendation of the Law Commission. Hence Indian law, as of now does not expressly recognize “emergency Arbitrator” award. It is important to note here that an interim award passed by the Arbitral tribunal, seated in India is enforceable, since after the 2015 amendment, domestic interim awards are enforceable. It is very important to note that the courts in India lost their power to grant an interim order in support of an international arbitration seated in India from 6th September 2012 due to the decision of the Supreme Court of India in the famous BALCO⁵ case. But 2015 amendment has brought the said powers to Indian Courts again.

² Convention on Recognition and Enforcement of International Arbitration awards (New York 1958)

³ The UNCITRAL Model law on international commercial Arbitration 1985

⁴ Gerald Metals Vs Timis

⁵ Bharat Aluminium Co Vs Kaiser Aluminium Technical Services

The views of Courts in India relating to Emergency Arbitrator Award: Even though, no court in India has got an opportunity to directly test the validity of an Emergency Arbitrator award or enforcement application for enforcing an emergency arbitrator award, they dealt with applications filed under S.9 of the Act, based on the emergency arbitrator awards. The following are the cases in which Emergency Arbitrator awards have been passed and parties did not seek for enforcement of the emergency arbitrator award but the Foreign party filed an application under S.9 of the Act and sought interim relief from Indian Courts,

The first two orders were passed by High Court of Bombay on 22nd January 2014 (Post BALCO and Pre-2015 Amendment) in **HSBC PI Holdings Mauritius Limited Vs Avitel Post Studioz Ltd.**, (2014) SCC Online 102 & 2015 SCC Online 6352. In the said case the arbitration clause provided for an international arbitration seated in India but specifically allowed the parties to approach Indian Courts seeking interim orders under S.9 of the Arbitration and Conciliation Act, 1996. As per the Arbitration clause Singapore International Arbitration Centre (SIAC) was designated to administer the arbitration seated at Singapore. Hence the Petitioner approached SIAC seeking to appoint an Emergency Arbitrator and the said emergency arbitrator also passed an interim award in favour of the petitioner. Since neither emergency arbitration award nor any other type of interim award can be enforced in India, under S.48 of the Act, the petitioner without seeking enforcement, sought for a similar order under S.9 of the Act. The High Court of Bombay passed an interim order directing the respondent to not to withdraw USD 60 million from its account. In this case, High Court never had an opportunity to test either the validity or enforceability of an emergency arbitration award, since the petitioner filed a S.9 application before the court seeking interim relief.

The 2nd Case was decided by the High Court of Delhi on 7th October 2016, which is reported as **Raffles India International Private Limited Vs Educomp Professional education Limited 2016 SCC Online Del 5521 & (2016) 234 DLT 349**. In this case, also parties did not try to enforce the emergency arbitrator award in India, they filed an application under S.9 under the 2015 Amended Act. The Court while referring to the emergency arbitration award, held that the Indian Arbitration and Conciliation Act, 1996 Pari materia does not have any provision similar to Article 17(H) of the UNCITRAL model law, which provided for the enforcement of the interim award passed in a foreign seat. Hence it held that the emergency arbitrator award cannot be enforced as it is and parties must file a separate suit seeking to enforce the emergency arbitrator award. It further held that S.17 of the Act is applicable only for interim arbitration awards passed from an Indian seat.

Conclusion: Hence, in the opinion of the author, an emergency arbitrator award passed in a foreign seat is not enforceable in India but an emergency arbitrator award passed by an emergency arbitrator in an Indian seat is enforceable in India under S.17 of the Act. Hence foreign parties, should seek an interim order from Indian courts instead of resorting to enforcing that award against an Indian party. But Indian parties should not hesitate to take

the route of emergency arbitrator, if the opposite party is from a New York convention country.

