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Strengthening Interim Relief in Indian Arbitration: A Quest for Efficiency

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Abstract

The need for efficient and effective measures for interim relief has become critical as the economic and legal landscape of India is rapidly evolving. In order to ensure that the arbitral award is effectual, interim relief is a crucial mechanism. However, the current provision of traditional court-ordered interim relief is often hindered by procedural delay and inefficiencies, compromising the very purpose of the relief. In this context, emergency arbitration emerges as an imperative and opportune solution. This medium of relief is particularly relevant today due to the fast-paced commercial environment, where rapid and adequate resolution is essential to maintain business continuity and protect investment. Moreover, it is pivotal for India to align with the global best practices and evolve its arbitration mechanism, particularly for interim relief in order to remain competitive in the global arbitration arena. This paper addresses the pressing need for incorporating emergency arbitration within the legal framework of India with the aim of enhancing the effectiveness of interim relief. Along with this, the paper explores innovative approaches to promote the adoption of emergency arbitration and fostering a more conducive environment for obtaining interim relief.

I. INTRODUCTION

In recent times, arbitration has been a preferred mode of resolving commercial disputes.[1] Arbitration is preferred as an alternative mechanism of resolution due to its flexibility, cost-effectiveness and timely resolution.[2] Certain procedural protections, such as interim orders that protect parties while the case is pending, are often included in the arbitral procedure.[3] Parties have a tendency to engage in strategies to delay and slow down the process or step over the rights of the opposite party.[4] In such circumstances, the arbitral award may be rendered futile. In order to avoid this, the tribunal or the courts are given the power to protect the rights of the parties during or before the proceedings.[5]

[1] Abhinav Gupta &SriroopaNeogi, *Emergency Arbitration In India: A Critical Appraisal Of The Institutional Framework*, Vol. 14, NUJS L. REV., 3 (2021).
[2] Vani Shrivastava, *Advantages of Arbitration over Litigation*, VIA MEDIATION AND ARBITRATION CENTRE, May 25, 2020, available at https://viamediationcentre.org/readnews/Mjcz/Advantages-of-Arbitration-over-Litigation#:~:text=Generally%20people%20prefer%20arbitration%20over,its%20cost%20and%20time%20effic acy.
[3] Gupta & Neogi, *Supra* Note 1.
[4] Interim Relief in Arbitral Proceedings: Powerplay between Courts and Tribunals, Nitesh Desai Associates, January 2020, available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Interim_Reliefs_in_Arbitral_Proc eedings.pdf.
[5] *Id.*

Depending on the specifics of the case, the parties' requested interim relief may take several forms.[6]

The legal framework in India with respect to arbitration proceedings is governed by the Arbitration and Conciliation Act, 1996 (the Act).[7] The Act is based on the UNCITRAL Model Law on International Commercial Arbitration, 1958.[8] The provisions of the statute dealing with interim relief are section 9 and 17.[9] Section 9 and 17 of the Act are largely found on Article 9 and 17 of the Model law respectively.[10] In order to protect the disputed sum and stop the alienation or dissipation of the subject-matter property, parties usually resort to courts under Section 9 of the Act and ask for a range of remedies.[11] In contrast, an Arbitral Tribunal's power to order interim measures is governed by Section 17 of the Act.[12] An appeal against a court ruling that either grants or denies temporary remedies under Section 9 may be submitted in accordance with Section 37(1)(b) of the Act.[13] Likewise, a request to challenge a decision of the Arbitral Tribunal that grants temporary remedies under Section 17 may be submitted in accordance with Section 37(2)(b) of the Act.[14]

One of the major pros of arbitration is its speediness.[15] Parties expect a quick resolution, but in reality, complex commercial disputes take longer than expected to reach a resolution. In such cases, an urgent interim relief becomes critical to ensure protection of the subject matter of the dispute.[16] As per the legal framework of India, parties who elect to move out of the traditional court setting and settle the dispute through arbitration are forced to seek interim relief from the courts.[17] The concept of emergency arbitration gained traction as parties who had chosen to forego going to court in favour of arbitration did not want to go back to the courts to request interim relief, and as time went on, the tribunal's ability to provide interim remedies came to be accepted as the standard.[18]

Emergency Arbitration is not recognised by the Arbitration and Conciliation Act. The paper analyses the current legal provisions and the judicial interpretation by the courts [II]. Various international as well as domestic institutes have recognised emergency arbitration. The paper evaluates practices of the institutions and the need to incorporate the mechanism within the Indian legal framework. Lastly, the paper assesses how emergency arbitration can be instrumental in making the mechanism of providing interim relief to parties more efficacious [III].

[6] *Id.*
[7] Arbitration and Conciliation Act, 1996.
[8] Aarushi Dhingra, *Arbitration and Conciliation Act, 1996-An Overview*, SSRN, May 19, 2020, available at https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3582896_code4130908.pdf?abstractid=3582896&mirid=1 &type=2.
[9] Arbitration and Conciliation Act, 1996.
[10] Dhingra, *Supra* Note 8.
[11] Arbitration and Conciliation Act, 1996 § 9. [13] [14]. [15]
[12] Arbitration and Conciliation Act, 1996 § 17.
[13] Arbitration and Conciliation Act, 1996 § 37(1)(b)
[14] Arbitration and Conciliation Act, 1996 § 37(2)(b).
[15] Nusrat Hassan & Sameer Thakur, *Emergency Arbitration Under Indian Law: Navigating A Complicated Maze*, INTERNATIONAL ARBITRATION AND MEDIATION CENTRE, April 22, 2023, available at https://iamch.org.in/emergency-arbitration-under-indian-law-navigating-a-complicated-maze.
[16] *Id.*
[17] *Id.*
[18] *Id.*

II. INTERIM RELIEF AND EMERGENCY ARBITRATION IN INDIA

Emergency arbitration is not covered under the Act. As a result, it may only be used if both parties consented to institutional arbitration with the possibility of emergency arbitration. The Law Commission of India suggested changes to the Act in its 246th Report in 2014. The commission considered the emergence of emergency arbitration and recommended that, if the regulations of an arbitral institution permitted such an appointment, an emergency arbitrator be included to the definition of arbitral tribunal in section 2(1)(d) of the Act. This was comparable to the method used in Singapore, where the definition of an arbitral tribunal included an emergency arbitrator. Despite being in accordance with the Law Commission's recommendations, the suggestion to include emergency arbitrators was left out when the Indian government submitted the proposed revisions to Parliament in 2015.

A. LEGAL FRAMEWORK FOR INTERIM RELIEF

Section 9 of the Actcontains the rules relating to interim measures by the court.[19] It states that the parties to an arbitration agreement may petition the court at any time before, during, or after the arbitral decision is made, but not before it is enforced.[20] Under Section 9 of the Act, a party may petition the court for a variety of reliefs, such as an interim order of protection regarding the sale, preservation, or interim custody of any goods that are the subject of an arbitration agreement, the securing of the amount in dispute, or the detention, preservation, or inspection of any property or thing that is the subject of an arbitration agreement, for the appointment of a receiver, etc.[21]

Section 17 of the Act addresses the authority of an arbitral tribunal to provide interim measures.[22] Before the Amendment Act 2015, the clause had a broad interpretation in terms of the kind of reliefs that might be granted. It allowed the tribunal to order any temporary protective measure.[23] Nevertheless, courts and arbitral tribunals held the opinion that the extent of the temporary remedies that might be awarded under Section 17 was narrower compared to those under Section 9. [24]As a result, some arbitral tribunals chose not to issue interim orders, such as awarding security. The 2015 Amendment Act, which clarified the kinds of reliefs admissible and brought them into line with those available from courts under Section 9, made much-needed reforms to the provision of interim reliefs by Arbitral Tribunals.[25]

The 2005 amendment added sub section (3) to section 9 where the arbitral tribunal's creation limited the court's ability to provide interim relief.[26] The provision of section 9(3) flowed from the principle minimum judicial intervention approach in arbitral procedures. Nevertheless, sub-section (3)'s limitation of the Court's authority under section 9 is predicated on two claims.[27] First, based on its authority to 'entertain' an application under subsection (1) and second, subject to a determination of

[19] Arbitration and Conciliation Act, 1996 § 9.
[20] *Id*.
[21] *Id*.
[22] Arbitration and Conciliation Act, 1996 § 17.
[23] Bhumika Indulia, *Interim Reliefs in Arbitration: Emerging Judicial Trends in India*, SCC ONLINE, March 17, 2024, available at https://www.scconline.com/blog/post/2024/03/27/interim-reliefs-arbitration-emerging- judicial-trends-india/.
[24] *Id*.
[25] The Arbitration and Conciliation (Amendment) Act, 2005, Cl. 10.
[26] *Id*.
[27] *Supra* Note 22.

whether conditions exist that would make the section 17 remedy of interim relief ineffective.[28] Thus, the creation of the arbitral tribunal does not cause a section 9 court to become *coram non judice*.[29] Furthermore, since subsection (3) is not intended to be an expulsion provision, its authority is not entirely removed by it.[30] In a judgement, the Calcutta High Court ruled that, provided the court has already entertained the application, its authority to continue hearing an application for interim relief under Section 9(1) of the Act would not be 'fettered' under Section 9(3) following the creation of an arbitral tribunal.[31]

A major problem for parties choosing arbitration as a dispute resolution procedure is highlighted by the complex interaction between Sections 9 and 17 of the Act. Arbitration is meant to be a quick and easy procedure, but because of the way the law is now written, parties often have to go to court to get interim relief, which negates the whole point of arbitration. This dual-track strategy overburdens the court and goes against the fundamentals of arbitration as a substitute for traditional conflict settlement procedures. Although the Act's provisions, especially Section 9(3), aim to strike a balance between the duties of arbitral tribunals and courts, they have instead introduced ambiguities that exacerbate the situation. As a result, parties are forced to negotiate the difficulties of both judicial and arbitral processes in order to get crucial interim relief, leaving them in a difficult situation.

B. JUDICIAL PERSPECTIVE ON EMERGENCY ARBITRATION

The judiciary has very few times dealt with the concept of emergency arbitration. One of the first chance for the court to assess an award given by an emergency arbitrator was in the case of *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd*.[32] In this particular instance, Singapore was the seat of arbitration and the petitioner invoked the emergency arbitration seeking interim relief.[33] The petitioner was awarded a favourable order post which they approached the courts in India to enforce the same under Section 9 of the Act.[34] The court in this case did not venture into the recognition of emergency arbitration but merely passed a similar order in accordance to the one passed by the emergency arbitrator.[35]

It was in the case of *Raffles Design International India (P) Ltd. v. Educomp Professional Education Ltd*. which was decided in 2016 by the Delhi HC where the courts derecognised the decision of an emergency arbitrator.[36] In this instance again, SIAC Rules were applicable and Singapore was the seat of arbitration.[37] The Court nonetheless, declared Section 9 relevant in the current case by virtue of the 2015 Amendment to the Act, which under Section 2(2) extended the application of Section 9, along

[28] *Supra* Note 22.
[29] *Supra* Note 22.
[30] Srinjoy Das, *Hearing Of Interim Application U/S 9(1) Arbitration Act Not Barred By Constitution Of Arbitral Tribunal If Court Has Already 'Entertained' It: Calcutta HC*, LIVE LAW, July 22, 2023, available at https://www.livelaw.in/high-court/calcutta-high-court/calcutta-high-court-arbitration-act-section-91-interim- application-entertained-no-bar-section-93-arbitral-tribunal-233386.
[31] *Id.*
[32] HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd., AIRONLINE 2020 SC 691.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Raffles Design International India (P) Ltd. v. Educomp Professional Education Ltd., 2016 SCC OnLine Del 5521.*
[37] *Id.*

with other provisions to international commercial arbitrations, irrespective of where the seat located.[38] Since this Section was not declared inapplicable by the parties, they had left open the possibility to apply the Court for relief for urgent circumstances.[39] It was ruled that a Court would adjudicate upon a Section 9 petition by utilising its discretion and judicial intellect, irrespective of the order granted by the emergency arbitrator.[40] This ruling had the result of nullifying the significance and derecognition of the decision of the emergency arbitrator in circumstances where the seat of arbitration was in a foreign country.

It was finally in the case of *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.*, where party autonomy was given importance. In accordance with SIAC standards, the parties chose emergency arbitration, with Delhi serving as the arbitration seat.[41] While the respondent argued that the award was not enforceable under Section 17(2) because Section 17(1) does not recognise an order passed by the emergency arbitrator, the petitioner argued that the award was enforceable under Section 17(2) because emergency arbitrators were not included in the definition of 'tribunal' under Section 2(1)(d).[42] According to Section 17(1) of the Act, the Court declared that an order rendered by the emergency arbitrator is an interim arbitral tribunal order, and as such, it may be enforced under Section 17(2) of the Act.[43]

The ruling treats an emergency award rendered under the norms of an arbitral institution like SIAC, in the context of an arbitration with an India-seated arbitral tribunal on par with an interim order granted by the same panel.[44] As a result, the ruling opens the door for an emergency arbitration award made in an arbitration held in India to be enforceable by Indian courts in the same manner as a court order.[45] Parties could also anticipate quicker and more efficient enforcement procedures since the order enforcing the emergency award would be final and non-appealable.[46] The decision to align the Indian approach with the global standard for emergency award recognition and enforcement is a positive development for the parties opting for arbitration in India.[47]

C. INSTITUTIONAL RULES

Due to its ability to offer parties to an arbitration agreement prompt and effective interim relief before the arbitral tribunal is established, Emergency Arbitrators are a relatively new phenomenon that have gained favour with the majority of eminent arbitration institutions worldwide.[48] The worldwide Centre for Dispute Resolution (ICDR), a worldwide section of the American Arbitral Association, was the first organisation to include provisions for Emergency Arbitrators in its rules.[49] In 2006, the ICDR

[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Amazon.com NV Investment Holdings LLC v. Future Retail Ltd., AIR 2021 SUPREME COURT 3723.
[42] *Id.*
[43] *Id.*
[44] Shivani Sharma, *Future Retails Limited v Amazon. Com NV Investment*, Vol. 3 JUS CORPUS LJ 89 (2022).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] Shobhit Agarwal, Recognition and Enforcement of Emergency Arbitration: India, US and Singapore, Vol. 4, INDIAN J.L. & LEGAL RSCH. 3 (2022).
[49] *Id.*

presented the idea of an Emergency Arbitrator.[50] The concept of an Emergency Arbitrator was subsequently introduced by some of the most illustrious arbitral institutions in the world, including the Hong Kong International Arbitration Centre, Singapore International Arbitration Centre, Stockholm Chambers of Commerce, and the International Chamber of Commerce.[51] These institutions handled urgent cases that needed the immediate intervention of an independent authority while the arbitral tribunal was being formed.[52] The appointment of an Emergency Arbitrator is permitted in India under the rules of arbitral institutions like the Delhi International Arbitration Centre and Mumbai Centre for International Arbitration. These institutions handle emergency situations that call for immediate interim relief.[53]

The use of emergency arbitration to provide quick interim relief in business disputes has become commonplace worldwide. Considering the worldwide movement towards effective conflict resolution, India must amend its laws to include this crucial instrument and bring itself into line with international standards. While there are some limitations to using an Emergency Arbitrator on a case-by-case basis like its non-binding effect on third parties and its inability to provide an *ex-parte* relief, there is no denying that the idea of an Emergency Arbitrator addresses a number of problems related to using national courts when a party needs urgent interim relief.

III. STREAMLINING INTERIM RELIEF WITH EMERGENCY ARBITRATION

D. ADVANTAGES OF EMERGENCY ARBITRATION

The advantages of Emergency Arbitration include privacy of the parties and the procedures, party autonomy, expediency of the proceedings, and the flexibility and transparency of the arbitrators.[54] An emergency arbitrator is required to adhere to the accelerated process for interim relief stipulated in the norms of the international arbitral organisations.[55] These regulations set down deadlines for tasks including assigning an emergency arbitrator and delivering final instructions.[56] Emergency arbitrators are set apart from judicial procedures by adhering to such a protocol. Such a method clearly calls for accelerated procedures to provide a party with prompt and efficient relief.[57]

Arbitration rules usually do not impose stringent guidelines on the emergency arbitrator's decision-making process. Instead, they often say that any action “it deems necessary or appropriate” may be ordered by an emergency arbitrator.[58] Domestic courts, in contrast to emergency arbitration procedures, may not be able to use their discretion since they are subject to the laws of the relevant jurisdiction.[59] Since most arbitration rules provide emergency arbitrators a great deal of discretion in issuing the ruling,

[50] *Id.*
[51] A.S. Chauhan, Pushing Arbitral Boundaries to Pave Way for Emergency Arbitration, Vol. 11, Indian J. Arb. L. 9 (2023).
[52] *Id.*
[53] *Id.*
[54] Daniel Pap, *When Justice Delayed Is Justice Denied: Advantages and Disadvantages of Emergency Arbitration in Comparison with Interim Relief*, Vol. 59, ANNALES U. SCI. BUDAPESTINENSIS ROLANDO EOTVOS NOMINATAE 51 (2020).
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Jussi Hakanen, *The Pros and Cons of Emergency Arbitration*, Vol. 7(2), HELSINKI LAW REVIEW (2013).
[59] *Id.*

engaging an arbitrator over a traditional court has a clear benefit.[60]

When selecting the mechanism for interim measures, the arbitrator's persuasiveness is a crucial factor to take into account. Since a party facing such an order would not want to be considered to be defying it before the arbitrator has formed an opinion on the case's merits, the arbitrators' orders for interim relief are often complied with willingly.[61] Furthermore, in certain circumstances, the arbitrators may deduce a negative outcome from a party's failure to comply with their interim instructions, and they may consider this when making decisions about the case and its associated expenses.[62] When weighed against the drawbacks of the traditional court system, the inherent advantages of the emergency arbitration mechanism show that it is a more viable option for obtaining prompt and effective remedy.[63]

E. NEED FOR INCORPORATING EMERGENCY ARBITRATION

Even after acceptance of the concept of emergency arbitration by the Supreme Court, most aspects of the mechanism remain debateable.[64] Only parties that participate in institutional arbitration are eligible to use the services of an emergency arbitrator.[65] The parties to the arbitration agreement agree that, should a dispute occur, it will be decided in line with the regulations of the relevant arbitral institution, and that the arbitration will take place there.[66] Therefore, in line with the institution's norms, an emergency arbitrator is appointed in the event of a disagreement and a need for interim relief is expressed by one of the parties.[67] However, in circumstances of ad hoc arbitrations, such norms are not intended nor relevant.[68]

Furthermore, it is often recognised that institutional arbitration may be more costly than ad hoc arbitration; this might be one of the reasons why institutional arbitration has not been very popular in India.[69] Considering this, one would question whether clauses like the Emergency Arbitration clause are reserved for those with the means to pay for them. As a result, parties that are unable to pay for institutional arbitration are at a disadvantage as they are unable to take advantage of emergency arbitration. Thus, there is a pressing need to incorporate the mechanism within the framework to endure equitable access to the remedy.

IV. CONCLUSION

Significant gaps in the Indian legal framework are revealed upon analysing the interim relief in India particularly through the lens of emergency arbitration. Often the current legislature forces parties to revert to court intervention which contradicts the essence of arbitration. Even though the judicial

[60] Bassam Mustafa Tubishat&Khaldon Fawzi Qandah, *The Role of Emergency Arbitrator in Commercial Arbitration: Comparative Study*, Vol. 11, J. POL. & L. 94 (2018).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Akash Srivastava, *Emergency Arbitration and India - A Long Overdue Friendship*, Vol. 10, Indian J. Arb. L. 98 (2021).
[65] *Id.*
[66] *Id.*
[67] Jaroslav Kudrna & Ank Santens, *The State of Play of Enforcement of Emergency Arbitrator Decisions*, Vol. 34, JOURNAL OF INTERNATIONAL ARBITRATION 13(2017).
[68] *Id.*
[69] Gupta & Neogi, *Supra* Note 1.

stance on the concept has positively evolved, the absence of statutory basis for emergency arbitration leaves much to be desired especially for parties engaged in ad hoc arbitration. In order to bridge the gap between those who can afford institutional arbitration and those who opt for ad hoc arbitration it is necessary to have a more inclusive legal framework. While the mechanism is gaining traction globally, India is yet to tap into its full potential. The current framework provided certain fruitful safeguards but the inclusion and recognition of emergency arbitration within the statues is an essential step to ensure a robust and responsive dispute resolution in India.