

UNDERSTANDING EMERGENCY ARBITRATION VIS-À-VIS INDIA'S STANCE ON IT

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ABSTRACT

The provisions of Emergency Arbitration and the enforcement of interim measures passed by it do not exist within the Indian statutes but now rather within the judicial practice and in major Arbitral Institutional Rules in India and around the world. The reason parties or disputants seek Emergency Arbitration is to get immediate interim relief on an issue, which otherwise would take considerable time in National courts. Another reason for seeking Emergency Arbitration is that, if relief is not granted urgently, the party will suffer injuries and damages. This paper looks into different facets of Emergency Arbitration and various Institutional Rules governing it. The paper also looks into the developing Indian legal jurisprudence on the subject and a way forward has been suggested for Legislature to give legal backing to Emergency Arbitration in India.

Keywords: arbitration, emergency, enforcement.

INTRODUCTION

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Recently, Bharat founder and Shark Tank India judge, Ashneer Grover filed an Emergency Arbitration petition in Singapore International Arbitration Centre (SIAC) against the firm's decision to conduct a governance review to look into some alleged financial irregularities and lapses in the three-year-old fintech firm, which has been rejected by the institution holding Grover's claims of "no merit".¹ This incident again brought Emergency Arbitration into the limelight. In this paper, I will firstly discuss, what arbitration is? Then, what is the concept of Emergency arbitration and Institutional Rules governing it, along with this I will also discuss the stance of the Indian judiciary on the status of an emergency arbitrator and the way forward for India concerning the practice of Emergency Arbitration?

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¹ economictimes.indiatimes.com, bharatpe.com: [SIAC quashes Ashneer Grover's emergency plea against BharatPe's 'governance review' - The Economic Times \(indiatimes.com\)](http://bharatpe.com) (last visited Mar. 18, 2022)

WHAT IS ARBITRATION?

Before understanding the concept of Emergency Arbitration and the Rules governing it, we first need to know what Arbitration is. So basically, Arbitration is one of the Alternative Dispute Resolution mechanisms like Mediation, Negotiation, conciliation, etc, which provides an alternative from conventional litigation to resolve disputes in a Cost-effective, speedy and amicable manner. In Arbitration, disputants agree to submit their disputes to an individual whose judgment they are prepared to trust. Each puts its case to this decision-maker, known as an arbitrator. This arbitrator, listens and considers the facts and arguments, and makes a decision.²

CONCEPT OF EMERGENCY ARBITRATION

To simply put, in Emergency Arbitration one of the parties/disputants makes an application to the Arbitral Institution for the appointment of an Emergency Arbitrator for the grant of interim reliefs, which it seeks before the constitution of Arbitral Tribunal. Now, Emergency Arbitration is common in almost all the major arbitration institution rules, for example, the International Chamber of Commerce (ICC) Arbitration Rules³, the International Centre for Dispute Resolution (ICDR) Rules⁴, the Singapore International Arbitration Centre (SIAC) Rules⁵, and even in Mumbai Centre for International Arbitration (MCIA) Rules⁶ provides for the provisions for Emergency Arbitration. It acts as an alternative to the disputants seeking interim relief before the constitution of the Arbitral Tribunal, which otherwise be sought from national courts, thereby, which becomes a time-consuming procedure.

- **Interim Measures:** During the Arbitral proceedings, depending upon the circumstance of the case, it may become necessary for the courts of the arbitral tribunal to pass interim measures/orders intended to protect evidence and material facts, financial assets or to simply maintain the status quo until the final decision has been made by the tribunal. To provide these interim reliefs rapidly, the institutional rules provide for the

² Redfern and Hunter on International Arbitration 504 (6th ed. Oxford University Press 2015).

³ ICC Arbitration Rules, 2021, art 29

⁴ ICDR International dispute resolution procedures, 2021, art 7

⁵ SIAC Rules, 2016, schedule 1

⁶ MCIA Rules, 2017, rule 14

appointment of an emergency arbitrator to pass such interim measures on an emergency basis before the arbitral tribunal has been constituted.

Another thing that needs to be noted is that as of now in International Arbitration, the appointment of an Emergency Arbitrator is only possible under Institutional Arbitration and not under ad hoc arbitration (where the disputants do not select an Institution to administer their Arbitration) because the UNCITRAL Rules, which are designed for ad hoc arbitration, do not provide for any institutional oversight.⁷ Thus, no mechanism to appoint an Emergency Arbitrator before the constitution of the arbitral tribunal.

PROMINENT INSTITUTIONAL RULES FOR EMERGENCY ARBITRATION

Lately, almost all the major Arbitral institutions have incorporated the provisions for the appointment of Emergency Arbitrator. Some of them are as follows:

1. International Centre for Dispute resolution (ICDR): ICDR, in 2006, became the first major institution to provide for the grant of Emergency relief before the constitution of an arbitral tribunal under ICDR Rules 2006.⁸ As per article 7 of ICDR Rules⁹, which is titled “Emergency Measures of Protection”, A party may apply for the Emergency relief before the arbitral tribunal has been constituted by submitting a written application to the administrator and all other parties. The application must mention:

- Nature of the relief sought;
- The reasons why the relief sought is required on an emergency basis;
- The reasons for the likelihood of the party seeking relief to be found entitled for such relief;
- What Damages/Injuries the party will suffer if the relief is not granted.

2. Singapore International Arbitration Centre (SIAC): SIAC, in 2010, also included similar provisions relating to Emergency arbitration.¹⁰ Schedule 1 of SIAC Rules 2016¹¹, identical to ICDR Rules, says that a party that seeks emergency interim relief may, concurrent with or

⁷ coprcounsel.com, [Rules for Appointing an Emergency Arbitrator 3 of 4.pdf](#), (last visited Mar. 18, 2022)

⁸ *Supra* note 7

⁹ *Supra* note 4

¹⁰ siac.org.sg, [The Emergency Arbitrator and Expedited Procedure in SIAC: A New Direction for Arbitration in Asia](#), (last visited Mar. 18, 2022)

¹¹ *Supra* note 5

following the filing of a Notice of Arbitration but before the Arbitral Tribunal has been constituted, apply for emergency interim relief with the Registrar. The party shall, at the same time as it applies for emergency interim relief, send a copy of the application to all other parties.

3. International Chamber of Commerce (ICC): [Following the thread, ICC, in 2012](#)¹² also incorporated the provisions for the appointment of Emergency Arbitrator in their Rules. [Pursuant to Article 29 of the Rules and Appendix V13 \(“Emergency Arbitrator Provisions”\)](#), a party that needs urgent interim measures (“Emergency Measures”) that cannot await the constitution of an arbitral tribunal may make an application to the Secretariat of the ICC International Court of Arbitration (“Secretariat”).

EMERGENCY ARBITRATION UNDER INDIAN JURISDICTION

India’s [Arbitration and Conciliation Act of 1996 \(“Act”\)](#)¹⁴ does not expressly mention anything relating to Emergency Arbitration and even the [2015 Amendment](#)¹⁵ to the Act, failed to do so, which is considered to be a Pro Arbitration amendment as it brought parity to many aspects. For example, now under [section 17 of the Act](#)¹⁶, even the Arbitral tribunal has the power to grant interim measures during the arbitral proceedings at any time before the award has been passed. This interim order would be enforceable as per the Code of Civil Procedure, 1908. It also limited the scope of judicial intervention as, now, the authority may require to refer the disputants to arbitration unless it finds that no valid arbitration exists which will now surely deter unnecessary interventions, which were before, subject to judicial interpretation. But lately, the Indian courts, through interpretations, are giving legitimacy to the grant of Emergency reliefs. One such example is the recent case of emergency arbitration under SIAC Rules is of [Amazon COM NV Investment Holdings LLC V. Future Coupons Private Limited and Others](#)¹⁷ before Delhi HC, where one of the primary questions aroused was regarding the legal status of Emergency Arbitrator i.e. Can Emergency Arbitrator be considered as Arbitrator and its Orders equivalent to tribunal’s order under [section 17\(1\) of the Act](#).¹⁸

¹² coprcounsel.com, [Rules for Appointing an Emergency Arbitrator 3 of 4.pdf](#), (last visited Mar. 18, 2022)

¹³ ICC Arbitration Rules, 2021, art 29 & appendix V

¹⁴ Arbitration and Conciliation Act, 1996

¹⁵ Arbitration and Conciliation (Amendment) Act, 2015

¹⁶ Arbitration and Conciliation Act, 1996, s17

¹⁷ [Amazon COM NV Investment Holdings LLC V. Future Coupons Private Limited and Others](#), 2021 SCC OnLine Del 1279 : (2021) 280 DLT 618 : (2021) 4 Arb LR 67

¹⁸ Arbitration and Conciliation Act, 1996, s17(1)

HC answered both the question in the positive¹⁹, concluding 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 Act²⁰ and the Rules of SIAC which are part of the arbitration agreement by Section 2(8). Section 2(1)(d) is wide enough to include an Emergency Arbitrator. The stance of Delhi HC, later in appeal, was affirmed by Supreme Court.²¹ It held that the emergency award passed in Indian seated arbitration will be enforceable as if it was an interim order passed by the arbitral tribunal under section 17(1) of the Act²². It also held that such an award will not be subject to challenge under section 37 of the Act²³ when enforced (section 17(2))

LOOKING FORWARD

It is clear that Emergency Arbitration, even though subject to additional charges/costs, is still a more efficient and speedy way of getting urgent reliefs, which are sought even before the constitution of the Arbitral Tribunal (Section 17 of the Act gives power to the tribunal to order interim measures). Thus, providing a better alternative to the parties when compared to National courts. And now, even the courts are affirming the approach of Emergency Arbitration along with more and more Arbitral institutions incorporating the Rules for the same. Therefore, it is high time that the legislature, to promote ease of doing business in India by strengthening Arbitration and rapid dispute resolution mechanisms, should amend the Act to give statutory backing to the practice, clear ambiguities regarding its status, and enforceability of the interim measures passed by an Emergency Arbitrator. For this, the Legislature can look into various Institutional rules. For example, in India, the MCIA Rules 2016²⁴, simply clears the controversy regarding the legal status of Emergency Arbitrator and awards or orders passed by it. As per rule 14.8 of MCIA rules²⁵, the interim relief granted by the Emergency Arbitrator can be in form of an award or an order and will be binding just like a Tribunal's award or order. Rule

¹⁹ *Supra note 17*

²⁰ Arbitration and Conciliation Act, 1996, s2(1)(d), s2(6), s2(8), s19(2)

²¹ Future Coupons Private Limited and Others V. Amazon.com NV Investment Holdings LLC and Others, 2021 SCC OnLine SC 3124

²² *Supra note 18*

²³ Arbitration and Conciliation Act, 1996, s37

²⁴ *Supra note 6*

²⁵ *Supra note 6*

14.9²⁶ also mentions that the Emergency Arbitrator shall have no further power to act after the Tribunal is constituted and becomes functus officio.



²⁶ *Supra note 6*