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Enforcement of Achille's heel in India

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During several disputes, we have heard "time is of the essence", Emergency Arbitration is a relief for such a situation. An Emergency Award is an interim and conservatory measure awarded to the parties to avoid irreparable harm before the commission of an arbitral tribunal. This concept found its need when applications for interim reliefs filed before the Courts were found to defeat the sole purpose of the arbitration, i.e., reducing the burden of the courts. This article along with giving a brief introduction, explains the view of the Indian judiciary on the concept of Emergency Arbitration. Serving as an add-on to the institutional rules, since the provisions for EA are only explicitly referred to, in a few jurisdictions the article also discusses the global position on the same.

Keywords: *arbitration, judiciary, emergency arbitration.*

INTRODUCTION

Conventionally, arbitration was advocated to be an inexpensive and speedier mode of alternative dispute resolution. Although the predicaments of suspended procedures and exorbitant expenditure were soon acknowledged by procurators and academicians[1]. This

[1] Justice Kerr, 'Arbitration v Litigation: The Macao Sardine case' (1987) 3 ARB INT'L 79

panorama persuaded the arbitral institutions, certainly intensified by competitive emotion- to simplify arbitrations in order to make their rules more appealing and allow them to handle more arbitrations in a shorter amount of time. Except for duration and costs, dawdled arbitral proceedings have equivalent detriment as every other conflict settlement system. When statutory duties and entitlements are indefinite, awaiting the conclusion of any conflict redressal procedure, claimants and respondents are incompetent to endure with their commercial reality.[2] This reflected the gap and a need for expedited procedures of arbitration, called emergency arbitration or Achille's heel[3].

EMERGENCY ARBITRATION

The provisional and precautionary measures are what make up an "emergency measure". The authority designated to bestow emergency remedy, while awaiting the composition of an arbitral tribunal, is an emergency arbitrator. Lately, a myriad arbitral institution seems incipient in the establishment of emergency arbitration policy with the intention of shielding and upholding the prerogatives of disputing parties, against which urgent relief is urged. [4]

The inception of procedure requirements on emergency arbitration was impelled by the trade associations. Prior to the incorporation of these provisions, contending parties visaged several predicaments, to begin with, the process of establishing an arbitral tribunal requires a considerable amount of time. Further, resorting to domestic jurisdiction is inconsistent with the parties' intention to use arbitration, particularly where the competent court is the respondent's home jurisdiction. [5] More so, the court where the request for interim relief is filed may lack the proficiency imperative to resolve matters of distinct disputes. To address these issues, emergency arbitration was implemented. [6]

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[2] C L Sun and T Weiyi, 'Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief' (2013) 6 Contemp Asia Arb J 349

[3] Martin Davies, '*Court ordered Interim measures in aid of International Commercial Arbitration*' (2006) 17 AM Rev Int'l Arb 299, 300

[4] Kyongwha Chung, 'Emergency Arbitration in Investment Treaty Disputes' (2016) Harvard Law School

[5] Fabio Santacroce, 'The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?' (2015) 31 Arb Int'l 284

[6] *Ibid*

The nature of interim orders by emergency arbitrators includes forfeiture of capital, proscriptive and requisite injunctions, an order restraining parties to file a new suit, order for retention and inspection of exhibits, interlocutory measures to dodge abuse of intellectual property and sensitive documents, etc.

Before granting an emergency award, the emergency arbitrator must be satisfied with two main conditions:

(i) Periculum in mora i.e., an irremediable loss is anticipated if the emergency award is not granted,

(ii) Fumus boni iuris i.e. there is a rational hypothesis that the claim of the complainant will sustain on merits[7].

The following points need to be established for seeking an emergency award/interim relief, which inter-alia includes: "i) locus standi to request an emergency measure, (ii) prima facie establishment of the right for the measure, (iii) urgency or emergency, and (iv) the existence of immediate damage or irreparable loss as the requirements to grant emergency relief."[8] On granting of the emergency relief, the emergency arbitrator becomes functus officio.

HISTORICAL BACKGROUND

In India, the legislature had come a long way from the first direct act on the subject being the Arbitration and Conciliation Act, 1899 which was applicable only in the province of Calcutta to the Arbitration and Conciliation Act, 1940 which was applicable to the whole of the country. Finally, parliament passed the bill of Arbitration and Conciliation Act, 1996 to repeal the 1940 act as the problem of non-enforcement of foreign arbitral awards and one major consideration in such enforcement was to curtail delays in the arbitral process and make the process simpler. Several amendments thereafter were made to attain the same objective as the amendment of 2015 ensuring less judicial intervention in the process. The need for the process of emergency arbitration was well recognized by Indian Lawmakers in 2014 and the 246th Law Commission

[7] ACIA Rules 2016, sch 1

[8] Ali Yeilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005)

Report offered a statutory recognition of the same, though it was not reflected in the 2015 amendment to the act.

POSITION OF INDIAN JUDICIARY

The overruled cases of *Bhatia International v. Bulk Trading SA*[9] *and Venture Global Engineering v Satyam Computer Services Ltd*[10] had set a clear rule for interim measures in cases of foreign seated arbitration which mandated the presence of a specific clause to bar the power of Indian Courts to grant interim reliefs. The *Hon'ble Supreme Court in Bharat Aluminium Co v Kaiser Aluminium Technical Services*[11]*('BALCO')* dinted this position of Indian Judiciary by following the international standards which were in place, back then even in the English Law[12] and the Singapore practices[13]. This aforesaid approach of the Supreme Court into the new era had completely forsaken the Indian Courts to rule upon the matters of foreign seated arbitration disputes for arbitration agreements on and post 6th September 2012. This included the grant of interim reliefs under Section 9 of the Act of 1996, the appointment of default arbitrators pursuant to Section 11 of the Act, and setting aside the arbitral award under Section 34 of the Act.[14] BALCO excluded the application of part I of the act, to foreign seated arbitration, making it abundantly clear no civil suit shall be entertained unless seated in India.

While letting go of judicial interventions was opined to be a pro-arbitration stance, the lack of interim reliefs in such cases of foreign seated arbitration was an issue that needed addressing, hence the 2015 Amendment to the Act made sure the lacunae was properly recognized and acted upon. A much-sought closure was provided by the Delhi High Court with the case of Amazon Nv Investment v. Future Coupons Retail Limited[15], the decision has though not given Indian Courts power to grant interim reliefs yet has confirmed the enforcement of such reliefs

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[9] *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105
[10] *Venture Global Engineering v Satyam Computer Services Ltd* (2008) 4 SCC 190
[11] *Bharat Aluminium Co v Kaiser Aluminium Technical Services* (2009) 7 SCC 220
[12] *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210
13 *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629
[14] A Chungh, 'Bharat Aluminum Case: The Indian Supreme Court Ushers in a new era' (*Kluwer Arbitration Blog*, 2012) <http://arbitrationblog.kluwerarbitration.com/2012/09/26/the-bharat-aluminium-case-the-indian-supreme-court-ushers-in-a-new-era/> accessed 29 August 2021
[15] *Amazon Nv Investment v Future Coupons Retail Limited* Civil Appeal no 4492-4493 of 2021

by emergency arbitrators. A much-debated issue in this judgment was how can the emergency arbitral award be enforced in India, if it is not recognized by the statute, and to resolve it, the court held that within the wide ambit of section 9 of the Act, interim relief granted by the emergency arbitrator can be enforced. Further, though the Indian 1996 act does not include an emergency arbitrator under the ambit of an arbitral tribunal, it grants party autonomy to the parties in an agreement, and when such party opts for institutional arbitration, it binds itself to all the rules therein. Moreover, the court after conjoint reading of Sections 2(1)(d), 2(6), 2(8), and 19(2) of the Act, as well as the SIAC Rules, held an emergency arbitrator as an arbitrator under the act. The Hon'ble Apex Court while upholding the aforementioned judgment of the single judge bench, held under section 17(1) of the act, emergency awards passed by emergency arbitrators (under SIAC rules) are interim orders and the same can be enforced under section 17(2) of the act, The Court further held that no appeal would lie before any civil courts against an order made under section 17(2) of the act. No appeal can be sought under section 37 of the act, though such appeal can be made before Arbitral Tribunal after its constitution.

GLOBAL POSITION

The choice of competent, neutral, and available arbitrators will often condition the conduct and outcome of the arbitration proceeding and thus is an important step that needs utmost consideration from both the parties and hence becomes time-consuming. The need for prompt redressal of interim claims through the introduction of expedited procedures was felt across the globe and the pioneer International Center for Dispute Resolution (ICDR) introduced the process of emergency arbitration (Article 6 of International Dispute Resolution Procedures) in 2006 subsequently the International Institute for Conflict Prevention & Resolution (CPR)(Fast Track Rules For Administered Arbitration of International Disputes) and Stockholm Chamber of Commerce (SCC) (Expedited Arbitration Rules 2017) in 2009, The Singapore International Arbitration Center (SIAC) (Rules 5, 30 of SIAC Rules 6th Edition, 2016) in 2010 the International Chamber of Commerce (ICC) (Article 29) and Swiss Chambers Australian Institution (SCAI) (Articles 42,43) in 2012, Hong Kong International Arbitration Centre

(HKIAC) (Article 38) in 2013, The London Court of International Arbitration (LCIA) (Article 9) & World Intellectual Property Organization (WIPO) in 2014 included the process for Emergency Arbitration in their respective rules, this highlights the extensive perspicacity of a lacunae in the existing system, the gap which is created due to the urgent requirement of an injunction/interim order and the time required in constitution of an arbitral tribunal and further documentation, hearing and final award formation stage.

The vanguards to Eastern hegemony were Singapore and Hong Kong, by expressly recognizing the interim orders passed by emergency arbitrators. The Singapore International Arbitration Act has been revised to include Emergency Arbitrator in the definition of "arbitral tribunal." Uniformly, Hong Kong added Part 3A to its Arbitration Ordinance, allowing for wider recognition and enforcement. Emulating the example of the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), and the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), and the International Chamber of Commerce (ICC) have reformed their provisions to embrace this contemporary theory, which not only redeems the duration of the proceedings and expenses but also accelerates the course and devises the recensions in accordance with more practical enforceability.

The various rules on emergency arbitrators can be compared across several criteria which may have an impact on the effectiveness of the emergency arbitrator procedure provided for. The opt-out provision in the ICC's Emergency Arbitration Procedure[16] allows parties to opt-out of the emergency arbitration procedure if specified in the contract[17], whereas under the SIAC and HKIAC Rules, such procedure automatically applies, and parties cannot opt-out of it[18]. Before an application for emergency arbitration under the SIAC Rules, it is a must to file a Notice of Arbitration in accordance with Rule 1 Schedule 1, but under the ICC Rules[19], the emergency arbitration provision is available to the party before such filing, the same has to be filed within

[16] ICDR Rules 2021, art 37(1)
[17] ICC Rules 2021, art 29(6)(a)-(c)
[18] SIAC Rules, sch 1; HKIAC Rules, sch 4
[19] ICC Rules 2021, Appendix 5 art 1

10 days, thereafter. This model appears to be contemplated by the HKIAC under its Revised Rules which came into force in November 2013.

Ex-parte applications are not permitted under the SIAC and HKIAC Rules' emergency arbitration. As stated under the SIAC Rules, the party endeavoring emergency relief must communicate to the Registrar and all other parties involved, in writing the essence of the relief requested and the grounds for the necessity for such relief on an emergency basis. On the authority of HKIAC Rules, the Emergency Arbitrator is empowered with complete autonomy to guide the proceedings in a manner deemed suitable according to him/her, in the light of the exigency, and on giving due regards to the principles of natural justice. [20] Following the same principle, ICC and ICDR foreclosed the ex-parte Emergency Arbitration proceedings, to ensure an effective chance of objection is present with all the parties involved in the dispute.[21]

Contrary to the aforementioned, to shun the prospect of jeopardy, provisions have been made to file an ex-parte application seeking interim relief in the 2006 amendment to the UNCITRAL Model Law.[22] To promote the reformist reconciliation and amalgamation of principles of international trade, UNCITRAL was accustomed by the United Nations in 1996. The welcomed Model Law on International Commercial Arbitration was espoused by several countries as part of their domestic legislation in 1985. However, the 2006 amendments have not yet received widespread adoption. In particular, the 2006 amendments on ex-parte application (called Preliminary Orders) are controversial. While institutional rules vary somewhat, most Emergency Arbitrators provisions have the following general characteristics:

(i) the institution appoints an Emergency Arbitrator within one or two business days of receiving an application.
(ii) the Emergency Arbitrators have broad discretion to determine the conduct of the proceedings, and

[20] HKIAC Rules, sch 4 art 11
[21] ICC Rules 2021, Appendix 5 art 5; ICDR Rules 2021, art 16.1
[22] UNCITRAL Model Law on International Commercial Arbitration, art 17B

(iii) the Emergency Arbitrators' decision (which may take the form of an order or an award depending on the institution) is subject to modification or repeal by the arbitral tribunal upon the constitution.

NEED FOR EXPRESS RECOGNITION IN THE ACT

"Arbitral institutions have adjusted their rules to allow for interim relief after an arbitral tribunal is in place but have been slower to provide a way to obtain relief before an arbitral tribunal is in place. Relief of this kind is important to the continued growth and success of international commercial arbitration."[23] The argument holds true for several grounds, primarily timing is a fundamental consideration for seeking emergency relief. Parties to a discord strive to safeguard either capital or land which can suffer irreparable damage in instances of inaction to secure it.[24] Antithetical to the former arguments, the well-formulated, structured traditional mechanisms yet again proved competent while, the arbitral institutions require the constitution of arbitral tribunals prior to formulating any orders, and this could take a while. [25] The Courts are accustomed to grant reliefs, to prevent unrecoverable damage, if not already engaged in arbitral proceedings. It is thus pertinent to mention that Article 17 H of the UNCITRAL Model Law, allows for the enforcement of foreign seated interim orders and rules pari materia to the same have yet not been added to the Indian Arbitration and Conciliation act along with recognizing emergency arbitrators as arbitral tribunals and empowering such tribunals to pass orders against a third party, the need for filling the gap in such case is something Indian Lawmakers need to address as soon as possible, as the recourse of Emergency Arbitration might be a road taken more frequently after the Apex Court's decision in the matter of Amazon Nv. Investment v Future Coupons Pvt. Ltd.[26]

[23] Peter JW Sherwin and Douglas C Rennie, Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis (2009) 20 AM Rtv INT'i ARB 317, 319-20
[24] Margaret L Mosies, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012)
[25] Davies (n 3)
[26] *Amazon Nv Investment* (n 15)