Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

Examining the enforcement of Emergency Awards in Foreign seated International Commercial Arbitration

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Received 24 May 2022; *Accepted* 14 June 2022; *Published* 20 June 2022

Emergency Arbitration (EA) is an arbitration pursuant to an agreement between the parties, conducted by an arbitrator appointed by an arbitral institution on an urgent basis due to a lack of time or an urgency pertaining to the subject matter of the dispute, to specifically deal with an application for interim relief that cannot wait for the constitution of an arbitral tribunal to deal with the substantive dispute between the parties. An arbitral tribunal conducts local or international arbitration procedures per the parties' agreement. A court or arbitral panel may only issue interim reliefs that facilitate a final relief. The party seeking interim relief must establish to the arbitral tribunal that its claim against the counterparty has reasonable validity and that failure to obtain it will result in significant and irreparable harm. This article analyzes 'The interplay of interim reliefs under Sec.9 of the Act and Emergency Arbitration' for foreign-seated International Commercial Arbitrations ('ICA') and critiques the 'Theory of implied exclusion' used by courts, which defeats the purpose of interim reliefs, i.e., to secure assets.

Keywords: *emergency arbitration, commercial contract, foreign seat, interim relief, implied exclusion.*

INTRODUCTION

Arbitration has emerged as the preferred mode to resolve commercial disputes due to expeditious proceedings. Like in litigation, preserving the subject matter before the dispute is

finally decided, remains of paramount importance.[1] A court can grant interim measures under Sec.9 *inter alia* to preserve the subject matter of the dispute, compel parties to act in a manner to maintain the status quo as well as ensure that the final award can be implemented. To reduce the burden on the judiciary, obtaining relief from courts is being discouraged, however, when urgent reliefs are necessarily constituting an arbitral tribunal is long a process that can take months. To provide urgent relief, international arbitration institutions like Singapore International Arbitration Centre (‘**SIAC’**)[2], London Court of International Arbitration (**‘LCIA’**)[3] along with leading institutions in India like the Mumbai Centre for International Arbitration (‘**MCIA**’)[4] and the Delhi International Arbitration Center (‘**DAC**’)[5] provide for Emergency Arbitration (‘**EA**’).

SCOPE OF THIS RESEARCH REPORT

This report examines *‘The interplay of interim reliefs under Sec.9 of the Act and Emergency Arbitration’* for foreign-seated International Commercial Arbitrations (‘**ICA**’) and critiques the ‘*Theory of implied exclusion*’ being employed by courts which defeats the purpose of interim reliefs, i.e., to secure assets.

JURISPRUDENCE AND CONDUCT OF EA PROCEEDINGS

The jurisprudence of Emergency arbitration stands on the legal maxims *Fumus boni iuris* and *Periculum in mora*, i.e., where there exists a reasonable possibility that the claimant will succeed on merits and relief not granted can lead to irreparable injury respectively.

To achieve these ends, EAs are appointed to pass interim awards. Institutional arbitration rules typically contain an opt-out policy wherein unless parties expressly exclude EA provisions, in cases where urgent relief is necessary an EA can be appointed upon the insistence of one party.[6]

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[1] Gary B. Born, *International Commercial Arbitration* (2nd edn., Kluwer Law International, 2014) 2427
[2] Singapore International Arbitration Centre, 2010, r 26.2
[3] London Court of International Arbitration, 1998, art.9
[4] Mumbai Centre for International Arbitration, 2016, r 14
[5] Delhi International Arbitration Center, 2019, s 18A
[6] Singapore International Arbitration Centre, 2010, Sch. 1(3)

Generally, an EA is appointed within 1-2 business days.[7] After parties submit their statements and are allowed to be heard, an EA award is usually pronounced as soon as possible but not beyond 2 weeks[8] and can include mandatory, anti-suit, and preservatory injunctions, orders for freezing of assets, an inspection of evidence, and securing confidential information.[9][10]An EA award remains in force until the arbitral tribunal is constituted after which the tribunal can entertain an application to reconsider the award and must subsequently then vacate its office[11], *functus officio*.[12][13]

POSITION OF LAW IN DOMESTIC SEATED ARBITRATIONS

The 246th Law Commission Report in 2014[14] and the B.N. Srikrishna Committee Report in 2017proposed an amendment to ensure that the appointment of emergency arbitrators under rules prescribed by Arbitral institutions and emergency awards are recognized.

The proposed Sec. 2(1)(d) sought to add the following phrase to the definition of an Arbitral Tribunal

> **[**'*in the case of an arbitration conducted under the rules of an institution providing for the appointment of an emergency arbitrator includes such emergency arbitrators.*'**]**

It is interesting to note that under the UNCITRAL model law, EAs are not included within the definition of Arbitral Tribunals.[15]

However, the 2015 and the 2019 amendments did not incorporate these recommendations. Finally, in *Amazon.com NV Investment Holdings LLC v Future Retail Limited & Ors* (‘**Amazon**’)[16], the court held that EA awards in India-seated arbitration would be valid and enforceable.

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[7] Mumbai Centre for International Arbitration, 2016, r 14.2
[8] Singapore International Arbitration Centre, 2010, Sch. 1(9)
[9] International Chamber of Commerce, 2010, art.2(1)
[10] Mumbai Centre for International Arbitration, 2016, r 14.6
[11] Singapore International Arbitration Centre, 2016, Sch. 1(10)
[12] International Chamber of Commerce, 2010, art.6(4)
[13] Mumbai Centre for International Arbitration, 2016, r 14.9
[14] Law Commission of India, *Amendments to the Arbitration and Conciliation Act* (Law Com No 246 2014) <https://lawcommissionofindia.nic.in/reports/report246.pdf> accessed 24 May 2022
[15] UNCITRAL Model Law on International Commercial Arbitration, 1966, art.2(b)
[16] *Amazon.com NV Investment Holdings LLC v Future Retail Limited & Ors.* (2021) 4 SCC 557

ENFORCEMENT OF EA AWARDS IN FOREIGN-SEATED INTERNATIONAL COMMERCIAL ARBITRATION

While generally an award is enforced by the courts of the seat of the arbitration, parties are left with no remedy but to approach local courts when assets are located in different jurisdictions. Accordingly, the enforcement of foreign seated EA awards in International Commercial Arbitration ('**ICA**') is more challenging as there is no mechanism for their enforcement as Sec.17 is not applicable. If a party acts in violation of an arbitral award, an application for contempt proceedings can be preferred under Sec.27(5). However, this is not a desirable alternative as such a remedy can be invoked once the asset is disposed of and requires a reference by the arbitral tribunal to a court.[17] Post the 2015 amendment, the best remedy to enforce such award is to approach courts under Sec.9 of the Act.

APPLICABILITY OF SECTION 9 TO FOREIGN-SEATED ARBITRATIONS

The law relating to the enforcement of interim measures in foreign seated arbitration under Sec.9 has evolved considerably. In the landmark judgement of *Bhatia International v Bulk Trading S.A*[18]('**Bhatia**') the Apex court held that Part I of the Act shall apply even to foreign seated ICA unless parties expressly or impliedly exclude its applicability. While the motive of this judgement, to ensure that foreign awards are enforceable, was noble it resulted in the genesis of the contentious '*theory of implied exclusion*'. This theory stipulated that the applicability of Part I and specifically Sec.9 would be determined by considering the juridical seat of arbitration, institutional rules, governing law of the arbitration agreement, etc.

This decision was overruled in *Bharat Aluminium Co. v Kaiser Aluminium Technical Service*[19]('**BALCO**') where the court adopted the doctrine of territoriality and made part I applicable only to India-seated arbitrations.

Sec.2(2) of the act was amended and a proviso was added that made Sec.9, Sec.27, and Sec.37 applicable to ICAs seated in territories where awards are recognized and enforceable under

[17] *Alka Chandaweri v Shamshul Ishrar Khan* (2017) 16 SCC 119

[18] *Bhatia International v Bulk Trading S.A.,* (2002) 4 SCC 105

[19] *Bharat Aluminium Co. v Kaiser Aluminium Technical Service* (2012) 9 SCC 552

the New York and Geneva conventions subject *to an agreement to the contrary.* However, whether *an agreement to the contrary* needs to be expressed or can be implied remains unclear and is detrimentally influenced by the *theory of implied exclusion* propounded in Bhatia.

In *Avitel Post Studioz Ltd. v HSBC PI Holdings (Mauritius) Ltd..*[20](**'HSBC'**) which was a Singapore seated ICA, an EA order was passed the freezing the respondent's assets. The petitioner applied Sec.9 seeking the same relief. Bombay High Court noted that while this order could not be directly enforced, the court reasoned that an independent action of filing a Sec.9 application would be permitted per SIAC rules which permitted approaching a court to enforce interim relief. This position was affirmed in the similar case of *Raffles Design International India P. Ltd. v Educomp Professional Education Ltd.*[21] (**'Raffels'**). Relying on the 2015 amendment to Sec.2(2), the court noted that it will independently apply its mind and grant interim reliefs were warranted and not solely rely on the EA award.

However, courts have adopted the theory propounded in *Bhatia,* to the detriment of parties thereby defeating the purpose of the 2015 amendment. In a Japan Seated arbitration in *Ashwin Minda & Anr v U-Shin Ltd*[22] (**'Ashwin'**), after failing to obtain interim relief through an EA under Japan Commercial Arbitration Association rules (**'JCAA'**) the petitioner approached the Delhi High Court under Sec.9 to seek the same relief. The court held that unlike SIAC rules in *HSBC and Raffels,* JCCA did not permit seeking interim reliefs in courts and contained an elaborate scheme for enforcing interim orders. Thus, the court reverted to the regressive *theory of Implied Exclusion* and held that Sec.9 application would not be maintainable. The court also held that parties cannot have another bite at the cherry per under Sec.9 after being denied interim reliefs by an EA.

Similarly in *Archer Power Systems Private Limited v Kohli Ventures Limited and Ors*(**'Archer'**) the arbitration was seated in London and to be governed by ICC rules. The court refused to grant interim relief under Sec.9 based on the *implied exclusion* of the proviso of Sec.2(2) another clause that made part II applicable- The Court made an interesting observation that *'[…] if a*

[20] *Avitel Post Studioz Ltd. v HSBC PI Holdings (Mauritius) Ltd.,* (2015) Arbitration Petition Nos. 690-757/2015
[21] *Raffles Design International India Pvt. Ltd. v Edu Comp Professional Education Ltd.,* O.M.P. (I) (COMM.) 23/2015 & CCP (O) 59/2016
[22] *Ashwani Minda v U Shin Ltd and Others* (2020) SCC Online Del 1648

section 9 application is filed in the instant case, post award, the dynamics and dimensions of applicable law may change'.

This meant that if the final foreign award was sought to be executed in India, any deliberation concerning the grant of an interim measure could have concluded differently. This aggravates complexity and introduces an unnecessary distinction with respect to pre-award and post-award interim

Despite this, the position of law remains unclear as High Courts have adopted differing positions. In *Aircon Beibars FZE v Heligo Charters Pvt. Ltd*[23]('**Heligio**') the Bombay High Court noted that simply choosing a foreign seat of arbitration cannot exclude the applicability of Part I of the Act and the operation of Sec.9 cannot be excluded in the absence of a specific agreement to the contrary. The court held that since the key asset, a helicopter, was within the territorial jurisdiction of the court, interim relief to secure the asset could be granted. Thus, the court adopted a purposive view to give effect to the intention of the 2015 amendment i.e. to prevent the dissipation of the asset.

Similarly, in *Actis Consumer Grooming Products Limited v Tigaksha Metallics Private Limited & Ors*[24] ('**Actis**') where the arbitration was conducted in Geneva under the rules of the LCIA, the Himachal Pradesh High Court granted interim relief as the asset was within its jurisdiction without sifting through the weeds of *implied exclusion* of Part I.

In *Goodwill Non–Woven (P) Ltd. v Xcoal Energy & Resources LLC*[25] the Delhi High Court took this position a step further. The respondent raised an asset-based jurisdiction argument stating that the subject matter was not within India. The Court held that even if assets were not located in India, interim measures could be granted to secure a bank guarantee- however on the basis of the facts as a prima facie case didn't exist-such relief wasn't granted - In *Plus Holdings Ltd. v Xeitgeist Entertainment Group Ltd. & Ors*[26] when the petitioner's rights had been recognized in the Emergency Award, the Bombay High Court granted an ad-interim

[23] *Aircon Beibars FZE v Heligo Charters Pvt. Ltd.,* (2018) SCC OnLine Bom 1388
[24] *Actis Consumer Grooming Products Limited v Tigaksha Metallics Private Limited & Ors.* (2020) SCC OnLine HP 2234
[25] *Goodwill Non-Woven (P) Limited v Xcoal Energy & Resources LLC* (2020) *SCC OnLine Del 631*
[26] *Plus Holdings Ltd. v Xeitgeist Entertainment Group Ltd. & Ors* (2019) SCC OnLine Bom 13069 (Bombay HC)

injunction under Sec.9 and noted that a favourable EA award holds considerable persuasive value.

FACTORS TO CONSIDER WHILE ENFORCING FOREIGN EA/INTERIM AWARDS

Based on these judgements, the following principles emerge-

- Interim/EA awards in foreign seated ICAs are not directly enforceable under the current legislative framework
- A similar interim relief can be prayed for under Sec.9 which will be judged independently on merits
- Parties should remain cognizant of whether institutional rules permit or at least do not expressly exclude an application to the court to obtain interim relief
- While a favorable award holds persuasive value, an unfavorable award could result in the court refusing to consider the Sec.9 application.
- Courts are adopting a purposive view and considering whether the assets are located in their territorial jurisdiction to prevent their dissipation, however, the regressive theory of implied exclusion is still being applied
- In India seated arbitrations Sec.9 and EAs are near substitutes, in foreign seated ICAs, EAs are dependent on Sec.9 for enforceability.

SUGGESTIONS AND THE PATH FORWARD

Firstly, to cement the validity of EAs in institutional arbitrations and encourage parties to prefer EA over Sec.9 applications, Sec. 2(1)(c) and Sec. 2(1)(d) should be amended. Additionally, the legislature should amend the Act to include provision 17H of the UNCITRAL Model Law which provides for the recognition and enforcement of interim awards in Foreign seated ICAs.

It is opined that the *theory of implied exclusion* which analyses institutional rules is antithetical to the object of the 2015 Amendment. Though *HSBC* and *Raffels* the court relied on the SIAC rules which permitted the application of Part I, in *Ashwin* and *Archer* parties were left

remediless due to the perplexing approach of ascertaining the intention of parties based on institutional rules. Courts must move beyond the *theory of implied exclusion* and adopt a proactive approach to secure assets within their territorial jurisdiction. The position ideally should be a presumption in favour of applicability of Part I unless *expressly* excluded to not leave parties remediless by imputing intention of exclusion, often where there is none.

Inspiration can be taken from mature pro-arbitration jurisdictions like the United Kingdom and Singapore. A survey of recent English cases reveals that courts grant interim relief when an asset within their territorial jurisdiction faces the risk of dissipation.[27] Alternatively in other cases courts attempt to establish a cogent link between the parties, the contract, or the arbitration agreement with the English jurisdiction.[28] While Singapore permits its courts to directly enforce interim awards in foreign seated arbitrations. [29] Thus, in conclusion, while the *Amazon* judgement undoubtedly clears the way for Domestic Emergency Arbitration, if India aspires to cement its position as a *Pro-Arbitration* jurisdiction, the enforcement of foreign-seated ICA EA awards leaves a lot to be desired.

[27] *Cetelem SA v Roust Holdings Limited* [2005] EWHC 300 (QB)
[28] *Mobil Cerro Negro v Petroleos de Venezuela* [2008] 1 Lloyd's Rep 684 [119]
[29] Rachael Kent & Amanda Hollis, 'Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration' (Diora Ziyaeva ed) *Interim and Emergency Relief in International Arbitration* (Juris Publishing 2015)