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EMERGENCY ARBITRATION IN INDIA: A BELLWETHER FOR THE GRANT OF INTERIM RELIEFS

Aakanksha Luhach & Varad S. Kolhe[*]

Abstract

Although emergency arbitration has emerged as a turning tide for the grant of urgent interim reliefs globally, it has still not been able to develop a strong ground in many jurisdictions, including India. Many arbitral institutions have started providing for rules governing emergency arbitrations wherein the parties have an opportunity to seek interim relief prior to the constitution of the arbitral tribunal. This is done keeping in mind the needs of parties that require urgent interim relief, the issuance of which can be an important factor in the outcome of the arbitral proceedings. However, it is imperative to note that there still exists a large number of arbitral institutions which do not have any provisions for emergency arbitration, therefore compelling parties to seek such measures from the national courts.

This article strives to demonstrate how emergency arbitration is beneficial for parties by making an unbiased comparison of the grant of urgent relief by an emergency arbitrator and by national courts on various practical grounds. The research article dwells deep into the practical aspect of emergency arbitration by providing a comparative analysis of the emergency arbitration rules of various Indian and International arbitration institutions. An attempt is made to explain and examine the various legal obstacles, such as enforceability and recognition of the relief granted, surrounding emergency arbitration in India and thereafter provide solutions for the same.

[*] The authors are students at ILS Law College, Pune.

Introduction: Grant of Interim Measures and A Preface to Emergency Arbitration

In contemporary legal systems, arbitration as well as litigation is almost always underlined by the ability to seek safeguards to maintain status quo and to refrain from aggravating the dispute. Since it is utopian to expect a court or tribunal to render a judgment or award immediately on being seized of a dispute, in this vein, interim measures address an epistemological reality[1] considering that the process of decision making by human agents is time-consuming. Properly defined, interim measures are orders, awards or decisions rendered for protecting one or both of the parties from damage before the commencement of or during the conduct of arbitral proceedings. Interim measures are "*intended to preserve a factual or legal situation so as to safeguard rights, the recognition of which is sought from the tribunal having jurisdiction as to the substance of the case.*"[2] The standards to be applied in deciding whether such measures are to be granted and the scope of those measures have

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1 Donald Francis Donovan, *The Scope and Enforceability of Provisional Measures in International Commercial Arbitration A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For Moving Forward*, in Albert Jan van den Berg (ed), 11 INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, ICCA CONGRESS SERIES, 82, (Kluwer Law International 2008)

2 *Restatement (Third) U.S. Law of International Commercial Arbitration* § 1-1 comment q (Tentative Draft No. 2 2012) ("Ordinarily, interim measures are issued to preserve the status quo, to help secure satisfaction of an eventual award, or otherwise to promote the efficacy or fairness of the arbitral process."); *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line*, Case No. C-391/95, [1998] E.C.R. I-7091, 7133 (E.C.J.). *See also Reichert & Klockner v. Dresner Bank*, Case No. C-261/90, [1992] E.C.R. I-20149, ¶34 (E.C.J.); *Judgment of 13 April 2010*, DFT 4A 582/2009, ¶2.3.2 (Swiss Federal Tribunal) ("Provisional or interlocutory measures are measures that a party may request to protect its rights on a provisional basis throughout the length of the proceeding on the merits and, in some cases, even before such proceeding begins."); Collins, *Provisional and Protective Measures in International Litigation*, 234 Recueil des Cours 9, 19-24 (1992), *see* also *Opinion of Advocate General Tesauro, The Queen v. Secretary of State for Transp., ex parte Factortame Ltd*, Case No. C-213/89, [1990] E.C.R. I-02433, ¶18 (E.C.J.)

either been codified in different jurisdictions or have evolved in the jurisprudence of the relevant court or tribunal.

In the Indian legal framework, section 9 and section 17 of the Arbitration and Conciliation Act, 1996 ("the Act") confer the powers upon national courts and arbitral tribunals respectively to grant interim reliefs to one or both the parties to the dispute.[3] On a plain reading of the relevant provisions, it becomes abundantly clear that arbitral tribunals can invariably grant interim reliefs to parties only during the conduct of the arbitral proceedings. Thus, in a scenario where the party requires any interim relief before the constitution of the arbitral tribunal, it is compelled to approach the national court having jurisdiction over the subject matter of the dispute.

It is here that the concept of emergency arbitration gains significant relevance. Historically, a party seeking urgent relief at the outset of the arbitration, prior to the constitution of the arbitral tribunal, only had recourse to the national courts. However, with numerous arbitral institutions relatively recently introducing emergency arbitration provisions in their rules, parties seeking to obtain interim measures may instead choose, or in certain jurisdictions may even be compelled, to turn to emergency arbitrators.[4]An emergency arbitrator is like a doctor who must operate in the emergency room. She must have the ability to quickly organize the procedure under tight time constraints, ensure fairness and efficiency, understand the issues,

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[3] § 9 and § 17 of the Indian Arbitration and Conciliation Act, 1996 are broadly derived from and based on Articles 9 and 17 of the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration, originally adopted by United Nations Commission on International Trade Law (UNCITRAL) in 1985.

[4] Philippe Cavalieros and Janet Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, in Maxi Scherer (ed), 35(3) JOURNAL OF INTERNATIONAL ARBITRATION 276 (2018).

and wisely make snap decisions that may have significant consequences.[5]

Arbitration, by nature, is founded in consent. It remains, as it always has been, a mechanism for dispute resolution agreed on between the parties, without recourse to courts of law.[6]Thus, at the outset, the authors seek to discuss certain practical factors which the parties need to analyse before exercising a choice of forum for grant of interim measures. (**I.**) In the second part of this note, the authors explore the readiness of the Indian legal framework with respect to emergency arbitration, providing a comparative analysis of the provisions in institutional rules for emergency arbitration. (**II.**) After a scrutiny of enforceability of emergency arbitrators' decisions in India, the authors conclude with suggestions and the way forward for emergency arbitration in India. (**III.**)

I. Concurrent Jurisdiction to Grant Emergency Reliefs: Emergency Arbitrators vs. Courts

For the purposes of granting interim relief prior to the constitution of the arbitral tribunal, there is an overlap of jurisdiction between the national courts of the concerned jurisdiction and emergency arbitrators. A party seeking urgent relief can either approach the court or seek the appointment of an emergency arbitrator. This section of the article evaluates the extent to which emergency arbitration can prove to be a substitute to obtaining urgent relief from national courts, by comparing both the options on various relevant factors.

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[5] Patricia Shaughnessy, *The Emergency Arbitrator*, in Patricia Shaughnessy and Sherlin Tung (eds), THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER, 339 Kluwer Law International 2017).

[6] ALAN REDFERN & MARTIN J. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (4th ed., 2004)

A. CONFIDENTIALITY

Maintaining confidentiality to protect the commercial secrets and relationships is at times very crucial for the parties involved in the dispute. According to A. Yesilirmak, in the context of emergency arbitration, confidentiality may be of greater importance in order to avoid pre-judgment on the merits of the case.[7] While traditional litigation and its docket is public, arbitrations are usually private and confidential and the documents, filings and transcripts associated with it are very rarely made public. For this reason, a party may prefer to apply to an emergency arbitrator for interim relief rather than the national court where the proceedings are made public.[8]

B. ORDERS AGAINST THIRD PARTY

In certain circumstances, interim relief is sought against a third party which is not a signatory to arbitration agreement, for example, when it is necessary to protect the subject-matter of the dispute. Especially in shareholder litigation, it sometimes becomes inevitable to enforce interim injunctions against a non-signatory to prevent any harmful corporate actions from going forward. .[9] However, an arbitral tribunal's jurisdiction is limited in this context as it cannot pass any orders binding third parties.

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7 A. Yesilirmak, *Emergency Arbitral Provisional Measures*, in PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION, 12 International Arbitration Law Library ¶4–80 (Kluwer Law International 2005),

8 Philippe Cavalieros; Janet Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, in Maxi Scherer (ed), 35(3) JOURNAL OF INTERNATIONAL ARBITRATION, 275 (Kluwer Law International 2018).

9 Guy Loesch and Pol Thielen, *Interlocutory Injunctions in Luxembourg Shareholder Litigation: Are Emergency Arbitration Proceedings Better Suited than Proceedings before the Ordinary Courts?*, KLUWER ARBITRATION BLOG (November 19, 2013) available at: http://arbitrationblog.kluwerarbitration.com/2013/11/19/interlocutory-injunctions-in-luxembourg-shareholder-litigation-are-emergency-arbitration-proceedings-better-suited-than-proceedings-before-the-ordinary-courts/

C. EX-PARTE ORDERS

Sometimes, an advance notice regarding the proceeding might lead the respondent party to get rid of the assets from the concerned jurisdiction. Therefore, the availability of the option to obtain *ex-parte* interim orders can be of immense significance in such circumstances where an element of surprise is necessary. Indian courts have the power to grant *ex-parte* orders in some exceptional circumstances like few other jurisdictions.[10]

Whereas, on the other hand, arbitral tribunal cannot exercise this option as it is required to treat both the parties equally, and give them equal opportunity to present their case. Hence, emergency arbitrator is not in a position to pass an order on *ex-parte* basis.

D. SPEED

Since urgency is the edifice of the parties' run to attainment of interim reliefs, speed is a prominent concern which needs to be carefully addressed by the parties. While the ICC reported that its emergency arbitrations last on an average for sixteen days, the ICDR reported fourteen days,[11] and the SCC reported an average of five to eight days.[12] Hence, on an average, grant of interim reliefs by emergency arbitrators may take from a week to a fortnight.

Furthermore, the parties should also consider the time taken for enforcing the interim award in case of non-compliance by the other party.

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[10] Rishab Gupta, Aonkan Ghosh, *Choice Between Interim Relief from Indian Courts and Emergency Arbitrator*, KLUWER ARBITRATION BLOG (May 10, 2017), available at http://arbitrationblog.kluwerarbitration.com/2017/05/10/choice-between-interim-relief-from-indian-courts-and-emergency-arbitrator/.

[11] J. Brian Johns, *ICDR Emergency Arbitrations*, THE ICDR INTERNATIONAL ARBITRATION REPORTER 6 (Fall 2016).

[12] A. H. Ipp, *SCC Practice Note: Emergency Decisions Rendered 2015–2016*, 4 (June 2017).

E. COSTS

Sr. No.	Name of the Arbitral Institution	Fees and Expenses of the Emergency Arbitrator	Filing Fees/Administrative Expenses	Total Fees and Expenses of the Emergency Arbitrator Application
1.	Singapore International Arbitration Centre[13]	SGD 25,000	SGD 5,000	SGD 30,000
2.	Hong Kong International Arbitration Centre[14]	HKD 2,05,000	HKD 45,000	HKD 2,50,000
3.	Stockholm Chamber of Commerce[15]	EUR 16,000	EUR 4,000	EUR 20,000
4.	London Court of International Arbitration[16]	GBP 20,000	GBP 8,000	GBP 28,000
5.	International Chamber of Commerce[17]	USD 30,000	USD 10,000	USD 40,000

Since the abovementioned fees are not derived from the sum involved in dispute and are further required to be paid upfront in full, national courts steer the sail ahead here too.

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13 SIAC Arbitration Rules, in force as of 1 Aug. 2016, Sch. 1, ¶2, SIAC Schedule of Fees, in force as of 1 Aug. 2016.

14 HKIAC Administered Arbitration Rules, in force as of 1 Nov. 2013, Sch. 6 and HKIAC 2015 Schedule of Fees.

15 Arbitration Rules of the Arbitration Institute of the SCC, in force as of 1 Jan. 2017, App. II, Arts 10(1), (2).

16 LCIA Arbitration Rules, in force as of 1 Oct. 2014, Art. 9.5 and Schedule of LCIA Arbitration Costs, in force as of 1 Oct. 2014, s. 7.

17 ICC Arbitration Rules, in force as of 1 Mar. 2017, App. V, Art. 7(1).

II. Emergency Arbitration: Analysing and Comparing the Indian Scenario

A. EMERGENCY ARBITRATION IN INDIA: WHERE DO WE STAND?

The Indian Arbitration and Conciliation Act, 1996 does not contain any provisions in respect of an emergency arbitrator or an emergency orders or awards. The 246th Law Commission Report in 2014, on amendments to the Arbitration and Conciliation Act, 1996, made an attempt to legislatively recognize emergency arbitration in India. The report proposed the following amendment to Section 2(1)(d) of the Act. [18]

> *"Arbitral Tribunal" means a sole arbitrator or a panel or arbitrators and, in the case of an arbitration conducted under the rules of this institution providing for appointment of an Emergency Arbitrator, includes such Emergency Arbitrator.*

While it was expected that the Arbitration and Conciliation (Amendment) Act, 2015 would embrace this proposal and would be among the few progressive international jurisdictions to incorporate such provisions, it did not do so. Another opportunity arose by way of the proposed amendments in 2018 in the Arbitration and Conciliation Amendment Bill, 2018,[19] proliferated on the basis of the recommendations of the high-level committee[20] to review institutionalization of arbitration mechanism in India and revamp the traditional arbitration culture.

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[18] 246th Report of the Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996, 37 (2014), available at: http://lawcommissionofindia.nic.in/reports/Report246.pdf (Sep 03, 2018, 10:05 AM)

[19] The Arbitration and Conciliation Amendment Bill, 2018, available at: https://www.prsindia.org/billtrack/arbitration-and-conciliation-amendment-bill-2018 (Sep 12, 2018, 08:05 AM)

[20] Report of the High Level Committee to the Institutionalization of Arbitral Mechanism in India, (30th July, 2017), available at: http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf (Sep 09, 2018, 22:05 PM)

However, that amendment also makes no provision for emergency arbitrators or emergency orders or awards.

B. AN OVERVIEW OF EMERGENCY ARBITRATOR PROVISIONS IN INSTITUTIONAL RULES

While emergency arbitrator provisions vary slightly from one arbitral institution to another, they are simultaneously based on the edifice that emergency arbitrators are appointed prior to the constitution of the arbitral tribunal and are only competent to decide on the grant of the urgent relief. At this stage, they have no authority or jurisdiction to decide on any substantive issues pertaining to the dispute. Once the arbitral tribunal is constituted, the emergency arbitrator is *functus officio*, and the decision issued by the emergency arbitrator may thereafter be reconsidered, modified or vacated by the arbitral tribunal.

The first institution to introduce procedures for emergency arbitration was the International Centre for Dispute Resolution (ICDR), the international arm of the American Arbitral Association (AAA), in 2006.The SCC introduced such procedures in its revised rules launched on January 1, 2010. The first Asian arbitral institution to introduce such procedures was the Singapore International Arbitration Centre (SIAC) on 1 July 2010. Thereafter, such procedures were introduced in the rules of several institutions such as the ICC in 2012, HKIAC in 2013 and, LCIA in 2014. Emergency arbitration procedures are now ubiquitous as part of the regulatory framework of arbitration institutes from Stockholm to Singapore, London to Kigali and Zurich to Beijing.

In India, arbitral institutions, such as the Mumbai Centre for International Arbitration (MCIA), Delhi International Arbitration

Centre (DIAC), also provide mechanisms for the appointment of an emergency arbitrator in their rules.[21]

The table below produces a comparative analysis of emergency arbitration provisions of several arbitral institutions including Mumbai Centre for International Arbitration and Delhi International Arbitration Centre:

Institution	**Year Introduced**	**Temporal Application**	**Timing of Application**	**Time required to appoint an EA**	**Time Frame to Grant Measures**	**Form of Measures**	**Access to Courts for the Grant of Interim Measures**	**Application Statistics**
ICDR	2006	Arbitration Agreements entered on or after 1 May 2006	With or after submission of notice of arbitration	Within 1 day of receipt	-	Order or Interim Award	At any time	70 (as of fall 2016)
SCC	2010	Any arbitration agreement referring to SCC Rules	Any time before referral to the tribunal (but commence arbitration within 30 days of decision)	Within 24 hours of receipt	No later than 5 days from referral	Order or Award	At any time	27 (As of June 2017)

[21] For a detailed analysis of the rules, refer to the table in (B.), in this section of the note.

SIAC	2010	Arbitrations commenced on after 1 July 2010	With or after submission of notice of arbitration	With in 1 day of receipt	Within 14 days of appointment of Emergency Arbitrator	Order or Award	At any time prior to the constitution of the arbitral tribunal or in exceptional circumstances thereafter	72 (As of December 2017)
ICC	2012	Arbitration agreements entered into on after January 2012	Anytime before constitution of Tribunal	With in 2 days of receipt	No later than 5 days from referral to Emergency Arbitrator	Order	At any time prior to making the EA application and in appropriate circumstance even thereafter	61 (as of August 2017)
HKIAC	2013	Arbitration agreements concluded on or after 1 November 2013	With or after submission of notice of arbitration	With in 2 days of receipt	Within 15 days from transfer of file to Emergency Arbitrator	Decision, Order or Award	At any time	8 (as of 2016)

LCIA	2014	Arbitration Agreements entered into after 1 October 2014	With or after submission of notice of RFA or response thereto	With in 3 days of receipt	No later than 15 days from appointment of Emergency Arbitrator	Order or Award	At any time before the formation of the arbitral tribunal	1 (as of April 2017)
MCIA [22]	2016	Any arbitration agreement referring to MCIA Rules	Anytime prior to constitution of Tribunal	With in 1 business day of receipt	No later than 14 days after the appointment of Emergency Arbitrator	Order or Award	At any time	-
DIAC [23]	2018	Any arbitration agreement referring to DIAC Rules	Anytime prior to constitution of Tribunal	With in 2 business days of receipt	No later than 7 days after the appointment of Emergency Arbitrator	Order or Award	At any time	-

[22] *See* Mumbai Centre for International Arbitration Rules, 2016, available at: http://mcia.org.in/mcia-rules/english-pdf/#mcia_rule14 (Sep 02, 2018, 11:08 AM)

[23] *See* Delhi International Arbitration Centre (Arbitral Proceedings) Rules, 2018, available at: http://www.dacdelhi.org/topics.aspx?mid=74 (Sep 02, 2018, 11:37 AM)

C. FREE CHOICE APPROACH VS. COURT-SUBSIDIARITY APPROACH[24]

This section of the article deals with the crucial question of allocation of authority for issuance of interim measures in arbitration. The authors seek to scrutinize how such allocation of authority streamlines itself when flowing back and forth between national courts and emergency arbitrators. While the conception of emergency arbitration is still in its nascent stage in India, a few questions deserve to be pondered over before the stage is finally set for perpetuation of emergency arbitration proceedings in the country:

a. Whether courts, tribunals, or both should have the power to order interim measures? Included within this question are two more questions: Whether the power of courts or tribunals to order interim measures should be subject to the agreement of the parties i.e. whether the parties should be permitted to ***opt out*** or ***opt in*** to some default arrangement in which courts and/or arbitral tribunals have the power to order such measures?

b. What is the scope of authority conferred on arbitral tribunals and national courts to grant interim measures? Whether courts and arbitral tribunals should have the power to order interim measures *suo motu*, and whether the issuance of interim measures by courts should be

[24] The terminologies of the approaches have been derived from Jan K. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2.2 ELECTRONIC J. COMP. L. (1998), available at <http://www.ejcl.org/22/art22-2.html>; which were further also employed by Donald Francis Donovan, *The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal*, in Albert Jan van den Berg (ed), 203 12 NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND, ICCA CONGRESS SERIES, 203-241 (Kluwer Law International 2005)

preceded by a request from the arbitral tribunal seeking involvement of the court?

c. How national courts and emergency arbitrators exercise their authority in relation to one another?

The answer to these questions lies in the regime of arbitration a particular country adopts. It is interesting to note that jurisdictions such as United States, Brazil, Argentina and Chile continue to reflect unsettled approaches to the above questions, swaying with the wave of decisions of courts. Thus, they neither seem to embrace the free choice model nor the court-subsidiarity model but appear to be flexible according to the circumstances of the dispute.

In the free choice approach, courts and tribunals may simultaneously grant interim reliefs. However, neither the courts nor tribunals take precedence over each other in considering such requests for interim relief. Germany has adopted the free choice approach based on UNICTRAL Model Law, as adopted in 1985 and further amended in 2006, where both courts and arbitral tribunals have been empowered to order interim reliefs. However, there is no clear priority between these two forums as the parties have a free choice to approach any forum whatsoever.

On the other hand, jurisdictions such as England, Hong Kong, Singapore and Zimbabwe follow the court-subsidiarity approach where although powers to grant interim measures vest in both courts and tribunals, the courts have been assigned a subsidiary role thus setting up a hierarchy between courts and tribunals. It follows that parties to an arbitration should first apply for interim measures to the arbitral tribunal, and only where there is a need for measures exceeding the powers of the tribunal, or the tribunal is unwilling or unable to act, to the Court.

In India, we see a peculiar situation where both of the above mentioned approaches come to the fore, varying according to the

stage of the arbitral proceeding. For instance, post the 2015 amendment to the Act, during the operation of the mandate of the arbitral tribunal, India adopts the court-subsidiarity approach, wherein the parties are mandated to apply to the arbitral tribunal for seeking interim reliefs and only in cases where the circumstances render this remedy to be inefficacious, the parties may file an application before the courts under Section 9 of the Act. In all other scenarios, India follows the free choice approach while granting interim measures.

Limiting the powers of the court to grant interim measures and making arbitral tribunal the first port of call seems to be a better approach in order to minimize applications filed before the court. Moreover, since the range of measures ordered by courts and arbitral tribunals in India vary, ramifications of conflict between the both are slim.

Having seen how the allocation of authority to issue interim measures may proliferate vividly in different jurisdictions across the globe, it now becomes important to examine the enforceability of decisions, orders or awards by emergency arbitrators as against the enforceability of interim measures granted by national courts.

D. CONUNDRUM OF ENFORCEABILITY OF EMERGENCY ARBITRATOR DECISIONS/ ORDERS/AWARD

Although the emergency arbitrators have the authority to grant interim reliefs that are contractually binding upon the parties but most of the times, they lack the power to bring about the compliance of the decision. It is of no surprise that enforceability of awards passed by emergency arbitrators continue to remain a reason of concern for the parties. According to the 2015 International Arbitration Survey conducted by Queen Mary University, 46% of surveyed respondents indicated that they would rather seek emergency relief from domestic courts than

from emergency arbitrators, with 79% of respondents citing enforceability concerns as their main reason for preferring domestic courts. [25]

Enforceability of interim reliefs passed by emergency arbitrators, depends majorly on the national laws of the jurisdiction where enforcement is sought. As mentioned above, emergency arbitration has not been given recognition in India and the current situation is such that interim reliefs granted by an emergency arbitrator in arbitrations, seated within or outside India, conducted under institutional rules, are not enforceable under the Act.[26]

In addition, the parties that have obtained such urgent reliefs in a foreign-seated arbitration cannot enforce such orders or awards in India. This is because the Act does not contain provisions for the enforcement of interim relief granted by a foreign-seated arbitral tribunal. In this situation, the parties are compelled to take recourse to the Indian courts by filing an application under section 9 of the Act (by the virtue of it being applicable to foreign seated arbitrations), asking for similar interim relief as granted by the foreign seated arbitral tribunal or emergency arbitrator.

In the case of *Avitel*,[27] the Bombay High Court in a petition under Section 9 of the Act ordered the same relief based on the same cause of action that was brought before the emergency arbitrator. Even while allowing such relief under Section 9 of the Act, the Court clarified *"recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean*

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[25] Queen Mary University of London, *International Arbitration Survey: Improvements and Innovations in International Arbitration* 27-28 (2015).

[26] Tejas Karia, Ila Kapoor & Ananya Aggarwal, *Post Amendments: What Plagues Arbitration in India?*5 INTERNATIONAL JOURNAL OF ARBITRATION LAW, 230-241 (2016).

[27] Avitel Post Studioz Limited and Others v. HSBCPI Holdings (Mauritius) Limited Arb. P. 1062 of 2012 Jan. 22, 2014 (Bombay High Court) (India).

that the court cannot independently apply its mind and grant interim relief in cases where it is warranted".

The Delhi High Court in the *Raffles Design*[28] case granted an interim order similar to that granted by the SIAC emergency arbitrator but clarified that that an emergency award in a foreign seated arbitration cannot be enforced in India under the Act.

Thus, in the absence of any statutory provision or a conclusive apex court precedent, the parties have to find a solution to fill this gap and bring about the enforcement of the relief granted by emergency arbitrator seated outside India. It appears that the parties are left with the option to indirectly enforce the interim relief in India, passed under a foreign seated arbitration by making an application under section 9 of the Act.

However, this is not a viable option since it requires parties to re-agitate the issue of interim relief before the Indian courts even though an emergency arbitrator may have considered the matter in detail, and granted the relief sought. It further adds to the potential delay in a party being able to utilize the relief it has already obtained from an emergency arbitrator. This roundabout process of enforcement may also further increase the risk of dissipation of assets by a recalcitrant party.

III. The Way Forward: Suggestions and Conclusion

The situations requiring emergency arbitration have been increasing globally in massive numbers, however, most of the jurisdictions have failed to cope up with the same. The uncertainty regarding the effectiveness of the interim measures issued by the emergency arbitrator has forced the parties to take recourse to the national courts for seeking urgent reliefs. This

[28] Raffles Design International India Pvt. Ltd. & Anr. v. Educomp Professional Education Ltd.& Ors. (MANU/DE/2754/2016)

essentially results in the loss of all the benefits that made the party choose arbitration over litigation.

The amendment to Section 2(1) (d) of Act proposed by the Law Commission of India would have brought Indian arbitration law in tandem with the global trend to enforce emergency awards by way of legislative amendment. The problem is more prevalent in foreign seated arbitrations as the domestic seated emergency orders can still be enforced under the amended Section 17(2) of the Act. But, in order to provide for the enforcement of emergency awards passed in foreign seated arbitrations, a provision similar to section 17 of the Act needs to be inserted in Part II of the Act.

There remain many more ambiguities with respect to India's take on emergency arbitration. For example, considering that emergency arbitration is workable only under the ambit of institutional arbitration, what will be the outcome when a party has chosen for ad-hoc arbitration instead of institutional arbitration, can the party invoke emergency arbitration using such agreement? In such a scenario, should the courts be conferred the power to appoint an emergency arbitrator? Will the parties have to enter into a separate agreement to choose arbitral institutions for providing an emergency arbitrator? In the absence of regulatory legislation governing this aspect and judicial clarification, answering such questions is certainly not easy.

With the amendments brought in the Act in 2015 and the Arbitration and Conciliation Amendment Bill of 2018 being silent about the various concerns regarding emergency arbitration, parties, for now, are without guidance as to how they wish to proceed with emergency arbitration if at all. However, it is pertinent to note that if Indian arbitration law does eventually embrace emergency arbitration, catch-all phrases in enumeration of interim measures granted by tribunals should be substituted

with a more illustrative rather than an exhaustive list similar to the English Arbitration Act, 1996.[29]

Considering that the concept of emergency arbitration is at a nascent stage, it certainly does not come without obstacles. But it is hoped that with the various arbitration institutions providing for emergency arbitration and the Government's push towards institutional arbitration as highlighted in the Arbitration Amendment Bill, 2018, the incorporation of provisions dealing with emergency arbitration in the Indian legislation will be encouraged in the near future.

[29] English Arbitration Act 1996 § 44.