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Emergency Arbitration And Interim Relief

This article analyses the concept of emergency arbitration in India, its recognition and the difficulty in enforcing emergency arbitral awards in India. Section 9 applications for interim relief will grant relief relatively faster. Thus, parties should consider filing a section 9 application for urgent relief instead of enforcing an emergency arbitral award.

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EXCLUSIVE ARTICLE
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Introduction:

Emergency arbitration is gaining traction in the field of arbitration. The object of emergency arbitration provisions is to provide emergency relief in the form of conservatory or urgent measures to a party that cannot wait for the establishment of an arbitral tribunal. The proceedings could either be domestic or international. For emergency arbitration request to be granted, there are two conditions that are required to be fulfilled:

1. There is a real and reasonable probability that the party which has invoked the provision has an opportunity to succeed; and
2. The loss that may occur cannot be compensated by way of damages.

Most institutions such as the International Chamber of Commerce have an opt-out clause wherein emergency provisions will be applicable to the dispute unless the parties specifically include it in the agreement that emergency provisions will not be applicable to them.

Emergency arbitrators are generally appointed within two days. The award is rendered by taking into consideration the documents and a hearing is given, if necessary, depending upon the facts and circumstances of the case. The hearing will be fixed by the emergency arbitrator by giving an opportunity to both parties to represent their case. In case a party does not appear, the order will be passed by the emergency arbitrator *ex parte*.

Global Perspective:

The Singapore International Arbitration Centre, the Stockholm Chamber of Commerce, the London Court of International Arbitration, International Chamber of Commerce etc. provide for provisions pertaining to emergency arbitration.

Singapore has enacted the Singapore International Arbitration Act to include the concept of emergency arbitrator under the term 'arbitral tribunal'. Hong Kong has also amended its domestic legislation to insert Part 3A which permits the recognition and enforcement of emergency arbitral awards.

Although, the New York Convention does not recognize an interim award and only recognizes final awards, the New York District Court in the case of *Yahoo! Inc. v. Microsoft Corporation* case, found that the relief awarded by the emergency arbitrator was "in essence final" and thus, confirmed it for the purpose of enforcement. As per the reasoning of the court, an Emergency arbitrator can give a final award to preserve the status quo regardless of the fact that the final arbitral award was yet to be issued.

Indian context:

The concept of emergency arbitration has not been introduced in the Arbitration and Conciliation Act. In the year 2014, the Law Commission released its 246th Report which was on amendments to the Arbitration and Conciliation Act, 1996. The report proposed an amendment by way of an insertion of Section 2(d) which would be as follows:

"Arbitral tribunal means a sole arbitrator or a panel of arbitrators and, in the case of arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator."

The note to the proposed amendment also mentions that the reason for the amendment is to give statutory recognition to institutional arbitration rules which provide for provisions on emergency arbitrators. However the Arbitration and Conciliation (Amendment) Act, 2015 did not incorporate the proposed provision.

Notwithstanding the fact that emergency arbitration provisions have not yet been introduced in India, many Indian arbitral institutions are adapting quickly and have absorbed the term 'emergency arbitration' into their rules.

Further, Indian courts have also taken a pro-arbitration stance and have recognized the concept of emergency arbitration. While previously emergency awards were not recognized in India, there has been a change recently when the Delhi High Court in the case of *Ashwani Minda v. U-Shin Ltd*, indirectly acknowledged the award given by an emergency arbitrator when it refused to grant interim relief on the grounds of refusal of identical relief given by the emergency arbitrator.

Interim Relief under the Arbitration and Conciliation Act, 1996:

Section 9 of the Arbitration and Conciliation Act, 1996 is on the interim measures that can be awarded by the court. It states that a party may before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced apply to a court for interim reliefs. Interim relief can be provided on the following grounds:

1. Assignment of a guardian for a minor person of unsound mind
2. Detainment of goods
3. Sale of goods
4. Appointment of a receiver etc.

Section 17(1) of the Arbitration and Conciliation Act also confers the aforementioned identical powers on the tribunal. Section 17(2) also provides that a court can enforce an arbitral award in the same manner as if it were an order of the court.

The turning point in emergency arbitration took place with the Supreme Court judgement in *Amazon NV Investment Holdings v. Future Coupons Ltd*. In this case the Supreme Court held and interpreted the definition of 'tribunal' as wide enough to include the concept of an emergency arbitrator within it.

Challenges to Enforcement of Awards:

Once the award has been rendered, there would be a three month period before which it can be enforced. During these three months, the opposite party can challenge the award as per section 34(2) of the Arbitration and Conciliation Act. An application for execution will then have to be applied for at the local court.

Section 44 of the Act defines a foreign award as, "an arbitral award on the differences relating to the matters considered as commercial under the law in force in India"

For a foreign arbitral award to be enforced in India, there are three steps that need to be fulfilled:

1. An application for enforcement has to be made along with the original arbitration agreement, arbitral award and evidences, if any.
2. An appropriate defense has been raised as per section 48 of the Arbitration and Conciliation Act
3. Once the court is satisfied as per section 49 of the Act the award can be enforced.

However there are several challenges associated with enforcing an arbitral award. Generally the enforcement of arbitral award involves huge a lot of litigation which almost defeats the purpose of resorting to faster mechanism for dispute resolution which is significant in an emergency arbitration.

Further, majority of the parties resort to court proceedings at the enforcement stage delaying the enforcement, thereby diluting effective emergency arbitration. There are several grounds under which enforcement proceedings can be challenged-

- Arbitral award is beyond the scope of the arbitration agreement
- Appropriate notice was not provided to the opposite party regarding the appointment of an arbitrator
- Enforcement of award is against public policy
- Dispute is not arbitrable

Further, emergency arbitration and the concept of an emergency arbitrator have not been given explicit recognition in the Arbitration and Conciliation Act, 1996. Each time a party seeks to enforce an emergency arbitral award, parties will have to go through the same tedious process with the uncertainty of whether the award will be enforced. The objective of any judicial process is certainty regarding the party's rights. Under a section 9 application, the outcome is certain as the courts have explicitly been conferred with the power to adjudicate upon such applications.

As per the SIAC Rules, emergency arbitrator's enjoy the same powers enjoyed by a regular arbitral tribunal. Furthermore, the powers of a judge and an arbitrator are similar as both of them can award the sale and detainment of goods, freezing of assets etc. The powers given to an arbitrator under section 9 and 17 are also similar, thereby diluting the necessity of the establishing an emergency arbitral tribunal where the same remedy exists under section 9 of the Act.

Moreover, local parties often exert pressure and at times have an advantage over the foreign party in a foreign seated arbitration. They will try and annul the award or reduce the damages that have to be awarded.

There is also a possibility that the judgement can be interpreted differently by the court where the arbitral award is going to be enforced. It also may not be necessarily enforceable in the country where it is sought to be enforced.

Enforcement of Emergency arbitral award through courts:

A faster mechanism for parties to arbitration is to make an application for grant of interim measures by the court. Interim relief from court is available in foreign seated arbitrations as well as the Arbitration and Conciliation (Amendment) Act, 2015 which has been notified by the Government of India.

A study was conducted in 2016 comparing the success of interim relief applications in Indian courts and that in emergency arbitrations. The results showed a 73 per cent success rate of section 9 applications. The data on emergency arbitration was sparsely available to analyse it. However, in institutional arbitrations such as SIAC, the success rate was 64.4 per cent.

Keeping in view the statistics, it would be the best for parties to approach the court under section 9 for interim relief. Thus, including the provision for emergency arbitration would be a futile exercise as the enforcement of the arbitral award would be time consuming, thereby running counter to the very purpose of emergency arbitration itself. The exclusion of emergency arbitration from the Arbitration and Conciliation (Amendment) Act, 2015, is not without reason.

Thus, it would be reasonable for parties to resort to interim relief through Indian courts instead of through emergency arbitration applications as it is not only faster but it also has a higher success rate.

Conclusion:

This article analyses the concept of emergency arbitration in India, its recognition and the difficulty in enforcing emergency arbitral awards in India. Section 9 applications for interim relief will grant relief relatively faster. Thus, parties should consider filing a section 9 application for urgent relief instead of enforcing an emergency arbitral award.

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