

Enforceability Of Emergency Arbitration Award Under Indian Law

written by Rajdev Singh | October 22, 2021



Emergency arbitration in india is a concept that allows a party to apply for urgent temporary relief before an arbitration tribunal has been officially established. Simply put, emergency arbitration in india is a time-bound and short-term solution for parties that are not in a position to wait for the formation of the arbitral tribunal. Any emergency relief granted takes the shape of an order which may later be revisited after the formation of the tribunal.

Emergency arbitration got global recognition post an amendment to the UNICTRAL Model Law (Model Law) in 2006. In the Indian scenario, Law Commission's 246th report^[1] recommended an inclusion to the definition of "arbitral tribunal" as mentioned in Section 2(1)(d) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

This amendment was to ensure that institutional rules such as the SIAC Arbitration Rules or ICC Rules or any other rule which provides for an appointment of an emergency arbitrator are given statutory recognition in India. Similar observations were made in Justice B.N. Srikrishna Report^[2]. However, the 2015 Amendment Act did not incorporate the recommendation of the Law Commission and the report alike.

Steps Towards Introduction Of Emergency Arbitration In India - Emergency Arbitration in India

Although the concept of "Emergency Arbitration In India" was missing from the amended Act, notable institutions such as the Delhi International Arbitration Center (DIAC)^[3], the Court of Arbitration of the International Chambers of Commerce -India^[4], the International Commercial Arbitration (ICA)^[5], the Madras High Court Arbitration Center (MHCAC)^[6], the Mumbai Center for International Arbitration^[7] have formulated certain regulations on the concept and are devising procedures thereof.

Judicial Precedents In India

Judicial decisions addressing emergency arbitration are limited in India. Enforcement of a foreign seated award in India is extremely unlikely as the enforcement shall only be recognized under Part II of the Arbitration and Conciliation Act, 1996. As per the decision of the Hon'ble Supreme Court of India in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc.*^[8], Part I of the Act would not be applicable to international commercial arbitration.

In *HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studios Ltd.*[9], the arbitration agreement was one in which the parties reserved their right to seek interim relief before the national courts of India, although the arbitration itself was conducted outside India. The parties resorted to Emergency Arbitration in Singapore, where a favourable order was given to the party that later on chose to enforce the same in India.

While upholding the award of the Emergency Arbitrator and granting interim relief, the Hon'ble Bombay High Court observed that "...petitioner has not bypassed any mandatory conditions of enforceability." since no direct enforcement of the interim award was sought. It is relevant to mention here that the subject agreements were entered into between the parties prior to the BALCO judgment, and thus the operative portion of BALCO was not applicable to the instant case.

The Hon'ble Delhi High Court in *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education*[10] observed that the emergency award is not directly enforceable under Section 9, Part I of the Act. Yet, the parties can file a separate suit and the court can thereby have an independent opinion on the enforceability of the emergency award. The Court noted that the proviso to Section 2(2) of the amended Act has widened the ambit of the powers invested in the Court to grant interim reliefs, as Section 9 shall now apply to international commercial arbitrations even if the place of arbitration is outside India. The main matter is the pending adjudication in the Hon'ble High Court.

Recent Developments

In a significant boost to the arbitral jurisprudence in India, a division bench consisting of Hon'ble Justices R.F Nariman (Retd.)[11] and B.R. Gavai of the Hon'ble Supreme Court in a landmark judgement of *Amazon.com NV Investment Holdings LLC vs. Future Retail Limited & Ors*,[12] observed that Section 37[13] of the Act is complete in itself and therefore no appeals shall lie from an order of enforcement under Section 17(2)[14] of the Act. The brief facts of the case are that the proceedings were initiated by the Appellant, i.e., Amazon.com NV Investment Holdings LLC (hereinafter referred to as "*Amazon*") before the Hon'ble Delhi High Court under Section 17(2) of the Act to enforce the award dated October 25th 2020 passed by Emergency Arbitrator, Mr V.K. Rajah, SC.

The order was passed in arbitration proceedings being SIAC Arbitration No. 960 of 2020 commenced by Amazon seeking emergency interim relief under the Singapore International Arbitration Centre Rules, asking for injunction relief against the respondents (collectively referred to as the "*Biyani Group*"). The single bench of the High Court held that an Emergency Arbitrator's award is an order under Section 17(1) of the Arbitration Act. Thereafter, the Division Bench stayed this order of Single Bench, and the stay order was impugned before the Apex Court. The Division Bench also held that an appeal against an order under Section 17(2) of the Arbitration Act would be maintainable under the provisions of the Code of Civil Procedure, 1908.

The Hon'ble Court framed two important questions of law for adjudication of the appeals:

1. Whether an "award" delivered by an Emergency Arbitrator under the Arbitration Rules of the Singapore International Arbitration Centre ["SIAC Rules"] can be said to be an order under Section 17(1) of the Act; and

2. Whether an order passed under Section 17(2) of the Act in the enforcement of the award of an Emergency Arbitrator by a learned Single Judge of the High Court is appealable.

The Appellant vehemently submitted that the basic foundation of the arbitration is party autonomy – which is reflected in Sections 2(1)(a), 2(1)(c), 2(1)(d), 2(6), 2(8), and 19(2) of the Act. Moreover, Section 37 of the Act is an exhaustive code in itself and if an appeal did not fall within the parameters of section 37, it would fail. It was further argued by the Appellant that the legislative intent behind Section 9(3) of the Act was to lessen the burden on courts overloaded with petitions under Section 9 being filed before them. It was submitted that an Emergency Arbitrator's award would be a step in the right direction under institutional rules, furthering this very motive.

It was reiterated that since Section 37 is a complete code in itself, no other appeal could possibly be filed except what was already mentioned in the said provision. The Respondents surprisingly did not dispute the fact that the emergency award was not outside the purview of the Act, however, it could not be said to lie under Section 17(1) of the Act. It was argued that since the Parliament had decided not to include the recommendation made by the 246th Report of the Law Commission to include provision for appointment of Emergency Arbitrator, it indicated that such an order would not be covered under Section 17(1) of the Act.

The Bench opined that the numerous judgments[15] of the Apex Court had regarded party autonomy as being one of the pillars of arbitration in the Act. The Court concluded the first issue in the favour of the Appellant by holding that full party autonomy is provided in the Act to have a dispute decided in accordance with institutional rules which can include Emergency Arbitrators delivering interim orders, described as "awards". The Hon'ble Court termed such orders as an important step in aid of decongesting the civil courts and affording expeditious interim relief to the parties.

The other point was regarding the second issue as that whether an order passed under Section 17(2) of the Act in the enforcement of the award of an Emergency Arbitrator would be appealable under Section 37 of the Act. The Hon'ble court said that even after the 2015 Amendment Act, no change was made in Section 37(2) (b) to bring it in line with Order XLIII, Rule 1(r) of CPC. The Section continued to provide appeals only from an order granting or refusing to grant any interim measure under Section 17.

It also said that the opening words of Section 17(2), namely, "*subject to any orders passed in appeal under Section 37...*" also demonstrates the legislature's understanding that orders that are passed in an appeal under Section 37 are relatable only to Section 17(1). The Bench ruled this issue in the favour of the Appellant as well and stated that no appeal would lie under Section 37 of the Act against an order of enforcement of an Emergency Arbitrator's order passed under Section 17(2) of the Act.

Consequences Of The Ruling

This decision of the Hon'ble Supreme Court would promote India as a hub of international commercial arbitration and serves as a welcome message to foreign investors around the world that India is a jurisdiction that honours commercial contracts. Furthermore, as held in the judgment, the Arbitration Act not only grants greater autonomy to the party but also contributes towards the decluttering of a large number of cases pending in the courts.

Additionally, since the order for enforcement of the emergency award would be final and non-appealable, it can save valuable time for the parties. This judgment majorly levels up the Indian position in the field of international arbitration and strengthens its status as an arbitration-friendly country.

- [1] The Law Commission's 246th Report dated 05.08.2014
- [2] High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India. The report can be accessed here:
<https://legallaffairs.gov.in/sites/default/files/Report-HLC.pdf>
- [3] Part III of its Arbitration Rules include "Emergency Arbitration in India". Further Section 18A enumerates 'Emergency Arbitrator' and further explains the appointment, procedure, time and powers of an Emergency Arbitrator.
- [4] Article 29 of the 'Arbitration and ADR Rules' r/w Appendix V enumerate the provisions of EA and Emergency Arbitrator.
- [5] Section 33 r/w Section 36(3) w.e.f 01.01.2014, enumerates the provisions of EA and Emergency Arbitrator
- [6] In the 2014 rules, under Part IV, Section 20 r/w Schedule A and Schedule D enumerate the provisions of EA and Emergency Arbitrator and emergency arbitration in india.
- [7] In the 2016 rules, under Section 3 w.e.f 15.June.2016 enumerates the provisions of EA and Emergency Arbitrator - emergency arbitration in india
- [8] (2012) 9 SCC 552
- [9] Arbitration Petition No. 1062/2012 dated 22.01.2014
- [10] M.P (I) (Comm.) 23/2015, CCP(0) 59/2016 and IA Nos. 25949/2015, 2179/2016 dated 07.10.2016
- [11] Hon'ble Justice Rohinton Fali Nariman superannuated on 12.08.2021
- [12] CIVIL APPEAL NOs. 4492-4493 OF 2021 pronounced on 06.08.2021
- [13] Section 37. Appealable orders.-(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:
 - (a) refusing to refer the parties to arbitration under section 8;
 - (b) granting or refusing to grant any measure under section 9;
 - (c) setting aside or refusing to set aside an arbitral award under section 34
- (2) Appeal shall also lie to a court from an order of the arbitral tribunal—
 - (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16, or
 - (b) granting or refusing to grant an interim measure under section 17.
- (3) No second appeal shall lie from any order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.
- [14] Section 17. Interim measures ordered by the arbitral tribunal- (2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.
- [15] Antrix Corporation Ltd. vs. Devas Multimedia Pvt. Ltd., (2014) 11 SCC 560; Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126; Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd., (2017) 2 SCC 228; PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India

Pvt. Ltd., 2021 SCC OnLine SC 331; The Project Director National Highways
No.45 E And 22 National Highway Authority of India (NHAI) vs. M. Hakeem &
Anr. 2021 SCC SC 473,
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