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EMERGENCY ARBITRATION: AN EMERGING PARADIGM IN DISPUTE RESOLUTION CHALLENGING TRADITIONAL MECHANISMS

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ABSTRACT

Global partnerships aimed at fostering sustainable development emphasize critical areas such as finance, technology, trade, and data to enhance the "ease of doing business." The 2024's SDG Progress Report issued by the United Nations Department of Economic and Social Affairs highlights that only 17% of Sustainable Development Goals (SDGs) are on track for achievement. SDG 17 underscores the need to strengthen implementation mechanisms and revitalize global partnerships to achieve SDGs. In an era of accelerated globalization, the rapid growth of commercial activities has pushed businesses to expand beyond geographical and cultural boundaries, introducing complex challenges. The resolution of disputes in this interconnected world has gained significant importance, as conflicts can affect not only the parties involved but also the broader global ecosystem. International arbitration places party autonomy at its core, underscoring its critical role in managing disputes effectively. This dispute resolution framework significantly influences both India's economic dynamics and global perceptions regarding the country's business environment. India has demonstrated notable progress, improving its ranking in the World Bank's Ease of Doing Business report from 142nd out of 190 countries in 2014 to 63rd in 2019. This article examines the evolution, advantages, and challenges of emergency arbitration while delving into its emerging framework in India. Ultimately, it aspires to position India as a global hub for arbitration. As globalization intensifies, the need for efficient and robust dispute resolution mechanisms like arbitration becomes ever more urgent.

Keywords: Sustainable Development, Globalization, Dispute resolution, Emergency Arbitration, Ease of doing business, Cross-Border Commerce

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INTRODUCTION

Emergency Arbitration is a method of alternate dispute resolution that provides quick and efficient solutions to disputes. It is a process where a temporary arbitrator is appointed to hear and resolve pressing disputes within a short span of time usually within a few days or a few weeks. The process is intended to provide a quick and an efficient solution to urgent disputes that require immediate attention, and they cannot wait for the conclusion of normal arbitration proceedings. One of the key advantages is its speed and efficiency unlike the traditional mode of arbitration which can even take longer time to resolve. It can provide a solution in faster manner for disputes that require an urgent resolution in time bound manner such as those involved in breach of contracts preservation of assets or preservation of evidence etc. Another advantage is the confidentiality that is attached to it unlike traditional courtroom disputes. Key criteria include relevant legal framework for assessing the request for interim relief, which often varies by jurisdiction. While other two primary factors are *Prima Facie* Case and Balance of Convenience. However, EA's decision-making depends upon other Atmospheric Factors i.e. evidence, knowledge of procedure & law etc.[1] The primary purpose of emergency arbitration is to grant immediate interim or protective relief to a party in urgent need, where waiting for the constitution of the Arbitral Tribunal is not feasible.[2]

EVOLUTION AND ITS DEVELOPING CONTOURS IN INDIA

EA is a procedural innovation born out of the need to make arbitration more self-reliant as previously parties had the only option of approaching Courts for interim measures under section 9 of Arbitration and Conciliation Act, 1996 which was prior to the constitution of arbitral tribunal now EA offers parties another Avenue to obtain urgent interim relief not only at the pre-arbitration stage but also during the course of the arbitration in circumstances where members of the arbitrary Tribunal for various reasons may not be readily available to assemble and conduct a sitting right away it provides an answer the option comes with many advantages such as ensuring appointment of emergency arbitration within one flat day of filing of application or rendering of orders in a time-bound manner. The relevance of EA can be seen by the fact that it has been introduced into the

[1] Eoin Moynihan, 'Procedural Creativity in International Construction Arbitrations: A Comparative Analysis of Institutional Innovations in the US, Singapore and France' (*International Bar Association*, 17 November 2024, 11:15 AM) https://www.ibanet.org/procedural-creativity-international-construction-arbitrations accessed accessed 7 December, 2024.

[2] Martin J. Valasek and Jenna Anne De Jong, 'Enforceability of Interim Measures and Emergency Arbitrator Decisions' (*Norton Rose Fullbright*, 11 November, 2024) https://www.nortonrosefulbright.com/en-in/knowledge/publications/6651d077/enforceability-of-interim-measures-and-emergency-arbitrator-decisions accessed 7 December 2024.

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rules of arbitration by institutions like SIAC, ICC,[3] HKIAC, etc. and in India, the DIAC,[4] MIAC (Mumbai international arbitration Centre), International Arbitration and Mediation Centre at Hyderabad, etc.

The concept of emergency arbitration was initially introduced in 2006 by the International Centre for Dispute Resolution (ICDR). Subsequently, the International Chamber of Commerce (ICC) integrated provisions for appointing emergency arbitrators in its 2012 rules. These provisions addressed situations requiring urgent interim or conservatory relief when waiting for the formal constitution of an arbitral tribunal was not feasible. Article 29 of the ICC Arbitration Rules (2021) allows a party to seek "Emergency Measures" under the Emergency Arbitrator Rules outlined in Appendix V, provided the requested interim relief cannot be delayed until the arbitral tribunal is formally established.[5] The concept of Emergency Arbitration was subsequently adopted by various international institutions, including the Netherlands Arbitration Institute (NAI), the Singapore International Arbitration Centre (SIAC), the Swiss Arbitration Centre, the Stockholm Chamber of Commerce, and the Australian Centre for International Commercial Arbitration (ACICA).[6] The rise of globalization and the expansion of international trade and agreements have significantly increased the reliance on international arbitration. A primary driver behind this trend is the hesitation of parties from diverse legal systems or countries to submit themselves to the jurisdiction of foreign courts. The UNCITRAL Model Law addresses this issue through Articles 34(2)(b)(ii) & 36(1)(b)(ii), which both invoke the concept of the state involved, whether in considering an application to set aside an arbitral award or in determining its recognition or enforcement.[7]

Under Section 2(1)(d) of the Indian Arbitration and Conciliation Act (A&C Act), the definition of an arbitral tribunal does not explicitly recognize an emergency arbitrator. While the Law Commission of India, in its 246th Report, recommended amending this provision to explicitly include emergency arbitrators, this suggestion was not incorporated during the amendments made to the Act in 2015. In 2017, the High-Level Committee tasked with reviewing the institutionalization of arbitration mechanisms in India emphasized the necessity of amending Section 2(d) to formally acknowledge emergency arbitration within the Indian legal framework.[8] An emergency arbitrator serves a temporary role, with their authority ending once the arbitral tribunal is formally constituted.

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[3] *ICC Rules (2012)*, art 29(1) and Appendix II.
[4] Delhi International Arbitration Center (DAC), Part III, Section 18A.
[5] ICC Arbitration Rules (2021), Appendix 5, Article 2(1).
[6] Swiss Rules, 2012, art 43; Australian Centre for International Commercial Arbitration Rules, 2011, art 28(1); NAI Arbitration Rules, 2010, art 42; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 2010, Appendix II, art 8; SIAC Rules, 2013, arts 26(2), 28; ASA Bull 462 (2010).
[7] Model Law, Articles 34(2)(b)(ii) and 36(1)(b)(ii).
[8] High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India, (18 November 2024), 09:15 PM, https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

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This arrangement leads to the appointment of different arbitrators at various stages of the process, which is problematic. The Act does not permit the appointment of arbitrators on a provisional basis, making such a practice legally untenable.

The concept of emergency arbitration has garnered significant attention following notable developments arising from the legal dispute between two corporate titans, Amazon and Future Group.[9] Amazon initiated arbitration under the Singapore International Arbitration Centre (SIAC) rules and obtained an interim award in its favor from an emergency arbitrator. Subsequently, Amazon sought to enforce this interim award in India through a petition filed under Section 17(2) of Act, 1996. The court ruled that the Arbitration Act does not prohibit commercial parties from adopting procedural rules that permit an emergency arbitrator to grant interim relief.

The Court clarified that the term "Arbitral Tribunal," as defined u/s 2(1)(d) of Act, 1996 is sufficiently broad to encompass an emergency arbitrator. Consequently, an order or award issued by an emergency arbitrator can be enforced u/s 17(2) of the Act, 1996 provided the institutional rules underpinning the arbitration explicitly authorize such powers. The Court further emphasized that parties possess the autonomy to choose institutional rules governing their arbitration process, and once selected, these rules define the rights and obligations between the parties. Additionally, it was determined that orders issued u/s 17(2) are not subject to appeal u/s 37. This judgment underscores the enforceability of emergency arbitration awards within legal framework, aligning with the principle of party autonomy in arbitration.

SCOPE & CHALLEGNES

The emergency arbitrator procedure is a highly demanding period for all stakeholders involved: institutions, arbitrators, legal representatives, and the parties. For institutions, appointing an emergency arbitrator within 24 to 48 hours necessitates a significant allocation of senior staff to quickly identify a suitable arbitrator, confirm their availability, and ensure they are prepared to dedicate substantial time immediately to the case. For the arbitrator, it is crucial to promptly engage with the parties and assess key factors such as jurisdiction, the nature of the requested relief, urgency, and the relevance of applicable laws. For both counsel and the parties, it is essential to be ready for a fast-paced, high-pressure process that could potentially resolve the dispute at hand.[10]

[9] *Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors.*, 2021 SCC OnLine SC 557.
[10] Grant Hanessian and E Alexandra Dosman, 'Songs of Innocence and Experience: Ten Years of Emergency Arbitration' (2016) 27(2) *American Review of International Arbitration* 215.

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Key advantages include its speed, efficiency and confidentiality. Unlike the traditional mode of arbitration which can take months to resolve, it can provide a solution in a matter of days or weeks it makes an ideal solution for disputes that require an urgent resolution such as those involved in breach of contracts preservation of assets or preservation of evidence. Further, it is conducted in private which allows parties to keep their disputes confidential which is particularly important for big business houses and corporate sector where they want their disputes to remain out of public domain keeping in mind the negative impact on their reputation is also their brand image.

It being just another facet of retained arbitration is the next step and the next level as it provides an efficient and effective solution to these problems a quick resolution has also avoidance of delay and expenses that are associated with traditional arbitration so despite its growing popularity. But there are several challenges. One of the biggest challenges is the opacity in the rules and the procedures. Till the procedures not standardized in India, it would cause confusion and inconsistencies which are avoidable in a manner in which the cases are handled parties will find it difficult to understand the process which itself can lead to delays in resolution of disputes. So, clarity and consistency of the rules and the procedures is important another challenge is the lack of awareness among the authorities about the availability of the mechanism of Ian and its benefits as many parties are still unaware of their alternative dispute resolution mechanism, they can miss out on the benefits provided. This lack of awareness is a significant barrier to the growth in India and it is important that efforts are made to educate the parties about this unique feature of area mechanism and its efficacy. However, other challenge include following –

Recognition and Enforceability

Emergency arbitration can be viewed as an alternative mechanism for granting interim relief before the establishment of an arbitral tribunal, offering a way to avoid the direct involvement of courts. However, the emergency arbitrator does not hold the same status as a judicial authority like a court or even a statutorily recognized body like an arbitral tribunal. Emergency Arbitrator is appointed by the institution's president whose rules govern the arbitration, and their mandate is time-bound. Once this period expires, it cannot be reappointed unless all parties' consent. Additionally, any order or award issued by it becomes non-binding if an arbitral tribunal is not constituted within 90 days, raising questions about the enforceability of such decisions and the overall status of orders issued by emergency arbitrators.

Many countries are still in the process of formally recognizing the binding nature of its orders, which often leads to uncertainties in their enforcement. The enforceability of its order largely depends on the jurisdiction in which

enforcement is sought. While one jurisdiction may uphold the order, a court in a different jurisdiction might fail to recognize it due to the lack of specific legislation supporting emergency arbitration. This issue is further complicated when an interim order by it does not meet the criteria of an award. In such cases, the response of courts can vary, and the party benefiting from the interim relief may be left in a precarious position, reliant on the discretion of the court to have the order enforced.[11]

As the law currently stands, emergency awards in foreign-seated arbitration are not enforceable in India.[12] A party that has obtained an emergency award must still initiate a Section 9 proceeding under Act, 1996, requiring the Indian Court to independently evaluate whether interim relief should be granted. The enforcement procedure mirrors that of an order under Section 17, and while the emergency award may hold some persuasive weight, it does not bind the court. Consequently, parties are likely to encounter similar challenges related to the slow and inefficient enforcement process, as discussed earlier. If the parties have opted, via agreement, to exclude Section 9, the only recourse for a party is to file a fresh suit under the Civil Procedure Code, 1908, rendering the emergency award essentially ineffective. Therefore, due to this inconsistency, it is more practical for parties seeking urgent interim relief to directly approach Indian courts, rather than relying on the emergency award mechanism. As a result, the lack of enforceability of an emergency award from a foreign-seated tribunal undermines the potential benefits of the emergency award process provided under institutional rules.

Interim Binding

It is possible that a country may acknowledge the provisions of Emergency Arbitration and enforce the order issued by an emergency arbitrator. However, a court in a different jurisdiction may be unable to recognize or enforce such an order if there is no specific legislation that designates order as a binding interim award. Once the arbitral tribunal is formed, the emergency arbitrator's order is not automatically binding. If a different person is appointed to the substantive tribunal, it is the tribunal's prerogative to either uphold or suspend the order, provided that the time frame for the interim award has not expired. The nature of the interim relief granted also matters, particularly when the emergency arbitrator's relief is issued in the form of an order rather than an award.

[11] Shivam Kumar, 'Emergency Arbitration - Its Advantages, Challenges and Legal Status in India' (*SCC Online*, 17 November 2024, 11:15 AM) https://www.scconline.com/blog/post/2022/03/26/emergency-arbitration/ accessed 7 December 2024.
[12] *Raffles Design International India v. Educomp Professional Education*, 2016 (6) ARB LR 426 (Delhi).

Uncertainty of the Consequences of Non-Compliance

A significant limitation of the current framework is the lack of clarity regarding the consequences of non-compliance with an emergency arbitrator's order. While Article 29(2) of the ICC Rules obligates parties to comply with any order issued by the emergency arbitrator, but it fails to specify the repercussions for failing to do so. Even parties who obtain interim orders in their favour face considerable challenges in enforcing them, as they must still rely on the courts of the jurisdiction in question. This situation forces them into litigation, which they originally sought to avoid. Consequently, this has created a dilemma for large corporations, who select their arbitration seat based on the flexibility of local laws in adhering to international conventions, particularly the New York Convention.

CONCLUSION

India is on a path towards becoming a "Viksit Bharat" by 2047, aiming for substantial progress and global recognition in various sectors, including the field of arbitration. The legal framework governing arbitration in India has evolved over the years, with a distinct pro-arbitration approach adopted by the legislature, judiciary, and various stakeholders. This paradigm shift is indicative of India's intent to emerge as a global hub for arbitration. The refinement of India's arbitration mechanism is not just a reflection of the country's commitment to enhancing its domestic arbitration framework but is also an expression of its ambition to adhere to international standards of dispute resolution. The recent developments, particularly in relation to Emergency Arbitration, signify that the country is gearing up for a robust arbitration system, with minimal judicial intervention and streamlined processes in line with global practices, specifically the UNCITRAL Model Law on International Commercial Arbitration.

At the core of this evolution is the need to refine and advance the procedural and substantive laws surrounding arbitration. The concept of Emergency Arbitration holds immense promise for India's arbitration landscape, providing a crucial mechanism for securing urgent relief in cases where time-sensitive issues arise before the constitution of a formal arbitral tribunal. This mechanism can alleviate the burden on overworked courts and offer parties immediate remedies that are often necessary in disputes involving sensitive information or high-stakes industries, such as energy, aviation, marine, and cross-border transactions. Thus, Emergency Arbitration not only accelerates the dispute resolution process but also ensures that confidential or commercially sensitive matters are handled expeditiously and securely.

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Although judicial decisions have contributed to shaping the interpretation of Emergency Arbitration, there is a clear need for more legislative clarity within Act, 1996. The current lack of specific provisions addressing it creates ambiguity regarding its practical application. A more defined statutory framework for Emergency Arbitration would provide greater certainty to parties and arbitrators alike, fostering a wider acceptance of this mechanism. Clear legislative provisions will also ensure that the tool is employed effectively and consistently, ultimately contributing to the overall efficiency of India's arbitration ecosystem.

The success of Emergency Arbitration largely hinges on two factors, the recognition of this mechanism by Indian courts and the enforceability of the orders passed by emergency arbitrators. Without consistent recognition and enforcement of emergency awards, its mechanism will fail to achieve its full potential. The current legislative provisions allow for the enforcement of interim orders passed by an arbitral tribunal, but there is uncertainty about the enforceability of orders passed by an emergency arbitrator, especially in cases where the arbitration is not seated in India. To ensure the success and acceptance of Emergency Arbitration, the legal framework must be revised to explicitly address the enforceability of emergency awards. The amendments in 2015 and 2019 aimed to minimize judicial interference in arbitration proceedings, reflecting the growing preference for autonomy in arbitration. However, there remains a need for further clarity on the distinction between judicial review and the enforcement of final arbitral awards. It is crucial to ensure that enforcement courts do not engage in the merits of the dispute or reinterpret the decisions of the arbitral tribunal or emergency arbitrator. Enforcement should strictly focus on ensuring that valid and final awards are executed efficiently without turning the process into an appellate review.

Arbitration mechanisms must evolve to address the complexities and demands of modern business environments. Industries such as energy, aviation, and marine require expedited resolutions due to the sensitive and high-value nature of the disputes involved. Traditional dispute resolution mechanisms may be inadequate to handle such cases, underscoring the importance of innovations like Emergency Arbitration. These innovations provide much-needed flexibility, speed, and efficiency to the arbitration process, enabling businesses to resolve disputes promptly and continue their operations without unnecessary delays.The recognition of Emergency Arbitration will significantly benefit institutional arbitration in India. By aligning India's arbitration laws with international best practices, particularly the principle of minimal judicial intervention as articulated in UNCITRAL Model Law, India will be able to attract more international parties to choose India as the seat of arbitration. The enforceability of orders passed by emergency arbitrators, especially for India-seated arbitrations, will enhance India's standing as a preferred jurisdiction for arbitration, particularly among foreign investors and businesses engaged in cross-border transactions.

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A critical aspect of the success of Emergency Arbitration is the role of enforcement courts. These courts must refrain from delving into the merits of the dispute when enforcing emergency awards. Judicial oversight should be restricted to ensuring that the award is enforceable under the Act. This will help maintain the integrity of the arbitration process and ensure that enforcement remains a swift and efficient process, avoiding unnecessary delays or procedural complications. One of the fundamental principles of arbitration is party autonomy, the ability of parties to choose the arbitration process and tailor it to their needs. The availability of Emergency Arbitration as an option would empower parties to make decisions based on their specific circumstances, ensuring that they have access to appropriate remedies in urgent situations. This flexibility aligns with the core tenets of arbitration and enhances the overall efficacy of the dispute resolution process.

The recognition and enforceability of orders passed by emergency arbitrators will reinforce the two foundational pillars of arbitration, party autonomy and efficiency. These pillars are crucial for the growth of institutional arbitration, and their integration into the Emergency Arbitration framework will promote a more dynamic and responsive arbitration environment in India. Furthermore, by reducing the caseload of overburdened courts, Emergency Arbitration will contribute to the overall efficiency of the judicial system, allowing courts to focus on other critical matters while arbitration proceedings continue without unnecessary interference.