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DISSERTATION

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ANALYSING THE REQUIREMENT FOR EMERGENCY ARBITRATION LAW IN THE INDIAN SCENARIO

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This is to certify that Alfiya Latheef, Reg No: LM0223003, has submitted her Dissertation titled "Analysing the Requirement for Emergency Arbitration Law In The Indian Scenario" in partial fulfillment of the requirement for the award of Degree of Master of Law in International Trade Law to the National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that the dissertation she submitted is original, bonafide, and genuine.

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DECLARATION

I hereby declare that this dissertation titled "ANALYSING THE REQUIREMENT FOR EMERGENCY ARBITRATION LAW IN THE INDIAN SCENARIO" has been researched and submitted by me to the National University of Advanced Legal Studies, Kochi, in partial fulfillment of the requirement for the award of Degree of Master of Laws in International Trade Law, under the guidance and supervision of Assistant Professor Dr. Aparna Sreekumar, is an original, bona fide, legitimate work. It has been pursued for academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree from either this University or any other University. I also confirm that all the material I borrowed from different sources and incorporated into this dissertation is duly acknowledged. If any material is not duly acknowledged and found incorporated in this thesis, it is entirely my responsibility. I am fully aware of the implications of any such act which might have been committed by me advertently or inadvertently.

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ABBREVIATIONS

- AAA- American Arbitration Association
- AIR- All India Report
- CANACO- Mexico City National Chamber of Commerce
- CPC- Civil Procedure Code
- DIAC- Delhi International Arbitration Centre
- EA- Emergency Arbitration
- EAP- Emergency Arbitration Procedure
- HKIAC- Hong Kong International Arbitration Center
- ICA- Indian Council of Arbitration
- ICC- International Chamber of Commerce
- ICDR- International Centre for Dispute Resolution
- JCAA- Japan Commercial Arbitration Association
- LCIA- London Court of International Arbitration
- MCIA- Mumbai Centre for International Arbitration
- NAI- Netherlands Arbitration Institute
- SCAI- Swiss Chambers Arbitration Institution
- SCC- Stockholm Chamber of Commerce
- SIAC- Singapore International Arbitration Center
- UNCITRAL- United Nations Commission on International Trade Law
- WIPO- World Intellectual Property Organization

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- Thummu Koti Nagaiahv. D. Sambaiah, 1962 SCC OnLine AP 107

CHAPTER 1-
INTRODUCTION

Just as every facet of law evolves gradually in response to social demands, the arbitration process is no exception. While arbitration is not a novel practice in India, comparable dispute-resolution mechanisms have existed for some time. India has seen many ups and downs, but now that we have the Arbitration and Conciliation Act, we have formalized arbitration processes. It has since acquired its concurrent immunity via a number of precedents and changes. However, there is a common convention that everything is not entirely black or white, and arbitration is not an exception to this rule. Because India is progressively becoming a world-class business destination, Indian arbitration procedures need to be more resilient and efficient as compared to the international arbitration rules and the convenience of commercial dispute settlement. [1]

Emergency arbitration, or 'EA', has become a popular process by which parties can get quick resolution from an emergency arbiter. It refers to a procedure for arbitration that is used before the main tribunal's establishment in order to provide quick, temporary relief for safeguarding assets and evidence that must be protected immediately and may otherwise be lost, destroyed, or changed. The possibility of success on the merits, the risk of irreversible injury, the risk of the dispute getting worse, and the balance of equities are the four guiding principles of the EA process. Because EA fulfills the aforementioned crucial objectives, it is commonly referred to as the "Achilles' heel" of arbitration.[2]

The Indian arbitration legal framework does not recognize emergency arbitration. This dissertation intends to explore the need for emergency arbitration in the Indian legal framework for a smooth resolution of interim reliefs for parties.

[1] Chiranjit Goswami, Contemporary Issues of Arbitration, 3 JUS CORPUS L.J. 394 (2023).
[2] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).

1. SCOPE OF THE STUDY

The most important aspect of arbitration is speed. The parties choose arbitration proceedings because they think it will resolve their disputes more quickly. The lengthy duration of complicated business arbitration procedures puts the parties in a difficult position as they attempt to uphold the arbitral award. To protect the subject of arbitration in such disputes, getting immediate interim relief often proves necessary. With regard to these difficulties in institutional arbitrations, the idea of emergency arbitration (or "EA") has evolved as a special remedy. EA's goal is to offer immediate conservatory or *pro-tem* actions to a party or parties who are unable to wait for the establishment of an arbitral tribunal. A party's emergency arbitration request is only effective if it is supported by a chariot with two wheels:

I. *Fumus boni iuris*- reasonable possibility that the requesting party will succeed on merits;
II. *Periculum in mora* – if the measure is not granted immediately, the loss would not and could not be compensated by way of damages.[3]

Depending on the criteria of an arbitration agreement or the institutional rules, the major function of emergency arbitration is when there is no arbitral tribunal in existence or when it would take too long to establish one. EA spreads as a promise as a result of a number of other flaws in the system, including a lack of faith in national courts to give urgent reliefs, disclosure of private information, excessive litigation costs, etc. [4]

According to a 2015 survey, 79% of respondents thought that one of the most crucial considerations was whether emergency decisions could be enforced. Unfortunately, rather than enforceability being a justification for using emergency arbitration, the weight seems to have been placed on worries about enforceability. The likelihood of effectively implementing emergency arbitrator decisions differs throughout jurisdictions, as a few respondents have remarked. Enforcement is viewed as being unexpected and time-consuming in some jurisdictions. Because of the apparent competence of the national courts in comparison to the

[3] India - Arbitration, Litigation and Conciliation - Emergency Arbitration In India: Concept And Beginning. Available at https://www.mondaq.com/advicecentre/content/3958/Emergency-Arbitration-In-India-Concept-And-Beginning

[4] Elamathi J., Enforcement of Emergency Arbitration: Indian Standpoint, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023).

uncertainty of enforcing an emergency arbitrator's judgment, the use of emergency arbitrators was viewed as an unnecessary addition in other jurisdictions.[5] Therefore, the enforceability of emergency decisions has encountered numerous practical challenges and uncertainties.

1.2. INDIAN SCENARIO

The Law Commission's 246th Report on amendments to the Arbitration and Conciliation Act, 1996 recommends changing Section 2 (1)(d) of the Act to recognize emergency arbitrations. This change was made to ensure that institutional rules that call for the appointment of an emergency arbitrator, such as the SIAC Arbitration Rules, ICC Rules, or any other regulation, be granted statutory recognition in India:

> *"Section 2(d): "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator."*

The Arbitration and Conciliation (Amendment) Act, 2015 was anticipated to recognize this global shift and include provisions for the appointment of an emergency arbitrator. The Srikrishna Committee, which was established to "review the institutionalization of arbitration mechanism in India," then made several recommendations, including that the legislation be changed to permit the execution of emergency arbitration decisions and that the Law Commission of India's proposal be adopted. A majority of the Srikrishna Committee's recommendations were expected to be implemented. However, this did not happen, and as of now, Emergency Arbitration has not been included in India's statutory arbitration framework. The Law Commission's recommendation calling for Emergency Arbitration was not included in the 2015 Amendment and makes no mention of Emergency Arbitration.

It is quite highly unlikely that a foreign-seated award will be enforced in India because Part II of the Arbitration and Conciliation Act, 1996 is the sole section that will allow for its recognition. According to the ruling made by the Supreme Court of India in the case of *BALCO v. Kaiser Aluminum Technical Services*[6], Indian courts are prospectively barred from granting interim relief in connection with arbitrations that are conducted in foreign jurisdictions.

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[5] White & Case & School of International Arbitration, Queen Mary Univ. of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration (2015), at 28, *available at* http: / /www. arbitration.qmul. ac.uk/media/ arbitration/docs /2015_Intemational_Arbitration_Survey.pdf.

[6] **BALCO** *Kaiser Aluminium Technical Services* (2012) 9 SCC 552

India, however, takes an ancillary enforceability approach to an EA ruling. There aren't many court rulings on emergency arbitration. The Bombay High Court and the Delhi High Court, respectively, have emerged as the torchbearers in the important cases of *HSBC v. Avitel*[7] and *Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors*[8], where the Courts granted interim reliefs in accordance with the order of the Emergency Arbitrator.[9] However, there is a clear distinction between the two orders in terms of whether or not the BALCO ratio applies in the aforementioned instances.

Under the Indian scenario, Emergency arbitration is not covered by the 1996 Arbitration and Conciliation Act ("Act"). As a result, it can only be used if both parties have consented to institutional arbitration that offers the option of emergency arbitration. However, institutional arbitration itself is going through a nascent stage in India. This puts parties opting for ad-hoc arbitration in dire need for a legislative acknowledgement of EA in order to opt for interim relief through ad-hoc arbitration. Therefore, how far Emergency Arbitration have any hope of flourishing without a legal framework recognizing the concept is unclear.

The Supreme Court's decision of the *Amazon.Com NV Inv. Holdings LLC v. Future Retail Ltd* [10] case in 2021, provided answers to two legal answers:

1. Does the Arbitration Act permit the enforcement of an EA award?
2. Is a Section 17(2) Arbitration Act order subject to an appeal under Section 37 of the same act?

In response to the first query, the Supreme Court ruled that nothing in the Arbitration Act prevents business parties from deciding on procedural rules of institutional arbitration that permit an emergency arbitrator to grant temporary relief. The ruling made it clear that an emergency arbitrator is included in the definition of "Arbitral Tribunal" in Section 2(1)(d) of the Arbitration Act.[11] Although the Supreme Court of India in the *Amazon*[12] case validated the mechanism and the decisions that resulted from it, the Arbitration Act should still be changed

[7] HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd & **Ors**., Arbitration Petition No. 1062/2012 dated January 22nd, 2014.

[8] Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors**,** O.M.P (I) (Comm.) 23/2015, CCP(O) 59/2016 and IA Nos. 25949/2015, 2179/2016 dated October 7th, 2016

[9] Emergency Arbitration in India – Concept and Beginning. Available at: https://singhania.in/blog/emergency-arbitration-in-india-concept-and-beginning

[10] Amazon.Com NV Inv. Holdings LLC v. Future Retail Ltd., Civil Appeal Nos. 4492-4493 of 2021

[11] Gautam Mohanty, ARBITRATING SHAREHOLDER DISPUTES: A CASE FOR EMERGENCY ARBITRATION IN INDIA ARBITRATION WORKSHOP (2021), Available at: https://www.thearbitrationworkshop.com/post/shareholder-disputes-emergency-arbitration (last visited Jun 21, 2024).

[12] *Ibid.*

to expressly include: (1) "emergency arbitrator" within the definition of an "arbitral tribunal" under Section 2(1)(d) of the Arbitration Act; and (2) the decisions of an emergency arbitrator under Section 2(1)(c), regardless of the terminology of the decision in the definition.[13] By making the aforementioned changes, India's arbitration framework would be strengthened and would offer stability and predictability for both emergency rulings with Indian seats and those with foreign seats. Since foreign-seated emergency rulings would now be final with the onset of legislative reform, binding on the parties, and enforceable under Section 36(1) of the Arbitration Act, the arbitration framework of India will hopefully evolve into a better standing and reputation in the eyes of potential international commercial entities.

1.3. FAST-TRACK ARBITRATION DISTINGUISHED FROM EMERGENCY ARBITRATION

It is important to note that the Indian Arbitration and Conciliation Act of 1996 recognizes fast-track arbitration but not Emergency Arbitration. Fast-track arbitration was recognized in the 2015 amendment of the Act. Although both types of arbitration sound similar, they have their own distinguishing characteristics. The idea of fast-track arbitration was introduced in India with the recommendations of the 246th Law Commission Report on August 5, 2014, which cited several cases to demonstrate the advantages of a rapid proceeding. Following this, the Amendment Act of 2015 was introduced, which added revisions to Section 29B of the Arbitration and Conciliation Act, of 1996 and described the process for fast-track arbitration. The procedure and rules for fast-track arbitration are discussed in Section 29B. In India, the idea of fast-track arbitration indicates that the case must be resolved within six months and that written pleadings are sufficient in place of an oral hearing. The essence of fast-track arbitration is to expedite the process of arbitration. The award of fast-track arbitration is final and effective, just as a normal arbitral award.

However, Emergency Arbitration intends to obtain interim relief, which will be conclusively granted or denied, depending on the final arbitral award. The objective of emergency arbitration

[13] Desai, A., Kabra, A. and Bansal, R. (2022) *Singapore High Court Enforces Foreign Emergency Arbitrator Award*, *Nishith Desai Associates*. Available at: https://nishithdesai.com/SectionCategory/33/Research-and-Articles/12/57/CourtCorner/8320/88.html (Accessed: 21 June 2024).

is to cure immediate damage, and the objective of fast-track arbitration is to expedite the whole process of arbitration for a final arbitral award within a short span of time (six months). Fast-track arbitration is the solution for companies intending to solve disputes with less time on their hands. Emergency arbitration is for those who need immediate interim relief, which, if left unaddressed promptly, may cause damage to the party. Emergency arbitration is opted for when the parties do not have ample time to wait for an arbitral tribunal to be set up. The issues addressed by emergency arbitration are time-bound.

The Indian arbitral legal framework recognizes fast-track arbitration but not emergency arbitration, although both these methods were recommended by the Law Commission's 246th Report. The Act was further amended in 2021; however, the amendment does not mention emergency arbitration. Emergency Arbitration is as important as fast-track arbitration to facilitate arbitration, depending on the situation at hand. The absence of an express provision recognizing emergency arbitration leaves a lacuna in the arbitral legal framework in India.

1.4. GLOBAL SCENARIO

The Netherlands Arbitration Institute (NAI), the Stockholm Chamber of Commerce (SCC), the Swiss Chambers Arbitration Institution (SCAI), the Mexico City National Chamber of Commerce (CANACO), and the Singapore International Arbitration Centre (SIAC) currently offer expedited formation of the arbitral tribunal and the EA.[14] Meanwhile, the International Centre for Dispute Resolution of the American Arbitration Association (ICDR/AAA) and the International Chamber of Commerce (ICC) have chosen to offer only EA.

Asian jurisdictions like Hong Kong and Singapore are seen as torchbearers. Both nations have passed modifications that expressly recognize the Emergency Arbitrator's interim orders. The Emergency Arbitrator has been added to the definition of "arbitral tribunal" in the Singapore International Arbitration Act of 1994[15]. Hong Kong has made changes to its Arbitration Ordinance by adding Part 3A, which expands the scope of recognition and enforcement. The London Court of International Arbitration (LCIA), American Arbitration Association (AAA), and International Chamber of Commerce (ICC) all followed suit. It updated its rules to include this novel idea, which not only speeds up the procedure and saves time and money, but also makes the changes enforceable.

[14] Ravi Singhania & Kanika Tandon, EMERGENCY ARBITRATION – JOURNEY FROM SIAC TO INDIA CHINA BUSINESS LAW JOURNAL (2023), Available at: https://law.asia/emergency-arbitration-journey-siac-india/ (last visited Jun 21, 2024).

[15] Section 2(1), Singapore International Arbitration Act 1994

The New York Convention does not recognize an intermediate order; it only recognizes a final award that may be enforceable. According to the aforementioned convention, the order is evaluated using the standard of finality. In a 2013 case involving the EA order in the *Microsoft Corporation v. Yahoo! Inc.*[16] lawsuit, Yahoo's move to rescind an EA award was denied by the District Court of New York.[17] The remedy granted by the Emergency Arbitrator was determined to be "in essence final" by the Court, which also confirmed it for reasons of recognition and enforcement. The Court reasoned that despite the absence of a final ruling from the Arbitral Tribunal, the Emergency Arbitrator is nevertheless permitted to provide final relief in order to maintain the status quo in the dispute.[18] In *Chinmax Medical Systems v. Alere San Diego*[19], the Southern District Court of California reached the opposite decision in 2011. In this case, the Court dealt with a request to overturn an emergency arbitrator's ruling. The court refused to exercise its jurisdiction on the grounds that the ruling was not legally conclusive and binding under the New York Convention.

Consequent to the International Chamber of Commerce (ICC) Article 29 Rules and Appendix V (Emergency Arbitration Provisions) provide for EA. Only parties who have signed the arbitration agreement that is the basis for the application or their successors are covered by the Emergency Arbitrator Provisions.[20]

The position of an emergency arbitrator and the legality of its rulings in light of international agreements and different national laws are examined in this dissertation. The analysis of the strategy used by Indian courts in a number of judgments from the past ten years and more recently in many rulings resulting from a continuing, highly publicized dispute between commercial titans then focuses explicitly on these issues under the Indian arbitration process and issues regarding the enforceability of these arbitration awards. The dissertation then concludes by offering suggestions for a better emergency arbitration legal framework that might help facilitate international trade and flourish India's economic prospects.

Jason Fry contends that in order for emergency arbitration to be as successful as it is well-liked,

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[16] **Yahoo! Inc. v. Microsoft Corporation,** United States District Court, Southern District of New York, 13 CV 7237, October 21, 2013

[17] India - Arbitration, Litigation and Conciliation - Emergency Arbitration In India: Concept And Beginning. Available at https://www.mondaq.com/advicecentre/content/3958/Emergency-Arbitration-In-India-Concept-And-Beginning

[18] Theadmin, EMERGENCY ARBITRATION: WHEN DOES IT COME INTO PLAY UNDISPUTED LEGAL INC. (2021), Available at: https://undisputedlegal.com/emergency-arbitration-when-does-it-come-into-play/ (last visited Jun 21, 2024).

[19] **Chinmax Medical Systems Inc., v. Alere San Diego, Inc**., Southern District of California, Case No. 10 CV 2467 WQH (NLS), May 27, 2011

[20] J. Y. Art, *Challenge of Arbitrators: Is an institutional decision final*, 2 ARBITRATION INTERNATIONAL 261–265 (1986).

it must be "properly welcomed into a legal framework."[21]

Two issues must be addressed in order to accomplish this and guarantee the unambiguous enforcement of emergency decisions:

(a) the status of emergency arbitrators and emergency decisions, and

(b) the enforceability of emergency decisions under the New York Convention, as arbitral decisions on interim relief under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"); and under national law.

2. OBJECTIVES

1. To attempt to understand the concept of Emergency Arbitration and its utility in the Indian scenario for facilitating international trade.
2. To use the judicial pronouncements in India to evaluate the current legal status of EA.
3. To understand how fast-track arbitration and emergency arbitration differ from each other and the need for emergency arbitration.
4. To evaluate the challenges and issues in enforcing Emergency Arbitration Awards in India.
5. To attempt to frame an ideal legal framework that addresses Emergency Arbitration in both ad-hoc arbitration and institutional arbitration in India.

3. HYPOTHESIS

The legal framework for emergency arbitration is lacking in India.

4. RESEARCH METHODOLOGY

The current research is mostly qualitative and doctrine in nature. The research approach

[21] Jason Fry, The Emergency Arbitrator - Flawed Fashion or Sensible Solution, 7 DISP. RESOL. INT'l 179 (2013).

used for the current work is the examination of international and national systems around the world and comparing it with the Indian scenario. The main sources of information are international conventions, municipal laws, foreign arbitration institution rules, and Law Commission Reports. The secondary data was gathered from publications such as books, journals, websites, and court decisions issued by courts around the world and in India.

5. RESEARCH QUESTIONS

1. Does the Indian legal framework recognize emergency arbitration?
2. What is the approach of the Indian judiciary in recognizing Emergency Arbitration?
3. Why is the implementation of the Law Commission's 246th Report regarding Emergency Arbitration relevant?
4. What are the challenges with regard to enforcing this Emergency Arbitration award?
5. What is India's approach to enforcing Emergency Arbitral awards?
6. Whether the current Indian approach to enforcing foreign Emergency Arbitral Awards is sufficient?

6. STATEMENT OF PROBLEM

The law regarding Emergency Arbitration was suggested to be amended and incorporated into the Indian Arbitration and Conciliation Act, 1996 in the Law Commission's 246th Report back in 2015. However, it failed to actualize and there is no legal framework governing Emergency Arbitration currently in India, even though there are judicial pronouncements addressing EA. The institutional arbitration system has its own rules that address EA. Considering that certain businesses opt for ad-hoc arbitration compared to institutionalized arbitration and the fact that institutionalized arbitration in India is still in its nascent stages poses less chance of Emergency Arbitration to actualize. Therefore, it is necessary to bring about a legal provision that governs Emergency Arbitration, considering the progress of the Indian economy and trade relations. India needs to step up its legal framework in order to be on par with industrial best practices. This will help India take another step to attain the goal of being an international arbitration hub.

7. LITERATURE REVIEW

- **Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator. Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023).**

The article examines the legal standing and legitimacy of emergency arbitrators' decisions. The study addresses an important theological question: Are Emergency Arbitrators considered full-fledged arbitrators? This research examines the norms of several arbitral organisations to provide a positive response to the issue. The report discusses revisions to the 246th Law Commission Report that were not included in the Act. Finally, the report proposes formal recognition for emergency arbitrations in India to improve their effectiveness.

- **Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).**

This article compares local rules to international ones and highlights important differences between the two. The report proposes reforms to India's domestic institutional architecture to strengthen emergency arbitration procedures. It examines the challenges of recognizing and enforcing emergency arbitration orders, which are crucial for effective emergency mechanisms.

- **Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).**

This paper analyses the relationship between India and emergency arbitration. The goal of this paper is twofold. First, assess the emergency arbitrator's position and the enforceability of their rulings. Second, present a case for formal recognition of the procedure.

- **Aakanksha Luhach & Varad S. Kolhe, Emergency Arbitration in India: A Bellwether for the Grant of Interim Reliefs, 1 IND. ARB. L. REV. 137 (2019).**

This article compares the benefits of emergency arbitration and national courts in granting immediate relief on practical grounds. This research study compares emergency arbitration

rules from Indian and international organizations, focusing on their practical aspects. This article examines legal challenges to emergency arbitration in India, including enforceability and recognition of awarded relief, and proposes alternatives.

- **Elamathi J., Enforcement of Emergency Arbitration: Indian Standpoint, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023).**

This article examines the Indian arbitration legislation and how the court has approached the concept of emergency arbitration to evaluate India's acceptance of emergency arbitration.

- **Chiranjit Goswami, Contemporary Issues of Arbitration, 3 JUS CORPUS L.J. 394 (2023).**

Arbitration is the most often utilized type of ADR for dispute resolution. The Arbitration and Conciliation Act 1996 has undergone many amendments to align with international norms. Arbitration practices in India have also changed. Despite all efforts to make the Arbitration procedure more thorough, several difficulties persist. This article explores current arbitration views and challenges in India, supporting various legislations and precedents.

- **Jason Fry, The Emergency Arbitrator - Flawed Fashion or Sensible Solution, 7 DISP. RESOL. INT'l 179 (2013).**

The first half of this article covers the general characteristics of emergency arbitrator processes. The second section discusses the legal standing of emergency arbitrators, while the third focuses on the enforcement of their rulings. The paper finishes with reflections on the practical value of the method and if voluntary compliance is adequate to address critics.

- **Arjun Solanki & Praveena N. S., Resolving the Conundrum of the Enforceability of Emergency Awards in India-Seated Arbitrations: Amazon v. Future Retail Ltd., 15 ROM. ARB. J. 121 (2021).**

Emergency arbitration is popular worldwide due to its capacity to protect parties' assets and evidence quickly and efficiently. However, the recognition of emergency arbitration rulings varies by jurisdiction. In India, there is doubt over the legality of emergency arbitrator awards based on freely chosen institutional arbitration norms. The seminal case of Amazon v. Future

Retail Limited clarifies this question. India's top court has affirmed its pro-arbitration attitude by recognising emergency arbitrators' verdicts under Part I of the Indian Arbitration Act. This article uses the case *Amazon v. Future Retail Ltd.* to analyse the enforceability of emergency arbitration awards in Indian seated arbitrations

- **Ishan Sharma, In Depth Analysis of Emergency Arbitration - The Indian Position vis-a-vis the Global Position, 8 SUPREMO AMICUS 93 (2018).**

The article covers the regulations of several arbitral institutions, both Indian and international, regarding emergency arbitration. The following section addresses gaps in the idea of Emergency Arbitration. The author discusses how to enforce rulings made by an Emergency Arbitrator within India's existing legislation. The paper recommends strengthening the notion through national legislation and international instruments.

- **Erin Collins, Pre-Tribunal Emergency Relief in International Commercial Arbitration, 10 LOY. U. CHI. INT'l L. REV. 105 (2012)**

This article provides an overview of international commercial arbitration and its popularity as a dispute settlement procedure. This article will discuss the limitations of international commercial arbitration, particularly in emergency situations that have led parties to rely on court systems for years. It outlines the current emergency relief provisions for five main international arbitration institutions. It examines the strengths and weaknesses of the five sets of rules, as well as additional challenges to emergency relief in commercial arbitration today. The paper aims to expand the use of emergency relief in international commercial arbitration to match its popularity.

8. CHAPTERISATION

CHAPTER 1- INTRODUCTION

This chapter introduces the topic to the reader by explaining why emergency arbitration is a crucial factor in the arbitration framework. The chapter goes on to elucidate the Law Commission's 246th report and how the parliament did not adopt its recommendations. The

chapter also mentions the differentiating factors between emergency arbitration and fast-track arbitration. The amendments to the Indian Arbitration and Conciliation Act of 1996 have acknowledged fast-track arbitration but not emergency arbitration. The chapter also delves into the scope of the study, objectives, hypothesis, research questions involved, statement of the problem, literature review, and characterization.

CHAPTER 2-
ANALYSIS OF CURRENT LEGAL FRAMEWORK REGARDING EMERGENCY ARBITRATION

This chapter analyses the current legal framework concerning emergency arbitration. The chapter analyses the international framework as well as Indian domestic legislation and its history.

CHAPTER 3-
INTERNATIONAL BEST PRACTICES- ANALYSIS

This chapter looks into the various institutions worldwide that has the best practices when it comes to emergency arbitration

CHAPTER 4-
JUDICIAL APPROACH REGARDING EMERGENCY ARBITRATION IN INDIA

This chapter looks into the various judicial pronouncements in India and how the Indian courts have approached the concept of emergency arbitration. Even in the absence of provision, the Indian courts through its approach has tried its best to be pro-arbitration.

CHAPTER 5-
ENFORCEABILITY OF EMERGENCY ARBITRAL AWARDS IN INDIA

The enforceability of emergency arbitration awards has been contested multiple times due to the

absence of legal provisions regarding the enforceability of emergency arbitration. This chapter analyses how the courts have dealt with enforceability and the need for law to enforce foreign seated emergency arbitration in India.

CHAPTER 6-
ISSUES AND CHALLENGES

This chapter analyses the various issues and challenges regarding the absence of law for emergency arbitration. Institutional arbitration in India does have provisions that acknowledge emergency arbitration. However, parties opting for ad-hoc arbitration does not have any provision to look into when it comes to emergency arbitration. There are also certain limitations faced by institutional arbitration when it comes to emergency arbitration. This chapter analyses why a provision is needed in the Indian legal framework so that these issues can be effectively negated.

CHAPTER 7-
SUGGESTIONS & CONCLUSION

This chapter makes suggestions as to the framing of law regarding emergency arbitration in India, inspired from the analysis of the previous chapters and adoption of the best practices around the world.

CHAPTER II-
ANALYSIS OF CURRENT LEGAL FRAMEWORK REGARDING EMERGENCY ARBITRATION

2.1. INTRODUCTION

Traditionally, arbitration has been promoted as a quicker and less expensive way to resolve disputes. Interim relief is a crucial part of commercial dispute resolution, which can be sought through litigation. Interim relief can be crucial in cases involving industrial action, intellectual property, share ownership, bank guarantees, contract payment rights, and more. It protects assets and safeguards a factual or legal situation until the final decision has been rendered. Interim relief is typically used to maintain the ability to enforce rights until a final decision on merits is made. Emergency arbitration (EA) rules have been implemented by arbitration institutes since 2006, with the International Centre for Dispute Resolution (ICDR) being credited with the first implementation. Over the past decade, EA rules have evolved from being envisioned an innovation to becoming the norm. In 2010, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) incorporated EA in its rules, while the International Chamber of Commerce's Court of Arbitration (ICC) followed suit in 2012. The availability of EA rules has enhanced the autonomy and effectiveness of arbitration.

This chapter focuses on the origin and current legal framework regarding emergency arbitration internationally and domestically.

2.2. ORIGIN OF EMERGENCY ARBITRATION CONCEPT

The concept of Emergency Arbitration originated in the 1990s when the Court of Arbitration of the International Chamber of Commerce (ICC) introduced the ‘Pre-Arbitral Referee Procedure’ in its rules. However, it did not succeed, and only 14 cases were filed in its 24-year existence. The World Intellectual Property Organisation (WIPO) contemplated establishing ‘Emergency Relief Rules’ in the middle of the 1990s, which would be incorporated into the suggested arbitration clause for WIPO arbitration. The proposed language requires parties to settle disputes using the WIPO Arbitration Rules "in conjunction with the WIPO Emergency

Relief Rules."[22] The regulations would have permitted *ex parte* emergency relief in cases where notifying the respondent would jeopardize the procedure's aim. However, the suggested regulation amendments were not implemented.[23] WIPO has recently modified its arbitration rules to include emergency arbitration as a default option for arbitrations made after June 1, 2014.[24]

In 1999, the American Arbitration Association ('AAA') included Optional Rules for Emergency Measures of Protection in its Commercial Arbitration Rules. The AAA can appoint an emergency arbitrator to avert imminent and irreparable loss or harm if the parties opt in rather than by default.[25]

The international division of AAA, the International Centre for Dispute Resolution ('ICDR'), was the first to include 'opt-out' emergency arbitrator options in its rules. The ICDR's 2006 rule amendments included emergency arbitration as a default option, but parties could opt out from it under Article 37 of the 2006 ICDR Rules. Over the next decade, most prominent arbitral institutions adopted emergency arbitration as a standard practice. [26]

2.3. INTERNATIONAL LEGAL FRAMEWORK RECOGNIZING EMERGENCY ARBITRATION

Over the past three decades, international arbitration has grown rapidly, leading to the necessity for interim solutions to address the increasing number of urgent situations before arbitral tribunals. Interim relief, which protects the rights of disputing parties until a case is resolved, is widely used in all legal systems. Claimants familiar with domestic interim measures often request similar safeguards in international arbitration. Initially, practitioners and scholars questioned the effectiveness of interim measures in arbitration. As consumer demand for immediate protection developed, the arbitral community gradually shifted its stance on international tribunals and their power to apply interim measures. The arbitral community was wary of emergency arbitral awards, which are analogous to interim measures. In 2006, the

[22]Grant Hanessian and Alexandra Dosman. "Songs of innocence and experience: ten years of emergency arbitration." *American Review Internafional Arbitrafion* 27 (2016): 215-237.
[23] *Ibid.*
[24] WIPO Arbitration Rules (2014), Article 49(A).
[25] American Arbitration Association Commercial Arbitration Rules And Mediation Procedures (1999), Optional Rules For Emergency Measures Of Protection, O-1 To O-8.
[26] Grant Hanessian and Alexandra Dosman. "Songs of innocence and experience: ten years of emergency arbitration." *American Review Internafional Arbitrafion* 27 (2016): 215-237.

first arbitral centre implemented the emergency arbitration procedure, which has subsequently been adopted by all global and regional arbitral centres. The procedure brought a valuable and necessary innovation. The provision of emergency arbitration remedy bridged the gap between the start of an arbitral dispute and the installation of a tribunal is crucial for preserving assets and individuals necessary for a successful resolution.[27]

The following are the international frameworks that recognize emergency arbitration:

2.3.1. INTERNATIONAL CHAMBER OF COMMERCE (ICC) RULES

An emergency arbitrator provides an urgent temporary remedy when parties cannot wait for an arbitral tribunal to be established. Emergency arbitration is a concept that originated from the ICC Pre-Arbitral Referee Procedure. The ICC Pre-Arbitral Referee Procedure, introduced in 1990, is considered the modern antecedent of the emergency arbitrator. The method appoints a "referee" who can issue orders before the arbitral tribunal or national court can hear the case. Since then, numerous institutional rules have been updated to include emergency arbitrator provisions. The Singapore International Arbitration Centre's 2010 Rules, Hong Kong International Arbitration Centre's 2013 Revised Rules, ICC's 2012 Rules, and International Centre for Dispute Resolution (ICDR) 2009 Rules all include provisions for emergency arbitrators. The ICC's Emergency Arbitrator Procedure enables parties to opt out of emergency arbitrator requirements. If parties agree to a different pre-arbitral procedure that allows for conservatory or temporary measures, this provision will not apply. The ICC's Emergency Arbitrator Procedure is available to any party immediately, even before filing a Request of Arbitration. However, a Request for Arbitration must be filed within 10 days. The ICC prohibits *ex-parte* applications, stating that the emergency arbitrator must provide each party with a reasonable opportunity to submit their case.[28]

Emergency Arbitration is explicitly recognized in the ICC Arbitration Rules Article 29, which states that:

> *1) A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in*

[27] Katarina Resar Krasulova, Should I Stay or Should I Go: The Evolution of Emergency Arbitration Procedure within Private International Law, 6 CARDOZO INT'l & COMP. L. REV. 819 (2023).

[28] Chan Leng Sun & Tan Weiyi, Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief, 6 CONTEMP. ASIA ARB. J. 349 (2013).

Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration.

2) *The emergency arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.*

3) *The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.*

4) *The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.*

5) *Articles 29(1)-29(4) and the Emergency Arbitrator Rules set forth in Appendix V (collectively the "Emergency Arbitrator Provisions") shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.*

6) *The Emergency Arbitrator Provisions shall not apply if:*

   a) *the arbitration agreement under the Rules was concluded before 1 January 2012;*

   b) *the parties have agreed to opt out of the Emergency Arbitrator Provisions; or*

   c) *the arbitration agreement upon which the application is based arises from a treaty.*

7) *The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat.*[29]

2.3.2. UNCITRAL MODEL LAWS AND ARBITRATION RULES

The UNCITRAL Model Law and Arbitration Rules, revised in 2006 and 2010, include extensive procedures for interim relief in international arbitration. The revisions aim to provide a comprehensive framework for interim relief in arbitration, ensuring legal certainty and guidance. Articles 17(A)(1) and 26(3) specify the same requirements for temporary relief:

1) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
2) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. […].

Both instruments define the scope of remedies in Articles 17(2) and 26(2), allowing arbitral tribunals to require parties to:

a) Maintain or restore the status quo pending determination of the dispute;
b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

[29] "2021 Arbitration Rules - ICC - International Chamber of Commerce." *ICC - International Chamber of Commerce*, 10 July 2023, iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-29.

c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Both refer to temporary remedies awarded by an arbitral tribunal but do not discuss the prospect of an emergency arbitrator ordering the same relief. As stated above, EA procedures are distinct from preliminary orders granted *ex parte* by arbitral tribunals under the UNCITRAL Model Law provisions for interim relief. Some UNCITRAL Model Law jurisdictions have provisions for interim remedy as part of the *lex arbitri*. The UNCITRAL Model Law and Arbitration Rules may have a more significant soft law influence. The UNCITRAL framework facilitated substantial collaboration and negotiation that resulted in both measures. Commentators refer to it as a compilation of internationally accepted rules for interim relief in arbitration. According to one analyst, they are an aggregation of interim relief practices in investor-state arbitration across time. They are based on acknowledged norms for interim relief in domestic courts. In addition, they deal with interim relief comprehensively. The clauses on temporary relief in both agreements are generally interpreted as arbitral procedures. The drafters were cautious while defining the extent of interim relief, aiming to accommodate diverse national perspectives. Therefore, it is common for both parties and emergency arbitrators to seek inspiration and assistance from them during EA practice.[30]

Article 17 of the UNCITRAL Model Law on International Commercial Arbitration states:

Power of arbitral tribunal to order interim measures

1. *Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.*
2. *An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:*
    a) *Maintain or restore the status quo pending determination of the dispute;*
    b) *Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*

[30] Eva Storskrubb, "Emergency Arbitration: A Maturing and Evolving Procedure.", Stockholm Arbitration Yearbook, Wolters Kluwer Publishers, 2nd Edition, (2020): 115-135.

c) *Provide a means of preserving assets out of which a subsequent award may be satisfied; or*
d) *Preserve evidence that may be relevant and material to the resolution of the dispute.*

Article 17A states the conditions for granting interim measures:

Conditions for granting interim measures:

1. *The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:*

a) *Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*
b) *There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*

2. *With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.*[31]

Even though UNCITRAL Model Law on International Commercial Arbitration makes no explicit use of the term Emergency Arbitration, it used these Articles to give rise to emergency arbitration procedure. It acts as a soft law influence on domestic laws regarding arbitration.

[31] UNCITRAL Model Law on International Commercial Arbitration

2.4. INDIA'S APPROACH TOWARDS EMERGENCY ARBITRATION: WHERE DO WE STAND?

India's legislation on the subject of arbitration has progressed from the 1899 Arbitration and Conciliation Act, which only applied to Calcutta, to the 1940 Act, which covers the whole country. The parliament repealed the 1940 Act and enacted the Arbitration and Conciliation Act in 1996 to address the issue of non-enforcement of foreign arbitral rulings. The goal was to streamline the procedure and reduce delays. Subsequent amendments to the Act aimed to reduce court interference in the process, similar to those introduced in 2015. In 2014, Indian lawmakers recognized the need for emergency arbitration, and the 246th Law Commission Report provided legislative recognition. However, the 2015 amendment to the legislation did not reflect this.[32]

The Arbitration and Conciliation Act of 1996 controls arbitration in India. Part I of the Act (parts 2–43) applies only to arbitrations held in India, with a few exceptions. Part II of the Act governs the execution of international awards in India based on the New York Convention.[33] The Indian Arbitration and Conciliation Act does not include explicit emergency arbitration provisions. Sections 9 and 17 of the Arbitration and Conciliation Act, 1996 ('the Act') allow national courts and arbitral tribunals to provide interim relief to any party in a dispute. Arbitral tribunals can only provide temporary relief to parties during the arbitration processes, as stated in the applicable laws. If a party seeks interim relief under the arbitral tribunal's constitution, they must approach the national court with jurisdiction over their case. However, this interim relief is granted after the constitution of an arbitral tribunal. Emergency arbitration is a different concept, and it aims to resolve issues that need immediate attention and cannot wait for the constitution of an arbitral award. Emergency arbitration is particularly relevant in this context.

Prior to the arbitration tribunal's formation, parties seeking immediate redress could only seek it through national courts. Many arbitral institutions now include emergency arbitration provisions in their rules, making it possible for parties seeking interim measures to choose or be forced to use emergency arbitrators. An emergency arbitrator functions similarly to a doctor in an emergency situation. She must be able to swiftly organise procedures under time limits,

[32] Swarnendu Chatterjee & Dhriti Bole, Enforcement of Achille's Heel in India, 2 JUS CORPUS L.J. 306 (2021).
[33] Elamathi J., Enforcement of Emergency Arbitration: Indian Standpoint, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023).

maintain fairness and efficiency, grasp concerns, and make informed judgements with critical repercussions.[34]

2.4.1. THE LAW COMMISSION'S 246TH REPORT

Part I of the Indian Arbitration and Conciliation Act defines an 'arbitral tribunal' as a sole arbitrator or a panel of arbitrators. The Law Commission of India's 246th Report suggested extending the 'arbitral tribunal' concept to include emergency arbitrators appointed under institutional guidelines. The report stated that the change aims to give legislative legitimacy to institutional regulations throughout India like the SIAC Arbitration laws, which include emergency arbitration. This idea was not adopted into the Arbitration and Conciliation (Amendment) Act of 2015.

Interestingly, the Lok Sabha did not address this problem during the 2015 Amendment discussion. If the modification to include emergency arbitrators in the definition of 'arbitral tribunal' were included, the Act would explicitly specify that their rulings are considered court orders, making them enforceable and removing any ambiguity. There are two possible reasons for not explicitly requiring an emergency arbitrator under the Act. The first is because the Act's structure always included the possibility of an emergency arbitrator, therefore no further provision was necessary. The legislation did not include provisions for enforcing Emergency Arbitration decisions. The Supreme Court ruled in *Amazon v. Future Retail Ltd.*[35] that the meaning of 'arbitral tribunal' under the Act does not include an emergency arbitrator. The Supreme Court cited *Avitel Post Studioz & Ors. v. HSBC PI Holdings (Mauritius) Ltd.*[36] to clarify that just because the 246th Report of the Law Commission of India's suggestions were not accepted does not mean they are not part of the Act as properly interpreted. The Supreme Court ruled that the 2015 Amendment made any interim order issued by an arbitral tribunal enforceable under the Code of Civil Procedure, 1908, much like a court order. Section 17(2) of the Act allows for the enforcement of an emergency arbitrator's order issued by an arbitral tribunal under Section 17(1). The Supreme Court held that emergency arbitrations have always been tacitly recognized under the Act, even if the legislators did not explicitly indicate so.[37]

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[34] Aakanksha Luhach & Varad S. Kolhe, Emergency Arbitration in India: A Bellwether for the Grant of Interim Reliefs, 1 IND. ARB. L. REV. 137 (2019).
[35] *Amazon.com NV Investment Holdings LLC* ***v.*** *Future Retail Limited & Ors*., 2021 SCCOnline SC 557.
[36] *Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd*., (2021) 4 SCC 713.
[37] Shreya Singh, The Emergence of Emergency Arbitrations in India, 2 INDIAN REV. INT'l ARB. 35 (2022).

2.4.2. THE HIGH-LEVEL COMMITTEE REPORT

Apart from the many pro-arbitration efforts, the Law and Justice Ministry established a High-Level Committee (referred to as 'Srikrishna Committee') on January 13, 2017, under the chairperson of Justice B. N. Srikrishna, to examine the institutionalization of arbitration. The Committee was charged with formulating suggestions for the reform of arbitration in India, and on August 3, 2017, it delivered its report to Ravi Shankar Prasad, the Minister of Law and Justice as well as Electronics and Information Technology.[38] The High-Level Committee was created to examine the process of institutionalizing arbitration in India. The committee submitted a report to the Indian government in which it reiterated the necessity of acknowledging Emergency Arbitration and suggested modifying the definition of an arbitral decision and adding a definition for a 'Emergency Award'. However, to date, not a single one of these recommendations has been implemented.[39]

Nevertheless, it is surprising to note that although the recommendation regarding emergency arbitration was not adopted, the recommendation made in the same report regarding the concept of fast-track arbitration was adopted. It is crucial to understand the difference between the two concepts.

Decisions are rendered by emergency arbitrators quickly—they can be appointed in as little as 24 hours and provide the decision in as little as a week. It reduces the need for parties to go back to local courts, which is the predominant motive behind arbitration. The objective of emergency arbitration is to cure immediate damage, and the objective of fast-track arbitration is to expedite the whole arbitration process for a final arbitral award within a short time (six months). Emergency Arbitration is as essential as fast-track arbitration to facilitate hassle-free arbitration, depending on the situation. The absence of an express provision recognizing emergency arbitration leaves a lacuna in the arbitral legal framework in India. The Section 29B of the Arbitration & Conciliation Act recognizes fast-track arbitration:

29B. Fast track procedure.—

[38] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[39] Elamathi J., Enforcement of Emergency Arbitration: Indian Standpoint, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023).

(1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

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(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

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(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):--

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(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

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(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

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(5) If the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.][40]

It is unclear why the recommendation regarding fast-track arbitration was adopted and emergency arbitration was not. A clear statutory recognition for emergency arbitration would solve ambiguity regarding the concept, provide a concise timeline and procedure for setting up an emergency arbitrator, would streamline the process of emergency arbitration, making it uniform across ad-hoc & institutional arbitration, and also would provide foreign eyes a better idea of whether such a concept is accepted within the Indian legal framework.

2.4.3. EMERGENCY ARBITRATION IN DOMESTIC ARBITRAL INSTITUTION RULES

Although the phrase "Emergency Arbitration" is not included in the amended Arbitration and Conciliation (Amendment) Act, arbitration institutions are attempting to include it in their rules and are developing parallel procedures as a result of a recent initiative. Despite not being statutorily recognized (in the case of an expressly excluded clause), the Indian arbitral institutions have created rules that are essentially equal to the leading institutional norms for international arbitration.[41] Here are a few notable organizations and the laws that go along with them:

1. Delhi International Arbitration Centre: A clause titled "Emergency Arbitration" may be found in Part III of the Delhi International Arbitration Centre's (DAC4) arbitration rules, which are administered by the Delhi High Court. Section 18A, which also specifies "Emergency Arbitrator," provides a thorough explanation of the appointment, procedure, duration, and powers of an Emergency Arbitrator.

[40] Section 29B, Indian Arbitration & Conciliation Act, 1996
[41] Elamathi J., Enforcement of Emergency Arbitration: Indian Standpoint, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023).

2. Appendix V of Article 29 of the "Arbitration and ADR Rules," published by the Court of Arbitration of the International Chambers of Commerce-India, contains a list of the laws pertaining to EA and Emergency Arbitrator.

3. International Commercial Arbitration (ICA) lists the conditions of the EA and Emergency Arbitrator under Section 33, with Section 36(3) taking effect on January 1, 2014.

4. The Madras High Court Arbitration Centre (MHCAC) Rules, 2014, Part IV, Section 20 r/w Schedule A and Schedule D, outline the provisions of EA and Emergency Arbitrator.

5. Mumbai Centre for International Arbitration: With effect from June 15, 2016, the Emergency Arbitrator and EA conditions are specified in Section 3 of the Mumbai Centre for International Arbitration (Rules) 2016.[42]

6. High Court of Orissa Arbitration Rules, 2014 mentions emergency arbitration under Rule 20, which may be found under Part IV of the Rules. As per the rules, an emergency arbitrator shall be appointed within two business days to resolve the issue.[43]

Nevertheless, there are covert ways to uphold emergency arbitrators' decisions while legislative action is being considered. When an emergency arbitration with an Indian seat occurs, the parties have two options: either they file for an interim order under Section 17(2) of the Act to have the emergency order enforced in line with the CPC's provisions, which are comparable to those of a court order, or they file for contempt under Section 27(5) of the Act against the party that disobeys the emergency arbitrator's decision.[44]

[42] Elamathi J., Enforcement of Emergency Arbitration: Indian Standpoint, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023).
[43] High Court of Orissa Arbitration Rules, 2014
[44] Elamathi J., Enforcement of Emergency Arbitration: Indian Standpoint, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023).

2.5. CONCLUSION

Although many advanced international legal frameworks have recognized and incorporated the concept of emergency arbitration, the Indian legal framework has only covertly acknowledged the concept. The judicial approach towards emergency arbitration will be explored in subsequent chapters. However, it is unclear as to why the law commission report and the high-level committee report have not yet been adopted into legislation. It is important to give explicit recognition to the concept of emergency arbitration as it poses several advantages, as mentioned above.

CHAPTER III-

INTERNATIONAL BEST PRACTICES- ANALYSIS

3.1. INTRODUCTION

This chapter will examine the EA mechanism in renowned international arbitration institutions. Such examination helps us understand the current legal best standards and helps adopt the compatible aspects of these rules into our national legislation. In today's day and age, several international arbitration institutions have evolved to be the arbitration leaders in the global market. As a growing economy, it helps India to follow in their footsteps and adopt their best practices into our legal system to rise on par with them. This will help India grow its arbitration sector and rise as a favorable arbitral hub among global entities. Many arbitral institutions worldwide have established guidelines for emergency arbitrators. Several institutions, such as the International Centre for Dispute Resolution (ICDR), International Chambers of Commerce (ICC), Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA), Hong Kong International Arbitration Centre (HKIAC), and Stockholm Chambers of Commerce (SCC) have established regulations for emergency arbitration. This chapter provides detailed information about the international best practices with regard to emergency arbitration.

3.2. INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

The American Arbitration Association (AAA) established the International Centre For Dispute Resolution (ICDR) in 1996 to provide global access to the arbitration and mediation services offered by the AAA. The ICDR manages all international matters under the AAA, and unless the parties specify otherwise, they are governed by the ICDR Rules. The Tribunal may request temporary relief prior to the Tribunal's establishment in accordance with the ICDR Rules.[45]Article 7 of International Dispute Resolution Procedures contains provisions related to emergency arbitration.

[45] Chan Leng Sun & Tan Weiyi, Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief, 6 CONTEMP. ASIA ARB. J. 349 (2013).

A party can request for emergency relief before the constitution of the arbitral tribunal by submitting a written application to the Administrator and to all other parties setting forth: the nature of the relief sought, the reasons why such relief is required on an emergency basis before the tribunal is appointed; and what injury or prejudice the party will suffer if relief is not provided. The application must be made concurrently or following the submission of a Notice of Arbitration. Such application may be made by email or in any other manner authorized by Article 11 and must include payment of any relevant fees as well as a statement verifying that all parties have been contacted or an explanation of the actions taken in good faith to notify all parties. Within one business day after receiving the application for emergency relief as provided in Article 7(1), and after determining that the conditions of Article 7(1) have been completed, the Administrator shall appoint a single emergency arbitrator. Upon accepting appointment, a potential emergency arbitrator must report to the Administrator any circumstances that raise justified suspicions about the arbitrator's impartiality or independence, as required by Article 14. Any objection to the appointment of the emergency arbitrator must be filed within one business day after the Administrator's notice to the parties about the appointment and the facts disclosed.[46]

The emergency arbitrator must set a schedule for considering the emergency relief application as quickly as feasible but no later than two business days after the appointment. Such a timetable must allow a reasonable chance for all parties to be heard and may include procedures via phone, video, written submissions, or other appropriate methods in lieu of an in-person hearing. The emergency arbitrator shall have the authority conferred upon the arbitral tribunal by Article 21, including the authority to rule on the emergency arbitrator's jurisdiction, and shall settle any questions over the applicability of Article 7. The emergency arbitrator shall have the authority to order or award any interim or conservatory remedies deemed appropriate, including injunctive relief and measures to safeguard or conserve property. Any such actions might be in the form of an interim award or an order. The emergency arbitrator must provide reasons in either situation. The emergency arbitrator has the authority to modify or vacate the interim award or order. Any interim award or order shall have the same effect as an intermediate measure issued under Article 27 and shall be binding on the parties when given. The parties agree to comply with such an interim award or decision without delay. After the arbitral panel is established, the emergency arbitrator will no longer be able to act. Once the tribunal is formed, it has the authority to uphold, scrutinize, modify, or eliminate the interim

[46] Article 7, ICDR Rules, 2021

award or order of emergency relief made by the emergency arbitrator. The emergency arbitrator may not be a member of the tribunal unless the parties agree otherwise. Any temporary award or order of emergency relief may be subject to the production of suitable security by the party requesting it. [47]

A party's request for interim measures addressed to a judicial body must not be regarded as incompatible with Article 7, the agreement to arbitrate, or a waiver of the right to arbitration. The emergency arbitrator will oversee the expenses connected with petitions for emergency relief, subject to the arbitral tribunal's ultimate determination of such costs.[48]

The Singapore International Arbitration Centre (SIAC) Rules and the International Centre for Dispute Resolution (ICDR) Rules include identical provisions. The administrator will designate an emergency arbitrator in cases where a party applies under the requirements for emergency arbitrators within one business day after receiving a written notification from the applicant. The emergency arbitrator will then, within two business days after the appointment, set a timetable for reviewing the application for emergency relief. In lieu of a hearing, the proceedings may involve a phone conference or written submissions. An order or award may be issued by the emergency arbitrator as a temporary or interim measure. Furthermore, parties may concurrently request an order for temporary remedies from a court body in order to circumvent the emergency arbitrator restrictions.[49]

3.3. SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

The SIAC arbitration is widely used by Indian firms and corporations. In three important EA-related cases in India, the arbitration proceedings followed the SIAC Rules. According to the SIAC 2020 Annual Report, India is the most active foreign user of SIAC's institutional mechanism, accounting for 690 out of 1,083 cases.[50] The SIAC pioneered emergency arbitrator services in Asia in 2010. Rule 30.2 of the SIAC Rules 2016 allows for the appointment of an emergency arbitrator. The SIAC made substantial revisions to its rules in 2016. To increase emergency arbitration efficiency, SIAC made the following changes:

[47] Article 7, ICDR Rules, 2021
[48] Article 7, ICDR Rules, 2021
[49] Chan Leng Sun & Tan Weiyi, Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief, 6 CONTEMP. ASIA ARB. J. 349 (2013).
[50] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).

1. Under SIAC Rules 2013, the appointment of an emergency arbitrator was limited to one business day. This has been altered to one day.
2. Orders or awards must be issued within 14 days following the appointment of an emergency arbitrator.

The Singapore International Arbitration Act was also revised to broaden the definition of 'arbitral tribunal' to include emergency arbitrators.[51]

At present, SIAC Rules, 2016 Rule 30 and Schedule 1 cover emergency arbitration. As per Rule 30:

30. Interim and Emergency Interim Relief:

30.1. The Tribunal may, at the request of a party, issue an order or an Award granting an injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.

30.2 A party that wishes to seek emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.

30.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules.[52]

Schedule 1 provides all additional information regarding emergency arbitration, such as the ingredients of the application, appointment of the arbitrator, fees, etc. As per the schedule, the application must include the nature of the relief sought and why such relief is sought, along with a statement certifying that all parties involved have been sent a copy of the application. The application for emergency interim relief is filed with the registrar. It is accompanied by a

[51] Ishan Sharma, In-Depth Analysis of Emergency Arbitration - The Indian Position vis-a-vis the Global Position, 8 SUPREMO AMICUS 93 (2018).
[52] Rule 30, Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules (6th Edition, 1 August 2016)

non-refundable administration fee. The President appoints the emergency arbitrator when the application is accepted. If the parties have agreed on a seat of arbitration, such seat shall be proceeded with. In other cases, Singapore shall be the default seat of arbitration. Prior to accepting an appointment, a potential Emergency Arbitrator must disclose to the Registrar any circumstances that may raise reasonable suspicions about his impartiality or independence. Any objection to the appointment of the Emergency Arbitrator must be filed within two days of the Registrar notifying the parties of the appointment and the facts disclosed. Unless the parties agree otherwise, an Emergency Arbitrator may not serve as an arbitrator in any subsequent arbitration involving the issue. The Emergency Arbitrator shall prepare a schedule for consideration of the emergency interim relief application as quickly as feasible but no later than two days after his appointment. Such a schedule must allow a reasonable chance for the parties to be heard, but it may also include processes via phone, video conference, or written submissions as alternatives to an in-person hearing. The Emergency Arbitrator shall have the powers conferred upon the Tribunal by these Rules, including the right to rule on his own jurisdiction, without prejudice to the Tribunal's decision. The Emergency Arbitrator shall have the authority to order or award whatever interim relief he considers necessary, including preliminary orders issued pending any hearing, telephone or video conference, or written submissions by the parties.[53]

The Emergency Arbitrator must provide summarised reasons for his decision in writing. The Emergency Arbitrator may alter or vacate the preliminary order, interim order, or award for good cause. The Emergency Arbitrator must issue an interim order or Award within 14 days of his appointment unless the Registrar grants an extension in extreme circumstances. The Emergency Arbitrator shall not make any interim order or Award until the Registrar has approved its form. The Emergency Arbitrator shall have no authority to operate once the Tribunal has been established. The Tribunal may evaluate, amend, or overturn any temporary order or Award issued by the Emergency Arbitrator, including a finding on his own jurisdiction. The Tribunal is not bound by the Emergency Arbitrator's reasoning. Any interim decision or Award given by the Emergency Arbitrator shall be void if the Tribunal is not formed within 90 days of such order or Award if the Tribunal issues a final Award or if the claim is withdrawn. Any interim order or award issued by the Emergency Arbitrator may be conditional

[53] Schedule 1, Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules (6th Edition, 1 August 2016).

on the party seeking such relief providing proper security. As part of the schedule, the parties agree that an order or award made by an Emergency Arbitrator under Schedule 1 is binding on them from the day it is issued, and they agree to carry out the interim order or award promptly and without delay. The parties further irrevocably renounce their rights to appeal, review, or recourse to any State court or other judicial body with regard to such Award, insofar as such waiver is properly given. The Emergency Arbitrator may decide how these Rules should be applied in suitable cases, and his judgment is final and not subject to appeal, review, or reconsideration. In applications filed pursuant to procedures initiated under Rule 30.2 and Schedule 1, the Registrar may shorten any time restrictions imposed by these Rules.[54] The administration fee for emergency arbitration stands at 5,000 Singapore Dollars for overseas parties and 5,350 Singapore Dollars for Singapore parties.[55] These are the current framework concerning emergency arbitration under the SIAC Rules, 2016.

The SIAC's approach to emergency proceedings is based mostly on Emergency Arbitrators, who can be called upon to resolve emergency situations before the arbitral tribunal is formed. It should be observed right away that these procedures apply to the applicable arbitration agreements by default—that is, there is no need for the parties to "opt-in" to their availability. As will be seen, the default operation of EA rules, or the obligation to expressly opt out of its provisions, is a key emerging element of EA processes throughout the institutions addressed in this section. The default implementation of these rules has the practical consequence of making EA procedures more broadly available to disputing parties, and the number of applications for EA interim relief is anticipated to rise further. Rule 26.2 and Schedule 1 of the SIAC Arbitration Rules (4th ed), which entered into effect on July 1, 2010, stated that a party in need of relief may apply for emergency interim relief before the constitution of the arbitral tribunal if it is done concurrently with or after the filing of a Notice of Arbitration. The Chairman of SIAC must appoint an EA within one working day of receiving the application.[56] In turn, within two business days after the appointment, the EA must develop a timeline for reviewing the application.[57]

[54] Schedule 1, Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules (6th Edition, 1 August 2016).
[55] Schedule of fees, Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules (6th Edition, 1 August 2016).
[56] SIAC Rules (2010) Sch.1(2).
[57] SIAC Rules (2010) Sch.1(5).

While SIAC rules provide the Emergency Arbitrator extensive discretionary powers to award whatever interim remedy judged necessary, the Emergency Arbitrator has no ability to act once the tribunal is created, and any relief given by the Emergency Arbitrator becomes non-binding after 90 days if the tribunal is not constituted. The newly created tribunal has additional jurisdictional protection since it is not constrained by any Emergency Arbitrator's decisions. The tribunal has the authority to reconsider, amend, or vacate any interim award or remedy made by the emergency arbitrator. Furthermore, once created, the tribunal has the authority to provide injunctions and other temporary remedies as appropriate on the application of a party to the dispute. However, a party may only request interim relief from the courts after the tribunal has been established in rare circumstances. [58]

On April 9, 2012, the Singapore Parliament amended the International Arbitration Act (IAA) in response to concerns about the enforceability of EA orders and judgments. The revisions make it clear that awards and orders issued by EAs are enforceable in Singapore. The amendments provided EAs with identical legal status as a properly formed arbitral tribunal. This legislative amendment differentiates Singapore from other institutions by providing clarity that is otherwise unavailable in most other jurisdictions, with the exception of the United States, where court decisions indicate that awards and orders of pre-tribunal EAs under Article 37 of the ICDR Rules are enforceable. However, the enforcement of rulings and awards outside of Singapore remains dubious. Other countries have taken efforts to alleviate the legal confusion surrounding an EA's decisions. Switzerland and Austria have also passed laws establishing the function of EAs. In July 2010, the revised SIAC Rules were issued, including two new and creative provisions for both parties: the emergency arbitrator and the expedited procedure. Both methods have shown to be quite effective in providing parties with alternate options of obtaining immediate relief while reducing time and expenses associated with conflict resolution. The emergency arbitrator provisions were added to the SIAC Rules to accommodate instances in which a party wants immediate interim relief before a Tribunal is formed. The SIAC was the first international arbitral institution situated in Asia to have emergency arbitrator procedures in its arbitration rules.[59]

[58] Dr. Parineeta Goswami, *Emergency Arbitration Procedures*,15-19 (1st edition, 2024) Satyam Law International, New Delhi

[59] Dr. Parineeta Goswami, *Emergency Arbitration Procedures*,15-19 (1st edition, 2024) Satyam Law International, New Delhi

They have also been effectively enforced, as in *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd and others*[60] , when the Bombay High Court awarded interim protection within its authority. Emergency arbitrators' awards are enforceable under Singaporean law. Singapore's International Arbitration Act was revised in 2012 to make emergency arbitrator's awards and orders enforceable in Singapore-seated arbitrations as well as arbitrations held outside of Singapore. Singapore became the first jurisdiction in the world to enact laws allowing such awards and orders to be enforced in Singapore. The second novel feature added to the 2010 SIAC Rules was the expedited procedure. In suitable instances, parties that agree to send their disputes to arbitration under the SIAC Rules may use the expedited approach, which saves time and money. According to the SIAC Rules 2010, a party may apply for accelerated proceedings before the Tribunal's entire formation:[61]

a. When the total amount in dispute is under SGD 5,000,000,
b. if the parties agree, or
c. in circumstances of extreme urgency.

Following consideration of the parties' views, the President of the Court of Arbitration decides whether to accept the application. If the President accepts the application, the matter will be assigned to a sole arbitrator until the President decides otherwise, and the award will be issued within six months of the tribunal's formations of the tribunal's formation unless the Registrar extends the deadline in exceptional circumstances. Since its inception in 2010, the fast approach has proven to be quite popular with parties. As of December 31, 2014, SIAC had received 159 applications, 107 of which were granted. [62]

The Singapore High Court recently upheld an award obtained via the expedited procedure in *AQZ v. ARA*[63]. The parties consented to arbitration "under the [SIAC Rules] by three arbitrators" in that dispute. The defendant requested that the arbitration be conducted using expedited procedures. After considering the parties' perspectives, the President approved the application and appointed a sole arbitrator to resolve the issue. The plaintiff filed an application to set aside an award that had been made against it. One of the factors it relied

[60] 2014 SCC OnLine Bom 102 ('HSBC')
[61] Dr. Parineeta Goswami, *Emergency Arbitration Procedures*,15-19 (1st edition, 2024) Satyam Law International, New Delhi
[62] *Ibid.*
[63] [2015] SGHC 49.

on was that the parties had not agreed on the composition of the arbitral panel or the arbitral procedure. The plaintiff contended that the arbitration should not have been performed before a single arbitrator because the parties had specifically consented to arbitration before three arbitrators, and their contract was signed before July 1, 2010, when the regulation on expedited procedure went into effect. In dismissing the application to set aside the award, the High Court determined that the SIAC Rules 2010 applied to the proceedings based on the presumption that references to rules in an arbitration clause refer to the rules in effect at the time the arbitration begins if they contain primarily procedural provisions. The arbitration began when the SIAC Rules 2010 were in existence, and the plaintiff has not claimed that the SIAC Rules 2010 comprised primarily substantial features.[64]

In July 2010, SIAC became the first Asian-based international arbitral tribunal to include rules allowing a party to request the appointment of an arbitrator solely to deal with claims for urgent interim relief. That arbitrator was designated as an 'emergency arbitrator.' A SIAC emergency arbitrator has the same powers as a normal arbitral tribunal, including the authority to decide jurisdiction, grant temporary relief at his discretion, and distribute costs (subject to tribunal review). Unless the parties agree, an emergency arbitrator cannot serve on the main tribunal. If a tribunal is not formed within 90 days following an emergency arbitrator's order or award, it loses its effectiveness. Legislative amendments passed in 2012 make it possible to execute awards or orders issued by emergency arbitrators in Singapore. SIAC proceedings have proven cost-effective. SIAC charges a set fee of SGD 5,000 to cover administrative expenditures. The Registrar determines the emergency arbitrator's fees, which are subject to a cap calculated at 20% of a sole arbitrator's fee cap drawn from the SIAC arbitrator's *ad valorem* fee schedule, as well as a minimum sum of SGD 20,000 at the Registrar's discretion. Interestingly, Indian parties were engaged in 85 of the 259 new cases filed at SIAC in 2013, as well as 9 of the 34 emergency arbitrator petitions. The SIAC Rules provide that 'the Emergency Arbitrator shall have the power to order or award any interim relief that he considers necessary'. Similarly, the Singapore International Arbitration Act states that an emergency arbitrator may order any party to adopt such interim measures of protection as the emergency arbitrator deems essential, given the nature of the dispute. Although an emergency arbitrator order is enforceable in

[64] Dr. Parineeta Goswami, *Emergency Arbitration Procedures*,15-19 (1st edition, 2024) Satyam Law International, New Delhi

some jurisdictions, it lacks the stature and near-global enforceability of an arbitral decision under the New York Convention. Another constraint of emergency arbitrator procedures is the lack of interim relief against third parties to the arbitration agreement, as opposed to equivalent processes in court.[65]

3.4. The Hong Kong International Arbitration Centre (HKIAC)

The HKIAC provides cost-effective arbitration and expedited EA processes. The HKIAC Administered Arbitration Rules, 2018 are modern and progressive, particularly for situations with several parties or contracts. Despite the COVID-19 pandemic, the institution has increased the number of cases it handles.[66]The HKIAC 2013 Administered Arbitration Rules (HKIAC Rules) provide that parties can seek urgent interim relief before the formation of the arbitral tribunal and outline the procedure. Unlike ICC, HKIAC Rules do not allow for the appointment of an emergency arbitrator prior to the notice of arbitration. The emergency arbitrator will be assigned within two days of receiving the application and payment of a fee. The emergency arbitrator will issue their decision within 15 days after receiving the case.[67]

The HKIAC Rules 2018, Article 23 and Schedule 4 mentions emergency arbitration. A party may request for urgent interim or conservatory remedies ("Emergency Relief") prior to the formation of the arbitral tribunal under Schedule 4. The arbitral tribunal may, at the request of any party, order any interim measures it considers necessary and suitable. An interim measure, whether in the form of an order or award or in another form, is any temporary remedy issued by the arbitral tribunal at any time before it issues the award by which the dispute is eventually determined that a party, for example, and without restriction:

(a) maintain or restore the status quo awaiting the resolution of the dispute;
(b) take steps to avoid or desist from taking actions that are likely to cause existing or foreseeable injury or prejudice to the arbitral process itself or
(c) offer a way of safeguarding assets that can be used to satisfy a later award or

[65] Dr. Parineeta Goswami, *Emergency Arbitration Procedures*,15-19 (1st edition, 2024) Satyam Law International, New Delhi
[66] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[67] Ishan Sharma, In Depth Analysis of Emergency Arbitration - The Indian Position vis-a-vis the Global Position, 8 SUPREMO AMICUS 93 (2018).

(d) preserve any evidence that may be relevant and important to the settlement of the dispute.[68]

When assessing a party's request for an interim remedy under Article 23.2, the arbitral tribunal must consider the circumstances of the case. Relevant elements might include, but are not limited to:

a) harm that cannot be satisfactorily repaired by an award of damages is likely to arise if the measure is not ordered, and such harm considerably outweighs the harm that is likely to happen to the person against whom the measure is intended if the measure is granted; and
b) there is a substantial likelihood that the asking party will prevail on the merits of the claim. The arbitral tribunal's discretion in making any future conclusion is unaffected by its decision on this option.[69]

The arbitral tribunal may amend, suspend, or terminate an interim measure issued upon application by either party or, in extraordinary circumstances and with prior notification to the parties, on its own initiative. The arbitral tribunal may compel the party requesting an interim measure to provide suitable security in relation to the measure. The arbitral tribunal may require any party to quickly report any substantial change in the circumstances under which an interim measure was requested or granted. If the arbitral tribunal later judges that the interim measure should not have been granted given the circumstances at the time, the party requesting it may be held accountable for any expenses and damages incurred by any party as a result of the measure. The arbitral panel may award such costs and damages at any time throughout the dispute. A request for interim measures made by either party to a competent body must not be considered incompatible with the arbitration agreement or a waiver thereof.[70]

Under HKIAC Rules, 2018 Schedule 4, the emergency arbitration procedures is outlined. A party requesting Emergency Relief may make an application (the "Application") to HKIAC for the appointment of an emergency arbitrator (a) before, (b) concurrently with, or (c) following the filing of a Notice of Arbitration but before the formation of the arbitral panel. The

[68] Article 23, HKIAC Rules 2018
[69] Article 23, HKIAC Rules 2018
[70] Article 23, HKIAC Rules 2018

application must be filed using any of the methods mentioned in Articles 3.1 and 3.2 of the Rules. The application should include the following information:

a) the names and (to the extent known) addresses, facsimile numbers, and/or email addresses of the parties to the Application and their representatives;
b) a statement of the circumstances giving rise to the Application, as well as the underlying dispute submitted to arbitration
c) a declaration about the emergency relief requested;
d) the reasons why the petitioner requires the Emergency Relief on an urgent basis and cannot wait for the formation of an arbitral panel;
e) the grounds why the petitioner is entitled to such emergency relief.
f) any applicable agreement, including the arbitration agreement.
g) remarks on the wording, the seat of the Emergency Relief procedures, and the relevant statute;
h) Payment confirmation for the "Application Deposit" in paragraph 5 of this Schedule;
i) The existence of any financing arrangement and the name of any third-party funder subject to Article 44; and
j) assurance that copies of the Application and any supporting documents accompanying it have been or will be delivered concurrently to all other parties to the arbitration via one or more methods of service specified in such confirmation.[71]

The Application may include any additional papers or material that the applicant believes are relevant or would aid in the efficient evaluation of the Application. If HKIAC accepts the Application, it will endeavour to appoint an emergency arbitrator within 24 hours of receiving both the Application and the Application Deposit. The Application Deposit is the sum determined by HKIAC and shown on HKIAC's website on the date the application is filed. The Application Deposit includes both HKIAC's emergency administrative costs and the emergency arbitrator's fees and expenses. The emergency arbitrator's fees will be determined by reference to his or her hourly rate, subject to the terms of Schedule 2, and will not exceed the amount set by HKIAC, as stated on HKIAC's website on the date the Application is submitted, unless the parties agree or HKIAC decides otherwise in exceptional circumstances. HKIAC may request additional deposits at any time during the Emergency Relief proceedings to cover any increase in the emergency arbitrator's fees or HKIAC's emergency administrative

[71] Schedule 4, HKIAC Rules 2018

fees, taking into account, among other things, the nature of the case as well as the nature and amount of work performed by the emergency arbitrator and HKIAC. If the party that submitted the Application fails to pay the extra deposits within the time frame set by HKIAC, the Application will be rejected. Once the emergency arbitrator has been appointed, HKIAC will notify the parties to the Application and provide the case file to the emergency arbitrator. The parties shall then communicate directly with the emergency arbitrator, with a copy sent to the other parties to the Application and HKIAC. Any written communication from the emergency arbitrator to the parties must also be copied to HKIAC. Article 11 of the Rules must apply to the emergency arbitrator, with the exception that the time restrictions specified in Articles 11.7 and 11.9 are reduced to three days. If an emergency arbitrator dies, is successfully challenged, dismissed, or resigns, HKIAC will endeavor to appoint a replacement within 24 hours. If an emergency arbitrator withdraws or a party agrees to terminate an emergency arbitrator's appointment under paragraph 8 of this Schedule, this does not imply acknowledgment of the validity of any basis mentioned in Article 11.6 of the Rules. If the emergency arbitrator is replaced, the Emergency Relief procedures will resume from the point where the emergency arbitrator was replaced or ceased to fulfil his or her powers, unless the substitute emergency arbitrator determines differently.[72]

If the parties have agreed on an arbitration seat, that seat will also be used for Emergency Relief procedures. Where the parties have not agreed on the seat of arbitration, and without prejudice to the arbitral tribunal's determination of the seat of arbitration under Article 14.1 of the Rules, the Emergency Relief procedures will be held in Hong Kong. Taking into mind the urgency of the Emergency Relief procedures and ensuring that each party has a reasonable chance to be heard on the Application, the emergency arbitrator may conduct such proceedings in any manner the emergency arbitrator deems suitable. The emergency arbitrator shall have the authority to rule on objections that the emergency arbitrator lacks jurisdiction, including objections to the existence, validity, or scope of the arbitration clause or the separate arbitration agreement, and shall resolve any disputes regarding the applicability of this Schedule. Articles 23.2 through 23.8 apply mutatis mutandis to any Emergency Relief granted by the emergency arbitrator. The emergency arbitrator's judgement, order, or award on the Application (the "Emergency Decision") must be made within 14 days of the day HKIAC sent the case file to the emergency arbitrator. This time restriction may be extended by agreement between the

[72] Schedule 4, HKIAC Rules 2018

parties or, in suitable circumstances, by HKIAC. The Emergency Decision may be issued even if the case file has already been delivered to the arbitral tribunal. Any Emergency Decision must be in writing, state the date it was made, and include the reasons for the decision, which may be in summary form (including a determination of whether the emergency arbitrator has jurisdiction to grant the Emergency Relief); and be signed by the emergency arbitrator. Any Emergency Decision may fix and apportion the expenses of the Emergency Relief procedures, subject to the arbitral tribunal's ability to fix and apportion such costs eventually in line with Article 34 of the Rules. The costs of the Emergency Relief procedures include HKIAC's emergency administrative fees, the emergency arbitrator's and tribunal secretary's fees and expenses, as well as the parties' reasonable legal and other costs. Any Emergency Decision shall have the same effect as an interim measure provided under Article 23 of the Rules, and shall be binding on the parties when issued. Any emergency decision ceases to be binding:

a) if the emergency arbitrator or the arbitral tribunal so determines;
b) when the arbitral tribunal issues a final award, unless the arbitral tribunal specifically rules otherwise;
c) if the arbitration ends before a final award is issued; or
d) if the arbitral tribunal is not established within 90 days of the Emergency Decision. This time restriction may be extended by agreement between the parties or, in suitable circumstances, by HKIAC.[73]

Once the arbitral panel has been established, the emergency arbitrator will no longer be able to operate. Unless otherwise agreed by the parties to the arbitration, the emergency arbitrator may not act as an arbitrator in any arbitration relevant to the dispute that gave rise to the Application and in which the emergency arbitrator has previously acted. The Emergency Arbitrator Procedure does not exclude any party from requesting urgent interim or conservatory remedies from a competent authority at any moment. The Emergency Arbitrator Procedure will be terminated if the applicant does not submit a Notice of Arbitration to HKIAC within seven days of HKIAC's receipt of the Application unless the emergency arbitrator extends this deadline. If the Emergency Arbitrator Procedure is terminated without an Emergency Decision, the emergency arbitrator may fix and apportion any costs of the Emergency Relief proceedings, subject to the arbitral tribunal's final authority to fix and apportion such costs in accordance

[73] Schedule 4, HKIAC Rules 2018

with Article 34 of the Rules.[74]

3.5. The London Court of International Arbitration (LCIA)

The LCIA, founded in 1892, is the world's oldest international arbitration institution and continues to be a global leader in the field. The LCIA is headquartered in London, with a regional office in Dubai. The LCIA consists of three components: the Company, Arbitration Court, and Secretariat. The company, led by well-known arbitration practitioners in London, manages the organization's commercial activities. The Arbitration Court consists of up to 35 members, including representatives from associated institutions and former Presidents. It is responsible for appointing tribunals, determining challenges to arbitrators, and ensuring compliance with LCIA rules during arbitration. The Secretariat oversees the on-going administration of all LCIA issues. The LCIA regulations were most recently revised in 2020.[75] LCIA is a renowned arbitration institution for commercial disputes. According to the LCIA 2020 Annual Report, the institution's caseload increased by 18% over the previous year. The LCIA Rules, 2020 ('LCIA Rules') have gained popularity among Indian parties due to their adherence to best practices and effective institutional functioning.[76]

Under Article 5 of the LCIAI Rules, the definition of 'arbitral tribunal' includes and emergency arbitrator. Under Article 9B, in the event of an emergency (under Articles 5 or 9A), any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal (the "Emergency Arbitrator"). [77]

Such an application must be submitted to the Registrar in writing by electronic means, together with a copy of the Request (if made by a Claimant) or a copy of the Response (if made by a Respondent), and must be provided or communicated to all other parties to the arbitration immediately. The application must include all applicable evidence, including (i) the particular grounds for necessitating the appointment of an Emergency Arbitrator as an emergency, and

[74] Schedule 4, HKIAC Rules 2018
[75] David Salton, Recent Trends in International Arbitration and 2021 International Rule Changes, 17 CONST. L.J. 81 (2021).
[76] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[77] Article 9B, LCIA Rules, 2020

(ii) the specific claim for immediate relief, along with justifications. The application must be supported by written confirmation from the applicant that the Special Fee under Article 9B has been paid or is being paid to the LCIA; otherwise, the application will be rejected by the LCIA Court. The Special Fee is subject to the conditions of the Schedule of Costs. Its sum is specified in the Schedule, and it covers the Emergency Arbitrator's fees and expenses, as well as the LCIA's administrative charges and expenditures, plus any extra charges levied by the LCIA Court. Following the appointment of the Emergency Arbitrator, the LCIA Court may raise the Special Fee due by the applicant in line with the Schedule. Except as specified in Section 5(vi) of the Schedule of Costs, Article 24 does not apply to any Special Fee paid to the LCIA. The LCIA Court will decide on the application as quickly as practicable, given the circumstances. If the application is approved, the LCIA Court will appoint an Emergency Arbitrator within three days of the Registrar receiving the application (or as soon as feasible afterward). Articles 5.1, 5.7, 5.9, 5.10, 6, 9C, 10, and 16.2 (final sentence) will apply to the appointment. The Emergency Arbitrator must follow the criteria of Articles 5.3, 5.4, and (until the emergency procedures are finished) Article 5.5.[78]

The Emergency Arbitrator may conduct the emergency proceedings in any manner deemed appropriate in the circumstances, taking into account the nature of such emergency proceedings, the need to provide each party, if possible, with an opportunity to be discussed on the claim for emergency relief (whether or not it takes advantage of such opportunity), the claim and reasons for emergency relief, and the parties' additional submissions (if any). The Emergency Arbitrator is not obligated to attend a hearing with the parties, either in person or electronically via conference call, videoconference, or other communications technology, and may decide the claim for emergency relief based on the existing material. The Emergency Arbitrator must make a decision on the application for emergency relief as quickly as feasible, but no later than 14 days after the appointment. This deadline may only be extended by the LCIA Court under extreme circumstances (as per Article 22.5) or by written consent of all parties to the emergency proceedings. The Emergency Arbitrator may make any order or award that the Arbitral Tribunal could make under the Arbitration Agreement, as well as any order adjourning the consideration of all or any part of the claim for emergency relief in the proceedings conducted by the Arbitral Tribunal (when formed).[79]

[78] Article 9B, LCIA Rules 2020
[79] Article 9B, LCIA Rules 2020

The Emergency Arbitrator's order must be in writing and supported by reasons. The Special Fee paid will be included in the Arbitration Costs under Article 28.1, and the amount will be set by the LCIA Court. Any legal or other fees spent by any party during emergency proceedings will be included in the Legal Costs under Article 28.3. The Emergency Arbitrator may establish the amount of legal costs associated with the emergency procedures, as well as the proportions in which the parties incur the legal and arbitration costs. Alternatively, the Emergency Arbitrator may leave the assessment of all or part of the emergency proceedings' expenses to the Arbitral Tribunal. Any order or award of the Emergency Arbitrator (excluding any order adjourning to the Arbitral Tribunal, when formed, any part of the claim for emergency relief) may be confirmed, varied, discharged, or revoked, in whole or in part, by an order or award issued by the Arbitral Tribunal on the application of any party or on its own initiative. Regardless of Article 9B, a party may apply to a competent state court or other legal authority for any interim or conservatory measures prior to the establishment of the Arbitral Tribunal; but, Article 9B must not be construed as an alternative to or replacement for exercising such power. During the emergency proceedings, every application to and orders issued by such court or body must be promptly informed in writing to the Emergency Arbitrator, Registrar, and all other parties. In addition to the conditions specifically set forth in Article 9B, the Emergency Arbitrator and the parties to the emergency procedures will be governed by other provisions of the Arbitration Agreement.[80]

The LCIA Court shall have the authority to rule on any issues concerning the administration of emergency proceedings that are not specifically addressed in Article 9B. Article 9B does not apply if: (i) the parties finalised their arbitration agreement before October 1, 2014 and did not agree in writing to 'opt in' to Article 9B; or (ii) the parties agreed in writing at any time to 'opt out' of Article 9B.[81]

Under the LCIA Rules 2020, the emergency arbitrator may be appointed within three days after the grant of the application. They also set timetables for the emergency arbitrator's appointment and decision-making. The emergency arbitrator was developed to provide an order within 14 days of being appointed, according to the LCIA Rules 2020.[82]

[80] Article 9B, LCIA Rules 2020
[81] Article 9B, LCIA Rules 2020
[82] Owen Umeh, The Emergence of Emergency Arbitration in International Arbitration (July 17, 2023). Available

Previously, the LCIA Rules lacked emergency procedures. However, in 1998, the LCIA Rules were amended to include a mechanism for the "expedited formation" of a tribunal. Article 9 calls for the tribunal's creation to be expedited.[83] Prior to 2014, LCIA regulations only allowed for an expedited formation of an arbitral tribunal in cases of extreme urgency.[84] The LCIA Rules, 2014 Article 9B of the LCIA Rules allowed for emergency arbitration. As per the Article, the registrar will appoint an emergency arbitrator within three days of receiving the application. The arbitrator's final judgment, whether in the form of an order or award, must be issued within 14 days after the appointment.[85]

3.6. STOCKHOLM CHAMBER OF COMMERCE (SCC)

SCC's popularity has steadily increased since its foundation in 1917. In 2020, the institute handled almost 50% of international disputes involving parties from over 43 countries, including India. Sweden's neutrality in global affairs and geopolitics contributes to its popularity as an arbitration site.[86]

Appendix II of the Arbitration Rules of the Stockholm Chamber of Commerce, titled "Emergency Arbitrator," outlines a thorough procedure for emergency relief remedies before referring the matter to an arbitral tribunal. The SCC's rules and procedures are comparable to those of the ICDR and SIAC, but more extensive. They include precise requirements for applications and awards, and refer to other sections in the rules to explain authorities and procedures. Appendix II of the SCC arbitration rules outlines the emergency relief procedure in 10 articles. A party can request the appointment of an Emergency Arbitrator until the matter is referred to an Arbitral Tribunal. When the matter is referred to an Arbitral Tribunal or the emergency ruling is no longer binding, the Emergency Arbitrator's powers cease. To appoint an Emergency Arbitrator, an application must include an overview of the dispute, as well as

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at SSRN: https://ssrn.com/abstract=4512857 or http://dx.doi.org/10.2139/ssrn.4512857

[83] Dr. Parineeta Goswami, *Emergency Arbitration Procedures*,15-19 (1st edition, 2024) Satyam Law International, New Delhi

[84] Ishan Sharma, In Depth Analysis of Emergency Arbitration - The Indian Position vis-a-vis the Global Position, 8 SUPREMO AMICUS 93 (2018).

[85] Ishan Sharma, In Depth Analysis of Emergency Arbitration - The Indian Position vis-a-vis the Global Position, 8 SUPREMO AMICUS 93 (2018).

[86] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).

reasons for seeking interim relief. Upon receipt of the application, the SCC secretariat will forward it to the opposing party in the arbitration. The SCC's board of directors must appoint an Emergency Arbitrator within 24 hours of receiving the application. Each party has 24 hours to dispute the appointment once they know the Emergency Arbitrator's identity and any potential conflicts of interest. Additionally, emergency arbitration procedures must be finished within a set deadline.[87] "Any emergency decision on interim measures shall be made not later than 5 days from the date upon which the application was referred to the Emergency Arbitrator." [88]The Emergency Arbitrator can request an extension of this time limit. The Emergency Arbitrator's ruling is binding on both parties and must be followed until it no longer applies. If any of the following happens, the emergency decision becomes non-binding:

(i) The Emergency Arbitrator or Arbitral Tribunal makes a decision;

(ii) an Arbitral Tribunal provides a final award;

(iii) arbitration is not initiated within 30 days of the emergency decision; or

(iv) the case is not referred to an Arbitral Tribunal within 90 days.[89]

In SCC practice, emergency arbitrators require three prerequisites for granting interim measures:

1. a prima facie jurisdiction,
2. a reasonable possibility of the applicant's claim being successful on the merits and
3. urgency and irreparable harm.[90]

Looking at the ten rejected applications, the most common reasons for rejecting the request for emergency interim relief were a lack of urgency (eight cases) and irreparable injury (seven cases). Unsurprisingly, in the two circumstances where the applicant requested relief against a party not bound by the arbitration agreement, the emergency arbitrator dismissed the request because he lacked jurisdiction over any third parties.[91]

[87] Erin Collins, Pre-Tribunal Emergency Relief in International Commercial Arbitration, 10 LOY. U. CHI. INT'l L. REV. 105 (2012)
[88] Article 8, Stockholm Chamber of Commerce Arbitration Rules, 2023
[89] Erin Collins, Pre-Tribunal Emergency Relief in International Commercial Arbitration, 10 LOY. U. CHI. INT'l L. REV. 105 (2012).
[90] Dr. Parineeta Goswami, *Emergency Arbitration Procedures*,15-19 (1st edition, 2024) Satyam Law International, New Delhi
[91] Dr. Parineeta Goswami, *Emergency Arbitration Procedures*,15-19 (1st edition, 2024) Satyam Law International, New Delhi

The costs incurred by the emergency procedures include

(i) the emergency arbitrator's charge of EUR 16,000,

(ii) the application fee of EUR 4,000, and

(iii) the parties' reasonable costs, including professional counsel.[92]

In amendments that went into effect on January 1, 2010, the SCC developed an efficient EA procedure that requires the appointment of an EA within 24 hours and gives the EA significant discretionary powers to conduct the proceedings as he or she deems proper. However, prior to the appointment of the EA, the SCC board is responsible for deciding jurisdiction over the dispute under Article 4(2) of the SCC Rules. An emergency judgement on interim measures must be taken within five days of the case's referral to the EA and may be contingent on the supply of suitable security. The Board may, however, extend the five-day period upon a reasoned request from the EA or if otherwise considered essential, such as if the defendant has not been served or notice has taken a lengthy time. The SCC Rules on an EA, like the SIAC and ICC Rules, are intended as an opt-out solution and hence apply to all SCC arbitrations unless the parties specifically agree otherwise. Similarly, the regulations are not meant to be available ex parte and thus require notification from the opposing party. The SCC Rules go one step further, retrospectively extending the opt-out mechanism to the EA provisions. This allows parties arbitrating under the Rules to employ the EA procedures even if their arbitration agreement was signed before to the implementation of the new procedures on January 1, 2010. The retroactivity of the new Rules has sparked much attention and controversy in the arbitration community. Seven applications for EA processes have been submitted under the SCC Rules since their inception in early June 2012.[93]

The SCC has one of the most comprehensive emergency relief approaches currently in place. The Appendix covers more concerns than previous sets of rules and refers readers to relevant articles within the SCC regulations. These guidelines provide a full understanding of the process and procedures for emergency arbitration.[94]

[92] Article 10, Stockholm Chamber of Commerce Arbitration Rules, 2023

[93] Dr. Parineeta Goswami, *Emergency Arbitration Procedures*,15-19 (1st edition, 2024) Satyam Law International, New Delhi

[94] Erin Collins, Pre-Tribunal Emergency Relief in International Commercial Arbitration, 10 LOY. U. CHI. INT'l L. REV. 105 (2012).

3.7. INTERNATIONAL CHAMBER OF COMMERCE (ICC)

The ICC Arbitration Rules, 2021 ('ICC Rules') have made it a popular arbitral institution worldwide. ICC has achieved tremendous success in the Asian market. Between 2018 and 2019, Indian parties adopted the ICC Rules, a threefold increase. India is the world's second-largest participant of ICC arbitration.[95] The International Chamber of Commerce (ICC) established its 'Pre-Arbitral Referee Procedure' in 1990, possibly the first attempt by a major institution to provide emergency relief prior to the formation of the tribunal. While the 1998 edition of the ICC Rules established provisions permitting applications for urgent measures to be made directly to courts, the most recent amendments to the ICC Rules provide an internal procedure for dealing with urgent petitions.[96] The most recent revisions took effect on January 1, 2021. Article 29, backed by Appendix V of the Rules, outlines the procedure for obtaining urgent interim relief prior to the formation of the arbitral panel.[97]

A party in need of urgent interim or conservatory remedies that cannot wait for the formation of an arbitral tribunal ("Emergency Measures") may apply for such measures in accordance with the Emergency Arbitrator Rules in Appendix V. Any such application will be approved only if it is received by the Secretariat before the file is sent to the arbitral tribunal under Article 16, and regardless of whether the party making the application has previously submitted its Request for Arbitration. The emergency arbitrator's decisions will take the form of an order. The parties agree to comply with any order issued by the emergency arbitrator. The emergency arbitrator's order shall not bind the arbitral tribunal in relation to any question, issue, or dispute resolved in the order. The arbitral tribunal has the authority to modify, terminate, or annul the order, as well as any modifications made by the emergency arbitrator. The arbitral tribunal shall rule on any party's requests or claims relating to the emergency arbitrator procedures, including the reallocation of such proceedings' expenses, as well as any claims resulting from or in connection with the order's compliance or noncompliance.[98] The Emergency Arbitrator Provisions will not apply if:

1) The arbitration agreement was signed before January 1, 2012;

[95] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[96] Dr. Parineeta Goswami, *Emergency Arbitration Procedures*,15-19 (1st edition, 2024) Satyam Law International, New Delhi
[97] ICC Rules, 2021
[98] Article 29, ICC Rules, 2021

2) the parties opted out of the Emergency Arbitrator Provisions; or
3) the application is based on a treaty.[99]

The Emergency Arbitrator Provisions do not preclude any party from obtaining urgent interim or conservatory remedies from a competent judicial authority at any time prior to filing an application for such measures, or in suitable circumstances even thereafter, in accordance with the Rules. Any application for such measures by a competent judicial body shall not be considered a violation or waiver of the arbitration agreement. Any such application, as well as any steps taken by the court authority, shall be promptly reported to the Secretariat.[100]

The new ICC EA Rules can be summarised with five key ideas, all of which echo to some degree with the principles associated with other institutions using EA provisions:[101]

- **OPT-OUT**

The first essential principle of the new EA Rules is that they apply by default to parties that have chosen to arbitrate their dispute using the ICC Rules. However, there are specified circumstances that must be completed for the "Emergency Arbitrator Provisions" as established in Article 29(6) of the Rules (EAP) to apply automatically, which are:[102]

(a) the application is submitted before the file is transmitted to the arbitral tribunal.
(b) the arbitration agreement was reached after January 1, 2012; and
(c) the parties have not agreed to opt out of the EAP.

According to ICC Institute for World Business Law Vice President Antonias Dimolitsa, the opt-out preference was created to address concerns about the low acceptance of past opt-in procedures and to provide more options to parties who may not have particularly considered the need for interim relief at the time of contracting.

[99] Article 29, ICC Rules, 2021
[100] Article 29, ICC Rules, 2021
[101] Dr. Parineeta Goswami, *Emergency Arbitration Procedures,*15-19 (1st edition, 2024) Satyam Law International, New Delhi
[102] Dr. Parineeta Goswami, *Emergency Arbitration Procedures,*15-19 (1st edition, 2024) Satyam Law International, New Delhi

- **NO BAR ON COURTS**

A second fundamental element is incorporated in Article 29(7), which specifically states that the EAP does not prohibit any party from obtaining urgent interim or conservatory measures from a competent legal authority. This provision applies without restriction before an application for Emergency Measures has been lodged and may even apply subsequently "in appropriate circumstances".[103]

- **GENUINE URGENCY**

A third essential concept is that, in order to prevent misuse, the EAP's scope has been limited to instances in which a party demands remedy and cannot wait for the formation of an arbitral tribunal. This idea is stated specifically in Article 29(1). [104]

- **NO THIRD PARTIES**

The fourth important concept is that the EAP applies only to the arbitration agreement's signatories or successors. This affords some protection to the responding party to an application for Emergency Measures and prevents the EAP from being applied to treaty-based arbitrations.[105]

- **RESPONDENT PROTECTED**

The fifth and last fundamental concept is to safeguard the responding party. This principle is apparently such that there is no default answer to the application for Emergency Measures within a certain short time frame, ensuring that the respondent has enough time to respond to the application and that the applicant must pay a fee for the EA procedure to the ICC in advance, and that the applicant must, as a rule, file a motion for arbitration within 10 days of the application; otherwise, the President will terminate the EA proceedings.[106]

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[103] Dr. Parineeta Goswami, *Emergency Arbitration Procedures,*15-19 (1st edition, 2024) Satyam Law International, New Delhi
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*

- **ENFORCEMENT**

Perhaps one of the most pressing problems arising from the evolution of EA processes is whether the benefits provided to a party by access to EA are compromised by ambiguity about whether an order or award made by an EA is enforceable. The various institutions have taken different approaches to this question, and while in many cases there hasn't been enough time and experience with the procedures to draw firm conclusions, there are some trends and lessons that should help institutions and jurisdictions come to terms with the legal and jurisdictional role that EAs may play. According to the ICC Rules, the EA's decision takes the form of an order, which is binding on the parties and must be followed. While the Rules and Appendix V are quiet on the issue of enforcing the EA's Order, it is unclear if the Order has the same legal effect as an arbitral tribunal's order for interim measures under Article 28(1) of the Rules. On the one hand, it may be enforceable in state courts under provisions such as paragraphs 17H and 17I of the 2006 version of the UNCITRAL Model Law, which provides for the recognition and execution of interim remedies given by arbitral tribunals. It is debatable whether, using a "substance-over-form" approach, the Order may qualify as an award enforceable under the New York Convention or related laws. US courts have also been obliged to address the issue of enforceability, and their approach has been to consider EA rulings as enforceable in the same way that arbitral awards are. The EA method under the ICC's 2012 Rules is intended to allow an applicant to get appropriate interim relief in less than three weeks after the procedure begins. Although there are limitations to what interim proceedings may legitimately achieve, it appears that the ICC expects that this new procedure will help to increase the options available to parties that use arbitration to resolve their disputes. As of March 9, 2012, there have been no EA applications under the ICC's revised rules. The 2012 ICC emergency arbitrator guidelines expand the benefits of arbitration to parties in urgent need of temporary measures before an arbitral panel is established. Previously, parties had to seek such remedies from state courts, which was not always feasible or desirable.[107]

Under the ICC Rules of Arbitration, an application for Emergency Measures may be made prior to the Request for Arbitration; however, the Request must be filed within 10 days following the application. This application has a dedicated email address[108] to guarantee prompt

[107] *Ibid.*

[108] Available at emergencyarbitrator@iccwbo.org; ICC guidance on filing an Application: https://iccwbo.org/products-andservices/arbitrationandadr/arbitration/emergencyarbitrator/

notice of the President of the ICC Court of Arbitration, who will determine whether to accept the case in one or two days. In particular, the President must determine whether the parties to the Application are signatories or successors to signatories of the applicable arbitration agreement. A parent firm that is not a signatory to the agreement is exempt from this procedure. Arbitration agreements grounded in investment treaties are likewise prohibited. This stringent application is intended to prevent jurisdictional conflicts, which would drag down the emergency procedure and contradict its purpose. This procedure should take place at the same location as the parties' agreed-upon arbitral venue. When this is not clear, the President fixes the seat. The former also appoints the emergency arbitrator. In this case, the arbitrator's country is not a problem. The Emergency Arbitrator should make an order within 15 days of receiving the case. Because of the inherent urgency of this proceeding, the arbitrator's jurisdiction may take precedence over the parties' earlier consensus. In principle, the cool-down time in arbitration agreements appears to be ignored, and contractual language stating that the parties recognized the courts' interim and conservatory procedures should have no bearing on the emergency arbitrator's authority. Under Article 29 of the Rules and Appendix V ('Emergency Arbitrator Provisions'), a party in need of urgent interim measures ('Emergency Measures') that cannot wait for the formation of an arbitral tribunal may apply to the Secretariat of the ICC International Court of Arbitration ('Secretariat'). The Emergency Arbitrator Provisions only apply to parties who are signatories to the arbitration agreement that is the basis for the application or their successors. The EA provisions do not apply if:[109]

- The Emergency Arbitrator Provisions are not applicable if the arbitration agreement under the Rules was signed before January 1, 2012.
- The parties have opted out of the Emergency Arbitrator Provisions (see to the Standard ICC Arbitration Clauses); or
- The parties have agreed to a pre-arbitral procedure that allows for conservatory, interim, or similar remedies.

Ultimately, the parties may agree that the Emergency Arbitrator Provisions apply to arbitration agreements entered into before January 1, 2012.[110]

[109] Dr. Parineeta Goswami, *Emergency Arbitration Procedures*,15-19 (1st edition, 2024) Satyam Law International, New Delhi
[110] *Ibid.*

3.8. CONCLUSION

These are some of the leading institutions worldwide that have provided emergency arbitration provisions. These rules have been created and amended over a period of time. The changing dynamics of international arbitration have made it imperative for them to include provisions for emergency arbitration. These rules can also be used as a model in the Indian arbitration scenario. Their robust procedures have made time-sensitive issues acknowledged in arbitrations, making commercial activities seamless and hassle-free.

CHAPTER 4-
JUDICIAL APPROACH REGARDING EMERGENCY ARBITRATION IN INDIA

4.1. INTRODUCTION

Emergency arbitration has become an important feature of international commercial arbitration, allowing parties to seek urgent interim relief prior to the formation of the arbitral panel. In India, the legal environment for emergency arbitration has changed throughout time, influenced by judicial decisions and modifications to laws. In the absence of an explicit provision in the Indian Arbitration and Conciliation Act of 1996, the Indian courts have devised a way to maneuver tricky situations whenever a question on emergency arbitration has popped up. This chapter will look into the judicial approach regarding emergency arbitration in India and the court's altering views of the matter.

4.2. SECTION 9 OF THE ARBITRATION AND CONCILIATION ACT, 1996

Until the establishment of the arbitral tribunal, the capacity to provide interim relief was principally based on Section 9 of the 1996 Act. A party can request an interim measure from the court before or during arbitral proceedings or after the tribunal's decision but before it is enforced. A party can seek protection from the court for things like preservation, interim custody, or securing the amount in dispute. The court may also impose additional interim measures deemed appropriate. The court has the same ability to enforce its orders as any other competent court. As jurisprudential patterns have evolved, Section 9 is now the preferred option for parties seeking temporary relief. [111]

There are certain prerequisites that need to be fulfilled for an arbitration case to be valid before a court of law. To obtain an order for interim measures from the court, the following requirements have evolved over time:

[111] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).

i. The arbitration agreement or clause must already exist;
ii. Any disagreement between the parties to the aforementioned agreement or clause regarding the content of the contract must be submitted to arbitration;
iii. The parties' clear and express intention to use arbitration at the time of filing; and
iv. The dispute's subject matter must fall under the civil court's original jurisdiction before an interim relief is requested.[112]

As is evident, the court is also empowered to award interim remedies during an arbitral procedure under Section 9(1). The 1996 Act was amended in 2015, which clarified the legal status in this area. With the addition of sub-section 3, it is now unambiguously stated that the court will not consider any application for interim measures once an arbitral tribunal has been created unless it determines that the case's circumstances may make the Section 17 remedy ineffective. Therefore, by doing this, the legislature tried to bring the provision's genuine aim and its practical execution into alignment. By implementing these changes, the legislature was able to reduce the role that courts play in arbitration, supporting the system that favors arbitration.[113]

4.3. SECTION 17 OF THE ARBITRATION AND CONCILIATION ACT, 1996

An arbitral tribunal has the authority to impose temporary remedies under Section 17(1). Similar to Section 9, Section 17 offers a list of issues for which the parties may request temporary relief. However, before the 2015 Amendment, the Act contained no provision for the arbitral tribunal to carry out its orders, which made the system entirely ineffective. The sole formal support arbitral tribunals had for these instructions was contained in Section 27(5) of the 1996 Act, which outlined the consequences for disobeying the tribunal's orders and how contempt would be dealt with in the end. Even with this clause, however, the arbitral panel would still need to ask the court for help in carrying out its directives. The arbitration panel would have to make a case and ask the court for help in determining the defaulting party's

[112] *Ibid.*
[113] *Ibid.*

disadvantages, penalties, and punishments in the event of a refusal to abide by the order.[114]

For example, the Supreme Court decided in *Alka Chandewar v. Shamshul Ishrar Khan*[115] that the tribunal might represent parties in court for disobedience of its orders under Section 27(5) of the 1996 Act. The Court additionally concluded that the matter should be remanded to the High Court, which would resolve the claimed contempt based on the relevant facts and legislation interpretation, as well as assess the consequences of the contempt for the defaulting party. As a result, the arbitrator's order and the order of the court were clearly different, with the latter having the only ability to implement its orders, as stipulated by Section 9. There was no such clause in Section 17. Because an arbitral tribunal is not a court, a defaulting party who disobeyed the panel's instructions could not be punished under the Contempt of Courts Act, 1971 (the 'Contempt Act') or the Code of Civil Procedure, 1908 (the 'CPC').[116]

The goal of the 2015 Amendment was to close this gap and match Section 17 with Section 9. It added Section 17(2), which states that orders issued under Section 17 will be regarded as court orders and would be enforced in accordance with the CPC. Although it would appear that a legal gap was filled, the 2015 amendment doesn't address the main issues brought up regarding enforcement. The precise process for enforcing the arbitral tribunal's order is not expressly stated in the 1996 Act. This means that there are several ways to interpret its enforcement under the CPC. It is unclear if Section 151 of the CPC, Order XXXIX Rule 1 or 2 of the CPC, or Section 94 of the CPC would all apply to the enforcement of such an order.[117]

Currently, we can see that the notion of EA is not included in Section 17, which deals with interim remedies given by the arbitral tribunal. Parties have argued against the recognition of EA under Indian law as a result of this omission. The suggestions of the Ministry of Law and Justice and the Law Commission of India (the 'Law Commission') were an effort to stop these objections.[118]

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[114] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[115] (2017) 16 SCC 119 ('Alka Chandewar').
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.*

4.4. INDIAN JUDICIAL APPROACH TOWARDS EMERGENCY ARBITRATION

Emergency Arbitration is not specifically mentioned in the Act; hence, there aren't many legal precedents on the subject. The most recent example of how Indian courts have adopted a pro-arbitration posture over time and tacitly upheld Emergency Arbitrators' decisions is the *Amazon-Future* verdict.[119] The court, in the absence of an explicit provision, has devised a method to inculcate acknowledgment for emergency arbitration through a slew of case interpretations. These cases are mentioned below.

In 2002, the Indian Supreme Court ruled in *Bhatia International v. Bulk Trading S.A.* [120] that Part I provisions apply to Part II arbitration proceedings, allowing courts to order interim relief for foreign-seated arbitrations. Parties can apply to set aside foreign-seated awards using the processes outlined in Part I. This resulted in harsh criticism, and Fali S. Nariman highlighted that the Supreme Court would need to "iron out the creases" from the Bhatia International judgment.[121]

The Bombay High Court's ruling in *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd.*[122] was the first case to address the recognition of EA in India. The SIAC Rules, 2016 (also known as the 'SIAC Rules') regulated the arbitral procedures in this instance, which had Singapore as its seat. The emergency arbitrator issued an order as a result of the petitioner's use of the EA mechanism, which was allowed under the aforementioned guidelines. Following that, it submitted a petition under Section 9 of the 1996 Act to have the aforementioned order enforced in accordance with Indian law.[123]The Court clarified that, despite permitting such relief under Section 9 of the Act, recourse to that section cannot be used to enforce the arbitral tribunal's orders. The court also stated that this does not preclude the court from exercising its independent judgment and awarding interim relief when it is appropriate.[124]

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[119] Elamathi J., Enforcement of Emergency Arbitration: Indian Standpoint, 3 INDIAN J. INTEGRATED Rsch. L. 1 (2023).
[120] Bhatia Int'l v. Bulk Trading S.A., (2002) 4 SCC 105
[121] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[122] 2014 SCC OnLine Bom 102 ('HSBC')
[123] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[124] Aakanksha Luhach & Varad S. Kolhe, Emergency Arbitration in India: A Bellwether for the Grant of Interim Reliefs, 1 IND. ARB. L. REV. 137 (2019).

Parties have chosen an ‘indirect method’ of implementing their foreign-seated emergency decisions, as seen in this case, which involves filing an action in Indian courts after obtaining an emergency order. This technique does not ‘enforce’ an emergency judgment but rather seeks fresh interim relief from Indian courts. The court can nonetheless consider the emergency decision's merits and existence while making its own decisions.[125]

Crucially, the Court's first task was to decide whether or not foreign-seated arbitrations would be subject to Part I's Section 9 of the 1996 Act. This took the place of the ruling in *Bharat Aluminium Co. v. Kaisel Aluminum Technical Services Inc*.[126] ('BALCO'), which clearly forbade the use of Part I of the 1996 Act in arbitrations with foreign seats. Regarding this, the Court observed that the decision's ratio would not apply to the current case since the parties' agreement was made before the *BALCO* ruling, which applied prospectively. Furthermore, the parties' arbitration agreement expressly disclaimed Part I's application, with the exception of Section 9 of the 1996 Act. Consequently, it came to the conclusion that the parties had clearly decided to keep Section 9 applicable. Following that, the Court issued an order that was consistent with the emergency arbitrator's decision. The Court used the EA ruling to provide a comparable relief under Section 9, even though it did not specifically address whether the concept of EA is recognized under the 1996 Act. As long as Section 9 applied to the case, it suggested that the Indian courts recognized and considered the EA rulings significant for issuing urgent interim orders.[127]

Following *HSBC*, the Delhi High Court resolved a similar case in *Raffles Design International India (P) Ltd. v. Educomp Professional Education Ltd*[128] ('Raffles Design'). In this case, arbitration took place in Singapore. The petitioner received an EA order from the emergency arbitrator under the SIAC Rules. Unlike *HSBC*, the agreement in this matter was put into force after *BALCO*. The parties did not explicitly agree to be bound by Section 9 of the 1996 Act. The respondent stated that the petition could not be maintained due to the foreign seat of arbitration. The Court relied on the 2015 amendment to Section 2(2) of the 1996 Act, which

[125] Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).
[126] (2012) 9 SCC 552.
[127] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[128] 2016 SCC OnLine Del 5521 ('Raffles Design').

took effect after the *HSBC* decision and only slightly altered the position established in *BALCO*. The revision to Section 2(2) makes various Part I provisions, including Section 9, applicable to international commercial arbitration with a seat outside India.[129]

The Court analyzed the objective of the change to Section 2(2). The legislation aims to allow parties to seek interim relief in Indian courts for arbitrations held outside of India. The amendment aligned the 1996 Act with the UNCITRAL Model Law, allowing for the application of Article 9 to foreign-seated arbitration. Prior to this change, Indian parties could not seek interim measures from Indian courts without a specific agreement. Indian parties were unable to get interim relief from the courts if the foreign entity's property or assets were based in India. This caused serious issues.[130] The Supreme Court overruled *Bhatia International v. Bulk Trading S. A*[131], where it was decided that arbitral processes falling under the purview of Part II would be subject to the pertinent provisions of Part I. This meant that interim relief may now be ordered by a court to assist arbitrations with foreign seats. However, as Part I contained the powers for setting aside an award, this also meant that parties might request to have foreign-seated awards set aside. As a result, there was a lot of criticism, to which Fali S. Nariman said that the Supreme Court would need to 'iron out the creases' left by the decision in *Bhatia International*.[132] The Supreme Court overturned *Bhatia International,* declaring in *BALCO* that Part I does not apply to foreign-seated arbitration proceedings. The international arbitration community welcomed this judgment because Indian courts had taken a 'less interventionist approach.' This raised the question of whether foreign-seated arbitration parties might seek interim relief from Indian courts to bolster their cases. In 2015, the Arbitration Act was amended to provide for a temporary remedy in foreign-seated arbitrations by judicial aid, resolving this issue.[133] To bring the 1996 Act in line with other foreign legislations, an amendment to Section 2(2) was recommended. Previously, the Indian party would have to apply to courts in the country where the arbitration is held, but by then, the foreign entity had typically removed or transferred the property or assets.[134]

[129] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[130] *Ibid.*
[131] (2002) 4 SCC 105
[132]Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).
[133] *Ibid.*
[134] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).

Following *HSBC*, a related case was heard by the Delhi High Court in *Raffles Design International India (P) Ltd. v. Educomp Professional Education Ltd.*[135] *('Raffles Design'*). In this particular case, the petitioner obtained an EA order from the emergency arbitrator in accordance with the SIAC Rules, and Singapore served as the arbitration seat. The parties had not expressly agreed to be bound by Section 9 of the 1996 Act, and unlike *HSBC*, the agreement in this case came into effect after *BALCO*. In light of the foreign arbitration seat, the respondent contended that the petition was not maintainable. In this case, the Court invoked the 2015 Amendment to Section 2(2) of the 1996 Act, which became operative subsequent to the *HSBC* ruling and somewhat modified the stance established in *BALCO*. Following the amendment, Section 2(2) specifies that even in cases where the seat of the international commercial arbitration is located outside of India, certain of Part I's rules, including Section 9, would still be applicable. The Court next looked at the rationale underlying the aforementioned Section 2(2) amendment. It also brought the 1996 Act into compliance with the UNCITRAL Model Law, which permits Article 9 to be applied to arbitration seated abroad. It was noted that the rationale behind such an amendment was to enable a party to approach the Indian courts for interim relief with respect to arbitration seated outside India. Therefore, prior to this revision, it would not have been possible for an Indian party to ask Indian courts for interim remedies in the absence of a particular agreement. This sparked serious concerns since, in the event that the foreign entity's assets or property were situated in India, Indian parties would not be able to seek temporary relief from the courts. The property or assets were often abandoned or transferred by the foreign corporation by the time the Indian party filed an application with the courts of the nation where the arbitration is to be held. Therefore, it was suggested that §2(2) be amended to address this issue and put the 1996 Act on level with other foreign laws.[136]

The Court clarified that under Rule 30.3 of the SIAC Rules, parties might seek interim relief from the judicial authority. The parties agreed that obtaining an interim remedy from the courts would not interfere with the arbitration procedures. The parties had not agreed to avoid the implementation of Section 2 (2) of the 1996 Act. The Court recognized that the parties would not be able to use the enforcement mechanism under Section 17 owing to the foreign seat of arbitration. To enforce an order, a party can bring a second suit under CPC or a petition under

[135] 2016 SCC OnLine Del 5521

[136] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).

Section 9, as seen in this instance. The Court will assess the request for temporary relief independently of the EA order, as per Section 9. The Court will give a remedy without mistakenly enforcing an EA order, as outlined in Section 9. Unlike *HSBC*, the Court in *Raffles Design* reviewed the matter independently before making a decision rather than enforcing the EA ruling by automatic relief. In *Raffles Design*, the Court ruled that parties in international commercial arbitration matters, even with a foreign seat, might seek interim relief under Section 9 of the 1996 Act. Prior EA orders from an arbitral tribunal are not relevant to the Court's conclusion and cannot be implemented under Section 9. As a result, the emergency arbitrator's previous rulings in foreign-seated matters were no longer considered relevant.[137]

In *Ashwani Minda v. U-Shin Ltd*[138]., the Court denied a claim for interim relief under Section 9 because of a different factual matrix. The parties decided to use the Japan Commercial Arbitration Association (Commercial Arbitration Rules), 2014 (the 'JCAA Rules') instead of Part I of the Arbitration Act. The case involves an applicant seeking interim remedy from the Delhi High Court despite receiving an adverse emergency verdict from a Japan-based arbitration under the JCAA Rules. The Delhi High Court's division bench confirmed the single bench's decision to deny the appeal for interim relief under Section 9.[139] The former refused the application, claiming that a 'second bite at the cherry' was impossible.[140]

The court upheld the decision, acknowledging the applicant's intention to seek interim measures as an 'appellate remedy' against the emergency arbitrator's order. They also stated that the appellants cannot change their choice of tribunal, seat, rules, and forum at this point. The Supreme Court affirmed the division bench's ruling.[141] The Court acknowledged the emergency order, noting that the petitioner had already been refused temporary relief by an emergency arbitrator.[142]

In Indian law, the judgments in *Ashwani Minda* and *Raffles Design* differed on whether a court might be approached under Section 9 of the Arbitration Act. *Raffles Design* said that an

[137] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[138] Ashwani Minda v. U-Shin Ltd., 2020 SCC OnLine Del 1648 (India) *[hereinafter* "Ashwani (single-bench)"].
[139] Ashwani Minda v. U-shin Ltd., 2020 SCC OnLine Del 721 (India) *[hereinafter* "Ashwani (division-bench)"].
[140] Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).
[141] Ashwani (single-bench), 2020 SCC OnLine Del 1648
[142] Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).

application can be examined independently of the tribunal's court instructions under Section 9. In the Ashwani Minda case, the court denied the Section 9 claim after dismissing the emergency arbitrator's interim relief application. *Ashwani Minda*'s viewpoint aligns with the *Gerald Metals S.A. v. Timis & Ors* [143] ('Gerald Metals') judgment from 2016. In *Gerald Metals*, the petitioners requested interim remedy from the English High Court after obtaining an adverse emergency ruling from the LCIA Court. Leggatt J. refused to hear the application, stating that the court would only intervene if the tribunal's powers were inadequate or ineffective. He also noted that the LCIA's emergency arbitration provision aims to reduce the need for court intervention in urgent cases.[144]

The closeness between *Ashwani Minda* and *Gerald Metals'* judgments regarding emergency decisions reflects Indian courts' pro-arbitration stance. *Ashwani Minda* limited its own authority to a "foreign-seated" emergency judgment, indicating strong support for arbitration. Despite *Ashwani Minda*'s pro-arbitration stance, Indian courts' decisions on emergency arbitration are inconsistent. This inconsistency highlights the need for India to implement statutory recognition of emergency arbitration, similar to Hong Kong and Singapore. Adoption of a legislative modification is urgent, given ongoing talks on EA and emergency decisions.[145]

In 2021, the Indian Supreme Court held many sessions on implementing emergency decisions in *Amazon.com NV Inv. Holdings LLC v. Future Coupons Pvt. Ltd*[146] in a dispute between Amazon.com NV Investment Holdings and the Future Group.[147] On October 5, 2020, Amazon filed emergency arbitration proceedings against Future Group under the 2016 SIAC Rules, citing a breach of the Shareholders Agreement. The claimed breach was that Future Group entered into a sales transaction with a 'Restricted Person' (Mukesh Dhirubhai Ambani Group/Reliance) without first obtaining approval (the 'Disputed Transaction'). On October 25, 2020, Mr. V.K. Rajah, Senior Counsel, obtained an injunction preventing Future Group from proceeding with the Disputed Transaction. Future Group argued that the definition of 'arbitrator' under Section 2(1)(d) does not include emergency arbitrators and that their decision would not be enforceable under the Arbitration Act. However, the court ruled that the

[143] Gerald Metals S.A. v. Timis, [2016] EWHC (Ch) 2327 (Eng.) *[hereinafter "Gerald"].*
[144] Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).
[145] *Ibid.*
[146] 2021 SCC OnLine Del 1279
[147] Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).

Emergency Arbitrators are an Arbitral Tribunal for all intents and purposes. The emergency arbitrator stated that "emergency arbitrators are recognized under the Indian arbitration framework."[148] Amazon filed a case in India's Delhi High Court to enforce the emergency ruling under Section 17(2) of the Arbitration Act. Future Group expressed concerns about the status of an emergency arbitrator and the enforceability of emergency decisions under Sections 2(1)(d) and 17(2), respectively. The Delhi High Court dismissed objections and granted temporary relief, directing Future Group to maintain the status quo till the reserved decisions are issued. A division bench of the Delhi High Court stayed the implementation of the interim order due to difficulties with the "group of companies" theory, not the emergency decision itself (3).[149]

On March 18, 2021, the single bench of the Delhi High Court issued its final decision. Justice J.R. Midha penalized the respondents with INR 20,00,000 fine for violating the emergency decision. An emergency arbitrator is appointed by the Arbitration Institution to consider Emergency Interim Relief Applications in cases where the parties have agreed to arbitrate according to the institution's rules, which include provisions for emergency arbitration. He stated that the emergency arbitrator's judgment is binding on all parties but not on the arbitral panel itself.[150] In Justice J.R Midha's view:

> *" ... Emergency Arbitrator is an Arbitrator for all intents and purposes, which is clear from the conjoint reading of Sections 2(1)(d), 2(6), 2(8), 19(2) of the Arbitration and Conciliation Act and the Rules of SIAC which are part of the arbitration agreement by virtue of Section 2(8). Section 2(1)(d) is wide enough to include an Emergency Arbitrator. Under Section 17(1) of the Arbitration and Conciliation Act, the Arbitral Tribunal has the same powers to make interim order, as the Court has, and Section 17(2) makes such interim order enforceable in the same manner as if it was an order of the Court."*[151]

The progressive judgment was thwarted by a division bench of the Delhi High Court. The Indian Supreme Court overturned this decision, ruling that:

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[148] 2021 SCC OnLine Del 1279
[149] Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).
[150] *Ibid.*
[151] Future Coupons Pvt. Ltd. v. Amazon.Com NV Inv. Holdings LLC, 2021 SCC OnLine Del 4101 (India).

"Given that the definition of "arbitration" in Section 2(1)(a) means any arbitration, whether or not administered by a permanent arbitral institution when read 35 with Sections 2(6) and 2(8), would make it clear that even interim orders that are passed by Emergency Arbitrators under the rules of a permanent arbitral institution would, on a proper reading of Section 17(1), be included within its ambit. [...] The heart of Section 17(1) is the application by a party for interim reliefs. There is nothing in Section 17(), when read with the other provisions of the Act, to interdict the application of rules of arbitral institutions that the parties may have agreed to. This being the position, at least insofar as Section 17(1) is concerned, the "arbitral tribunal" would, when institutional rules apply, include an Emergency Arbitrator."[152]

Although this judgment recognizes the legitimacy of emergency arbitration and its decisions in India, it is important to note that the arbitration was held in New Delhi rather than abroad. The question of enforcing international emergency arbitrations in India remains unresolved.[153]

Amazon's judgment on the recognition of EA in India differs from *Raffles Design* and *HSBC* since it included a local arbitration in New Delhi. Part I of the 1996 Act was fully applicable in this situation. The parties completed an SIAC EA, resulting in an EA order. The petitioner sought the Court under Section 17 (2), Order XXXIX Rule 2A, and Section 151 of the CPC to enforce the arbitration order due to its domestic seat. The respondent argued that emergency arbitrators are not recognized as arbitrators under Section 2(1)(d), and EA orders are not recognized as orders under Section 17 (1), rendering them unenforceable under Section 17(2) of the Act.[154]

The Delhi High Court cited Section 2(6) of the 1996 Act, which allows parties to appoint any person, including an arbitral institution, to resolve disputes. According to Section 2(8), an agreement to authorize an institution must include the arbitral rules specified in the agreement. Furthermore, Section 19(2) allows parties to agree on the process for the arbitral tribunal. The Court used Section 2(8) to determine that the parties consented to be bound by the EA

[152] Amazon (SC), Civil Appeal Nos. 4492-4493 of 2021
[153] Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).
[154] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).

requirements after incorporating the SIAC Rules into their arbitration agreement. [155]

After considering Section 2(6), Section 2(8), Section 19(2), and the SIAC Rules, the Court determined that the emergency arbitrator meets the definition of an arbitrator under Section 2(1)(d) of the 1996 Act. The established framework recognized the notion of EA and did not require any adjustments recommended by the Law Commission or Committee. The Court determined that the EA order was an interim order of an arbitral tribunal under Section 17(1) and enforceable under Section 17(2) of the 1996 Act. The ruling in Amazon was appealed to the Supreme Court, which made identical remarks as the High Court.[156]

The EA order issued in domestic arbitrations is now recognized under Section 17 of the 1996 Act. EA orders given in a foreign-seated arbitration for international commercial disputes, such as *Raffles Design*, are not recognized under Section 17 because of Part I's inapplicability. The parties would need to seek the Court under Section 9 or file a new matter under the CPC. The courts do not acknowledge or consider EA orders when resolving claims under Section 9. Therefore, they cannot be directly enforced under the mechanism. The Court's consequent order under Section 9, based on its independent application of mind, is recognized under the clause.[157]

Another topic to examine is the acceptance of EA orders made by foreign tribunals that do not entail international commercial arbitration (as defined in Section 2(1)(f) 1996 Act), which requires a foreign party's involvement. The recent Supreme Court ruling in *PASL Wind Solutions (P) Ltd. v. GE Powers Conversion India (P) Ltd*. [158]('PASL') allows two Indian parties to seek a foreign seat of arbitration, potentially leading to this situation.[159]

In this circumstance, the arbitration, even if held in a foreign country, would only be considered domestic. As a result, Section 2(2) of the 1996 Act would not apply. The Court in *PASL* ruled that Indian parties choosing a foreign arbitration site should have access to Section 9 remedies for interim measures by domestic courts, regardless of any omissions. In foreign-seated

[155] *Ibid.*
[156] *Ibid.*
[157] *Ibid.*.
[158] 2021 SCC OnLine SC 331.
[159] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).

arbitrations, only Section 9 of the 1996 Act applies, as per the *Raffles Design* ratio.[160]

To acknowledge EA in foreign seated arbitration, a clause equivalent to Section 17 should be included in Part II of the 1996 Act, as previously proposed. Adopting the Committee's suggestion to incorporate EA orders in an arbitral ruling under Section 2(1)(c) can help achieve this goal. However, this raises theoretical difficulties about temporary relief being considered a reward, as previously addressed.[161]

In the recent case of *Shanghai Electric Group Co, Ltd. v. Reliance Infrastructure Ltd*[162]., the Delhi High Court ruled that a foreign emergency award might be enforced under Section 9 of the Act.[163] However, it is unclear as to the resoluteness of this decision. There appears to be a legislative void in Indian law that impacts emergency arbitration proceedings, particularly the enforcement of arbitrations with foreign seats.[164] The ambiguity regarding the enforceability of foreign seated EA will remain as long as there is no law recognizing such enforcement.

4.5. CONCLUSION

In recent years, Indian courts have taken varying approaches to emergency arbitration, reflecting a time when the country's arbitration procedure was bogged down by litigation and lacked effectiveness. The author proposes that statutory acknowledgment of the process for enforcing emergency decisions in India is the only solution. Recognizing emergency decisions in India will provide consistency and predictability in enforcing them while also allowing international emergency decisions to be enforced in India without the need for the ‘indirect method’ previously mentioned. During the third annual meeting of the Asian Infrastructure Investment Bank in 2018, India's Prime Minister, Narendra Modi, stated that the continent is now at the centre of global economic activity, a period known as the Asian Century. This highlights India's potential to become a great economic powerhouse, rivalling Hong Kong and Singapore. To capitalize on this opportunity, India must develop its arbitration system and

[160] *Ibid.*
[161] *Ibid.*
[162] 2022 SCC OnLine Del 2112
[163]Elamathi J., Enforcement of Emergency Arbitration: Indian Standpoint, 3 INDIAN J. INTEGRATED Rsch. L. 1 (2023).
[164] *Ibid.*

improve its conflict settlement capabilities.[165] This includes amping up the provisions of the Indian Arbitration and Conciliation Act of 1996. Emergency Arbitration is arguably not the only provision that needs to be changed; the whole Act is in a nascent form, which, if revamped into a progressive legal framework, can provide India an opportunity to rival world-class arbitration systems as that of Hong Kong and Singapore.

[165] Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).

CHAPTER 5-

ENFORCEABILITY OF EMERGENCY ARBITRAL AWARDS IN INDIA

5.1. INTRODUCTION

The enforceability of emergency arbitrators' interim reliefs is mostly determined by the national legislation of the jurisdiction in question. Urgent interim reliefs have not been effectively addressed by national courts in many countries, making the enforceability of emergency arbitration rulings questionable. Emergency arbitration is not legislatively recognized in India. Therefore, temporary reliefs awarded by emergency arbitrators in arbitrations conducted under institutional procedures, whether within or outside India, are not acknowledged under the Act. Parties seeking urgent relief in foreign-seated arbitration have no option to implement their rulings or judgments in India, since there exists a lacuna regarding emergency arbitration in India. The Act does not provide measures for enforcing interim relief issued by a foreign arbitral tribunal.[166] National courts' perspectives on enforcing emergency arbitration have shifted over time. The arbitration community around the world is actively supporting the acceptance and execution of emergency awards.[167] Therefore, this chapter aims to highlight the significant foreseeable concerns with the execution of EA orders - within the Indian legal framework. The chapter will focus on the enforcement mechanism for both local as well as foreign seated arbitrations.

5.2. ENFORCEABILITY OF INDIAN-SEATED EMERGENCY ARBITRAL AWARDS

An emergency arbitrator's award can be implemented in three ways: as a final award, as interim measures of arbitration, or by particular legislation. In India, emergency awards are often enforced through the second approach, which recognizes them as arbitral awards and provides interim relief. This way of enforcement involves two steps. To seek enforcement, there is a

[166] Aakanksha Luhach & Varad S. Kolhe, Emergency Arbitration in India: A Bellwether for the Grant of Interim Reliefs, 1 IND. ARB. L. REV. 137 (2019).
[167] Arjun Solanki & Praveena N. S., Resolving the Conundrum of the Enforceability of Emergency Awards in India-Seated Arbitrations: Amazon v. Future Retail Ltd., 15 ROM. ARB. J. 121 (2021).

need to determine if the state's national legislation specifically acknowledges the enforcement of awards, orders, or interim relief by an arbitral tribunal. Second, the court should consider whether temporary remedies granted by an emergency arbitrator are equivalent to those issued by an arbitration panel. In the enforcement case involving *HSBC*, Indian courts used a hybrid strategy to execute an emergency award issued by the SIAC panel under Singapore Rules. The Bombay High Court ruled that *HSBC*'s motion for interim relief is considered a direct application before a national court. As a result, a mirror relief, similar to an emergency award, was awarded. The case highlighted the potential for emergency arbitrators to expedite court processes to enforce emergency awards and provide instant relief.[168]

The 246th Law Commission Report in 2014 and the B.N. Srikrishna Committee Report in 2017 suggested an amendment to recognize emergency arbitrators appointed by arbitration institutions and their awards. The proposed Sec. 2(1)(d) would add the following phrase to the definition of an Arbitral Tribunal: [169]

> *"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."*

Defining an arbitrator is necessary to understand its unique characteristics. Surprisingly, neither international treaties nor national legislation provide clear guidelines on defining an arbitrator. The arbitration community generally agrees on the definition of an arbiter, making it practicable to use this term. Scholars and practitioners agree that national legislatures are increasingly adopting a uniform definition, i.e, *"An arbitrator is an independent and impartial third subject entrusted by the parties with the resolution of their dispute, who will exercise his task in an adjudicatory manner and whose decision will yield the effects of a judgement rendered by state courts."*[170]

The UNCITRAL Model Law 2006 (the 'Model Law') serves as a guide for governments seeking to implement or amend legislation to enforce interim arbitral tribunal decisions. The Model Law's Article 17 H(1) stipulates that "An interim measure issued by an arbitral tribunal

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[168] *Ibid.*

[169] Mridula Pandey, Examining the Enforcement of Emergency Awards in Foreign Seated International Commercial Arbitration, 2 JUS CORPUS L.J. 197 (2022).

[170] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator.. Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023).

shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court." The clause emphasizes the significance of permitting any interim measures imposed by arbitral tribunals to be enforced regardless of the nation where the decision is made. Santacroce argues that emergency arbitrators should be treated as equivalent to regular arbitrators, allowing for easy enforcement of their decisions.[171] The UNCITRAL model legislation does not include EAs in its concept of Arbitral Tribunals. The proposals of the law commission or that of the report were not incorporated into the 2015 or 2019 amendments. The 1996 Act grants temporary measures principally under Section 9 and Section 17. In general, Section 9 allows the court to grant temporary remedies, whereas Section 17 gives the arbitral tribunal comparable powers. These provisions follow the model of Articles 9 and 17 of the UNCITRAL Model Law.[172]

5.2.1. POWER OF ENFORCEMENT

Sections 9 and 17 of the 1996 Act enable courts and tribunals to offer temporary relief but do not address enforcement. Under Section 9, courts can issue and enforce interim orders following Civil Procedure Code (CPC) procedures. Prior to the 2015 Amendment, Section17 lacked a clause that allowed interim orders given by tribunals to be valid. And since arbitrators are not subject to the Contempt Act or other CPC prohibitions as they are distinct from a court, they could not be held in contempt of an order. Furthermore, Section 3 of the Evidence Act of 1872 explicitly excluded arbitrators from the term of 'court.'[173]
In 2015, Section 17 of the Arbitration and Conciliation Act was substituted to include interim measures ordered by the arbitral tribunal:

> ***17. Interim measures ordered by arbitral tribunal.-***
>
> *(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal-*
>
> *(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*

[171] Arjun Solanki & Praveena N. S., Resolving the Conundrum of the Enforceability of Emergency Awards in India-Seated Arbitrations: Amazon v. Future Retail Ltd., 15 ROM. ARB. J. 121 (2021).
[172] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[173] *Ibid.*

(ii) for an interim measure of protection in respect of any of the following matters, namely:--

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(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.][174]

The 2015 Amendment amended clause (2) to Section 17, bringing the tribunal on par with the court on interim orders. The amendment made interim orders under Section 17 enforceable under the CPC, much like court orders. However, the Kerala High Court ruled that the change

[174] Section 17, Arbitration and Conciliation Act, 1996

did not effectively address enforcement.[175] The High Court clarified that the tribunal's authority to issue interim orders does not imply enforcement powers. The Court determined that the arbitral tribunal's composition stems from a contract despite its power being drawn from legislation. As a contract-based entity, it lacks the authority to perform sovereign functions or public law, which are reserved for courts. The High Court ruled that the petitioner must seek execution of an interim order obtained by the panel through civil court proceedings. This contradicts the amendment's goal of preventing courts from interfering with arbitration processes. The Supreme Court clarified its approach to enforcing interim orders in response to varying conclusions from High Courts.[176] The Supreme Court used the report[177] to determine that adding clause (2) to Section 17 provided a 'complete solution' for enforcing interim orders given by tribunals under Section 17(2). The Court underlined that the tribunal's orders are now enforceable in the same way as those of a civil court, eliminating the need to seek contempt from a High Court.[178]

The 1996 Act's procedure for direct enforcement by tribunals remains unclear despite the Supreme Court's efforts to clarify the legislation. The 1996 Act lacks a clear procedure for addressing violations of orders issued under Section 17.[179]

5.2.2. ENFORCEMENT OF INTERIM ORDERS

Interim orders issued under Section 9 or Section 17 may be enforced under Section 94, Section 151, or Order XXXIX of the CPC. The Act lacks a mechanism for addressing violations of orders issued under Section 17. Nonetheless, the Supreme Court of India in *Alka Chandewar v. Shamshul lshrar Khan*[180] concluded that a defaulting party might be penalized under Section 27(5) of the 1996 Act for disobeying an arbitral tribunal's interim order. The Supreme Court ruled that the clause requiring the tribunal to seek the Court's aid in obtaining evidence also included penalizing a party for contempt of the tribunal as if it were an order of the court itself. However, Section 27(5) allows the tribunal to seek judicial help in implementing the order

[175] *Pradeep K.N. v. Station House Officer*, 2016 SCC OnLine Ker 8995.
[176] (2017) 16 SCC 119 ('Alka Chandewar').
[177] 246th Law Commission Report
[178] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[179] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[180] (2017) 16 SCC 119

rather than penalizing the defaulting party for contempt.[181] The 1996 Act does not provide for direct execution of tribunal orders. Nevertheless, an interim order issued by a tribunal can be executed as a civil court order under the Civil Procedure Code.[182] To understand how courts implement interim orders and penalize parties that violate them, it's important to look into their procedures.[183]

5.2.3. ENFORCEMENT OF INTERIM ORDERS BY CIVIL COURT

To obtain an interim remedy, a party must first file an injunction application in a civil court under Order XIX Rule 1 or 2 or Section 94 of the CPC. The court may issue an ad interim injunction without hearing the opposing party or notice them to submit their argument before issuing a temporary injunction. If the court does not grant an ad interim injunction, it will send a summons to the other party. Typically, the opposing party avoids serving summonses. If the summons is served, the opposing party might raise objections to the application and prolong the procedure. As a result, the applicant party's request for immediate temporary relief becomes futile. The opposing party may file a caveat with the court and request time to oppose the motion for temporary relief. Adjournments on various grounds might postpone interim relief and render it ineffective.[184]

If a court orders an ad interim injunction or an interim order, non-compliance by the opposing party might undermine the purpose of the relief granted. If a defaulting party violates an interim order, the applicant party must submit a petition in the same court and demonstrate how the breach occurred. The defaulting party will be given another opportunity to defend themselves. Only after this chance will the court issue an order under Order XXXIX Rule 2A or Section 94 of the CPC. The opposing party can use these methods to postpone proceedings and prevent civil court enforcement orders from being effective.[185]

[181] The Arbitration and Conciliation Act, Section 27(5).
[182] *Ibid.,* Section 17(2).
[183] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[184] *Ibid.*
[185] *Ibid.*

5.2.4. PENALISING NON-COMPLIANCE OF INTERIM ORDER

The CPC lacks a mechanism for enforcing orders under Section 94 or Order XXXIX Rule 2A[186], making penalties for non-compliance ineffective. Order XXXIX Rule 2A allows for penalties such as property attachment or civil imprisonment, but the appendix to the CPC lacks a proforma for civil imprisonment for disobedience. This leaves us with Section 151 of the CPC to enforce an order successfully. However, an application under Section 151 relies significantly on the subjective satisfaction of the presiding judge. Under Section 151, the applicant party must first prove their case for interim relief, followed by proof that the defaulting party violated the interim order. The court can issue an order for disobedience or contempt if they are satisfied. The court's enforcement of Order XXXIX Rule 2A is uncertain; hence the order can only be implemented under Section 151 of the CPC. The current enforcement system for temporary orders given by tribunals relies on voluntary compliance rather than punitive penalties.[187]

5.2.5. OTHER ISSUES WITH ENFORCEMENT OF INTERIM ORDERS

Although the issue of enforcing an interim order and dealing with contempt remains unresolved, there are numerous other issues. The current enforcement mechanism allows orders to be enforced under Order XXI of the CPC.[188] According to Section 36 and Section 2(14) of the CPC, unless "there is a formal expression of an order of the Civil Court," resort to Order XXXIX Rule 2A or Section 94 of the CPC.[189] To file an application under Order XXI, the matter must have been adjudicated and a final decree issued.[190] Order XXI only applies to final decrees and does not cover interim orders.[191]

Interim orders granted under Section 9 or Section 17 of the 1996 Act can only be enforced by the court under Section 94, Section 151, Order XXXIX Rule 2A of the CPC, or the Contempt Act. Order XXXIX Rule 1 or 2 or Section 94 or Section 151 of the CPC can only be used to grant an injunction. Disobeying an injunction order is penalized under Order XXXIX Rule 2A

[186] Rayapati Audemma v. Pothineni Narasimham, 1969 SCC OnLine AP 204
[187] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[188] *Ibid*
[189] Pradeep K.N. v. Station House Officer, 2016 SCC OnLine Ker 8995
[190] Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307
[191] *Thummu Koti Nagaiahv. D. Sambaiah*, 1962 SCC OnLine AP 107

of the Civil Procedure Code.[192] These provisions only apply to circumstances when an injunction is issued. This approach has limited reach because not all interim orders are injunctions.[193]

The 2015 Amendment to Section 17 aimed to provide the tribunal enforcement power, although this was not realized in practice. When it comes to enforcing interim orders, it's clear that voluntary cooperation is more important than threatening penalties. The current enforcement framework allows opposing parties to delay the process, hindering the aggrieved party's goal of obtaining rapid interim relief.[194]

However, when a bigger picture is considered, in the absence of an explicit law, in *Amazon.com NV Investment Holdings LLC v Future Retail Limited & Ors* [195]('Amazon'), the court determined that EA awards in India-seated arbitration are legitimate and enforceable.[196] In this case, the Future Group stated that the Principal Act does not address emergency arbitration, notwithstanding advice from the Law Commission and the Srikrishna Report. The court rejected the claims and emphasized that the Principal Act allows parties to regulate their disputes through institutional mechanisms, including temporary relief by EAs. The Court ruled that emergency arbitration is permissible under the Principal Act, contrary to the Future Group's claim. The court may have adopted a negative posture due to the description of the arbitral panel and the narrow scope of Section 17. Despite the lack of a statutory structure, the EA's award was acknowledged through a purposeful and constructive reading of the Principal Act's existing provision. The Supreme Court's decision is significant not just for India but also for other countries worldwide.[197]

[192] *Adaikkala v. Imperial Bank*, 1925 SCC OnLine Mad 466
[193] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[194] *Ibid.*
[195] *Amazon.com NV Investment Holdings LLC v Future Retail Limited & Ors.* (2021) 4 SCC 557
[196] Mridula Pandey, Examining the Enforcement of Emergency Awards in Foreign Seated International Commercial Arbitration, 2 JUS CORPUS L.J. 197 (2022).
[197] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator. Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023).

5.3. ENFORCEABILITY OF FOREIGN-SEATED EMERGENCY ARBITRAL AWARDS

Arbitration awards are typically enforced by the courts of the arbitration seat. However, where assets are located in multiple countries, parties must seek relief from local courts. Enforcing foreign-seated EA rulings in International Commercial Arbitration (ICA) is hard due to the lack of an enforcement mechanism under Section 17. If a party violates an arbitral award, they may face contempt proceedings under Section 27(5). However, this option is not ideal as it requires the arbitral tribunal to submit the case to a court after the asset has been disposed of. After the 2015 amendment, the best way to enforce an award is to seek courts under Section 9 of the Act.[198]

5.3.1. APPLICABILITY OF SECTION *9* TO FOREIGN-SEATED ARBITRATIONS

The legislation on enforcing interim measures in foreign arbitration under Section 9 has changed significantly. In the landmark case of *Bhatia International v Bulk Trading S.A*[199] ('Bhatia'), the Apex Court ruled that Part I of the Act applies to foreign-seated ICA unless explicitly or implicitly excluded. The commendable goal of ensuring the enforcement of foreign awards led to the controversial 'theory of implied exclusion.' According to this theory, Part I and Section 9's application is governed by factors such as the arbitration agreement's controlling legislation, institutional regulations, and jurisdiction. However, in *Bharat Aluminium Co. v Kaiser Aluminium Technical Service*[200] (BALCO), the court acceded to the doctrine of territoriality and limited Part I to arbitrations held in India. Section 2(2) of the act was amended to apply Section 9, Section 27, and Section 37 to ICAs in jurisdictions where awards are recognized and enforceable under the New York and Geneva treaties unless an agreement states otherwise. However, it is uncertain whether an agreement to the opposite must be explicitly stated or implicit, and Bhatia's theory of implied exclusion has a negative impact.[201]

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[198] Mridula Pandey, Examining the Enforcement of Emergency Awards in Foreign Seated International Commercial Arbitration, 2 JUS CORPUS L.J. 197 (2022).
[199] AIR 2002 SC 1432
[200] *Bharat Aluminium Co. v Kaiser Aluminium Technical Service* (2012) 9 SCC 552
[201] Mridula Pandey, Examining the Enforcement of Emergency Awards in Foreign Seated International Commercial Arbitration, 2 JUS CORPUS L.J. 197 (2022).

In *Avitel Post Studioz Ltd. v HSBC PI Holdings (Mauritius) Ltd.*[202], a Singapore-based ICA, an EA order was issued to freeze the respondent's assets. The petitioner used Section 9 to seek the same relief. The Bombay High Court ruled that while the decision could not be immediately implemented, filing a Section 9 application under SIAC guidelines would allow for the enforcement of interim relief. This position was confirmed in the case of *Raffles Design International India P. Ltd. v Educomp Professional Education Ltd.*[203] ('Raffels'). The court used the 2015 amendment to Section 2(2) to award temporary relief as necessary rather than relying primarily on the EA award.[204]

Courts have embraced Bhatia's view, which disadvantages parties and negates the purpose of the 2015 amendment. In the case of *Ashwin Minda & Anr v U-Shin Ltd* [205]('Ashwin'), the petitioner sought interim relief from the Delhi High Court under Section 9 after failing to achieve it via an EA under Japan Commercial Arbitration Association regulations ('JCAA'). The court ruled that the JCCA, unlike the SIAC guidelines in *HSBC* and *Raffles, did not provide for court-ordered interim remedies* and had a complex enforcement mechanism. The court applied the regressive theory of Implied Exclusion and determined that the Section 9 application could not be maintained. The court ruled that parties cannot seek additional interim relief under Section 9 after being refused by an EA. In the case of *Archer Power Systems Private Limited v Kohli Ventures Limited and Ors*[206] (Archer'), arbitration took place in London and followed ICC rules. The court denied interim relief under Section 9, citing the implied exclusion of a provision in Section 2(2) that applied to Part II.[207] The court made an intriguing point:

> *'[...] if a section 9 application is filed in the instant case, post-award, the dynamics and dimensions of applicable law may change'.*

If the final foreign award was to be executed in India, the decision on granting an intermediate

[202] 2014 SCC OnLine Bom 102 ('HSBC')
[203] 2016 SCC OnLine Del 5521 ('Raffles Design').
[204] Mridula Pandey, Examining the Enforcement of Emergency Awards in Foreign Seated International Commercial Arbitration, 2 JUS CORPUS L.J. 197 (2022).
[205] 2020 SCC OnLine Del 1648
[206] 2018 (2) CTC 241
[207] Mridula Pandey, Examining the Enforcement of Emergency Awards in Foreign Seated International Commercial Arbitration, 2 JUS CORPUS L.J. 197 (2022).

remedy may have been different. This adds complexity and creates an unnecessary difference between pre-award and post-award interims.[208]

Despite this, the legal position is ambiguous due to conflicting High Court verdicts. The Bombay High Court ruled in *Aircon Beibars FZE v Heligo Charters Pvt. Ltd* [209]('Heligio') that choosing a foreign arbitration seat does not preclude Part I of the Act or Sec.9 from applying unless a written agreement states otherwise. The court granted interim relief to secure the main asset, a helicopter, as it fell within its territorial jurisdiction. The court took a purposive approach to ensure the 2015 amendment's aim of preventing asset dissipation was met. In *Actis Consumer Grooming Products Limited v Tigaksha Metallics Private Limited Ors* [210]('Actis'), the Himachal Pradesh High Court granted interim relief because the asset was within their jurisdiction, despite the implied exclusion of Part I. The arbitration was conducted in Geneva under the LCIA rules.[211]

In *Goodwill Non-Woven (P) Ltd. v. Xcoal Energy & Resources LLC*[212], the Delhi High Court expanded on this view. The respondent claimed asset-based jurisdiction, arguing that the subject matter was not within India. The court was of the opinion that even if the assets were not situated in India, a bank guarantee could be secured through a grant of interim measures. However, since a prima facie case didn't exist based on facts, the court could not grant such a relief. In *Plus Holdings Ltd. v Xeitgeist Entertainment Group Ltd. & Ors*[213], the Bombay High Court granted an ad-interim injunction under Sec.9 when the petitioner's rights were recognized in the EA award, and it stated that there was persuasive value for a favorable EA award.[214]

According to the *Raffles Design* case, an EA order from a foreign arbitration cannot be considered an interim order under Section 17 of the 1996 Act. Therefore, a party cannot directly

[208] Mridula Pandey, Examining the Enforcement of Emergency Awards in Foreign Seated International Commercial Arbitration, 2 JUS CORPUS L.J. 197 (2022).
[209] *Aircon Beibars FZE v Heligo Charters Pvt. Ltd.,* (2018) SCC OnLine Bom 1388
[210] *Actis Consumer Grooming Products Limited v Tigaksha Metallics Private Limited & Ors.* (2020) SCC OnLine HP 2234
[211] Mridula Pandey, Examining the Enforcement of Emergency Awards in Foreign Seated International Commercial Arbitration, 2 JUS CORPUS L.J. 197 (2022).
[212] *Goodwill Non-Woven (P) Limited v Xcoal Energy & Resources LLC* (2020) *SCC Online Del 631*
[213] *Plus Holdings Ltd. v Xeitgeist Entertainment Group Ltd. & Ors* (2019) SCC OnLine Bom 13069 (Bombay HC)
[214] Mridula Pandey, Examining the Enforcement of Emergency Awards in Foreign Seated International Commercial Arbitration, 2 JUS CORPUS L.J. 197 (2022).

enforce an EA order in such cases. *Raffles Design* suggests pursuing legal action under Section 9 and enforcing the resulting order. The enforcement method is the same as for an order under Section 17. The parties will confront the same issues as outlined, including ineffective and slow-paced enforcement processes. If the parties agree to exclude Section 9, they can only launch a new suit under the CPC, making the EA order ineffective.[215]

Due to this conflict, parties seeking urgent interim relief may opt for Indian courts rather than the EA procedure. The absence of enforceability of an EA order in a foreign tribunal undermines the benefits of the EA mechanism under institutional rules.[216]

5.4. FACTORS TO BE CONSIDERED WHILE ENFORCING FOREIGN EA/INTERM ORDERS

Based on these judgments, the following concepts emerge:

- Interim/EA awards in foreign ICAs are not directly enforceable under existing legislation.
- Interim relief can be requested under Section 9 and will be evaluated separately based on merit.
- It is important for parties to ensure that the institutional rules don't explicitly prohibit them from seeking interim relief in court.
- A favorable award is convincing, but an unfavorable award may prevent the court from considering the Section 9 application.
- Courts are evaluating whether assets are located in their jurisdiction to avoid dissipation, although the regressive idea of implied exclusion continues to be used.
- In India-seated arbitrations, Section 9 and EAs are nearly equivalent. However, in foreign-seated ICAs, EAs rely on Section 9 for enforcement.[217]

[215] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[216] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).
[217] Mridula Pandey, Examining the Enforcement of Emergency Awards in Foreign Seated International Commercial Arbitration, 2 JUS CORPUS L.J. 197 (2022).

5.5. CONCLUSION

The above analysis of currently existing laws clearly proves why there is a need for an explicit law acknowledging emergency arbitration and its enforcement mechanism in the Indian legal framework. The current mechanism provides plenty of loopholes to make the whole purpose of emergency arbitration ineffective, which includes both domestic seated arbitrations and foreign seated arbitrations. The purpose of emergency arbitration is to create solutions to time-sensitive business issues. What we currently have in our legal framework does nothing to smooth out this issue while, at the same time, it proves plenty of ways to prolong the issue.

CHAPTER 6-

ISSUES AND CHALLENGES

6.1. INTRODUCTION

The Act of 1940 has been replaced by the Arbitration and Conciliation Act of 1996; however, the 1996 Act has undergone five major amendments since then. Significant modifications have been implemented by the new Act of 1996, which supersedes the previous provisions. Over the past few decades, a growing number of countries and arbitral bodies have adopted and used emergency arbitration (EA) procedures. India's arbitration procedure is governed by the Arbitration and Conciliation Act of 1996. It doesn't specifically contain any EA provisions. On the other hand, some arbitration institutions in India have included special clauses regarding emergency arbitration in their arbitration rules. These organizations include the Nani Palkhivala Arbitration Centre, the Indian Council of Arbitration (ICA), the Mumbai Centre for International Arbitration (MCIA), and the Delhi International Arbitration Centre (DIAC).[218] However, this does not negate the need for a provision in the Act acknowledging emergency arbitration. This chapter intends to explore the issues and challenges with regard to the absence of a specific provision for emergency arbitration.

6.2. MAKING THE CHOICE OF COURT PROCEEDINGS VERSUS EMERGENCY ARBITRATION PROCEDURE

Parties have two options for obtaining remedy during the pre-arbitral phase: they can use national courts or an emergency arbitration proceeding. When selecting a forum, parties should take a few things into account. This section compares the two forums based on a number of criteria, including (not in order) cost, speed, secrecy, neutrality of the court, ex-parte relief, and order against third party:[219]

[218] Chiranjit Goswami, Contemporary Issues of Arbitration, 3 JUS CORPUS L.J. 394 (2023).
[219] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator..Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023).

1. SPEED

The party's desire for immediate relief means that the formation of a tribunal is not a viable option; hence, expediency of the procedure is crucial. Institutions establish a deadline for the provision of immediate relief in emergency arbitration cases. Despite the fact that these deadlines are usually adhered to, institutions have stated that they often went a little beyond the mark. For example, the average time to provide relief was reported by ICDR and SCC to be 14 and 5–8 days, respectively. Parties should take into account the time that will be needed to enforce the relief in addition to these deadlines in the event that the other party does not comply voluntarily. On the other hand, depending on the court's stance and level of experience with arbitration, the speed of judicial proceedings might differ significantly between jurisdictions. Obtaining temporary relief from the courts might occasionally provide difficulties due to the unfavourable disposition of the court. For example, non-commercial disputes are frequently allocated to the judges of Indian High Courts' commercial courts/divisions (like Bombay High Court), which causes the entire process to drag on and delays the granting of relief. However, going to court might be the best course of action in other situations. For example, the Delhi High Court is well known for awarding interim relief in an average of three days.[220]

One may argue that an accelerated process is the foundation of an EA mechanism. A number of mechanisms within an EA process expedite the process and allow for the express resolution of the claims. Parties frequently only move on with the EA procedure in an attempt to get a quicker order and avoid irreversible damage. Therefore, the goal of EA is to safeguard resources and data that may otherwise be lost, destroyed, or devalued by one party in an attempt to render arbitration pointless.[221]

2. COST

Institutions mandate that the party making the request pay the whole upfront cost of set emergency arbitration fees. Institutions impose a set price that pays for both the EA's cost and

[220] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator..Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023).
[221] Abhinav Gupta & Sriroopa Neogi, Emergency Arbitration in India: A Critical Appraisal of the Institutional Framework, 14 NUJS L. REV. 640 (2021).

their own administrative costs. In India, the court charge for Section 9 application is limited to INR 4,000. Consequently, disregarding the attorney's fee, a comparison of court fees and institutional fees indicates that the latter is far less expensive. Senior attorneys are occasionally hired and demand outrageous costs, nevertheless, only to argue the case, thus rendering the court more costly than an arbitral body. Furthermore, this is more expensive if numerous countries are involved in the request for temporary relief. An emergency arbitration procedure becomes cost-effective in such circumstances because it avoids the expense of starting several court actions.[222]

3. RELIEF AGAINST THIRD PARTIES

Parties may occasionally ask for temporary relief from a third party that did not sign the arbitration agreement. However, the EAs' authority over parties who sign the agreement and submit their dispute to arbitration is limited by the contractual character of arbitration. EA is unable to provide a remedy against third parties as a result. For example, the ICC Rules limit the remedy an EA might award, saying that it can only be given "to parties that are either signatories of the arbitration agreement [….]."[223] On the other hand, Indian courts are able to grant temporary relief against outside parties.[224]

4. EX PARTE ORDERS

Sometimes, assets from the relevant jurisdiction may be dispersed if the opposing party is given advance notice. Therefore, in such an instance, a degree of surprise is required to guarantee the efficacy of the relief. Most organizations forbid their EAs from providing ex-parte relief. For example, the EA is required by the MCIA Rules "to provide all parties a reasonable opportunity to be heard." Furthermore, under Section 37 of the Principal Act, the order may be contested for failing to provide parties an opportunity to be heard if any institution (such as Swiss Rules) authorizes such a challenge. On the flip side, Indian courts possess the power to provide ex parte relief. Moreover, Section 37 of the Principal Act allows for an appeal against their failure

[222] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator..Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023).
[223] The ICC Rules of Arbitration ('ICC Rules') (1 January 2021) art. 29(5).
[224] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator..Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023

to comply.[225]

5. CONFIDENTIALITY

For the parties engaged in the dispute, maintaining secrecy to safeguard relationships and business secrets can occasionally be quite important. A. Yesilirmak states that maintaining anonymity during emergency arbitration may be more crucial to preventing prejudging the case's merits. Arbitrations are often secret and confidential proceedings; the records, pleadings, and transcripts involved with them are rarely made public, in contrast to ordinary litigation and its docket, which is open to the public. Because of this, a party may decide to file an application for interim relief with an emergency arbitrator as opposed to the national court, where the proceedings are open to the public.[226]

Parties primarily choose arbitration because of confidentiality, which restricts access to information by the public, rival businesses, the media, and other parties. The secrecy of the underlying issues is guaranteed by the emergency arbitration procedure since institutions have a confidentiality clause in their terms that also applies to emergency arbitration proceedings. For example, the SIAC Rules clearly stipulate that "all matters relating to the proceedings and the Award shall at all times be treated as confidential."[227] by both the party and any arbitrator, including any Emergency Arbitrator. Nevertheless, going to court can occasionally undermine the parties' desire to keep their disagreements private since there is a great chance that the court processes will make the private details of the underlying conflict public.[228]

6. EXPERTISE OF THE ADJUDICATOR

There are advantages to having the issue decided by an umpire whose knowledge and experience in that particular field allows them to resolve it best. Because he is qualified to handle the intricate factual and legal concerns that may surface in conflicts, an expert provides

[225] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator..Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023
[226] Aakanksha Luhach & Varad S. Kolhe, Emergency Arbitration in India: A Bellwether for the Grant of Interim Reliefs, 1 IND. ARB. L. REV. 137 (2019).
[227] SIAC Rules (n 20) r. 39.1.
[228] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator..Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023

the best kind of relief. Moreover, it expedites the process, which is still the highest priority at that particular moment. It is well acknowledged that organizations designate things to EAs according to their subject-matter expertise. Additionally, these organizations guarantee that an EA will be accessible throughout the whole process, giving the issue the attention it deserves On the other hand, national courts lack a pool of specialized judges, and it is also quite improbable that the expert judge will be available when a request for temporary relief is filed. Due to this, the courts are forced to allocate arbitration cases to non-specialist judges, whose decision-making gravely jeopardizes the legitimacy of the remedy.[229]

7. NEUTRALITY AND IMPARTIALITY OF THE ARBITRATOR

Concerns about the court's impartiality and neutrality in particular settings may also be very valid. As it can be the only choice available, the issue is particularly pressing when the defendant is a state or one of its entities and interim relief is requested against the state within its own nation. There's a likelihood that the domestic court will rule in favor of the state entity in such a case. Institutions, on the other hand, make sure that an EA's nationality and that of either party do not change. In the event that the parties are not of the same nationality, the presiding arbitrator should not have the same nationality as either party, according to the LCIA Rules, for example.[230]

This section outlines the issues regarding choosing a forum for arbitration. Both institutional and court interim relief comes with its own pitfalls. Creating a provision in the 1996 Act that provides for emergency arbitration provides solutions to all these issues. The explicit recognition of emergency arbitration in the statute will negate unnecessary costs, maintain the confidentiality of the parties (which is one of the very important aspects of commercial disputes), provide for expert arbitrators, etc. However, this is not the only challenge. The absence of a provision in the Act for emergency arbitration has created a lot of confusion regarding the enforceability of arbitration awards.

[229] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator..Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023
[230] *Ibid.*

6.3. ENFORCEABILITY

Not only is the acceptance and implementation of arbitral awards essential to arbitration's effectiveness, but they are also a major factor in its popularity. When it comes to emergency arbitration enforcement, there is still more work to be done, particularly in cases when enforcement is requested in a foreign country. At present, emergency arbitration procedures are allowed in India. Certain arbitral rules specify that emergency decisions are considered awards, while others go a step further and state that an emergency arbitrator is included in the definition of an arbitral tribunal. Despite this, the only way to address the problems with emergency award enforcement in India is for emergency arbitration to be legally recognized in the country.[231]

Parties are contractually bound by emergency arbitration rules of institutions. Thus, they are required to comply to a great extent with emergency relief. However, there is no guarantee that a party will follow suit. The efficacy of emergency relief is questioned in certain circumstances. The results of Queen Mary University's poll on international arbitration are worth taking into account. According to the poll, 46% of participants were likely to choose emergency arbitration over seeking interim relief through the national court, with 79% identifying the enforceability of emergency rulings as a major issue[232]. Therefore, it is crucial that an applicant has faith in the enforcement of emergency reliefs; otherwise, the procedure would be pointless.[233]

The Indian arbitration community anticipated the incorporation of the 246th Law Commission to be adopted into the Principal Act. The Indian Parliament lost a great chance to become one of the few progressive countries to enact such a law.[234] It has also resulted in hindering the growth of arbitration culture in the Indian scenario. Another chance presented itself when the Srikrishna Committee emphasized implementing the recommendation of the 246th Report and made a biting observation about how "India's approach differs from that of developed arbitration jurisdictions such as Singapore and Hong Kong which have recognised the

[231] Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).
[232] Queen Mary University of London, *International Arbitration Survey: Improvements and Innovations in International Arbitration* 27-28 (2015).
[233] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator..Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023)
[234] *Ibid.*

enforceability of orders given by an emergency arbitrator." But the second time around, the advice was not implemented. Therefore, unlike several modern nations like Singapore and Hong Kong, India did not grant an EA formal status, leaving this matter unresolved. The notion that EA is an arbitrator is strongly supported by the name "emergency arbitrator" and the emergency arbitration procedure that was added to the institution's regulations. We are not, however, able to determine with certainty whether an EA is a fully qualified arbitrator based on this line of reasoning.[235]

The UNCITRAL Model Law and the New York Convention both make emergency decisions enforceable. India has previously signed the former, and it has the option to accept the 2006 amendments to the latter, particularly Article 17H.[236] In addition to recognizing emergency arbitrators as arbitral tribunals and granting such tribunals the authority to pass orders against a third party, Article 17 H of the UNCITRAL Model Law permits the enforcement of foreign-seated interim orders. These provisions, which have not yet been added to the Indian Arbitration and Conciliation Act, must be filled as soon as possible by Indian lawmakers, as the use of emergency arbitration may become more common following the Apex Court's ruling in the *Amazon Nv. Investment v. Future Coupons Pvt. Ltd*[237] case.[238]

The uncertainty surrounding emergency arbitration procedures may be eliminated by putting the 246th Report's and the Srikrishna Report's recommendations into practice and granting emergency arbitration legislative status. This will enable the implementation of emergency arbitral tribunal rulings in emergency arbitrations with Indian seats, in line with the Supreme Court's decision in the *Amazon-Future Retail* case. This would also help establish India as a hub for international commercial arbitration.[239]

6.4. CONCLUSION

It is to be noted that commercial entities prefer arbitration to maintain confidentiality and

[235] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator..Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023)
[236] Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).
[237] 2021 SCC OnLine Del 1279.
[238] Swarnendu Chatterjee & Dhriti Bole, Enforcement of Achille's Heel in India, 2 JUS CORPUS L.J. 306 (2021).
[239] Elamathi J., Enforcement of Emergency Arbitration: Indian Standpoint, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023).

resolve disputes robustly. When there is no provision for emergency arbitration, foreign commercial entities may be discouraged from opting for an Indian arbitration framework. Not to mention that the difficulty is that enforcement drags along the procedure, negating the intent behind emergency arbitration, which is a prompt resolution that needs immediate attention. Resorting to court proceedings may delay the whole procedure, not to mention it jeopardizes the confidentiality factor. These are some major issues due to the current absence of an emergency arbitration provision in India.

CHAPTER 7-

SUGGESTIONS & CONCLUSION

The number of instances demanding emergency arbitration has been rising dramatically on a worldwide scale, yet most countries are finding it difficult to keep up. Due to the lack of confidence around the efficacy of the interim orders made by the emergency arbitrator, the parties were compelled to seek immediate remedy from national courts. In essence, this means that the party who selected arbitration over litigation has lost all of the advantages that made them choose arbitration in the first place.[240] The author would like to put forth the following suggestions with regard to formulating a law for emergency law provision-

7.1. SUGGESTIONS

The Law Commission of India's proposed change to Section 2(1)(d) of the Act would have brought Indian arbitration law into alignment with the worldwide practice of enforcing emergency awards by legislative amendments. The issue is more common in foreign seated arbitrations because domestic seated emergency orders can still be implemented under the modified Section 17(2) of the Act. However, a clause akin to section 17 of the Act must be included in Part II of the Act in order to allow for the execution of emergency awards made in arbitrations with foreign seats.[241]

There are still a lot of unanswered questions regarding India's stance on emergency arbitration. For instance, what happens if a party chooses ad-hoc arbitration over institutional arbitration? Can the party use such an agreement to initiate emergency arbitration, given that emergency arbitration is only feasible inside the framework of institutional arbitration? Should the courts be given the authority to name an emergency arbitrator in such a case? Will selecting arbitral institutions to choose an emergency arbitrator require the parties to sign a separate agreement? Given the lack of judicial explanation and regulatory laws controlling this area, it is undoubtedly difficult to respond to such inquiries. Parties now lack direction for how to continue with emergency arbitration, if at all, as a result of the Act's 2015 revisions and the

[240] Aakanksha Luhach & Varad S. Kolhe, Emergency Arbitration in India: A Bellwether for the Grant of Interim Reliefs, 1 IND. ARB. L. REV. 137 (2019).
[241] *Ibid.*

Arbitration and Conciliation Amendment Bill of 2018's silence regarding the many difficulties surrounding emergency arbitration. If emergency arbitration is eventually included in Indian arbitration law, it is important to remember that catch-all terms in the list of interim measures awarded by tribunals should be replaced with a more illustrative rather than exhaustive list akin to the English Arbitration Act, 1996.[242]

While we attempt to form a provision for emergency arbitration under our domestic legislation, the following aspects must be considered:

1. The definition of arbitral tribunal must include 'emergency arbitrator' as suggested by the Law Commission's report. The inclusion of such a definition will bring the Indian arbitration system on par with other leading national legislations, such as the Singapore International Arbitration Act of 1994, which includes emergency arbitrators under the definition of arbitrator in Section 2 (1). It states*, "' arbitral tribunal' means a sole arbitrator or a panel of arbitrators or a permanent arbitral institution, and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties, including the rules of arbitration of an institution or organization."*[243]

2. The application for emergency arbitration must be filed with proof that the opposing parties were served with it, and payment must be made in line with the schedule for each center where the arbitration will take place. It is expected that only parties who have signed the arbitration agreement or its successors may apply for emergency arbitration.

3. In an emergency arbitration, conservatory relief or temporary remedies can only be given for a set period of time. It functions in a manner that is essentially the same as that of an ad hoc tribunal, which is one that is created with a specific objective in mind and is promptly dissolved after that objective has been reached or the deadline for making a decision on these matters has passed. Most arbitration rules across the world include an "opt-out" approach when it comes to crises. This implies that these

[242] *Ibid.*
[243] Section 2(1), Singapore International Arbitration Act of 1994

provisions would only not apply in full if the parties' agreement expressly excluded "Emergency Arbitrator Provisions."

4. An arbitrator appointed expressly to preside over an emergency arbitration is known as an emergency arbitrator. The Emergency Arbitrator shall perform its functions and exit as soon as the Interim Order is issued.

5. As soon as is reasonably possible, but preferably within two business days after the appointment, the Emergency Arbitrator should provide a timeline for the assessment of the application for emergency relief.

6. Under this plan, each party shall have a fair chance to be heard. It may stipulate that processes will be conducted by telephone conference or on the basis of written submissions rather than a formal hearing.

7. Due to time constraints, the emergency arbiter may never truly speak with the parties or engage with them—aside from a few essential clarifications. Rather, he shall base his decision solely on the written submissions and supporting documentation that have been provided to him. This shall be done to create convenience for the parties involved.

8. The average turnaround time for an emergency arbitration is eight to ten days from the date of application to the date of award. However, timelines might vary depending on the international arbitration norm. This must be followed when domestic legislation absorbs emergency arbitration provisions into it.

9. All of the rights and powers provided to the Arbitral Tribunal by legislation must be extended to the Emergency Arbitrator, including the ability to choose his own jurisdiction. He or she may also mandate any party to implement any interim safeguards that, given the particulars of the dispute, they believe are necessary.

10. Interim orders can be of several forms, such as asset freezing orders, anti-suit injunctions, preservation and inspection orders, orders for the preservation and examination of evidence, and preventative orders to prevent the misuse of intellectual

property or sensitive information. Future legislation must address these several forms of interim orders.

11. The interim order must be definitively changed, discharged, or revoked, in whole or in part, by a subsequent order or award issued by the arbitral tribunal upon request from any party or on its own initiative if it is deemed necessary. It shall be done despite the fact that the emergency arbitrator's order is not legally binding on the arbitral tribunal with regard to any question, issue, or dispute that has not yet been resolved.

12. Under the international EA rules, an emergency arbitrator's appointment can be contested within one to three days after the appointment or the publication of information that casts doubt on the arbitrator's independence or impartiality. It is significant to remember that the EA processes are still progressing even though there is a challenge to the appointment of an emergency arbitrator. There must be an acknowledgment of law to ensure that a three-day deadline to contest the appointment of arbitrator, excluding non-business days. Thus, it's critical to bring up these issues in a timely way in order to provide a choice made prior to the EA order being approved. Additionally, it stops the respondent from stalling the EA procedures at any later date by bringing up insignificant objections to the appointment.

13. By including EA into the definition of the "arbitral tribunal," the Parliament may still establish a legislative framework for emergency arbitration—better late than never. This innovative action will guarantee that foreign parties choose Indian institutions to settle their disputes. However, as the Principal Act lacks the authority to enforce the rulings and awards from external arbitrations held abroad, simply broadening the term of ‘arbitral tribunal’ would amount to little more than lip service in the creation of an efficient emergency arbitration regime. This disadvantage can be eliminated by allowing a minor modification to Section 17. The phrase ‘irrespective of the country in which it was issued’ should be added to Section 17(2) by the legislature. This provision makes Section 17 of foreign-seated emergency orders and awards enforceable in India.[244]

[244] Rajvansh Singh & Saksham Barsaiyan, An Emergency Arbitrator Is an Arbitrator.. Is There a Need for Statutory Recognition Post-Amazon?, 5 IND. ARB. L. REV. 47 (2023).

14. Beyond all, India ought to establish a unique emergency arbitration system reserved for emergency rulings with foreign seats. The laws of Hong Kong serve as an inspiration in this regard. They state that "any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court."[245] Additionally, there may be restrictions that would make it so that the implementation of emergency decrees with foreign seats would rely on whether or not they grant the generally recognized norm of temporary measures. Again, the government of Hong Kong might serve as an inspiration in this regard.[246]

7.2. CONCLUSION

Emergency arbitration is still a relatively new idea therefore there are undoubtedly challenges involved. However, it is hoped that the government's push for institutional arbitration, as evidenced by the Arbitration Amendment Bill, 2018, and the fact that several arbitration institutions offer emergency arbitration, will encourage the inclusion of emergency arbitration provisions in Indian legislation soon.[247]

India is a growing economic power that witnesses increased commercial activity every year. This growth comes with commercial disputes arising on the horizon as well. The Indian courts have time and again stood in favor of emergency arbitration awards. However, mere judicial pronouncements in support of emergency arbitration will not be enough. Any foreign entity choosing to conduct arbitration with a seat in India will definitely be concerned with domestic legislation and its efficacy in addressing commercial issues. In this regard, there are several issues with the Indian Arbitration and Conciliation Act of 1996. However, this dissertation intends to focus solely on the issue of emergency arbitration. The time sensitivity of commercial issues stands at the heart of emergency arbitration. It is due to this aspect that

[245] Hong Kong Arbitration Ordinance, Section 22B
[246] Akash Srivastava, Emergency Arbitration and India - A Long Overdue Friendship, 10 INDIAN J. ARB. L. 98 (2021).
[247] Aakanksha Luhach & Varad S. Kolhe, Emergency Arbitration in India: A Bellwether for the Grant of Interim Reliefs, 1 IND. ARB. L. REV. 137 (2019).

emergency arbitration provisions must be included in our domestic legislation. Although institutional arbitrations do provide emergency arbitration rules, they have their own limitations, which can only be smoothened out by introducing emergency arbitration into our domestic legislation. It is well understood that courts are already overburdened with cases. This is exactly the reason why arbitration is favored. It has multiple advantages, such as preserving confidentiality and maintaining the robustness of dispute resolution. Introducing emergency arbitration will only further help bolster the effectiveness of the current arbitration framework in India. As a rapidly growing economy, creative and highly efficient dispute resolution systems are imperative to attract foreign investors. Emergency arbitration being included in the domestic legislation will provide clarity and effectiveness to foreign entities regarding interim relief given by an emergency arbitrator prior to the formation of an arbitral tribunal.

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