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## Emergency Arbitration: Global and Indian Perspective

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### ABSTRACT

In the context of a well-structured international arbitration, an emergency remedy is vital part of the scheme of the arbitration. Emergency Arbitration (EA) is a revolutionary idea in the world of arbitration that is suited for individuals who wish to preserve their assets and evidence from being destroyed or lost in the normal course of litigation. Typically, such arbitration is agreed upon and created by the parties without the necessity for a Tribunal to initially be convened. An arbitrator conducts domestic or international arbitration in line with the parties' agreement or mutual consent. In contractual obligations involving Business to Business trade transactions, disputes may arise over the transaction's subject matter, which may include any kind of dispute. Disputes involving the subject of the disagreement might result in the subject matter being damaged or destroyed.

In rare cases, one of the disputing parties may also destroy evidence of the dispute which cause irreparable loss to the other party. The problem of destruction of subject matter becomes more critical in arbitration disputes since the process of destruction might occur even prior to the creation of the panel. To avert the destruction of the subject matter in any situation, an emergency arbitration to protect them becomes necessary.

Keywords: Emergency Arbitration, interim relief, Emergency Award, UNCITRAL Model Law, SIAC

## INTRODUCTION

Concept of the emergency arbitration is new and emerging concept in the field of arbitration. Where parties need an urgent interim relief before the constitution of an Arbitral Tribunal, in such cases, emergency arbitration comes into the picture. The concept of emergency arbitration is akin to the concept of ad-interim injunction as provided by Section 37 of the Specific Relief Act, 1963 and regulated by the Code of Civil Procedure, 1908, wherein both the cases the primary measure is the preservation of the matter in status quo till the dispute is heard on merits. The provision of ad interim injunction is widely used by the Indian courts while restraining one party in civil disputes and intellectual property cases. An emergency arbitrator is appointment with the mutual consent of the parties to the dispute without recourse to a tribunal at the first instance. Emergency arbitration award is, enforceable and applicable only to parties in arbitration agreement and is applicable unless the contracting parties have opted out of it.

The objective of emergency arbitration is to provide urgent pro tem or conservatory relief to a party or parties that cannot await the formation of an Arbitral Tribunal.

Emergency Arbitration is based on two principles:

- i. ***Fumus boni iuris***- (superficial merit of a petition) Reasonable possibility that the requesting party will succeed on merits;
- ii. ***Periculum in mora*** –(danger in delay )if the measure is not granted immediately, the loss would not and could not be compensated by way of damages.

An Emergency Arbitrator can grant interim measures or conservatory relief only for a stipulated period. The power of emergency arbitrator is similar to an ad hoc tribunal constituted for a limited purpose. Many countries follow an '*opt-out*' policy with respect to emergency arbitration. So, Emergency Arbitration Provisions will be applicable if there is an agreement between the parties.

Emergency Arbitrator is an Arbitrator appointed for the purposes of an Emergency Arbitration. Followings are the functions of The Emergency Arbitrator and his duties come to end once the Interim Order is made:

- i. The Emergency Arbitrator shall, as soon as possible, establish a schedule for consideration of the application for emergency relief.
- ii. Parties should be provided with a reasonable opportunity to be heard. Proceedings may be formal or informal.

- iii. Due to urgency, the emergency arbitrator cannot do throughout inquiry apart from certain major clarifications and simply give his order based on the written submissions and documents submitted to him.
- iv. Timelines do vary under various International Arbitration rules, but a typical emergency arbitration takes around eight to fifteen days from the date of application to the date of award.
- v. The Emergency Arbitrator shall have the powers vested in the Arbitral Tribunal pursuant to these Rules, including but not limited to the authority to rule on his own jurisdiction, and pass such interim orders as are necessary to protect the subject matter of the dispute.
- vi. The nature of the interim orders include asset freezing orders, both prohibitive and mandatory injunctions, orders for the preservation and inspection of evidence, preventive orders to prevent misuse of intellectual property rights etc.

Order of emergency arbitrator is not binding on the arbitral tribunal with respect to any question, issue or dispute determined. But emergency award must be varied, discharged or revoked, in whole or in part, by a subsequent order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative.

### **Emergency Arbitration in Global Perspective**

Globally, In the 1990s, the ICC introduced the preliminary ruling procedure to seek interim measures pending tribunal formation. The process still exists today. But the program has not gained many users, perhaps because it is an optional process that requires both parties to agree to appoint an arbitrator. It took three years for the first case to occur; Between 1990 and 2008 there were only nine claims.

International Centre for Dispute Resolution (“ICDR”), the international division of the American Arbitral Association (“AAA”) was the first institution to introduce Emergency Arbitrator provisions into its rules. The ICDR introduced the concept of Emergency Arbitrator in the year 2006. After that all prestigious arbitral institutions around the world like Singapore International Arbitration Centre (“SIAC”), the International Chamber of Commerce (“ICC”), Stockholm Chambers of Commerce (“SCC”), the London Court of International Arbitration (“LCIA”), and the Hong Kong International Arbitration Centre (“HKIAC”) introduced the concept of Emergency Arbitrator to deal with urgent cases, that required the immediate intervention of an independent authority, pending the constitution of the arbitral tribunal.

On 1 January 2012, the ICC introduced emergency referees under the ICC Rules; Accordingly, this clause shall apply to all agreement decisions taken after this date, unless both parties agree to withdraw. This provision was later included by Institute of the Stockholm Chamber of Commerce (“SCC”), the Australian Centre for International Commercial Arbitration (“ACIA”), Netherlands Arbitration Institute (“NAI”), the Singapore International Arbitration Centre (“SIAC”), Swiss Arbitration.

Emergency Arbitrator is relatively a recent concept in arbitration which become popular with most prestigious arbitration institutions in the world. The reason for its popularity is immediate and efficient interim relief to parties without constitution of arbitral tribunal. Despite some drawbacks like non-binding effect on third parties, non-availability of an ex-parte relief, there is no doubt that the concept of Emergency Arbitrator addresses various issues emerging with approaching national courts for obtaining interim reliefs.

Major international arbitration institutions around the world such as the International Centre for Dispute Resolution (ICDR), the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) have incorporated a mechanism in their arbitration rules for EA, on an ‘opt-out’ rather than an ‘opt-in basis’. Jurisdictions such as Singapore, Hong Kong, New Zealand, and Switzerland have given statutory recognition to EA in order to ensure a harmonious adaptation of international arbitral practices into their domestic regimes. In United Kingdom and United States judicial rulings have recognized and allowed enforcement of emergency awards and orders while these countries have not enacted specific legislation in this regard. The UNCITRAL Rules, which are often used in international arbitrations conducted on an ad hoc basis, are a notable exception to this trend.

### **Emergency Arbitration in Indian Perspective**

To recognize emergency arbitrations, The Law Commission of India in its 246<sup>th</sup> Report on amendments to the Arbitration and Conciliation Act, 1996, proposed an amendment to Section 2(d) of the Act. The aim of the amendment was to give statutory recognition in India to the institutional rules like ICC Rules or SIAC Arbitration Rules, or any other rule which provide for an appointment of an emergency arbitrator. But the recommendations are not implemented by the Govt. till date.

Notwithstanding the fact that the term "Emergency Arbitration" is not incorporated in the amended Arbitration and Conciliation (Amendment) Act, a new move has surfaced by way of which, arbitration institutions are trying to absorb the term "Emergency Arbitration" in their rules and are making contemporaneous procedures thereof. Indian arbitral institutions have framed rules which are by large

synonymous to the leading global arbitration institutional rules. Some notable institutions in India with their regulations are as under:

- (i) The Delhi International Arbitration Center (DAC), of the Delhi High Court in Part III of its Arbitration Rules includes "Emergency Arbitration". Provisions relating to power, procedure and appointment of an Emergency Arbitrator are prescribed under section 18A of the rules.
- (ii) Court of Arbitration of the International Chambers of Commerce-India, under Article 29 of the 'Arbitration and ADR Rules' r/w Appendix V enumerate the provisions of EA and Emergency Arbitrator.
- (iii) International Commercial Arbitration (ICA), under Section 33 r/w Section 36(3) w.e.f 01.01.2014, enumerates the provisions of EA and Emergency Arbitrator.
- (iv) Madras High Court Arbitration Center (MHCAC) Rules, 2014, under Part IV, Section 20 r/w Schedule A and Schedule D enumerate the provisions of EA and Emergency Arbitrator.
- (v) Mumbai Center for International Arbitration (Rules) 2016, under Section 3 w.e.f 15.June.2016 enumerates the provisions of EA and Emergency Arbitrator.

The term emergency arbitration in India came into limelight after the legal battle that ensued between two corporate giants viz. Amazon and Future Group. In its Landmark Judgement on 06th August 2021, The Supreme Court of India has ruled that an award made by an Emergency Arbitrator under the Singapore International Arbitration Centre (SIAC) Arbitration Rules is enforceable under the Arbitration and Conciliation Act 1996, and that no appeal would lie against a court order enforcing such emergency awards. It allowed the enforcement of an order passed by an emergency arbitrator under the ("SIAC") Arbitration Rules ("SIAC Rules") in an arbitration seated in New Delhi, thereby clarifying that emergency arbitration is recognized in India even though it is not expressly recognized in Arbitration and Conciliation Act.

This decision brings India in line with international practices of emergency arbitration recognition and enforcement. This is the most important decision that provides parties to Indian arbitration with additional opportunities to seek urgent relief and could pave the way for enforcement of emergency arbitrations conducted in foreign jurisdictions.

In this case, Amazon initiated arbitration proceedings against the Future Group under the SIAC Rules and an Emergency Arbitrator was appointed who, by way of an award, granted a stay on the Impugned Transaction. Despite this award, Future Group progressed with the Impugned sale. Amazon also filed an application under Section 17(2) of the Arbitration Act before a single judge bench of the Delhi High Court requesting the enforcement of the Emergency Arbitrator's award. The single judge originally passed a status- quo order in which he restrained the Future Group from concluding the Impugned sale. This was followed by a detailed judgment where the Court held, among other decisions, that the Emergency Arbitrator's award was an order under Section 17(1) of the Arbitration Act and was enforceable by the court under Section 17(2) of the Arbitration Act. Future Group filed separate prayers against the original status- quo order as well as the judgment of the single judge before a two- judge appellate bench of the Delhi High Court. The appellate bench, by way of separate orders, stayed the prosecutions of the status-quo order and the judgment of the single judge. Amazon also challenged these orders before the Supreme Court.

The Supreme Court ordered in favour of Amazon and ruled that:

- (i) an award made by an Emergency Arbitrator is an order made under Section 17(1) of the Arbitration Act and can be executed by Indian courts under Section 17(2), and
- (ii) no appeal would lie under the Arbitration Act against an order made under Section 17(2) of the Arbitration Act for enforcement of an Emergency award.

Before this decision, one was acutely aware of this kind of interim relief wherein an “Emergency Arbitrator” is appointed to issue emergency relief before the constitution of the Arbitral Tribunal, and same can be very detrimental in ensuring that any of the parties does not suffer on account of procedural delay or even to protect the very subject-matter of the arbitration. The Supreme Court's decision in Amazon.Com NV Investment Holdings LLC v. Future Retail Limited & others has now provided much-needed clarity on these questions in the context of an award made by the Emergency Arbitrator under the Arbitration Rules of the foreign arbitration institutions in an India-seated arbitration.

## **Conclusion**

The Supreme Court has shown required enthusiasm towards upholding the necessary rules which include orders passed by an emergency arbitrator and similar orders are enforceable to inasmuch can be made under Section 17(1) of the Act. The holistic approach by the Supreme Court would further robust the arbitration system in India and the same would enlighten India's prospect towards becoming arbitration friendly jurisdiction. It would clearly help India in making a big progress toward minimal judicial intervention which

was envisaged in Article 5 of the UNCITRAL Model Law on International Commercial Arbitration and incorporated in the form of Section 5 of the Act. Recognition and enforcement of Emergency Award will certainly help to reduce the work burden of Indian courts which are already overburdened. It is to be noted that Arbitration is an alternative not the substitution of litigation.

### Footnotes

1. Martin Davies, *Court ordered Interim measures in aid of International Commercial Arbitration*, 17 AM, Rev. Int'l Arb. 299, 300 (2006).
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3. The Arbitration and Conciliation (Amendment) Act, 2015 (No. 3 of 2016), dt. 31.12.2015, w.r.e.f. 23.10.2015.
4. Delhi International Arbitration Center (DAC)4, Part III, Section 18A.
5. Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules 6th Edition, 1 August 2016.
6. The International Chamber of Commerce (ICC) 2021 Arbitration rules.
7. SCC Rules (2010), Expedited Rules and Appendix II.
8. ICDR / AAA Rules (2006), Article.37.1.
9. London Court of International Arbitration (LCIA) rules.
10. 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.
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16. Civil Appeals No. 4492-4497 of 2021, Supreme Court of India, Judgment dated 6 August 2021 ("Amazon v. Future").
17. Amazon.Com NV Investment Holdings LLC v. Future Coupons Private Limited & others (Delhi High Court, OMP(ENF)(COMM) 17 of 2021, Order dated 2 February 2021).
18. Amazon.Com NV Investment Holdings LLC v. Future Coupons Private Limited & others (Delhi High Court, OMP(ENF)(COMM) 17 of 2021, Judgment dated 18 March 2021).
19. Future Retail Limited v. Amazon.Com NV Investment Holdings LLC & others (Delhi High Court, FAO(OS)(COMM) 21 of 2021, Order dated 8 February 2021).
20. Future Retail Limited v. Amazon.Com NV Investment Holdings LLC & others (Delhi High Court, FAO(OS)(COMM) 51 of 2021, Order dated 22 March 2021).