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EMERGENCY ARBITRATION AND THE RULE OF LAW: EXAMINING STATUTORY ENFORCEMENT OF INTERIM ORDERS

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ABSTRACT

This study looks into the recognition of interim orders in emergency arbitration in India's juridical framework, an issue that is becoming increasingly important in the setting of global trade. Significant changes in arbitration law, as well as the rising use of emergency arbitration, have highlighted the necessity for an extensive approach to dealing with the enforcement of such rulings. This research proposes to understand the legal and practical issues related with the implementation of interim orders, as well as determine the likely consequences of statutory recognition in India. Emergency arbitration is a useful instrument for parties desiring quick resolution in emergency situations, but enforcing interim orders remains difficult, particularly in India.

Keywords: *Emergency Arbitration, Interim Order, Enforcement, Statutory Recognition, Amazon-Future.*

1. INTRODUCTION

The study begins with a literature review, summarizing existing research and highlighting the growing importance of provisional relief mechanisms in global commercial arbitration. The research delves into the heart of the matter. "Statutory Recognition of Interim Orders" explores the concept and necessity of a statutory framework for recognizing emergency arbitrator interim orders in India. "Judicial Approaches to Interim Order Enforcement" assesses how Indian courts currently handle these orders.

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The study also identifies and analyses the "Challenges in Enforcing Interim Orders" in India, considering both legal and practical obstacles that parties encounter when seeking enforcement. For comparative insights, "Case Studies across Jurisdictions" examines how other countries handle the enforcement of interim orders, offering valuable lessons and best practices to inform India's legal framework. The research concludes with a discussion on the "Future of Emergency Arbitration" and the significance of addressing interim order enforceability in India. This research offers practical advice to legislators, arbitrators, and legal professionals, enhancing the oversight and reliability of arbitration in India as a means of resolving disputes. It contributes to the evolving arbitration discourse and serves as a thorough resource for those handling emergency arbitration in India.

1.1 Emergency Arbitration

The term emergency arbitration means it is a particular means in dispute settlement that allows parties to request immediate temporary relief prior to the establishment of a regular arbitral panel. It covers situations in which urgent intervention is required to avoid permanent damage or to maintain the situation as it is awaiting a complete arbitration procedure. Emergency arbitrators have the jurisdiction to deliver interim orders, that can involve injunctions, collateral maintenance, or alternative remedies designed to preserve the interests of parties throughout the important initial phases of a disagreement.

Statutory recognition of interim orders given by emergency arbitrators gives them formal legitimacy and effectiveness, rendering them legally binding and executable in courts. This acknowledgment guarantees that parties have an efficient way of obtaining prompt resolution in emergency instances, therefore increasing the efficacy and of the arbitration procedure. It presents parties with reliability, fostering trust in the arbitration mechanism while supporting its usage as an option of settling disputes globally. Statutory recognition promotes a pro-arbitration atmosphere, causing nations more desirable to parties engaged in international commerce and investments.

1.2 Significance of the Study

The research on India's statutory recognition of interim orders in emergency arbitration has significant implications in light of current events. It targets the crucial demand for expediency and consistency in conflict resolution, particularly in a corporate climate that is becoming more complicated and hectic. Previous decisions have highlighted the need of prompt and efficient remedial methods, which renders it vital to consider how statutory recognition might improve parties' recourse to justice and safeguard their

respective rights. Aligning India's arbitration process with globally accepted norms is also necessary as global business and investment continue to expand. By presenting India as a desirable location for mediation and arbitration, and enhancing its financial and commercial potential, this study may provide policy makers and interested parties with ideas regarding ways to update and enhance the legal framework.

2. STATUTORY RECOGNITION OF INTERIM ORDERS

The Arbitration and Conciliation Act, 1996 of India makes no mention of Emergency Arbitration or execution of such reliefs. Legal approval to the emergency arbitration process in its Report Number 246 released in 2014 titled *"Amendment to the Arbitration and Conciliation Act, 1996"* recommended the change to the word *"arbitral tribunal"* specified in Section 2(d) by the Law Commission of India[1]. Yet, this issue is still open as India fails to accord an emergency arbitration its statutory sanction.

Most countries' laws do not specifically recognize Emergency Arbitrators as complete arbitrators. These verdicts, nevertheless, are indirectly backed by legislation that acknowledge and enforce arbitral tribunal rulings. It's so because, particularly related to providing interim orders, Emergency Arbitrators are considered as performing identical role as ordinary arbitral tribunals.[2] Emergency awards can be implicitly implemented in India using Section 17, although this stipulation is confined to arbitral tribunals located in India. Due to legislative limits, it does not extend to emergency arbitrators seated abroad.

Where Section 17 is not applicable, the issue that arises is whether remedies from foreign-seated emergency arbitrators can be enforced under Part II of India's Arbitration and Conciliation Act, 1996. The provisions of Section 17 of this Act are not included in Part II. Moreover, Part II rulings are carried out in compliance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), that often comprises conclusive judgements.[3] However, as the Emergency Arbitrator or a different tribunal may alter them, the orders issued by them are not considered enforceable. As a consequence, foreign emergency orders under Part II are difficult to implement, forcing parties to file for remedies in Indian courts. Section 17 was revised in 2015 to strengthen enforcement, although it omitted a key provision from the UNCITRAL Model

1 Law Commission of India, "246th Report on Amendments to the Arbitration and Conciliation Act 1996" 246 (2014).

2 Rajvansh Singh and Saksham Barsaiyan, "An Emergency Arbitrator Is an Arbitrator… Is There a Need for Statutory Recognition Post-Amazon?" 5 *Indian Arbitration Law Review, NLIU* (2023).

3 The Arbitration and Conciliation Act 1996 (Act 26 of 1996), s. 17.

Law that could have rendered interim orders internationally binding. Section 17(2) would have been strengthened by adding "irrespective of the nation where they were awarded" to guarantee the enforceable nature of orders from foreign Emergency Arbitrators.[4]

3. JUDICIAL APPROACHES TO INTERIM ORDER ENFORCEMENT

In a leading judgement, *Rafes Design v. Educomp*,[5] the Delhi High Court has noted that Section 17 of the Arbitration Act does not apply to the role of an emergency arbitrator in arbitration conducted outside the jurisdiction where the dispute arises.[6] Because of this ruling, the order by the emergency arbitrator was no longer as significant, and the parties were forced to submit an objection under interim measures given in Section 9 of Arbitration Act.[7]

The High Court of Delhi has also given conflicting assessments in two cases after this: *Ashwani Minda v. U-Shin Limited*[8] and *Plus Holdings v. Xeitgeist Entertainment Group*[9], which was ultimately resolved by the Bombay High Court. Such as decisions holding that any need for involvement as per Section 9 sub-section 3 of the Act was eliminated when an emergency arbitrator was selected in line with the Institutional Rules.[10] The legal legitimacy of emergency arbitration rulings in India is uncertain due to these contradictory judgements.

To draw a comparison, the court of the United States, have acknowledged and permitted for implementation of emergency arbitral verdicts. In a case in United Courts of Appeal for the 11th Circuit, *City of Gainesville, Florida v. Island Creek Coal Sales,* it was upheld that as per Commercial Arbitration Rules of American Arbitration Association, the right of an arbitral tribunal to give temporary remedy in accordance with the AAA.[11]

4 The UNCITRAL Model Law on International Commercial Arbitration (Vienna, 21 June 1985), art. 17 (H) (1).

5 *Rafes Design v. Educomp,* (2016) 234 DLT 349.

6 *Ibid*.

7 Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 9.

8 *Ashwani Minda v. U-Shin Limited,* (2020) 271 DLT 287.

9 *Plus Holdings v. Xeitgeist Entertainment Group,* (2019) SCC Online Bom 13069.

10 Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 9(3).

11 Iram Majid, "Emergency Arbitration in the Indian Regime: Need of The Hour", *ADR E-Newsletter, Dispute Resolution Board, NLU Odisha*, September 2020.

Contrastingly, in the High Court of Justice in London, *Gerald Metals (SA) v. Timis Mining Corp (SL) Limited* [12], it was determined that the Court lacked jurisdiction to provide urgent relief when parties can seek interim relief from the Emergency Arbitrator as per the London Court of International Arbitration ("LCIA") regulations. Consequently, the High Court held that the Emergency Arbitrator's authority under the LCIA Rules supersedes the court's authority to grant temporary relief under the English Arbitration Act. The Court of Appeal of Singapore, upheld in the matter of *Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation*[13], that all awards, regardless of the arbitration phase in which they are issued, are conclusively binding, provided another interpretation of the "finality" of an arbitral judgement.

The larger dispute was sparked by the significant decision in leading case of *Amazon NV Investment Holdings LLC v. Future Retail Limited.,*[14] which dealt with enforceability of emergency arbitration order and the legal grey area associated with it. The court's decision prevented Future from offering its retail businesses to another entity. Arbitration has been filed by Amazon as per the governing rules of the International Arbitration Centre in Singapore ("SIAC"), and emergency arbitration granted it secured an interim award in its advantage. Subsequent to this, Amazon had submitted a petition pursuant to Section 17 sub-section 2 of the Arbitration and Conciliation Act ("Arbitration Act") in order to have this interim award enforced in India.

The Delhi High Court had delivered a ruling, holding that the emergency arbitrator ought to be acknowledged as an arbitrator and stating that the Arbitration Act's Section 17(2) was to be applied for the interim decision enforcement by the emergency arbitrator. The Delhi High Court's one-judge panel reaffirmed this ruling on later.[15]

Future appealed the subsequent order intra-court, and a panel of judges from the Delhi High Court granted an injunction. Later, this order was challenged to stay by Amazon with an appeal lied to the Supreme Court of India. In August 2021, the Apex Court rendered a decision after consolidating many appeals that Amazon had submitted.[16]

12 *Gerald Metals (SA) v. Timis Mining Corp (SL) Limited,* 2016 EWHC 2327 (Ch).

13 *Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation,* 2014 SGHC 146.

14 *Amazon NV Investment Holdings LLC v. Future Retail Limited,* 2020 SCC OnLine Del 1636.

15 *Ibid.*

16 *Ibid.*

The Apex Court's ruling provided clarity on two legal issues:

- Whether enforcement of an emergency arbitration award is permissible as per the Arbitration Act?

  According to the Apex Court, there are no provisions in the Indian Arbitration Act which prevents that an agreement of parties is guided by procedural rules that enable an emergency arbitrator in case of granting a temporary relief. The ruling made it clear that as per Section 2 sub-section (1)(d)[17] of the Act, the inclusive definition of Arbitral Tribunal would go further to mean an arbitrator. Provided that, the fundamental institutional regulations empower neutral third party appointed to provide urgent interim relief with the requisite authority, an award or order given by that emergency arbitrator becomes enforceable pursuant to Section 17 sub-section 2 of the Act. Discretion that is granted to the parties to select the institutional norms that will govern their arbitration procedures has been highlighted by the Supreme Court. When this choice is arrived at, the institutional rules take precedence over the privileges of the parties.

- Whether an order made under Section 17(2) of the Arbitration Act is subject to appeal under Section 37 of the same statute?

  An order made as per Section 17 sub-section of the Act, according to the Apex Court, cannot be appealed. The Apex Court has ruled that under Section 37 of the Arbitration Act, appeals are only allowed from decisions made by arbitral tribunals regarding interim measures under Section 17(1), and not from decisions of Indian courts to enforce an arbitral tribunal's interim measures order under Section 17(2).

  The Supreme Court's ruling indicates that it supports the view that as per Section 2 sub-section (1)(d) of the Arbitration Act, an 'arbitral tribunal' would include an emergency arbitrator, and that the decision or order issued by such an emergency arbitrator would be enforceable within India in accordance with Section 17 of the Arbitration Act.

17 Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 2 (1)(d).

4. CHALLENGES IN ENFORCING INTERIM ORDERS

i. The recognition and enforceability of an emergency arbitration are the main obstacles. Many countries continue to acknowledge the absolute and enforceable status of an emergency arbitrator's judgement, that has a preclusive impact. The actualization of the ruling is nevertheless dependent to the state where the implementation request is lodged. The Supreme Court's position suggests that a party who has obtained a favourable interim order would be inclined to seek its enforcement before the appropriate forums, as an emergency arbitrator's interim order does not appear to be recognized as an 'award' under the Arbitration Act. This makes the situation much more unpredictable with respect to the manner in which different authorities might react to those demands.

ii. Another issue is that the award is only temporary in nature; once the arbitral tribunal has been established, it ceases to be binding. If a different arbitrator is appointed to the substantive tribunal, they may modify or suspend the temporary relief granted by the emergency arbitrator, until the deadline for doing so has not expired. The manner in which the interim relief is provided by the emergency arbitrator can be significant - whether it is in the form of an 'order' rather than an 'award' may impact its enforceability.[18]

iii. A significant flaw is also the impossibility to predict what will happen if the order of the emergency arbitrator is disobeyed. The Arbitration and Conciliation Act, 1996[19] does not address or make reference to the principle of emergency arbitration, hence India's statutory provision relating to it is unclear. Even while Section 2 sub-section (1)(d) of the Act[20], that states, an Arbitral Tribunal is one that consists one of the two, a sole arbitrator and the other panel of arbitrators, the definition is nonetheless incorrect. The issue of in case of an emergency arbitrator falling within the purview of the Tribunal for Arbitration remains unaddressed.

iv. Another set-back is enforcing these interim measures that are granted outside of India Section 17[21] is only applicable when the arbitration is held in India because it is a part of Part I of the statute. This calls into doubt the applicability of interim orders issued by tribunals located outside of India. Even while the majority of

18 *Ibid.*

19 Arbitration and Conciliation Act (Act 26 of 1996), 1996.

20 Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 2 (1)(a).

21 Arbitration and Conciliation Act, 1996 (Act 26 of 1996), s. 17.

arbitration centres across the world, like the International Centre for Dispute Resolution or the Singapore International Arbitration Centre, have procedures that allow issue of temporary orders or emergency relief, India does not have the legal authority to implement these judgements.[22] The Arbitration and Conciliation Act lacks provisions enabling the enforcement of interim orders issued by tribunals located outside of India.

5. ENFORCEMENT OF INTERIM MEASURES GLOBALLY

The District Court of New York, United States has reaffirmed a long-standing legal concept that interim equitable relief issued besides the core arbitration dispute can be implemented instantly.[23] Even though there was no direct reference the New York Convention or the Federal Arbitration Act by the Courtin general as its foundation for its enforcement in the dispute engaging foreign parties, it most certainly came within the expansive interpretation by the American Courts of the New York Convention.

The Court of Appeal of Singapore had determined in 2015, that a temporary remedy judgement which tackles particular concerns such as the necessity for emergency acts could be executed as per the Singapore Arbitration Act. This includes implementing an arbitral ruling requiring one party to follow a previous judgment before a dispute adjudication board in the given case.[24]

Section 44 sub-section 5 of the Arbitration Act, imposes a restriction on arbitrations in England. It only authorizes the court to interfere if the arbitral tribunal is unable to work properly. This suggests that the English court might not be able to intervene if the parties choose arbitration rules with emergency arbitrator procedures and the disagreement concerns the length of time needed to form the panel.[25] This matter was brought up in a case that made parties agree not to invoke emergency arbitrator provisions in London-based arbitrations.

22 Vansha Sethi, Suneja and Ajay Bhargava, "Enforcement of Interim Orders Passed by Arbitral Tribunals Seated Outside India", *Lexology*, March 12, 2020, *available at:* https://www.lexology.com/library/detail.aspx?g=71d75812-588a-46f6-b242-def302d55115#Enforceability (last visited on July 18, 2024).

23 *CE International Resources Holdings LLC v. SA Minerals Limited*, 2013 BCSC 1804.

24 *PT Perusahaan Gas Negara (Persero TBK) v. CRW Joint Operation*, [2010] SGHC 202.

25 Karen Maxwell, "LCIA Emergency Arbitrator Provisions Limit Court's Power to Grant Freezing Injunction in Support of Arbitration", *UK Practical Law | Thomson Reuters*, Oct. 12, 2016, *available at:* https://anzlaw.thomsonreuters.com/w-003-8589?transitionType=Default&contextData=(sc.Default). (last visited on May 21, 2024)

6. CONCLUSION AND RECOMMENDATIONS

Globally, the number of instances requiring emergency arbitration has been growing dramatically, yet most governments are unable to keep up. The Emergency Arbitrators' temporary remedy orders are erratic and frequently unenforceable. Hence the only option left for the parties is the court. For India to move forward with emergency arbitration, the recommendations shared in the 20th Law Commission's Report on Arbitration and amendment in the Act would help.[26]

The Amazon Future decision[27] confirms that the Act offers both parties a great deal of freedom to choose the rules that will apply to their arbitration proceedings. Additionally, it will give users of institutional arbitration assurance that an emergency arbitrator's emergency relief can be swiftly implemented pursuant to Section 17 sub-section of the Act.

A comprehensive strategy strengthens India's arbitration system and paves the path for the country to emerge as a centre for international arbitration. Article 5 given in the Model Law on International Commercial Arbitration which mandates minimal judicial intervention in arbitration proceedings by UNCITRAL, further bolsters this decision. Nevertheless, it's important to remember that the Apex Court's decision only takes effect when India serves as the arbitration's seat. A specific process is emphasised for arbitrations with foreign seats:

i. A petition within Section 9 of the Act may be submitted if two parties have consented that Indian law would apply.

ii. If Section 9 of the Act having taken withdrawn by the parties, subsequently they may bring a civil suit within the Civil Procedure Code, 1908 to seek remedy through emergency arbitration.

However, it can be seen that regarding India's position on emergency arbitration, there are still more questions than answers. And providing an answer to these would only be possible with the help of new legislations and judiciary. Even with the amendments of 2015 and 2018 there are areas of Emergency Arbitration that the parties are unclear with if they want to opt for it. Given that Emergency Arbitration is a relatively new idea, there are undoubtedly challenges involved.

Given the prevalence of emergency arbitration services and the government's push for institutional arbitration, which is emphasised in the 2018 Arbitration Amendment Bill, it is sincerely hoped that the inclusion of provisions addressing emergency arbitration in Indian law will be encouraged in the near future.

26 *Supra* note 1.

27 2020 SCC OnLine Del 1636.