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DISCLAIMER

RESOLVING THE CONUNDRUM OF EMERGENCY ARBITRATOR DECISIONS: STATUTORY RECOGNITION AND ENFORCEABILITY IN INDIA

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Abstract

The emergence of emergency arbitration procedures under major arbitral institution rules has been a significant development in international commercial arbitration over the past two decades. However, issues related to the recognition of emergency arbitrators and the enforcement of their decisions have also arisen. This uncertainty persists in several jurisdictions, including India, that presently lack an explicit statutory framework on this issue. This paper examines the jurisprudential status of emergency arbitrators and the binding nature and enforceability of 2 comparative analyses of legislative approaches regarding emergency arbitration and enforcement mechanisms in jurisdictions like Singapore, Hong Kong, France, and England. The paper then comprehensively analyses the position under Indian law, tracing the judicial approach through the examination of key Indian court judgments. It highlights issues that have arisen regarding the applicability of the Indian arbitration statute to emergency procedures and critically evaluates recent Indian Supreme Court jurisprudence that upholds the validity of emergency arbitration under Indian law. Based on the analysis, the paper argues that legislative intervention is necessary in India to explicitly recognize emergency arbitration and facilitate direct enforcement of emergency arbitrator decisions, both foreign and domestic. It then puts forth proposed statutory amendments to incorporate emergency arbitration procedures and decisions within the Indian arbitration law regime. The paper highlights how the proposed changes will bring clarity, certainty, and predictability, thereby cementing India's stature globally as an arbitration-friendly jurisdiction.

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INTRODUCTION

Party autonomy and the ability to seek urgent interim relief are fundamental to the success of arbitration as an efficient dispute resolution mechanism, especially in cases of complex cross-border transactions cannot be overstated or ignored.[2] However, historically, there existed a lacuna in institutional arbitration regarding the availability of interim measures in the pre-arbitral phase, i.e. the period between the commencement of a dispute and the constitution of the arbitral tribunal. During this time, parties were often compelled to approach national courts for interim relief, which defeated the purpose of opting for a confidential arbitral process. It also raised concerns regarding lengthy proceedings in foreign courts, besides jurisdictional challenges.

To address this critical gap, arbitral institutions explored mechanisms like the appointment of a 'referee' to grant interim relief. The International Chamber of Commerce ("ICC") was the first to introduce its Pre-Arbitral Referee Rules in 1990. However, this procedure did not gain traction at the time. The modern incarnation of emergency arbitration took root in 2006 when the International Centre for Dispute Resolution ("ICDR") incorporated provisions for emergency arbitrators under its arbitration rules.[3] In the year 2012, the same provisions as that of ICDR were being adopted by the International Chamber of Commerce. Therefore this version of ICC rules in matters where urgent interim or conservatory measures were needed provided for the appointment of emergency arbitrator.[4]

Thereafter, numerous other leading arbitral institutions included emergency arbitration procedures in their rules. Unlike the referee mechanism, emergency arbitration provisions are now usually opt-out, and the process is automatically available to parties, conferring legitimacy and recognition. In one of the surveys conducted by the Queens Mary University of London and White

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

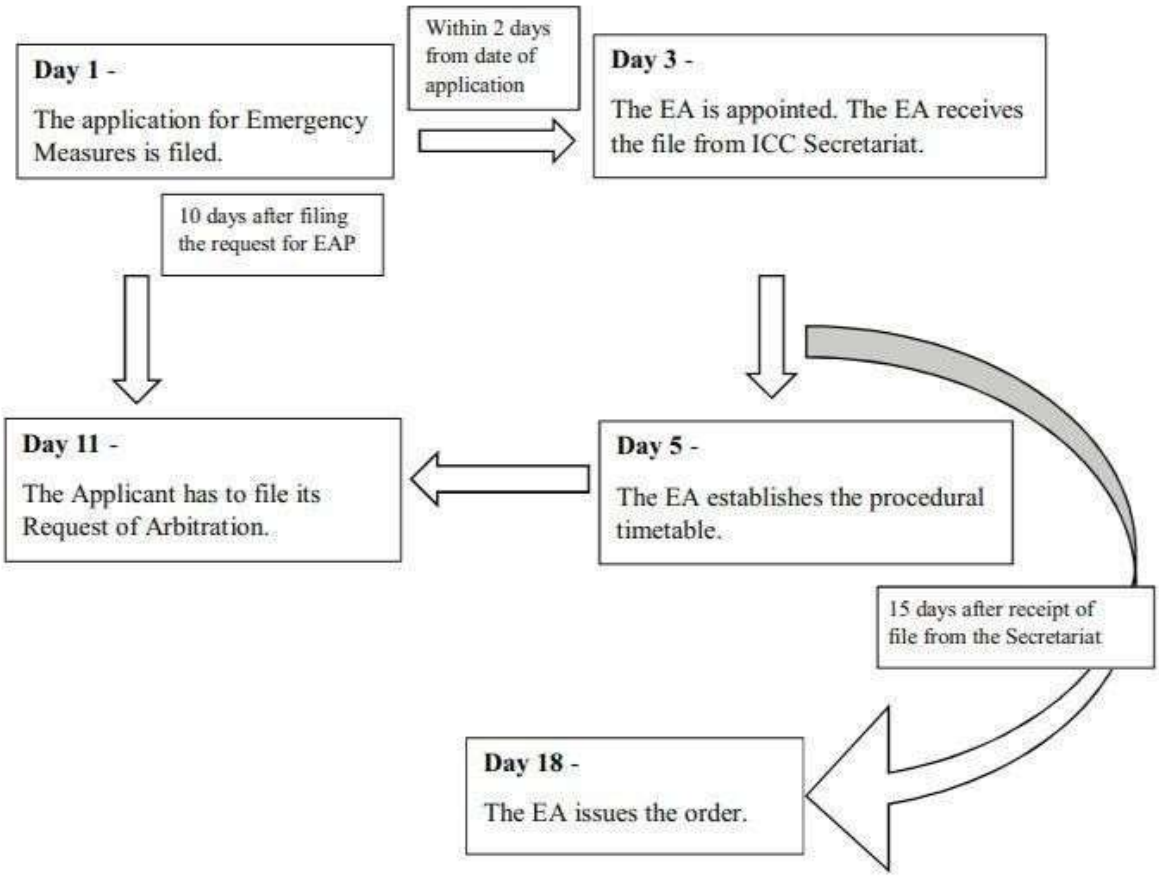
[3] Jasmine Low Sze Hui, *Emergency Arbitration: Practical Considerations.* ,22(3) ASIAN LAW DISPUTE REVIEW ,(2020)

[4] Gary B. Born, International Commercial Arbitration, Ch. 17 on Provisional Relief in International Arbitration, 2453 (2nd Edn., Kluwer Law International 2014).

and Case International Arbitration, there was a prediction in relation to the growing use of emergency arbitration.[5]

Under most institutional rules today, parties can apply for the appointment of an emergency arbitrator within days of submitting the application. The nominee is required to make a disclosure and confirm availability to decide the application urgently. Upon appointment, the emergency arbitrator typically has to render a decision within 10-15 days, either in the form of an order or an award. As per the ICC Rules, the emergency arbitrator has to render an order; most other institutions permit both options. Critically, the order/award granting interim reliefs is deemed binding on parties as per institutional rules. The mandate of the emergency arbitrator expires on the appointment of the main arbitral tribunal, which is not bound by the emergency decision.[6]

APPOINTMENT AND ORDER OF EMERGENCY ARBITRATOR(EA)



[5] Rafael Brown, *Challenging the Enforcement of Emergency Arbitrator Decisions* , 8(3) , KUWAIT INTERNATIONAL LAW SCHOOL JOURNAL, (2020)

[6] Alnaber, R., *Emergency arbitration: Mere innovation or vast improvement,* 35(4) ARBITRATION INTERNATIONAL ,441-472., (2019)

While emergency arbitration helps avoid the consequences of approaching foreign courts, issues around the recognition of emergency arbitrators and enforcement of their decisions have arisen due to the temporary nature of the reliefs granted. It has been argued that lack of an enforcing authority coupled with the prima facie or summary nature of the determination renders emergency reliefs ineffective. This uncertainty persists in several jurisdictions that lack a specific statutory framework for emergency arbitration. Consequently, parties may be compelled to seek de facto enforcement through ordinary interim measures in national courts.

As Gary Born has rightly pointed out in his book –

"At the same time, these Rules all require very prompt and professional action by the arbitral institution and emergency arbitrator, which imposes burden and risk on the institution and the parties. Despite this, unless practical application in coming years is to the contrary, these approaches appear to be sensible steps towards improving the arbitral process."[7]

This paper scrutinizes the jurisprudential status of emergency arbitrators and the binding nature and enforceability of the decisions they render. It analyses the position under international instruments, particularly the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration, 1985, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention"), besides comparing legislative approaches across jurisdictions [Parts II & III]. It then closely examines Indian law, evaluates recent jurisprudence, and proposes amendments to recognize emergency arbitration [Parts IV & V]. The analysis focuses on four aspects - (i) the Status of emergency arbitrators as arbitral tribunals; (ii) the Binding nature of emergency decisions; (iii) Enforceability under the New York Convention; and (iv) Enforceability under national arbitration laws.

II. STATUS OF EMERGENCY ARBITRATORS AND ENFORCEABILITY OF THEIR DECISIONS

[7] Gary B. Born, *Supra Note 1*, at 1

A. STATUS OF EMERGENCY ARBITRATORS AND THEIR DECISIONS

The status of emergency arbitrators as 'arbitrators', and corollary enforceability of their decisions as 'awards', was debated even under the older ICC Pre-Arbitral Referee Rules. In a 2003 case, "Congo v SNPC", the Paris Court of Appeal ruled that the pre-arbitral referee was not an 'arbitrator', and their decision was not an 'award'. However, the prevailing jurisprudential understanding today supports recognizing emergency arbitrators as arbitral tribunals, empowered to make binding decisions.

It has been argued that ICC emergency arbitrators are still not 'arbitrators' as: (i) ICC Rules provide for emergency 'orders', not 'awards'; (ii) Unlike traditional arbitrators, they are unilaterally appointed by the ICC Court; (iii) The tribunal can modify their decision without rationale of 'error' or 'new circumstances' [8]. These arguments do not appear legally tenable. The nomenclature of 'order' versus 'award' cannot affect substantive status. Parties authorise the arbitral institution to appoint emergency arbitrators per the rules they have agreed to. Further, the power to modify emergency reliefs recognises the urgency involved, instead of affecting status.

In fact, emergency arbitrators share critical features with regular arbitral tribunals that favour recognising their identical status:

1. Power to Rule on their Jurisdiction: Under the doctrine of Kompetenz-Kompetenz, tribunals can rule on their jurisdiction, a power also conferred on emergency arbitrators.[9]

2. Duty of Impartiality and Independence: Like regular tribunals, emergency arbitrators have a duty to be impartial and independent while adjudicating the request for urgent relief.[10]

[8] Baigel, *The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis*, 1, J. INTL. ARB., 31, (2014).
[9] Fry, *The Emergency Arbitrator – Flawed Fashion or Sensible Solution?*, 7 DISP. RESOL. INT'L 179 (2013).
[10] Boog & Stoffel, Preliminary Orders and the Emergency Arbitrator, in Ten Years of Swiss Rules of International Arbitration (Nathalie Voser ed., 2014).

3. Power to Grant Interim Relief: Emergency arbitrators, like tribunals, adjudicate upon a specific issue the parties have submitted, i.e. the interim measure, by reviewing facts and applying relevant legal standards. Their role is not merely contractual.[11]

Additionally, parties authorise the emergency arbitrator to grant interim relief by agreeing to institutional rules providing for emergency procedures. Hence, emergency arbitrators derive adjudicatory and jurisdictional authority akin to regular tribunals. This underscores the need to accord emergency arbitrator decisions identical status.

B. ENFORCEABILITY UNDER THE NEW YORK CONVENTION

The recognition and enforcement framework under the New York Convention also supports treating emergency decisions as enforceable arbitral awards.

Article I(1) of the New York Convention applies to "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought". For an emergency decision to constitute an 'award', arguably it must be 'binding' and 'final' under the Convention.

First, the binding criterion is satisfied as institutional rules usually deem emergency decisions binding on parties. By agreeing to rules providing for compliance, parties confer binding authority. Second, finality does not require a full-fledged decision on merits. It only necessitates conclusively determining the specific issue, i.e. interim measures.[12] An emergency decision passes this test as it definitively decides the interim relief request placed before the emergency arbitrator, akin to a partial or interim award.[13]

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[11] Shaughnessy, The Emergency Arbitrator, in The Powers and Duties of an Arbitrator (Patricia Shaughnessy & Sherlin Tung eds., 2017).

[12] Yesilirmak, Provisional Measures in International Commercial Arbitration 2005.

[13] Santacroce, *The emergency arbitrator: a full-fledged arbitrator rendering an enforceable decision?*, 31 ARB. INT'L 283 (2015).

The fact that emergency decisions are prima facie, temporary or subject to modification by the tribunal does not affect this finality. U.S. courts have enforced interim awards with temporal effect on similar grounds.[14] Further, courts like in Congo distinguish between 'form' and 'content' of decisions. The facilitated summary procedure only impacts form, not the finality or enforceability of the substantive determination .[15] Hence, emergency decisions can arguably be recognized as awards under the New York Convention.

C. ENFORCEABILITY UNDER THE UNCITRAL MODEL LAW

The UNCITRAL Model Law on International Commercial Arbitration ("Model Law") did not initially address enforceability of interim reliefs ordered by arbitral tribunals. The 2006 amendments added Article 17H to enable enforcement of tribunal ordered interim measures. By including Article 17H, applicable to 'interim measures issued by an arbitral tribunal', the Model Law amendments impliedly facilitate enforcing emergency arbitrator decisions as well.[16]

Further, Article 17H(2) permits a court to refuse enforcement only on limited grounds like due process concerns, public policy violations or inability of the tribunal to rule on the interim measure. Refusal of enforcement because the procedure is prima facie or the relief is temporary is not contemplated .[17] This lends credence to the view that in jurisdictions that have adopted Article 17H recognising enforceability of interim reliefs, emergency decisions must also be enforceable even if interim or temporary.

D. ENFORCEABILITY UNDER NATIONAL LAWS

The inability of national legislatures to recognise emergency arbitration in municipal statutes contributes to the ambiguity surrounding the enforcement of emergency awards, as the losing party cannot use the court system established by the Arbitration Laws to have the award issued by the

[14] Yahoo Inc. v. Microsoft Corp., 983 F.Supp.2d 310 (S.D.N.Y. 2013).
[15] Congo v SNPC, Paris Cour d'appel, April 29, 2003
[16] Feigerlova, *Emergency Measures of Protection in International Arbitration*, 18 INT'L COMP. L. REV. 155 (2018).
[17] Bucy, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*, 25 AM. U. INT'L L. REV. 579 (2010).

emergency arbitrator enforced. This goes against the whole spirit of emergency arbitration, which is to quickly resolve disputes and prevent further damage.[18]

Only a few states have amended their national legislation to make the rulings of the Emergency Arbitrator enforceable. Singapore is one of the nations that has taken steps in this direction, amending its Arbitration Law to include Emergency Arbitrators in the definition of "Arbitral Tribunals." This would result in the Emergency Arbitration Awards being enforced in the same way as Arbitral Tribunal awards. Honk Kong and the Netherlands have done the same thing, allowing courts to issue leave to enforce Emergency Arbitrators' rulings. Countries like Hong Kong permit enforcement subject to conditions like limiting the relief to preserving status quo, assets, evidence etc. In France, courts can order specific performance of emergency decisions through summary procedure .[19]

However, in the absence of such explicit provisions, complexities persist in jurisdictions like India regarding enforceability. While the arbitral seat and lex arbitri play a role, it is principally the domestic law provisions and their interpretation that determine the recognition and enforceability of emergency arbitrator decisions.

III. LEGISLATIVE APPROACHES TO EMERGENCY ARBITRATION AND ENFORCEMENT

A survey of legislative approaches to emergency arbitration in select jurisdictions reveals a diversity of solutions, besides highlighting possible options for law reform in jurisdictions like India grappling with enforceability concerns.

A. SINGAPORE

Singapore's famed arbitration regime explicitly recognises emergency arbitrators and facilitates enforcement of their decisions.[20] The International Arbitration Act ("IAA") defines 'arbitral

[18] Hinder, T. S., & Saxena, T. ,Enforcement of Emergency Arbitration Awards: Done Yet Undone?,Manupatra (Aug 11,2023, 11:16 AM). Available at https://articles.manupatra.com/article-details/ENFORCEMENT-OF-EMERGENCY-ARBITRATION-AWARDS-DONE-YET-UNDONE

[19] Hamama & Sendetska, *Interim measures in support of arbitration in Ukraine*, 34 ARB. INT'L 307 (2018).

[20] Shobhit Agrawal , *Recognition and enforcement of emergency arbitration: India, US and Singapore*, Issue 3 INDIAN JL & LEGAL RSCH, (2022)

tribunal' to include emergency arbitrators under Section 2(1). Further, Section 12(6) stipulates that unless parties agree otherwise, the IAA provisions on court ordered interim measures do not apply where urgent relief can be sought through arbitration. Read together, this statutory scheme upholds autonomy, enforceability and minimal court intervention where emergency relief is available .[21]

The Singapore courts have also reinforced the legitimacy of emergency arbitration. The Singapore High Court in the 2016 case of SSL Services Ltd v Tahan[22] held that the emergency arbitrator's decision must be accorded due respect as the seat was Singapore, and the nominee derived jurisdiction under parties' agreement to the SIAC Rules providing for emergency arbitration.

B. HONG KONG

Similar to Singapore, legislative changes clarifying the law on emergency arbitrator decisions were enacted in Hong Kong via the Arbitration (Amendment) Ordinance, 2013. It inserted Sections 22A and 22B in the Hong Kong Arbitration Ordinance.

Section 22A defines arbitral tribunal to include emergency arbitrators. Accordingly, the provisions applicable to interim measures granted by a tribunal extend to emergency arbitrators. Further, Section 22B explicitly states that a Hong Kong court shall enforce an emergency relief granted in or outside Hong Kong in the same manner as it would enforce an order of the court, provided limited conditions are fulfilled. This statutory framework upholds party autonomy and provides certainty regarding enforceability.

C. FRANCE

The French Code of Civil Procedure governs international arbitration in France and overseas French territories. It defines international arbitration based on the dispute involving international trade interests under Article 1504. Article 1506 stipulates that French courts can intervene in such

[21] Rogers, Singapore Court of Appeal Upholds Emergency Arbitrator Award, 13 Arb. News 2 (2017).
[22] SSL Services Ltd v Tahan [2016] SGHC 156.

an international arbitration only in limited scenarios like appointing arbitrators. Emergency arbitration is not addressed explicitly.

That said, the jurisprudence indicates French law recognizes emergency arbitrators as 'arbitrators', and upholds the enforceability of their decisions. French courts have held that the duty of a judge under Article 1506 to refer parties to arbitration extends to situations where arbitration is commenced merely by making an application for emergency relief.[23] This confirms the identical status accorded to applications for emergency arbitration and main arbitration. More significantly, courts can enforce emergency reliefs ordered in international arbitrations seated in France by granting specific performance through summary procedure. [24] However, they scrutinize applications for enforcing foreign emergency decisions closely .[25]

D. ENGLAND

The United Kingdom Arbitration Act 1996 is based on the Model Law, but does not define emergency arbitrators as tribunals or specifically provide for enforcing emergency reliefs. In the absence of statutory provisions, the English courts have upheld party autonomy and recognised the legitimacy of emergency arbitration through their judgments.

In Gerald Metals SA v. Timis [26], the Court enforced the primacy of the tribunal's jurisdiction by refusing to entertain an application for interim relief once an emergency arbitrator had been appointed. This prevented parties from having "two bites at the cherry". The Court held that the applicant should have challenged the unfavourable emergency decision instead of seeking fresh reliefs from the court in contravention of the agreed dispute resolution mechanism providing for emergency arbitration.

[23] Paraguacuto-Maheo & Lecuyer-Thieffry, *Emergency Arbitrator: A New Player in the Field*, 40 FORDHAM INT'L L.J. 748 (2017).
[24] ICC Commission Report, Emergency Arbitrator Proceedings, 205 (2019).
[25] Chabert, France, in The Guide to Challenging and Enforcing Arbitration Awards (J. William Rowley QC ed., (2019).
[26] Gerald Metals SA v. Timis [2016] EWHC 2327 (Ch).

However, English courts will not always refuse interim relief after an emergency decision. In RMP Consulting Ltd v dataroom [27] , the Court granted an anti-suit injunction despite an earlier emergency order as the main tribunal was constituted by then, and the emergency order had expired as per institutional rules. This nuanced approach eschews dogmatic application. Hence, the overall position confirms recognition of the emergency arbitration process, subject to limited case-by-case exceptions.

IV. THE POSITION IN INDIA

The Indian arbitration law regime has witnessed considerable evolution from a judicial interventionist approach to a pro-arbitration jurisprudence aimed at minimal court interference today. However, issues around applicability of the Indian arbitration statute to emergency arbitration and enforceability of emergency decisions have persisted.

A. LEGISLATIVE FRAMEWORK AND JUDICIAL APPROACH PRE-2015 AMENDMENT

Prior to the 2015 amendments to the Arbitration and Conciliation Act, 1996 ("Arbitration Act"), the Act did not define emergency arbitration or provide for enforceability of emergency reliefs. However, the availability of urgent interim relief from Indian courts under Section 9 was interpreted to extend to foreign seated arbitrations as well.

In a seminal 2012 decision in Bharat Aluminium v Kaiser Aluminium[28] , the Indian Supreme Court held that Part I of the Arbitration Act would apply only to arbitrations seated in India. This raised doubts if Indian courts could grant interim relief in support of foreign arbitrations under Section 9 thereafter. However, the issue was settled by amending Section 2(2) in 2015 to clarify that Section 9 would also apply to foreign seated arbitrations.

[27] RMP Consulting Ltd v dataroom [2017] EWHC 667 (QB).
[28] Bharat Aluminium v Kaiser Aluminium (2012) 9 SCC 552.

Therefore, prior to 2015, parties who had obtained an emergency relief order from an arbitral institution could not directly seek enforcement in India, and had to file a fresh Section 9 application instead. In Raffles Design[29] , the Delhi High Court held that while enforcement of emergency decisions was not possible under Section 17 which applies only to awards of India seated arbitrations, party autonomy must be respected and fresh interim reliefs could be sought under Section 9 through a distinct analysis.

This jurisprudence indicates that Indian courts recognised emergency arbitration procedurally. However, they adopted a guarded approach on enforceability, possibly since specific statutory provisions were absent then. This forced parties to seek de facto enforcement by filing fresh Section 9 applications, instead of direct enforcement of emergency decisions.

B. THE 2015 AMENDMENT AND THEREAFTER

The 2015 amendment, besides clarifying the applicability of Section 9, also amended Section 2(1)(d) which defines 'arbitral tribunal'. While recommendations to include emergency arbitrators within this definition were made[30] , they were not incorporated. This legislative choice indicates a conscious decision was made to avoid statutory recognition of emergency arbitration just yet.
However, there was uncertainty in relation to the orders passed by the emergency arbitrator and its legal status before the Amazon Future dispute.
Like in the matter of Raffes Design vs Educomp[31]rule of Delhi High Court left parties with no other option than to seek recourse under section 9 of the Arbitration and Conciliation Act and the very essence of Emergency Arbitrator's order was diluted by not enforcing it under section 17 of the Act .Followed by conflicting observations in matter of Aswini Minda vs U-shin Limited [32] made by Delhi High Court and Bombay High Court in Plus Holdings v Xeitgeist Entertainment Group[33] that there shouldn't be any intervention of Section 9(3) when the arbitrator has been

[29] Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd. (2016) 234 DLT 349.
[30] Law Commission of India, Amendments to the Arbitration Act (2014); Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017).
[31] (2016) 234 DLT 349.
[32] (2020) SCC OnLine Del 1648
[33] (2019) SCC Online Bom 13069

appointed under Institutional Rule .Thus, the legal status of the emergency arbitrators has been shrouded by such uncertain and confliction judgments of courts.

The significant judgment of Amazon-Future was helpful to an extent in clearing the unsettled legal waters of emergency arbitration and its enforcement in India.

C. AMAZON V FUTURE RETAIL– VALIDITY OF EMERGENCY ARBITRATION UPHELD

The Supreme Court of India had the opportunity to settle the law on emergency arbitration conclusively in the high-profile Amazon v Future Retail case [34]. Amazon had initiated an SIAC emergency arbitration proceeding against Future Retail. The emergency arbitrator restrained Future Retail from proceeding with a disputed transaction.

Amazon sought to enforce this emergency decision before Indian courts under Section 17 of the Arbitration Act. Future Retail objected on the ground that Section 17 applied only to 'awards' of arbitral tribunals, and an emergency arbitrator did not qualify as a tribunal under the Act. However, the Supreme Court rejected this contention and held that:

1. The definition of 'arbitration' under Section 2(1)(a) includes institutional arbitration as well, not just ad hoc arbitration.

2. Section 2(8) provides that parties are free to agree on the procedure to be followed by the arbitral tribunal.

3. By agreeing to institutional rules providing for emergency arbitration, parties authorise emergency arbitrators to grant interim reliefs.

4. Hence, emergency arbitrators derive status akin to an arbitral tribunal from the conjoint reading of Sections 2(1)(a), 2(8) and the institutional rules.

[34] (2022) 1 Supreme Court Cases 209

5. Therefore, even though the definition under Section 2(1)(d) does not explicitly include emergency arbitrators, a harmonious reading of the Act upholds the validity of emergency arbitration.

6. Consequently, the emergency arbitrator's decision in this case must be treated as an interim order of the arbitral tribunal under Section 17, which can be enforced just as a court order.

By laying down this interpretation, the Apex Court lent its imprimatur to the legitimacy of emergency arbitration under Indian law. It upheld party autonomy and recognized emergency arbitrators as possessing identical status and power as regular tribunals under the statute. While this settled the law regarding India-seated emergency arbitrations, the Supreme Court did not examine the issue of foreign seated emergency decisions. Hence, ambiguity persists on that front.

D. ANALYSIS OF THE INDIAN POSITION

The Indian judicial approach has traversed from initially insisting on fresh consideration under Section 9, to recognizing emergency arbitration procedurally but not enforcing emergency decisions directly, to finally upholding emergency arbitration as valid under Indian law. However, concerns still remain:

First, Indian courts have enforced emergency decisions not as orders/awards in their own right under Section 17, but by equating emergency arbitrators with tribunals. This Blender Approach obfuscates the status.[35] Statutory recognition of emergency decisions independent of the definition of tribunal is absent.

Second, the jurisprudence only considers India-seated emergency arbitrations. The Amazon judgment is restricted to Section 17. Enforceability of foreign emergency decisions remains unaddressed. Parties still rely on de facto enforcement by seeking fresh reliefs under Section 9. The availability of this option itself is based on courts' interpretation, not any statutory stipulation.

[35] Moses, The Principles and Practice of International Commercial Arbitration (2nd ed. 2012).

For instance, in India, emergency arbitration is ambiguous with respect to statutory provisions, as there is no discussion about it in the Arbitration and Conciliation Act of 1969.This brings a very difficult situation for the big corporate giants who prefer the seat of arbitration as per the flexibility of the national laws of the countries in the way they adopt and implement international conventions .Thus, since the very major act related to Arbitration prevailing in India is silent about emergency arbitration , it is less likely that the same be enforced by Indian Courts.[36]

Third, Indian courts examine foreign emergency decisions substantively while entertaining Section 9 applications, instead of limiting review to due process issues like natural justice.[37]This entails merit review of emergency decisions, whereas even regular foreign awards can be reviewed only on narrow procedural grounds under Section 48.

Therefore, while courts like the Supreme Court have upheld party autonomy procedurally, enforceability concerns mar emergency arbitration even today. Issues persist due to lack of statutory clarity. Ad hoc judicial lawmaking has limitations, and leaves the law incoherent and inconsistent. Codified provisions explicitly recognizing emergency arbitration are vital to cement India's stature as an arbitration friendly jurisdiction.

V. THE WAY FORWARD: PROPOSED STATUTORY AMENDMENTS TO RECOGNIZE EMERGENCY ARBITRATION IN INDIA

A. NEED FOR STATUTORY INTERVENTION

The preceding analysis reveals that India needs statutory amendments to cement the validity of emergency arbitration, enable direct enforcement of emergency decisions, and confer certainty. Ad hoc judicial pronouncements cannot fully substitute legislative validation, and also raise rule of law implications regarding arbitrary exercise of judicial power. The judiciary has gone far in

[36] Shivam Kumar, Emergency Arbitration — Its Advantages, Challenges and Legal Status in India,[Aug11,2023,at 12:11 PM] available at https://www.scconline.com/blog/post/2022/03/26/emergency-arbitration/

[37] Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. (2014) SCC OnLine Bom 1102.

preserving party autonomy procedurally. However, substantive problems persist, necessitating statutory changes.

STATUTORY RECOGNITION IS IMPERATIVE FOR CERTAIN REASONS:

First, legislative intervention would bolster party autonomy in substance, besides procedure. Parties opt for confidential arbitration to avoid consequences of approaching foreign courts for urgent reliefs. Their choice must be accorded legitimacy at par with the main arbitration. Explicit provisions upholding emergency arbitration substantively would prevent parties being forced to justify enforceability repeatedly.[38]

Second, statutory amendments are essential to bring clarity, coherence and certainty. The stop-gap judicial innovations like the Blender Approach sit at odds with the existing framework that only contemplates regular tribunals rendering awards, enforceable under Section 17 and 48. Emergency arbitration does not fit cleanly within this structure currently. Legislative changes are imperative to clarify validity and enforcement, and confer certainty. This will eventually lead to rise in India-seated arbitration proceedings as parties may seriously consider India to be chosen for seat of Arbitration after the inclusion of Emergency Arbitral award under section 17 of the Act.

Third, statutory Evolution is needed to cement India's pro-arbitration reputation. India faces competition from mature arbitration jurisdictions like Singapore, Hong Kong, England and France that have recognised emergency arbitration and enforcement, either statutorily or through evolved jurisprudence. India has to adopt similar legislative changes to attain global stature as an arbitration hub. Ad hoc judicial efforts cannot singularly secure such international reputation.

Fourth, one of the reasons would be that institutional arbitration and its growth in India would be supported by such statutory initiative and in addition to International arbitral institutions our domestic arbitral institution like Delhi International Arbitration Centre, Mumbai International Arbitration Centre also provide for emergency arbitration and A definitive judgement in support of emergency arbitration will provide institutional arbitration in India with a much-needed boost.

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

B. PROPOSED STATUTORY CHANGES

To address the issues highlighted, the following statutory amendments are proposed to the Arbitration Act:

i. Recognizing Emergency Arbitrators as Arbitral Tribunals

1. Inserting the following explanation under Section 2(1)(d) defining arbitral tribunal:

"Explanation – The expression "arbitral tribunal" includes an emergency arbitrator appointed pursuant to the rules agreed to by the parties, including the rules of an arbitration institution."

2. Inserting the following clarification under Section 19(2) specifying the powers of arbitral tribunals:

"For the avoidance of doubt, the expression "arbitral tribunal" under this sub-section includes an emergency arbitrator appointed pursuant to the rules agreed to by the parties, including the rules of an arbitration institution."

ii. Enforceability of Emergency Decisions

1. Inserting the following clause in Section 17(1) dealing with interim measures ordered by arbitral tribunals:

"For the avoidance of doubt, interim measures ordered by an emergency arbitrator shall be enforceable in the same manner as if it were an order of the court."

2. Inserting the following independent explanation under Section 17(2) dealing with enforcement of interim measures:

"Explanation – For the purposes of this sub-section, an interim measure includes an interim order or direction made by an emergency arbitrator under the rules agreed to by the parties, including the rules of an arbitration institution."

3. Inserting the following clause in Section 36(1) dealing with enforcement of awards:

"For the avoidance of doubt, an award includes any interim, partial or final award made by an arbitral tribunal or emergency arbitrator under the rules agreed to by the parties, including the rules of an arbitration institution."

iii. Additional Safeguards

To balance party autonomy with possible misuse, additional statutory safeguards can be incorporated for enforcing foreign seated emergency decisions. For instance, limiting enforcement only to reliefs preserving status quo, evidence, assets etc. as under Hong Kong law.[39] Further requiring the party seeking enforcement to demonstrate urgency and good faith efforts to notify the counterparty. Such provisions would enable enforcement while preventing misuse, and optimally uphold party autonomy.

VI. CONCLUSION

From the above discussion it is very clear that due to loopholes in the judiciary of various countries emergency arbitration has become a trend in International Commercial Arbitration. Confidentiality, time and costs have been the major advantages that emergency arbitral awards carry over the orders passed by courts of justice. Though, a major question mark to emergency arbitration in India is its enforceability here.

However, issues around temporary reliefs and nomenclature of decisions should not cloud recognition of emergency arbitrators rendering binding determinations. While India has made progress, legislative changes explicitly recognizing emergency arbitration are still needed to facilitate direct enforcement and confer certainty. It would cement India's stature as an arbitration friendly jurisdiction. The proposed amendments balance party autonomy with calibrated safeguards. Statutory validation of emergency arbitration by Parliament, rather than only the Supreme Court, will place India alongside jurisdictions like Singapore and Hong Kong that have taken the legislative route to uphold emergency arbitration. It will optimally preserve party autonomy and efficiency, while strengthening the rule of law.

[39] Hong Kong Arbitration Ordinance, 2011, 22B.