

# ENFORCEMENT OF EMERGENCY AWARD- INDIA TAKES A LEAP

**Dr. Seemasmiti Pattjoshi**

**Assistant Professor**

**Xavier Law School, XIM University, Bhubaneswar**

## **ABSTRACT:**

An application for interim relief that cannot wait for the creation of an arbitral tribunal to handle the parties' substantive dispute may be addressed through emergency arbitration (or "EA"), which is a binding arbitration conducted by an arbitrator appointed by an arbitral institution due to a lack of time or urgency about the subject matter of the dispute. Arbitral procedures, whether local or international, are handled by an arbitral tribunal following the parties' agreement. According to well-established legal principles, a court or arbitral tribunal may only give interim relief in furtherance of ultimate comfort. To get interim relief, the party requesting it must demonstrate to the arbitral tribunal that its claim against the opposing party has a substantial basis. That failure to obtain temporary relief will result in grave and irreparable harm. An EA allows a party to get urgent interim relief for a set time. The emergency arbitrator(s) perform similar, if not identical, tasks as an ad hoc tribunal, which is likewise formed for a specific reason and is quickly dissolved once that purpose is completed or the time window in which such matters must be resolved expires.

One of the primary aims of international commercial arbitration is to ensure that arbitral rulings are enforced. In practice, the award debtor must have sufficient assets to guarantee that the award is fulfilled in favor of the award creditor after the legal prerequisites for enforcement are completed. Parties to the arbitration might seek interim remedies from domestic courts in injunction remedies to prevent the other party from diluting their assets for this purpose. Because such a remedy is time-sensitive, parties may rely on emergency arbitration procedures, which have been included in the rules of many arbitral institutions, for immediate relief before creating an arbitral panel.<sup>1</sup>

**KEYWORDS:** Arbitration, Emergency Award and Enforcement

## **INTRODUCTION**

Because of the multiple benefits it provides, the need for emergency arbitration codification has produced a frenzy in international arbitration law. Emergency arbitration is a method that permits arbitration parties to seek urgent interim relief before the formation of the arbitral panel. The awarding of an Emergency Award ('EA') is based on two criteria: 'Fumus Boni iuris,' which means that there should be a reasonable chance that the petitioner will triumph on merits, and 'Periculum in mora,' which means that if such an award is not given promptly, the loss will be irreparable. EAs have several advantages over municipal court interim orders. To begin with, unlike court orders, arbitral decisions are not public papers since secrecy is maintained. Furthermore, arbitrators are often subject matter experts in the sector for which the award is sought, providing a well-informed and appropriate ruling. Finally, EAs are given more quickly than temporary court orders since the latter are already overburdened with other cases.

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<sup>1</sup> Revisiting the Enforceability of 'Foreign-Seated ... - IndiaCorpLaw. <https://indiacorplaw.in/2021/10/revisiting-the-enforceability-of-foreign-seated-emergency-awards-post-amazon.html>

In international arbitration, jurists and significant players agree on the recognition and enforcement of EAs. According to Queen Mary University's 2021 International Arbitration Survey, the International Chamber of Commerce ('ICC'), Singapore International Arbitration Centre ('SIAC'), Hong Kong International Arbitration Centre ('HKIAC'), and London Court of International Arbitration ('LIAC') are the most favored arbitral institutions in the world, all of these institutions have rules recognizing emergency arbitrator relief.<sup>2</sup>

Both the **Justice Srikrishna Committee's 2017 report and the Law Commission of India's 246th Report supported changing Section 2(1)(d) of the Arbitration and Conciliation Act, 1996 (the Act)** to add emergency arbitrators to the definition of "arbitral tribunals."<sup>3</sup> The main problem is India's lack of EA enforcement; without it, EAs are ineffective. Fortunately, in **Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Others**, the Supreme Court of India upheld the use of EAs in arbitrations with India as the seat.<sup>4</sup> EAs having an Indian base are enforceable under the Act's Section 17(2). However, in arbitrations with foreign seats, there must still be a reason for the employment of EAs.

### **APPLICABILITY OF PART 1: FOREIGN SEATED ARBITRATION**

A Constitution Bench of the Hon'ble Supreme Court overturned the Bhatia International three-judge bench decision in the BALCO case,<sup>5</sup> establishing that international commercial arbitrations are exempt from Part I of the Arbitration & Conciliation Act, 1996 (the "Act") except for those held in India. As a result, only Part II of the Act applies to arbitral awards from foreign-seated tribunals. These awards would be enforceable by national courts in India under Section 49, subject to conformity with the provisions of Sections 44, 46, and 48 of the Act, whether they ultimately settle disputes at the intermediate or final stage.

With the addition of the Provision, Section 2(2) of the Act by the 2015 Amendment, this stance has undergone some alteration. Part I of the Act is still reserved for domestic arbitration. Still, the addition to Section 2(2) makes Part I's Sections 9, 27, 37(1)(a), and 37(3) applicable to foreign-seated arbitrations unless the parties agree otherwise. The most prominent of them is Section 9, which grants the court the authority to impose temporary orders at any moment before, during, or following the creation of the arbitral judgment. This means that parties to a foreign-seated arbitration can approach Indian courts to get interim relief, mainly where the counterparty's assets are in India.

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<sup>2</sup> Enforcing Emergency Awards in India in the Foreign Seated ... - Koinos.

<https://indianarbitrationlaw.com/2022/05/03/enforcing-emergency-awards-in-india-in-foreign-seated-arbitrations-winning-a-half-won-battle/>

<sup>3</sup> Enforcing Emergency Awards in India in the Foreign Seated ... - Koinos.

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<sup>4</sup> Enforcing Emergency Awards in India in the Foreign Seated ... - Koinos.

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<sup>5</sup> Emergency Awards passed in Foreign-seated ... - India Corporate Law.

<https://corporate.cyrilamarchandblogs.com/2020/11/emergency-awards-passed-in-foreign-seated-arbitration-enforceable-or-not/>

## EMERGENCE OF EMERGENCY ARBITRATION

Since the UNICTRAL Model Law ("Model Law") was amended in 2006, many arbitral tribunals have been given the authority to issue parties interim reliefs. The prominent arbitration institutes listed below have modified their respective rules to give parties access to emergency arbitration as a remedy.

### International Arbitration Centre of Singapore (SIAC)

Dutch Arbitration Institute (NAI), Swiss Chambers' Arbitration Institute (SCAI), Hong Kong International Arbitration Centre (HKIAC), International Chamber of Commerce (ICC), Stockholm Chamber of Commerce (SCC), International Centre for Dispute Resolution (ICDR)/American Arbitration Association (AAA).<sup>6</sup>

It is crucial to remember that an EA's most important component is time. The entire process is useless if the prize is not passed on time. Although the norms of each arbitration institution vary concerning the emergency arbitration procedures, providing prompt remedy is always the primary goal of emergency arbitration. A comprehensive range of interim remedies, such as injunctive reliefs, measures for conserving the subject property, and steps to obtain the amount in dispute, may be awarded by an emergency arbitrator to protect the interests of the next party.

## CONTOURS OF EMERGENCY ARBITRATION IN INDIA

The Law Commission's 246th Report recommended amending Section 2(d) of the Arbitration and Conciliation Act, 1996 ("Act") to recognize EA.<sup>7</sup> With this amendment, arbitral institution rules like the SIAC Arbitration Rules, ICC Rules, or any other authority that calls for the appointment of an emergency arbitrator would be legally recognized in India; section 2(d) of the act defines an Arbitral Tribunal as either a single arbitrator or a panel of arbitrators.<sup>8</sup> If the arbitration is being conducted in line with institutional policies that permit the appointment of one, then mention this Emergency Arbitrator.

“A provision for the appointment of emergency arbitrators was anticipated to be included in the Arbitration and Conciliation<sup>9</sup> (Amendment) Act, 2015 ("Amended Act"), which was intended to acknowledge this worldwide shift in the law. However, the Law Commission's advice was not included in the Amendment of 2015, and EA is not given an enabling clause. According to Section 9 of the Act, parties may request temporary relief from the relevant court before implementing the arbitral judgment. It is important to note that interim awards made in an EA case are not recognized under Part II of the Act, which deals with enforcing foreign arbitral decisions. Only final awards may be implemented before Indian courts”.<sup>10</sup>

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<sup>6</sup> The Viewpoint: Enforceability of Emergency Award in India, Passed in .... <https://www.barandbench.com/view-point/enforceability-emergency-award-india-passed-foreign-seated-arbitration>

<sup>7</sup> Composition of an Arbitration Tribunal - Indian Legal Solution. <https://indianlegalsolution.com/composition-of-an-arbitration-tribunal/>

<sup>8</sup> Resolving Disputes Through Arbitration | ADR | Johnson Pope. <https://www.jpfirm.com/practices/alternative-dispute-resolution/arbitration/>

<sup>9</sup> First-step analysis: arbitration in India - Lexology. <https://www.lexology.com/library/detail.aspx?g=e6949c52-9b7e-4240-b5ef-1be3ede121c7>

<sup>10</sup> The Viewpoint: Enforceability of Emergency Award in India, Passed in .... <https://www.barandbench.com/view-point/enforceability-emergency-award-india-passed-foreign-seated-arbitration>

In addition, Section 17 of the Act stipulates that absent a party's express consent to the contrary, an arbitral tribunal may impose temporary relief as it sees proper. However, because this is stated in Part I of the Act, which relates to arbitration procedures when the juridical venue is abroad, Section 17 of the Act does not apply to arbitrations with foreign seats in India.

An emergency award cannot be enforced without a clause like Section 17 of the Act for foreign-seated arbitrations under Part II of the Act. The only option would be to launch a lawsuit, which may take a while to resolve and nullify the emergency award. The act is silent regarding enforcing EAs and orders from arbitral tribunals with foreign seats. Several Indian arbitral institutions have recognized EA in their various rules. Still, they lack the authority necessary to grant the required remedy of enforcing such decisions because only Indian Courts are granted this jurisdiction under Section 9 of the Act.

### **IMPLEMENTING FOREIGN SEATED EMERGENCY AWARDS IN INDIA: ANALYZING THE ARBITRATION ACT'S PROVISIONS**

A few provisions already in place under the Arbitration Act may be used to facilitate the enforcement of the award or decree of an emergency arbitral tribunal with a foreign seat in India.

#### **SUBTITLE 27 (5)**

When the Arbitration Act was first established, Section 17 gave arbitrators the authority to issue interim orders but did not provide a method of enforcing them. *NEPC India Ltd. v. Sundaram Finance Ltd.* In light of this, the Delhi High Court ruled in *Sri Krishan v. Anand* that under Section 27(5), if a party violates the arbitral tribunal's interim orders, the court may penalize the party for contempt at the arbitral tribunal's request. The Supreme Court agreed with this view in *Alka Chandewar v. Shamshushrar Khan*, where the court ruled that the arbitral tribunal's orders could not be treated as a dead letter.

The UNCITRAL Model Law is not the source of Section 27(5), a helpful provision adopted along the lines of the since-repealed Arbitration Act of 1940's Section 43(2). According to Section 43(2), the court can penalize people who show contempt for the arbitrator in the same way it would treat other criminal offenses. The Arbitration Act's section 27(5) now has a legislative inclusion of the same clause. After the 2015 Modification expanded Section 27 to include foreign seated arbitrations (see the modification to the proviso to section 2(2)), Section 27(5) can now be used as a fortiori to enforce emergency awards of foreign seated arbitral tribunals, much like it had been used to implement interim rulings by domestic tribunals. It would be useless to apply Section 27 to arbitrations with foreign seats if so.

Even the Law Commission of India's 246th Report, which served as the foundation for the 2015 Modification, made it clear that the amendment to Section 2(2) was to enable Indian courts to exercise section 27 jurisdiction over arbitrations with foreign seats. The Arbitration Act has also purposefully diverged from the UNCITRAL Model Law, which solely intended to apply this provision to domestically seated arbitrations by extending section 27 to arbitrations with foreign seats.

According to *Raffles v. Educomp*, the respondent put up this argument, but it was denied without conducting a thorough analysis. According to the court, someone who disobeyed interim rulings of

an arbitral tribunal with a foreign seat could not be penalized in India. However, the court neglected to consider that the party breaking the order would be in India, where the court may exercise jurisdiction in personam. When a party or witness is located within the court's jurisdiction, Section 27 is a provision to assist the arbitral tribunal. The court would use this power even at the request of an arbitral tribunal with a foreign seat. As a result, this clause may be used to enforce decisions made by an arbitral tribunal with a foreign location during the arbitration.

### **A FOREIGN AWARD FOR ENFORCEMENT**

An emergency award may even be enforced as a foreign award under certain conditions following Part II of the Arbitration Act. Under SIAC Rules, 2016, Rule 1.3, the meaning of "Award" includes a decision issued by an Emergency Arbitrator. Rule 9.9 of the DIFC-LCIA Arbitration Centre Arbitration Rules, 2021, provides that an emergency award shall have the same effect as an award. The term "arbitral awards" is likely wide enough to encompass an "emergency award" within the meaning of Article I section 2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").<sup>11</sup>

Therefore, a foreign-seated "emergency award" may come under the broad meaning of a "foreign award" under Section 44 of the Arbitration Act,<sup>12</sup> depending on the type of relief issued by the emergency tribunal. Even though an interim award is only meant to be effective while the final decision is pending, that award may still qualify as an "interim award" based on its terms. An interim award may also refer to equitable relief awarded by the emergency arbitrator. (**Satwant Singh Sodhi v. State of Punjab**)

An order may appear finality and be enforceable as an award if the arbitral tribunal grants an equitable emergency award to stop irreparable harm to the petitioner. These criteria were used by the New York District Court in **Yahoo Inc. v. Microsoft Corp.** to validate an emergency award and uphold it. Although there have been instances in the United States where an emergency award has not been enforced, the court may consider a case-by-case analysis and lean in favor of an enforcement strategy to avoid making the emergency award useless.

### **ARBITRATION IN AN EMERGENCY AND THEIR ORDERS**

With the idea of "Emergency Arbitration," arbitral institutions have given international commercial arbitration a new dimension. As evidenced in the rules of the Singapore International Arbitration Centre (SIAC), the Mumbai Centre for International Arbitration (MCIA),<sup>13</sup> and others, Emergency Arbitration was first developed to get quick temporary relief before the start of the arbitral proceedings. The order issued by an EA is regarded by organizations like SIAC and others as an "award" comparable to an award given by an Arbitral Tribunal in a non-emergency situation.

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<sup>11</sup> The public policy exception under the New York Convention on the ....

[https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/245678/orawiec\\_the\\_public\\_policy\\_exception\\_under\\_the\\_new\\_york\\_convention\\_2016.pdf?sequence=1](https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/245678/orawiec_the_public_policy_exception_under_the_new_york_convention_2016.pdf?sequence=1)

<sup>12</sup> Indian Parties can choose a Foreign seat of Arbitration - IndiaLaw LLP Blog.

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<sup>13</sup> Emergency Awards passed in Foreign-seated ... - India Corporate Law.

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There are also clauses compelling the parties to the EA's order to comply effectively. In terms of enforcement, the situation is murky. The idea of emergency arbitration differs from the standard arbitration process, and it is this difference that also becomes its limitation:

- First, according to the parties' agreement, the arbitral institution handling the arbitration appoints the EA, not the parties.
- Second, their authority was constrained because the EA was only constituted to provide temporary assistance.
- Third, this restricted mandate ends once an EA is granted (subject to any clerical revisions). The EA ceases to exist and is not entitled to participate in the Arbitral Tribunal that resolves the disputes arising from the Contract following the rendering of an award.

The arbitration tribunal created by the parties in line with the arbitration agreement may also modify the EA's judgment because it is only "interim-binding." Thus, a decision made by the EA may be changed or even revoked at any time throughout the proceedings. These characteristics all lead to the same issue. – a lack of finality. India has not changed its national laws to guarantee the efficient implementation of awards given by an EA, unlike several other nations like Singapore. In fact, even though many arbitral institutions in the country include provisions for the appointment of an EA and the creation of an emergency award in their rules, the act does not expressly recognize the idea because an emergency arbitrator is not included in Section 2(1)(d), which defines an "arbitral tribunal" under the act.

Despite the lack of clear legislative recognition for such verdicts, Indian courts have made an effort to give parties seeking their enforcement in foreign-seated arbitrations the required remedy. In the case of *HSBC PI Holdings (Mauritius) Ltd. v. Avital Post Studioz Ltd.*, the plaintiff obtained a favorable ruling from an EA in Singapore before suing the defendant for an interim injunction following Section 9 of the Act. The Hon'ble Bombay High Court decided to provide the plaintiff with relief, but it did so independently of the EA's conclusions.

Similar to this, a Single Judge Bench of the Hon'ble Delhi High Court categorically held in the *Raffles Designs* case that, although Section 17 of the 1996 Act does not apply to arbitrations conducted outside of India, which makes it impossible to enforce an EA's award, it will still be possible for the parties to file a petition under Section 9 of the Act to seek interim relief. Additionally, it was decided that the Arbitral Tribunal's emergency award could not be enforced under the act and that the petitioner would have to bring a lawsuit. A recent decision by the Division Bench of the Honourable Delhi High Court in *Ashwani Minda* showed respect for the EA's processes by ruling that a party who lost before the EA cannot seek the same interim remedy from the national court.

Therefore, important considerations must be made by parties to foreign-seated arbitrations attempting to enforce emergency verdicts in India. First, a Section 9 petition for requesting emergency measures may be submitted if Section 9 of Part I has not been expressly prohibited by the parties. Second, the party has the option to file a civil lawsuit following the relevant provisions of the Code of Civil Procedure, 1908, where Section 9 of the Act has been expressly excluded (Proviso to Section 2(2) of the Act), to obtain the same relief that is the focus of the emergency award before the EA (e.g., suit for recovery for monies, etc.). Remember that neither of the above scenarios qualifies as "forcing of the emergency award." The third choice is for the party to apply for enforcement in the national

courts of the seat.<sup>14</sup>

Additionally, when using the second option, the party may successfully circumvent Section 8 of the act's mandate as well as any maintainability objections by arguing that

- a) The dispute has already been submitted to arbitration,
- b) The suit is aiding and strengthening the arbitration process, and
- c) If the suit is deemed to be not maintainable at the request of a party who is a party respondent in arbitration, the party will be left without recourse.

Although it is unknown if Amazon will take any action to enforce the emergency as mentioned above Award in India's national courts, Future Group's unwillingness to do so is likely to influence how the world views India's enforcement environment and RVVL's chances in the arbitration process.

## CONCLUSION

The 2019 Amendment to the Act seeks to make India one of the top locations for arbitration in the world by fostering the expansion and scope of arbitration procedures there. Despite this, the legal recognition for EA enforcement in arbitration with a foreign seat in India is still far off. However, under Section 9 of the Act, parties may ask the courts for temporary relief. However, the parties must ensure that their agreement does not exclude or exempt them from applying the clause mentioned above.

If Section 9 is not applicable as described above, the party may initiate a civil lawsuit following the pertinent provisions of the Code of Civil Procedure, 1908<sup>15</sup>, to request the remedy that is the focus of the EA. However, it is persistently believed that for India to eventually become the much-anticipated global powerhouse in arbitration, it is urgent to consider recognizing emergency arbitration under the act and, consequently, giving full effect to the development and aspirations of India's arbitration potential. Emergency Awards acknowledge the principle of party autonomy, which is essential to the arbitration process, and allow the parties to agree to submit the dispute to a particular jurisdiction.

Second, the necessity of EA is strongly supported by the concerns of efficiency and secrecy. Courts must adhere to predetermined rules when making decisions about temporary measures. On the other hand, EA can offer such relief more effectively and privately, saving money and the parties' meaningful time. Parties should exercise extreme caution when relying on emergency arbitral decisions obtained outside of India to defend their rights in an emergency, given the existing position of the Indian courts refusing to enforce such judgments.

Under Section 17 of the Act, an emergency arbitral award made in a foreign seat is not enforceable in India, while an emergency arbitrator award made in a domestic center is. Due to this contradiction, it is more practicable for foreign parties to get an interim injunction from Indian courts instead of using an emergency arbitral ruling to enforce their rights against an Indian party.

A foreign-seated emergency award falls under section 44's definition of a foreign award and can thus be enforced under section 48. Given the lack of a judicial ruling supporting this legal position, Parliament needs to use this chance to include a stand-alone clause in Part II of the Act that corresponds to section 17. Following the Supreme Court's ruling in Amazon would guarantee that a

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<sup>14</sup> The Viewpoint: Enforceability of Emergency Award in India, Passed in .... <https://www.barandbench.com/view-point/enforceability-emergency-award-india-passed-foreign-seated-arbitration>

<sup>15</sup> Code of Civil Procedure, 1908 - Bare Acts - Live. <http://www.bareactslive.com/ACA/ACT379.HTM>



court judgment affirming or rejecting the implementation of a foreign-seated emergency award cannot be challenged under section 50. Additionally, this would advance the act's main goal of facilitating swift dispute settlement. Enabling the execution of emergency awards made in foreign jurisdictions would also give proper credence to the institutional acceptability of emergency arbitrations in general."

Given the recent 2019 Amendment to the Act aimed at broadening the boundaries of arbitration processes in India and making India one of the world's largest arbitration centres<sup>16</sup>, recognition of Emergency Arbitration has become mandatory. However, at this point, it is reasonable to conclude that the prevailing wind in India is blowing against extending enforcement to EA. The Indian courts appear to be opposed to executing an EA Award. At the same time, the various benefits of using an EA Tribunal cannot be overlooked. EAs allow mutually agreed-upon parties to refer a dispute to a specified jurisdiction and recognise the idea of party autonomy, which is essential to the arbitration system.

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