
RECOGNITION AND ENFORCEMENT OF EMERGENCY ARBITRATION: INDIA, US AND SINGAPORE

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ABSTRACT

In the context of a well-structured international arbitration, an emergency remedy is frequently referred to as a "Achille's Heel." 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 amended or lost in the normal course of business. 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 processes in line with the parties' agreement or cooperation. In contractual interactions involving Business to Business trade transactions, disputes may arise over the transaction's subject matter, which may include any kind of items. Disputes involving the items as the subject of the disagreement might result in the commodities being damaged or destroyed. In rare cases, one of the disputing parties may also erase evidence of the conflict in exchange for the other party's loss. The problem of destruction 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 commodities in any situation, an emergency arbitration to protect them becomes necessary. The purpose of this study is to examine the idea and implementation of emergency arbitration, as well as the feasibility of implementing it in India, United States, and Singapore.

Keywords: Emergency Arbitrators, interim relief, Recognition, UNCITRAL Model Law, arbitral institutions.

INTRODUCTION

In 2006, the American Arbitration Association's International Center for Dispute Resolution was the first to use emergency arbitration. Later, it was used by the Singapore International Arbitration Center in 2010, the International Chamber of Commerce in 2012, and the Hong Kong International Arbitration Center in 2013.¹ It has been a long time since most arbitration institutions around the world added emergency arbitration procedures to their rules of procedure. An emergency arbitrator can be called in if one of the arbitration parties needs immediate temporary relief before an arbitral tribunal is set up, according to the general rules of these rules. After the emergency arbitrator has made his or her decision, the decision is final and binding on all of the parties. The arbitral tribunal may revisit the decision later, but only after it has been set up after the emergency arbitrator has made it.

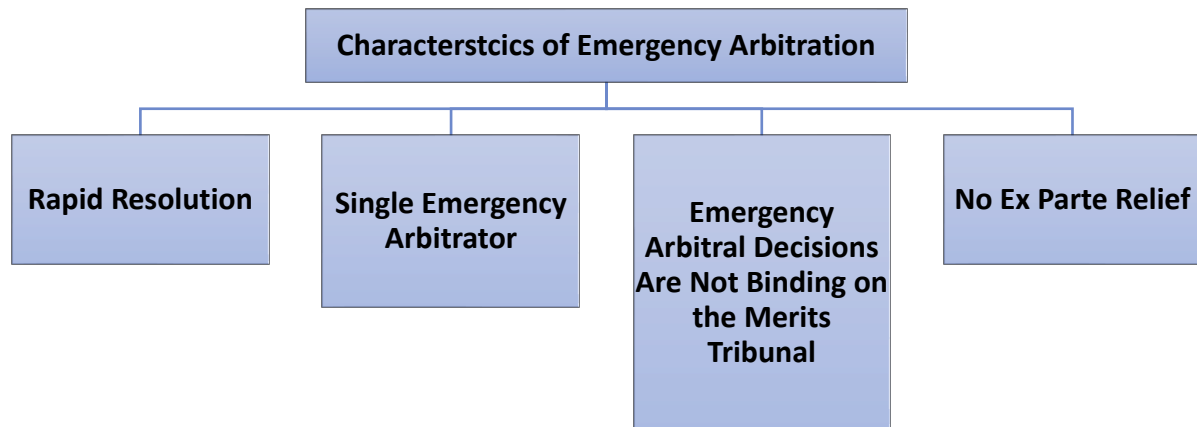
In this case, it is important to note that the Arbitration Act doesn't make any mention of or define "Emergency Arbitrations." The Indian Council of Arbitration, the Delhi International Arbitration Center, the Nani Palkhivala Arbitration Center and Mumbai Center for International Arbitration all have emergency arbitration provisions that can be used in a pinch. "Section 2(1)(d): "Arbitral tribunal" means a single arbitrator or a panel of arbitrators, and, in the case of an emergency arbitration, "emergency arbitrator." This was changed by the Law Commission in 2014. However, this idea was not included in the 2015 Amendment to the Arbitration Act, which took effect in 2016. To be clear, the New York Convention only applies to final awards, not interim ones. According to a textualist view, Indian law doesn't have a specific rule for recognising and implementing decisions made by an emergency arbitrator in a foreign-based arbitration. Before the creation of the main tribunal, an arbitrator is appointed to hear urgent temporary relief applications, such as an interim injunction, and to determine whether or not they should be granted.² Most major arbitration rules now contain provisions for an emergency arbitrator, which allows parties to seek interim relief without turning to a national court or waiting for the establishment of a main tribunal. Most major arbitration rules now contain provisions for an emergency arbitrator, which allows parties to seek interim relief without turning to a national court or waiting for the establishment of a main tribunal.

¹ Law C, 'India - Enforcement Of Emergency Arbitration Awards In Domestic Seated Arbitrations. - Conventus Law' (Conventus Law, 2022) <<https://www.conventuslaw.com/report/india-enforcement-of-emergency-arbitration-awards/>> accessed 3 April 2022.

² Alnaber R, 'Emergency Arbitration: Mere Innovation or Vast Improvement' (OUP Academic, 2019) <<https://doi.org/10.1093/arbint/aiz021>> accessed 3 April 2022.

SIGNIFICANT CHARACTERISTICS

While emergency arbitration processes vary according to institutional standards, there are many characteristics that are shared by all emergency arbitrations performed under the main institutional rules. Among these characteristics are the following:



Rapid Resolution: Because emergency arbitration is intended to produce results quickly, most institutions seek to appoint emergency arbitrators within 24 to 48 hours of receiving the emergency request (and paying the filing fee), and generally require those arbitrators to issue emergency awards within two weeks of the application being registered.³ Due to the compressed timetables, emergency arbitrators will impose aggressive written submission schedules and will often centre oral hearings on legal arguments rather than witness testimony.

Single Emergency Arbitrator: Regardless of the number of arbitrators specified in the arbitration clause or the method of appointment, emergency arbitrations are conducted by a single emergency arbitrator appointed by the relevant institution, which the parties consent to when they select the applicable arbitral rules. Due to the constrained deadlines for giving emergency awards, parties making emergency applications must typically already possess the evidence necessary to support their emergency case.

Emergency Arbitral Decisions Are Not Binding on the Merits Tribunal: Because merits arbitrators have the authority to accept, amend, or revoke emergency awards, emergency awards and orders are essentially temporary in nature.

³ Dunmore M, 'The use of Emergency Arbitration Procedures - GAN' (Global Arbitration News, 2022) <<https://globalarbitrationnews.com/use-emergency-arbitration-provisions/>> accessed 3 April 2022.

No Ex Parte Relief: With the exception of the Swiss Rules of International Arbitration, institutional rules require notification of emergency petitions, since ex parte relief is usually deemed to be unconstitutional under Article V of the New York Convention.

As arbitration is a consensual method of resolving disputes that binds only the parties to the arbitration agreement, emergency arbitration judgments cannot legally bind other parties such as banks, consumers, or other third parties who possess counterparty assets. Therefore, emergency arbitration is a rapid procedure that provides parties with immediate relief during the usually lengthy period until a full merits panel is formed. While parties may seek such remedy via national courts in many cases, as shown in the next section, emergency arbitration usually provides considerable benefits over interim judicial remedies in suitable circumstances.

THE BENEFITS OF INTERIM JUDICIAL RELIEF

In proper circumstances, emergency arbitration offers significant benefits over temporary court remedies. Among these benefits are the following:



Single Forum Relief: Emergency arbitration is ideally suited for resolving multijurisdictional disputes, such as those involving intellectual property and trade secrets, because it enables parties to present their case to a single commercially minded adjudicator who will apply a single set of procedural rules and (generally) a single governing law, rather than forcing parties to simultaneously approach multiple national courts through multiple sets of counsel in proceedings that will follow divisive rules.

Confidentiality: Emergency arbitration is generally confidential, which enables applicants to seek interim relief quietly without alerting the world to their dispute (unless enforcement in a court with public access is required), which not only helps protect sensitive commercial information, but also facilitates possible settlement.⁴

⁴ Santens A, and Kudrna J, 'The State Of Play Of Enforcement Of Emergency Arbitrator Decisions' (Papers.ssrn.com, 2022)

Speed: Emergency arbitration is an excellent alternative to courts around the world that are unable to grant prompt interim relief or that are unable to grant interim relief within the two-week timeframe required by most institutional rules, particularly during difficult time periods such as the pandemic.

Numerous Remedies: Emergency arbitration enables applicants to obtain interim remedies that may not be available in all jurisdictions where they seek relief—for example, a worldwide freezing order or an injunction in situations where money damages may still compensate the applicant—but that can be enforced in those jurisdictions as a New York Convention award.⁵

Global Enforcement: The New York Convention now has 170 signatories, and although not every nation will enforce an emergency Judgement, sufficient will do so that emergency arbitration provides a genuine potential of global enforcement⁶.

Thus, although emergency arbitration is not always the best course of action, especially where *ex parte* relief or relief against third parties is required, it typically provides considerable benefits over judicial intermediate procedures in suitable situations. As explained in the next section, such conditions include scenarios in which the relevant jurisdictions will enforce an emergency award, but not all countries will do so due to the emergency character of the award.

ENFORCING EMERGENCY AWARDS IN INDIA

Due to the Arbitration Act 1996, Part II, international arbitration judgements may be implemented in India. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1927 Geneva Convention on the Enforcement of Foreign Arbitral Awards were both signed by Indian citizens in 1958. A party seeking to enforce an arbitration award issued in a signatory nation to the New York or Geneva Conventions must file an execution petition in Indian courts. There is still no clear answer to the issue of whether emergency arbitrators have the authority to provide interim relief in the same way that an arbitral panel does. The High Courts of India receive a large number of petitions under Section 9 of the Arbitration Act 1996 from individuals seeking a speedy, temporary resolution to a matter. When the Arbitration Act was amended in 2015, it was clarified that a party to an

<https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3461019_code2001676.pdf?abstractid=2944074> accessed 3 April 2022.

⁵ Santens A, and Kudrna J, (*n* 4) accessed 4 April 2022.

⁶ Alnaber R, (*n* 2) accessed 4 April 2022.

international commercial arbitration with a foreign seat may also seek interim relief from Indian courts, provided the parties do not expressly or indirectly reject Section 9 of the Arbitration Act. When individuals choose a venue for arbitration, they are not automatically agreeing to Section 9 of the Arbitration Act, Indian courts have held so far. The parties may still get interim relief from an Indian court.

The Indian Courts have made three important decisions about whether emergency arbitration rulings made by Indian courts can be enforced. An emergency decision made under Section 9 of the Arbitration Act can't be enforced by the Bombay High Court or Delhi High Court. This is what they said in *HSBC v. Avitel*⁷ and *Raffles v. Educomp*^{8,9}. Instead, the parties need to ask the court for temporary help through a Section 9 application, which is what happens when they do this. This application would be looked at on its own, not as part of the emergency arbitration hearing that was taking place. In *Plus Holdings v. Xeitgeist*¹⁰, the Bombay High Court took a similar approach. An order was made that impliedly implemented the decision of the emergency arbitrator, despite the fact that emergency arbitrators don't have statutory authority under the Arbitration Act of 1947.

SINGAPORE'S ENFORCEMENT

The Singapore Parliament changed the International Arbitration Act (IAA) on April 9, 2012, because it was worried about the enforceability of EA rulings and judgments, so they did. The changes make it clear that EA awards and orders can be enforced in Singapore. They are now just like regular arbitral tribunals because of the changes made. It makes Singapore different from other institutions because it gives a lot of information that isn't available in most other places, with the possible exception of the United States, where court decisions say that pre-tribunal EAs made under Article 37 of the ICDR Rules are enforceable. It is worth noting, however, that there is doubt over the enforcement of orders and awards made outside of Singapore. Other governments have also taken efforts to alleviate the legal confusion surrounding EA rulings. Switzerland and Austria have likewise implemented legislation

⁷ *HSBC v. Avitel*, Arbitration Petition No. 1062/2012.

⁸ *Raffles v. Educomp*, O.M.P.(I) (COMM.) 23/2015 & CCP(O) 59/2016.

⁹ Smith G, 'The Emergence of Emergency Arbitrations' (Gordonsmithlegal.com.au, 2022) <[http://www.gordonsmithlegal.com.au/resources/Emergency%20Arbitrations%20\(12082016\).pdf](http://www.gordonsmithlegal.com.au/resources/Emergency%20Arbitrations%20(12082016).pdf)> accessed 5 April 2022

¹⁰ *Plus Holdings v. Xeitgeist*, Commercial Arbitration Petition No.339 of 2019.

defining the function of environmental auditors.

THE UNITED STATES' ENFORCEMENT

After a long time, US courts have looked into the ICDREA provisions. They looked into issues like whether "awards," not "orders," can be enforced, and whether the EA rulings seem to be ephemeral enough to meet the New York Convention's finality requirement. In a number of cases, people have said that only awards should be enforced in the United States because orders aren't enough to be "final." The courts in the United States, on the other hand, have always rejected the idea that "orders" and "awards" are different because of their form.

*Publicis Communication v. True North Communications*¹¹ was a case where the 7th Circuit examined a request to enforce an interim measure that was provided as a court order. The side argued that the order should not be executed due to the US Federal Arbitration Act and the New York Convention. A final dispositive judgement, they said, is not needed by either party, and an order is not such a judgement. Because of what they say, not because of their names, decisions are final. US courts are expected to obey any remedy judgments issued under Article 37 of the ICDR Rules, regardless of whether they are orders or awards after this case.

COMPARATIVE ANALYSIS: INDIA, SINGAPORE AND US

The majority of arbitral institutions that have recently changed their rules have added EA provisions; more institutions that are currently reviewing their rules are said to be thinking about adding EA provisions as well. Despite the fact that there are still a lot of questions about how these measures will be enforced, they may not be used in the end. There may be good reasons to think about the problems and constraints faced by other institutions and countries, as well as practical lessons that can be learned. The ICC is the most recent institution to use EA processes. Perhaps the most important thing to learn from other institutions and countries is that the legal consequences of EA decisions may not be clear, especially when it comes to enforcement. Singapore and the United States, both of which are in favour of EA, show how some of these doubts can be solved. It's unclear how EA rulings will be enforced outside of the jurisdiction, and what penalties should be given to people who don't follow EA rules¹². The

¹¹ *Publicis Communication v. True North Communs*, 206 F.3d 725 (7th Cir. 2000).

¹² Sajnani S, 'Future Retail V. Amazon: Time to Strike Out Emergency Arbitration In India' (The HNLU CCLS Blog, 2022) <<https://hnluccls.in/2021/02/23/future-retail-v-amazon-time-to-strike-out-emergency-arbitration-in-india/>> accessed 5 April 2022

case studies indicate that whether parties use EA processes is contingent on the facts of each case, the location of the assets, and the type of the damage that is anticipated to occur, all of which affect whether an EA may give effective remedy.

The parties are more likely to choose environmental assessment processes where:

- The relief is very urgent and cannot wait for the tribunal's rapid composition or the possibly sluggish pace of national courts, particularly if the measure is requested prior to the filing of the notice of arbitration;
- The national courts are ineffective or untrustworthy; and
- In instances when the relevant regulations provide inter parties relief.

The parties are less likely to choose EA procedures in the following situations:

- The EA's expenditures are exorbitant;
- When ex parte remedy is required (in which case domestic courts are likely to be favoured); and
- If relief from third-party beneficiaries of the arbitration agreement is required (in which case national courts are again likely to be preferred).

While the emergence of EA processes undoubtedly provides parties wishing to settle conflicts with further freedom and autonomy, it is a relatively new and untested technique, with important issues developing about the connection of EAs to current legal frameworks. Its potential to aid parties is considerable; but, in the early phases of its development, it is vital that parties understand EA limits, notably in terms of enforcement both locally and globally.

SUGGESTIONS

These concerns impose restrictions on the conditions under which emergency arbitration may be invoked. Therefore, parties should contemplate filing for emergency arbitration only under the following circumstances:

- There is no way to obtain interim relief from a national court, or the only national court that is accessible has a reputation for prejudice or incompetence;
- The parties value confidentiality, which is maintained during the arbitration process but

lost when the issues are contested in open court; and/or

- It is likely that the opposing party will not oppose the interim relief application (for example, by dissipating its assets after receiving notice of the application) and will abide by any emergency arbitration Judgement¹³.

This second aspect has resulted in emergency arbitration being used primarily for temporary relief in the context of a continuing contractual relationship, such as claims for supply contract continuation or the release of interim payments under construction contracts.

If the circumstances allow, parties should also consider whether it would be desirable to wait for the main tribunal to be created before seeking emergency arbitration. This means that the issues are presented to arbitrators who will ultimately settle the matter, rather than an emergency arbitrator who will stay inactive after making a ruling on the temporary relief application. If a lone arbitrator is chosen or if the relevant laws allow for the tribunal's establishment to be hastened, the time necessary to create the main tribunal may be reduced.

CONCLUSION

The emergency arbitrator's decision will take the form of an interim award, to which both parties will agree to be bound. If a party fails to comply with such an order, it may be enforced under the terms of different national laws, depending on the discretion of national courts and the presence or absence of Emergency Arbitration provisions in the relevant national legislation at the time of the failure. While injunctions in arbitration processes have the potential to change the worldwide arbitration scene, India is still waiting for official legal recognition of the verdicts of Emergency Arbitrators in the country.

¹³ Ezeoke D, and Pratap Singh M, 'Interim Relief And Emergency Arbitration In Singapore, UK And UAE: A Comparative Review Of Practices And Procedures' (Kilaw Journal, 2022) <<https://journal.kilaw.edu.kw/special-editions/special-supplement-issue-no-4-part-1/?lang=en>> accessed 5 April 2022

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