

## Emergency Arbitration in India: Concept and Beginning

Contributed by: Madhu Sweta | Nov 2016

### I. INTRODUCTION

In the gamut of a sound and systematized International Arbitration, an emergency relief is often described as an “Achille’s Heel”<sup>1</sup>. Emergency Arbitration (EA) in the guise of an emergency relief is an upcoming concept in the field of arbitration suitable for those who want to protect their assets and evidence that might otherwise be altered or lost. Such arbitration is usually agreed to and arranged by the parties themselves without recourse to a Tribunal at the first instance. The proceedings either domestic or international are conducted by an Arbitrator as per the agreement between the parties or with the concurrence of the parties.

### II. AIM & ROLE

The objective of EA is to provide urgent *pro tem* or conservatory measures to a party or parties that cannot await the formation of an Arbitral Tribunal. The efficacy of an Emergency Arbitration, invoked by a party, survives on a chariot of two wheels:

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

The main role of Emergency Arbitration comes into play in a situation, when there is no arbitral tribunal in place or in a situation where sufficient time would be wasted in setting up one, depending upon the requirements of an arbitration agreement or the institutional rules. EA proliferates as a promise because of various other defects in the system such as lack of confidence in the national courts to grant urgent reliefs, leakage of confidential information, exaggerated litigation cost, etc. Amongst many, two major procedures have to be ineludibly adopted once a party decides to pursue the remedy of EA:

- i. Filing of proof of service of such application upon the opposite parties.
- ii. Payment of the decided fee schedule depending upon the schedule for each center, where such arbitration is to be carried out with an implicit understanding that the application of EA would be limited to signatories to the Arbitration agreement or their successors.

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<sup>1</sup> **Martin Davies**, *Court ordered Interim measures in aid of International Commercial Arbitration*, 17 AM, Rev. Int’l Arb. 299, 300 (2006).

An **Achilles’ heel** is a weakness in spite of overall strength, which can actually or potentially lead to downfall. In Greek mythology, when Achilles was a baby, it was foretold that he would die young. To prevent his death, his mother took Achilles to the River Styx, which was supposed to offer powers of invulnerability, and dipped his body into the water; however, as Thetis held Achilles by the heel, his heel was not washed over by the water of the magical river. Achilles grew up to be a man of war but, One day, a poisonous arrow shot at him was lodged in his heel, killing him shortly afterwards.

### III. POWERS VESTED

An Emergency Arbitration is capable of granting interim measures or conservatory relief only for a stipulated period of time. For all purposes, it exercises similar if not same functions as that of an ad hoc tribunal which has been constituted for a limited purpose and would immediately be dissolved, once the purpose is served or the said time frame in which such issues have to be decided, lapses. Most Arbitration Rules across nations follow an 'opt-out' policy with respect to emergency which means that only if the agreement between the parties specifically excludes "**Emergency Arbitrator Provisions**" would these provisions not apply in toto.

An Arbitrator appointed for the purposes of an Emergency Arbitration is known as an Emergency Arbitrator. The Emergency Arbitrator exercises the following functions and becomes *functus officio* after the Interim Order is made:

- i. The Emergency Arbitrator shall, as soon as possible but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief.
- ii. Such schedule shall provide a reasonable opportunity to all parties to be heard. It may provide for proceedings by way of telephonic conference or on written submissions as alternatives to a formal hearing.
- iii. Due to strict time-lines, the emergency arbitrator may never actually hear or consult with the parties apart from certain major clarifications and simply give his order on the basis of the documents and written submissions placed before him.
- iv. Timelines do vary under various International Arbitration rules, but a typical emergency arbitration takes around eight to ten days from the date of application to the date of award.
- v. The Emergency Arbitrator shall have the powers vested in the Arbitral Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction, and may order any party to take such interim measure of protection, as the arbitrator may consider necessary considering the subject matter of the dispute.
- vi. The nature of the interim orders include asset freezing orders, both prohibitive and mandatory injunctions, orders for the preservation and inspection of evidence, preventive orders to avoid misuse of intellectual property or confidential information as well as anti-suit injunctions.

Although the emergency arbitrator's order is not binding on the arbitral tribunal with respect to any question, issue or dispute determined, yet, the interim order has to be definitely varied, discharged or revoked, in whole or in part, by a subsequent order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative.

### IV. LAW COMMISSION'S REPORT:

In order to recognise emergency arbitrations, The Law Commission's 246<sup>th</sup> Report<sup>2</sup> on amendments to the Arbitration and Conciliation Act, 1996, proposed an amendment to Section 2(d) of the Act. This amendment was to ensure that institutional rules such as the SIAC Arbitration Rules, or ICC

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<sup>2</sup> The Law Commission's 246<sup>th</sup> Report dated 05.08.2014.

Rules or any other rule which provide for an appointment of an emergency arbitrator are given statutory recognition in India:

***“Section 2(d): “Arbitral tribunal” means a sole arbitrator or a panel of arbitrators and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator.”***

It was expected that the Arbitration and Conciliation (Amendment) Act, 2015<sup>3</sup> would embrace this global turn of tide and create provisions for appointment of Emergency Arbitrator. The Amendment of 2015, however, failed to incorporate the recommendation of the Law Commission and does not provide at all for Emergency Arbitration.

#### **V. INDIA’S INITIATIVE TOWARDS EA:**

Notwithstanding the fact that the term “Emergency Arbitration” is omitted from the amended Arbitration and Conciliation (Amendment) Act, a new move has emerged by way of which, arbitration institutions are trying to absorb the term “Emergency Arbitration” in their rules and are making simultaneous procedures thereof. Although, the Indian arbitral institutions statutorily are not cogent enough (in realm of an expressly omitted provision), yet they have framed rules which are by large synonymous to the leading international arbitration institutional rules. Some notable institutions with their respective regulations are:

- a) The **Delhi International Arbitration Center (DAC)**<sup>4</sup>, of the Delhi High Court in Part III of its Arbitration Rules includes “Emergency Arbitration”. Further Section 18A enumerates ‘Emergency Arbitrator’ and further explains the appointment, procedure, time period and powers of an Emergency Arbitrator.
- b) **Court of Arbitration of the International Chambers of Commerce-India**, under Article 29 of the ‘Arbitration and ADR Rules’ r/w Appendix V enumerate the provisions of EA and Emergency Arbitrator.
- c) **International Commercial Arbitration (ICA)**, under Section 33 r/w Section 36(3) w.e.f 01.01.2014, enumerates the provisions of EA and Emergency Arbitrator.
- d) **Madras High Court Arbitration Center (MHCAC)** Rules, 2014, under Part IV, Section 20 r/w Schedule A and Schedule D enumerate the provisions of EA and Emergency Arbitrator.
- e) **Mumbai Center for International Arbitration (Rules) 2016**, under Section 3 w.e.f 15.June.2016 enumerates the provisions of EA and Emergency Arbitrator.

#### **VI. ENFORCEMENT IN INDIA**

Enforcement of a foreign seated award in India is highly unlikely as the enforcement shall only be recognized under Part II of the Arbitration and Conciliation Act, 1996. In accordance with the decision laid down by the Supreme Court of India in **BALCO vs. Kaiser Aluminum Technical Services**<sup>5</sup>, the powers of Indian courts are prospectively excluded to grant interim relief in relation to foreign seated arbitrations.

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<sup>3</sup>The Arbitration and Conciliation (Amendment) Act, 2015 (No. 3 of 2016), dt. 31.12.2015, w.r.e.f. 23.10.2015.

<sup>4</sup>**Delhi International Arbitration Center (DAC)**<sup>4</sup>, Part III, Section 18A.

<sup>5</sup>**BALCO Kaiser Aluminum Technical Services** (2012) 9 SCC 552

However, India's approach towards an EA order is that of ancillary enforceability. Judicial decisions concerning emergency arbitration are scant. In the leading cases of *HSBC v. Avitel*<sup>6</sup> and *Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors*<sup>7</sup>, the Bombay High Court and the Delhi High Court respectively, have emerged as the torch bearers wherein interim reliefs were granted by the Courts in sync with the order of the Emergency Arbitrator. However, a glaring difference between both of these orders is the fact, whether the ratio of BALCO applies to the said cases or not.

**HSBC v. Avitel** : The case involved an arbitration agreement in which the parties reserved their right to seek interim reliefs before the national Courts of India, even though the Arbitration was conducted outside the country. The parties resorted to EA seated in Singapore, where a favorable order was given to the party who sought to enforce the same in India. The Bombay High Court while upholding the award of the Emergency Arbitrator and granting interim relief observed that the '*...petitioner has not bypassed any mandatory conditions of enforceability.*'<sup>8</sup> since it was not trying to obtain a direct enforcement of the interim award. It is germane to note that the subject agreements were entered into between the parties prior to the BALCO judgment, thus the ratio decidendi of BALCO did not apply to this case.

**Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors** : The case involved an arbitration agreement which was governed and construed in accordance with the laws of Singapore. The parties resorted to EA seated in Singapore, wherein an interim order was passed, which was later enforced in the High Court of the Republic of Singapore. The party who obtained the favorable order later filed an application under the amended Section 9 of The Arbitration and Conciliation (Amendment) Act, 2015 seeking interim reliefs alleging that the other party is acting in contravention to the orders passed in the Emergency Award. The Delhi High Court while allowing the maintainability of such petitions highlighted the relevancy of the amended Section 2(2) of the Act. The proviso to Section 2(2) of the amended act has widened the ambit of the powers invested in the Court to grant interim reliefs, as Section 9 shall now apply to international commercial arbitrations, even if the place of arbitration is outside India. It is germane to note, that the subject agreements were entered between the parties after the BALCO judgment. The main matter is yet to be decided on merits by the Delhi High Court.

## VII. GLOBAL SCENARIO

Presently, the Singapore International Arbitration Centre (SIAC)<sup>9</sup>, the Stockholm Chamber of Commerce (SCC),<sup>10</sup> the Swiss Chambers Arbitration Institution (SCAI)<sup>11</sup>, the Mexico City National

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<sup>6</sup> **HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd & Ors.**, Arbitration Petition No. 1062/2012 dated January 22<sup>nd</sup>, 2014.

<sup>7</sup> **Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors.**, O.M.P (I) (Comm.) 23/2015, CCP(O) 59/2016 and IA Nos. 25949/2015, 2179/2016 dated October 7<sup>th</sup>, 2016.

<sup>8</sup> **HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd & Ors.**, Arbitration Petition No. 1062/2012 dated January 22<sup>nd</sup>, 2014, Para 89.

<sup>9</sup> **Singapore International Arbitration Center (SIAC)** included the provision for Emergency Arbitration only in July 2010. The International Chamber of Commerce (ICC) included Emergency Arbitration Provisions in the 2012 Rules via Article 29 and Appendix V

<sup>10</sup> **SCC Rules** (2010), Expedited Rules and Appendix II.

<sup>11</sup> **Swiss Rules** (2012), Articles 42–43

Chamber of Commerce (CANACO)<sup>12</sup>, and the Netherlands Arbitration Institute (NAI)<sup>13</sup> provides for both expedited formation of the Arbitral tribunal as well as the EA. Whereas, the London Court of International Arbitration (LCIA)<sup>14</sup>, and the Hong Kong International Arbitration Centre (HKIAC)<sup>15</sup>, the International Centre for Dispute Resolution of the American Arbitration Association (ICDR/AAA)<sup>16</sup> and the International Chamber of Commerce (ICC)<sup>17</sup> have opted to provide solely for EA.

Asian Jurisdictions such as Singapore and Hong Kong are considered to be torch bearers. Both countries have passed amendments to provide express recognitions to the interim orders of the Emergency Arbitrator. The Singapore International Arbitration Act has amended its definition of 'arbitral tribunal' to bring Emergency Arbitrator within its ambit. Similarly, Hong Kong amended its Arbitration Ordinance by inserting Part 3A which further allows the recognition and enforcement. Following the lead, the London Court of International Arbitration (LCIA)<sup>18</sup>, American Arbitration Association (AAA)<sup>19</sup> and International Chamber of Commerce (ICC) have also amended their rules to incorporate this new concept which not only saves time and money, but also expedites the process and makes the amendments enforceable in nature.

The New York Convention only recognizes a final award which can be enforceable in nature and not an interim order. The order is tested on the touchstone of finality under the said convention. In a 2013 case before the District Court of New York concerning the EA order in **Yahoo! Inc. v. Microsoft Corporation case**<sup>20</sup>, Yahoo's motion to vacate an EA award was rejected. The Court found that the relief awarded by the Emergency Arbitrator was, "*in essence final*" and therefore confirmed it for the purposes of recognition and enforcement. The Court, reasoned that the Emergency Arbitrator is not barred from awarding final reliefs for the purposes of preserving status quo in the subject matter, irrespective of the fact that a final award of the Arbitral Tribunal is yet to follow.

However, in 2011, Southern District Court of California came to the opposite conclusion in **Chinmax Medical Systems v. Alere San Diego**<sup>21</sup>. In this case, the Court addressed a request to vacate a decision of an emergency arbitrator. The Court denied jurisdiction purporting that the decision was not final and binding for the purposes of the NY Convention.

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<sup>12</sup> **CANACO Rules** (2008), Articles 36 and 50.

<sup>13</sup> **NAI Rules** (2010) Articles 42a and 42b.

<sup>14</sup> **London Court of International Arbitration (LCIA)** amended its Rules of 1988 in 2014 to create a provision for Emergency Arbitration (Article 9). These rules are applicable to agreements concluded on or after 01.10.2014, unless the parties opt-in

<sup>15</sup> **HKIAC Administered Arbitration Rules** (2008) Article.38.

<sup>16</sup> **ICDR / AAA Rules** (2006), Article.37.1.

<sup>17</sup> **ICC Rules** (2012) , Article 29(1) and Appendix II.

<sup>18</sup> **London Court of International Arbitration (LCIA)** amended its Rules of 1988 in 2014 to create a provision for Emergency Arbitration (Article 9). These rules are applicable to agreements concluded on or after 01.10.2014, unless the parties opt-in

<sup>19</sup> **American Arbitration Association (AAA)** issued revision to its Rules on 08.09.2013. Rule 38 particularly deals with Emergency Arbitration.

<sup>20</sup> **Yahoo! Inc. v. Microsoft Corporation**, United States District Court, Southern District of New York, 13 CV 7237, October 21, 2013.

<sup>21</sup> **Chinmax Medical Systems Inc., v. Alere San Diego, Inc.**, Southern District of California, Case No. 10cv2467 WQH (NLS), May 27, 2011.

## VIII. CONCLUSION

The emergency arbitrator's order shall take the form of an interim award which the parties undertake to comply with. In the event that a party fails to comply with such order, it may be enforceable in nature under the provisions of various national laws depending upon the discretion of national courts and national laws which may or may not include Emergency Arbitration provisions.

Although, Emergency Arbitration steps in as a turning tide for the global scenario in view of injunctions in Arbitration proceedings, India still awaits a formal statutory recognition of the awards of the Emergency Arbitrator.

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**Madhu Sweta**  
Partner  
madhu@singhania.in