AN EMERGENCY ARBITRATOR IS AN ARBITRATOR….IS THERE A NEED FOR STATUTORY RECOGNITION POST-AMAZON?

—Rajvansh Singh, Saksham Barsaiyan

(Mr. Rajvansh Singh is an advocate practising at the Delhi High Court. Mr. Saksham Barsaiyan is a final year student at National Law University Odisha.)

ABSTRACT

Interim relief is an instrument to protect the interests of parties and preserve the effectiveness of the enforcement of arbitral awards. The rules governing tribunal-ordered interim relief in arbitration have been a topic of discussion for a long time. This is primarily because of the interventionist approach of the Judiciary under Section 9 of the Arbitration & Conciliation Act, 1996 with respect to granting interim relief in arbitrations in India, which eventually defeats the very purpose behind parties entering into arbitration initially. In response to these difficulties, arbitration institutions introduced the mechanism of Emergency Arbitration. This mechanism allows the parties to seek interim relief through an emergency arbitrator before the formation of the arbitral tribunal. However, despite its advantages, challenges concerning the enforcement of emergency arbitrators' reliefs have prevented it from being utilized by parties effectively. This is so because there is nothing in the Indian Arbitration and Conciliation Act, 1996 to enforce such relief. Although the recent Supreme Court decision in Amazon v. Future Retail has recognized Emergency Arbitration, several issues still need to be revisited by the Legislature to strengthen the arbitration landscape in India. In this light, this paper aims to assess the legal standing of emergency arbitrators and the validity of their decisions. In doing so, the paper deals with a doctrinal question which is of immense import: Is an Emergency Arbitrator a full-fledged arbitrator? The paper answers this question in the affirmative by analysing the rules of different arbitral institutions. It further examines the amendments of the 246th Law Commission Report which were not incorporated into the Act. Finally, the paper charts a way to confer statutory recognition upon emergency arbitrations in India to derive its best workability.

1. INTRODUCTION

The securing of appropriate and effective interim relief in arbitration has assumed increasing importance with the growing complexity of commercial transactions.[1] Interim relief is certainly an effective tool that complements the enforcement of final awards and ensures a meaningful resolution of the dispute. Resolving a dispute is not a quick process. It can take months or sometimes years.[2] During this time, interim relief prevents the other party from engaging in harmful conduct, preserves evidence or subject matter that is material to the resolution of the dispute and prevents the dissipation of the assets.[3] Therefore, the potential to provide and enforce effective interim relief is imperative to maintain the status quo during the arbitral proceedings.

The Arbitration and Conciliation Act, 1996 [hereinafter "**The Principal Act**"] provides the parties to seek interim relief through national courts and the arbitral tribunal respectively under Section 9 and Section 17. A plain reading of Section 17 reveals that until constituted, the tribunal is toothless to grant relief. Thus in cases of urgency, the route of seeking relief from the tribunal is ruled out, and eventually, parties only have recourse to national courts.[4] Though resorting to the national court for urgent relief at the pre-arbitral stage is a norm, it is often criticised as the foremost reason as to why parties opt for arbitration over litigation is to avoid a rigorous court process.[5] In response to such shortcomings, institutions have introduced a useful arbitral tool known as the 'emergency arbitration procedure'[6] which enables the institutions to appoint an emergency arbitrator

1. Zia Mody & TT Arvind, 'Redeeming Sisyphus: The Need to Invigorate Interim Relief in International Commercial Arbitration', in Albert Jan Van den Berg (ed), *International Arbitration and National Courts: The Never Ending Story*, ICCA Congress Series, vol. 10 (Kluwer Law International 2001) 126; Christopher Boog, 'Chapter 18, Part III: Interim Measures in International Arbitration', in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, 2nd edn. (Kluwer Law International 2018) 2543.
2. Ashish Kabra, 'An Evolved Approach to the Court-Subsidiarity Model' (2017) 20(5) Int. A. L. R . 149.
3. Julian D M and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) ch. 23 para 1.
4. Sumeet Kachwaha, 'The Arbitration Law of India: A Critical Analysis' (2005) 1(2) Asian Int'l. Arb. J. 105, 113.
5. Tejas Karia, Ila Kapoor & Ananya Aggarwal, 'Post Amendments: What Plagues Arbitration in India' (2016) 5 Indian J. Arb. L. 230, 240.
6. Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, (vol. 12, Kluwer Law International 2005) ch. 4 para 5.

[hereinafter "**EA**"] to consider a request for such urgent relief. The word 'emergency' denotes the exceptional urgency of such requests that must be dealt with before the tribunal is formed.[7] Thus emergency arbitration procedures bridge the time lag between the parties' request for relief and the constitution of the tribunal.[8]

Anecdotal evidence reveals that Indian parties more often seek interim relief from EAs of international institutions, especially SIAC.[9] To tackle this appetite, Indian institutions such as MCIA, ICA, ICADR and the like, have also amended their rules to incorporate provisions for emergency arbitration. While this concept has been around for a good amount of time, it is disconcerting that the Indian legislature has remained silent on the status of the EA and the enforceability of their reliefs.[10] Given this backdrop, the present contribution aims at examining the legality of emergency arbitration in India. To this end, the article slices the discourse into four chapters. At the outset, it briefly outlines various factors which the parties need to consider while choosing an avenue for seeking interim relief (*Chapter 2*). Then, it critiques the concurrent jurisdiction between national courts and EA in relation to granting relief at the pre-arbitral stage (*Chapter 3*). The next chapter touches upon the enforceability of emergency reliefs, examines the status of an EA at the preliminary stage and then delves into the enforceability of their decision in the current Indian arbitration landscape (*Chapter 4*). Lastly, some concluding remarks are provided with the way forward to obtain the best workability of emergency arbitration in India (*Chapter 5*).

2. CHOICE OF FORUM: EMERGENCY ARBITRATOR OR COURT

For the purpose of seeking relief at the pre-arbitral stage, parties can either opt for an emergency arbitration procedure or resort to national courts. However, there are certain factors that parties should consider while

7. Maxim Osadchiy, 'Emergency Relief in Investment Treaty Arbitration: A Word of Caution' (2017) 34(2) J Int Arb 239, 241.
8. *Ibid*.
9. Risabh Gupta & Aonkan Ghosh, 'Choice Between Interim Relief from Indian Courts and Emergency Arbitrator' (Kluwer Arbitration Blog, 10 May 2017) http://arbitrationblog.kluwerarbitration.com/2017/05/10/choice-between-interim-relief-from-indian-courts-and-emergency-arbitrator accessed 13 May 2022.
10. Nishant Nigam & Anjali Dwivedi, 'The Viewpoint: Emergency Arbitration – An Absent Concept' (*Bar & Bench*, 29 November 2017) https://www.barandbench.com/view-point/untying-the-noose-around-cbd-and-cannabis-regulation-in-india accessed 23 May 2022.

choosing a forum. This chapter compares both the forums on factors which include [not in order] the cost; speed; confidentiality; court's neutrality; ex-parte relief and order against the third party.

A. Speed

In line with the party's need for urgent relief that cannot wait for a tribunal to be formed, the speed of the process is a key concern.[11] In the case of emergency arbitration, institutions set a certain timeline for the issuance of emergency relief. Although, these timelines are generally respected[12] institutions have reported that on average, they slightly exceeded the deadline. For instance, ICDR[13] and SCC[14] reported an average of 14 and 5-8 days respectively to issue a relief. Along with these deadlines, parties should also consider the time that will be invested to enforce the relief if there is no voluntary compliance by the other party.[15]

Institution	Time required to appoint EA	Time frame to grant the measure
MCIA[16]	Within 1 business day of receipt	Within 14 days of appointment of EA
HKIAC[17]	Within 24 hours of receipt	Within 14 days from referral to EA
SCC[18]	Within 24 hours of receipt	Within 5 days from referral to EA
LCIA[19]	Within 3 days of receipt	Within 14 days from appointment of EA
SIAC[20]	Within 1 day of receipt	Within 14 days of appointment of EA

11. Eliane Fischer and Michael Walbert, 'Chapter I: The Arbitration Agreement and Arbitrability, Efficient and Expeditious Dispute Resolution in M&A Transactions', in Christian Klausegger and others, *Austrian Yearbook on International Arbitration* (vol. 2017, Manz'sche Verlags-und Universitätsbuchhandlung 2017) 27.
12. Raja Bose & Ian Meredith, 'Emergency Arbitrator Procedures: A Comparative Analysis' (2012) 5 Int'L Arb. L. R. 186, 192.
13. Philippe Cavalieros & Janet Kim, 'Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations' (2018) 35(3) J Int Arb 275, 280.
14. *Ibid*.
15. *Id*, 294.
16. Arbitration Rules Mumbai Centre for International Arbitration ('MCIA Rules') (2nd edn, 15 January 2017) arts. 14.2, 14.6.
17. 2018 HKIAC Administered Arbitration Rules ('HKIAC Rules') (1 November 2018) sch. 4 paras 4, 12.
18. 2017 Arbitration Rules of the Arbitration Institute of The Stockholm Chambers of Commerce ('SCC Rules') (1 January 2017) app 2 arts. 4(2), 8(1).
19. London Court of Arbitration Rules ('LCIA Rules') (1 October 2020) arts. 9.6, 9.8.
20. Singapore International Arbitration Centre Arbitration Rules ('SIAC Rules') (6th edn, 1 August 2016) sch. 1 paras 3 and 9.

Speed of proceeding in courts, on the other hand, can vary widely between jurisdictions based on the court's attitude and familiarity with the arbitration.[21] Sometimes seeking interim relief from courts may be problematic based on the court's negative attitude. For instance, the judges of the commercial courts/divisions of Indian High Courts (Bombay High Court, for instance) are often assigned with non-commercial matters which protracts the whole process and the relief is not granted promptly.[22] While, at other times, resorting to the courts may be an ideal option. The Delhi High Court, for instance, is renowned for granting interim relief generally in an average timeline of 3 days.[23]

B. Cost

Institutions require the requesting party to pay fixed emergency arbitration fees upfront in full. Institutions charge a fixed amount of fee that covers their administrative expenses and the fee of EA. The fee structure of some institutions is;

Institution	EA's Fee	Filing Fee	Total Cost	Total Cost (USD)[24]
SIAC[25]	SGD 30000	SGD 5000	SGD 35000	USD 25470
SCC[26]	EUR 16000	EUR 4000	EUR 20000	USD 21480
HKIAC[27]	HKD 250000	HKD 200000	HKD 450000	USD 57350
LCIA[28]	EUR 22000	EUR 9000	EUR 31000	USD 33315
MCIA[29]	INR 300000	INR 80000	INR 380000	USD 4960

The court fee for a commercial Section 9 application in India does not exceed INR 4,000. Thus, ignoring the fee of the counsel, a comparison of institutional fees and court fees reveals that the latter is much cheaper. However, sometimes senior counsels are engaged just to argue the matter (apart from the solicitor) and charge exorbitant fees, eventually making the

21. Philippe Cavalieros (n 13) 294.
22. Department of Legal Affairs, *Report of the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India* (2017) 19.
23. Risabh Gupta (n 9).
24. As per the exchange rate on 25th April 2022.
25. SIAC Rules (n 20) sch. 1 para 2, SIAC Schedule of Fees (1 August 2016).
26. SCC Rules (n 18) App 2 art 10.
27. HKIAC Rules (n 17) sch. 4 para 5, HKIAC 2018 Schedule of Fees.
28. LCIA Rules (n 19) art 9.5, LCIA Schedule of Cost (1 October 2020) para 5.
29. MCIA Rules (n 16) art 32, MCIA Schedule of Fees (15 July 2017).

court a more expensive option when compared to an arbitral institution. Additionally, this becomes costlier when interim relief is to be sought in multiple jurisdictions. In situations like this, an emergency arbitration procedure becomes cost-effective as it prevents the cost of initiating multiple court proceedings.[30]

C. Relief against the third party

Sometimes, parties seek interim relief against a third party who is a non-signatory to the arbitration agreement. But the contractual nature of arbitration limits the EAs' jurisdiction over the parties who submit their dispute to arbitration and are signatories to the agreement.[31] Therefore, EA cannot grant relief against third parties. ICC Rules, for instance, restrict EA from granting relief by stating, "*only to parties that are either signatories of the arbitration agreement [.....].*"[32] Conversely, Indian courts have the authority to render interim reliefs against third parties.[33]

D. Ex-parte Orders

At times, prior notice to the reluctant party may trigger the dissipation of assets from the concerned jurisdiction.[34] Hence, in such an event, to ensure the effectiveness of the relief, an element of surprise is necessary.[35] The majority of institutions bar their EAs from granting ex-parte relief. For instance, MCIA Rules require the EA"*to provide a reasonable opportunity to all parties to be heard.*"[36] Further, if any institution (Swiss Rules[37] for instance) permits so, that order can be challenged under Section 37 of the Principal Act for not providing parties with the opportunity to be heard.[38] On the contrary, Indian courts have the authority to render an ex-parte

30. Christoph Muller and Sabrina Pearson, 'Waving the Green Flag to Emergency Arbitration under the Swiss Rules: the Sauber Saga' (2015) 33(4) ASA Bulletin 808, 809.
31. J Fry, S Greenberg & F Mazza, *Commentary on the 2012 Rules* in *The Secretariat's Guide to ICC Arbitration* (ICC Service 2012) ch. 3 para 1098.
32. The ICC Rules of Arbitration ('ICC Rules') (1 January 2021) art. 29(5).
33. Risabh Gupta (n 9).
34. Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 2694.
35. Jasmine Sze Hui Low, 'Emergency Arbitration: Practical Considerations' (2020) 22(3) Asian Disp. Rev. 109, 110.
36. MCIA Rules (n 16) art 14.5.
37. Swiss Rules of International Arbitration ('Swiss Rules') (June 2021) art 29(3).
38. Godrej Properties Ltd. v. Goldbricks Infrastructure (P) Ltd. 2021 SCC OnLine Bom 3448.

relief. Furthermore, their refusal to do so can be appealed against under Section 37 of the Principal Act.[39]

E. Confidentiality

Confidentiality is the prime reason parties choose to arbitrate, as it limits the information to the public, competitors, press and others.[40] The process of emergency arbitration ensures the confidentiality of the underlying disputes, as institutions incorporate the confidentiality clause in their provisions which is applicable to the emergency arbitration proceedings as well. For instance, SIAC Rules expressly state that "*a party and any arbitrator, including any Emergency Arbitrator [....], shall at all times treat all matters relating to the proceedings and the Award as confidential.*"[41] However, resorting to the court can sometimes fail the parties' intention of keeping their differences confidential as there is a huge potential that the court proceedings may render the confidential information of the underlying dispute public.

F. Expertise of the Adjudicator

Adjudication of the dispute by an umpire whose expertise and experience can best deal with the area of the dispute has its benefits. An expert grants an ideal relief as he is competent to deal with the complex factual and legal issues that may arise in disputes.[42] Further, it enhances the speed of the proceedings which remains the topmost priority at that point in time. It is widely accepted that institutions assign matters to EAs based on their specialization in the subject matter. Further, these institutions make sure that an EA is available during the entire proceedings dedicating proper attention to the matter.[43] Contrarily, national courts are not equipped with a pool of specialist judges and additionally, it is highly unlikely that the specialist judge will be available at the time when an application for interim

39. Jabalpur Cable Network (P) Ltd. v. ESPN Software India (P) Ltd. 1999 SCC OnLine MP 74 : AIR 1999 MP 271.
40. Gary B Born (n 34) 3003; Joyjyoti Misra and Roman Jordans, 'Confidentiality in International Arbitration' (2006) 23(1) J Int Arbitr 39, 48.
41. SIAC Rules (n 20) r. 39.1.
42. Hermann J Knott & Martin Winkler, 'The Arbitrator and the Arbitration Procedure, Emergency Arbitration Securing advantages at an early stage' in Christian Klausegger and other (ed), *Austrian Yearbook on International Arbitration* (Manz'scheVerlags- und Universitätsbuchhandlung 2022) 171.
43. Diana P Mahéo & Christine L Thieffry, 'Emergency Arbitrator: A New Player In The Field - The French Perspective' (2017) 40(3) Fordham Int. Law J. 749, 760.

relief is made.[44] This compels the courts to assign arbitration disputes to the judges' non-specialist judges whose adjudication seriously compromises the credibility of the relief.[45]

G. Neutrality and Impartiality of the Adjudicator

Neutrality and impartiality of the court present in specific locations may also be a matter of significant concern.[46] Indeed, the concern is dominant where the respondent is a state or its entity and the interim relief is sought against the state in its own country as it may be the only available option. In such a situation there may be chances that the domestic court may be biased towards the state entity.[47] On the contrary, institutions ensure that the nationality of an EA and either of the parties remains different.[48] For instance, LCIA Rules ensure that "*where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party [.....]*"[49]

3. RELATIONSHIP BETWEEN JURISDICTION OF EMERGENCY ARBITRATOR AND COURTS

Chapter II reflects that emergency arbitration is not without its disadvantages as the jurisdiction exercised by the tribunal is ineffective or impossible in some cases. This is attributable to inherent shortcomings which the tribunal possesses due to the nature and operation of the arbitration agreement. In such circumstances the court's assistance is imperative.[50] In this regard, Lord Mustill observed that at times court's intervention is highly beneficial to seek effective interim relief, otherwise, justice would be denied.[51] Hence, institutions have framed the emergency arbitration provision in a manner that does not necessarily exclude the court's jurisdiction to grant urgent relief for instance;

44. KajHobér, 'Chapter 10: Courts or Tribunals?' in Fabricio Fortese and other (eds) *Finances in International Arbitration* (Kluwer Law International 2019) 207.
45. Diana (n 43) 759.
46. Mike Salova, 'Interim Measures and Emergency Arbitrator Proceedings' (2016) 23 Croat. Arbit. Yearb. 73, 74.
47. Diana (n 43) 759.
48. LCIA Rules (n 19) arts. 6 and 9.6.
49. LCIA Rules (n 19) Art 6.1.
50. Erin Collins, 'Pre-Tribunal Emergency Relief in International Commercial Arbitration' (2012) 10(1) Loy U. Chi. Int'l. L. Rev. 105, 120.
51. *Coppee-Lavalin v Ken-Ren Chemicals and Fertilizers Ltd* (1994) 2 All ER 449.

The SIAC Rules: "*A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules.*"[52]

The ICC Rules: "*The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, [.....]*"[53]

A bare reading of these rules demonstrates that institutions permit the parties to seek relief by the courts not only before the formation of the tribunal but even thereafter in "*exceptional*" or "*appropriate*" circumstances. Thus, the inception of emergency provision in institution rules has overlapped the jurisdiction of EA and national courts with respect to granting relief at the pre-arbitral stage. Under the supportive approach given by Lord Mustill, at times concurrent jurisdiction may be open to abuse. As during the EA's mandate or when they refused to grant relief, the reluctant party may approach the courts even under circumstances that do not fall under "*appropriate*" or "*exceptional*."

To avoid such abuse, the terms "appropriate" and "exceptional" have to be deliberated upon. In this regard, Smit's approach assumes importance; he proposes national courts restrict their supportive role to the circumstances where the relief is sought against third parties or on an ex-parte basis and must step back from granting relief in any other circumstances.[54] This approach respects the jurisdiction of an EA as it dilutes the court's interference to only those circumstances when the former is incapable of granting relief. Also, it precisely underlines what institutions meant by "*appropriate*" and "*exceptional*" circumstances.

Additionally, when the court plays a supportive role in granting interim relief, circumstances may arise when the court pre-assesses the merits of the dispute. Scholars and academicians opine that such pre-assessment indirectly impacts the proceedings.[55] For instance, if the court while granting relief makes favourable comments on the merits of the application

52. SIAC Rules (n 20) art. 30.3.
53. ICC Rules (n 32) art. 29(7).
54. Hans Smit, 'Provisional Relief in International Arbitration: The ICC and Other Proposed Rules' (1990) 1(3) Am. Rev. Int'l. Arb. 388, 394.
55. Grant Hanessian & E Alexandra Dosman, 'Songs of Innocence and Experience: Ten Years of Emergency Arbitration' (2016) 27(2) Am. Rev. Int'l. Arb 215.

for relief, the other party might consider settling the dispute rather than commencing the arbitration proceedings as the court in such instances has effectively decided the dispute. At this juncture, it is apt to contemplate the Channel Tunnel case which dealt with similar circumstances. In this case, Lord Mustill refused to grant interim relief. The reasoning behind this was based on the ground that "*injunction granted today, would largely pre-empt the very decision of the panel and arbitrators whose support forms the raison d'être of the injunction.*"[56] In the authors' opinion, national courts must follow Lord Mustill's approach while granting interim measures and should be wary of doing so if it is going to comment on the merits of the dispute.

4. ENFORCEABILITY OF EMERGENCY RELIEFS

Emergency arbitration provisions of institutions contractually bind parties,[57] and hence a high degree of compliance towards emergency relief is expected from them. Yet, there is no assurance that a party will comply with the same.[58] Thus, in such situations, the effectiveness of emergency relief is called into question. It is worthwhile to consider the findings of Queen Mary University's survey on international arbitration. As per the survey, 46% of the surveyed respondents were inclined towards opting for the national court to seek interim relief instead of emergency arbitration, with 79% of them citing the enforceability of emergency decisions as a significant concern.[59] Thus, it is all-important for an applicant to be confident about the enforceability of emergency reliefs, or else, the entire mechanism would become redundant.

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56. Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. 1993 AC 334 : (1993) 2 WLR 262, 366-68.
57. SCC Rules (n 18) app 2 art. 9(1) - "*An emergency decision shall be binding on the parties when rendered.*"; ICC Rules (n 32) art. 29(2) - "*The emergency arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.*"; MCIA Rules (n 16) art. 14.8 - "*Any interim relief ordered or awarded by an Emergency Arbitrator shall be deemed to be an interim measure ordered or awarded by a Tribunal. The parties undertake to comply with any such interim measure immediately [.....].*"; SIAC Rules (n 20) sch. 1 para 12 - "*The parties agree that an order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made [.....].*"
58. Gary B Born (n 34) 2628.
59. Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2015, White & Case) 27-28.

Coming to the crux of the paper, the enforceability of relief by EA under the present Indian context majorly stands on two pillars: the statutory recognition of EA under the Principal Act[60] and, the seat of an emergency arbitrator.

Delving upon the first pillar, the Principal Act is absolutely silent with respect to the EAs or enforcement of their reliefs. "The Law Commission of India" [hereinafter "**The Law Commission**"] in its Report no. 246[61] on "*Amendment to the Arbitration and Conciliation Act, 1996*" [hereinafter "**246**th **Report**"] attempted to accord legislative sanction to the emergency arbitration procedure by proposing the following amendment to the term "*arbitral tribunal*" defined under Section 2(d).[62]

"*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.*"

While the Indian arbitration community expected the change to be incorporated in the Principal Act, the Indian Parliament missed a golden opportunity to join the group of a few progressive nations to introduce such a provision. Another opportunity arose when the Srikrishna Committee made a scathing observation pointing out how "*India's approach differs from that of developed arbitration jurisdictions such as Singapore and Hong Kong which have recognised the enforceability of orders given by an emergency arbitrator"*[63] and emphasised upon adopting the recommendation of the 246th Report. However, the recommendation for the second time did not see the light of the day. Thus, unlike some contemporary countries like Singapore and Hong Kong, India failed to provide statutory recognition to an EA which leaves this issue unsettled.

The nomenclature of the term "emergency arbitrator" and the introduction of emergency arbitration procedure in the rules of the institution strongly second the notion of EA being an arbitrator. However, such an argument is not leading us to any determinative conclusion as to whether an EA is

60. Gracious Timothy, 'The Workability of Emergency Arbitrator in India: A Flawed Emergence of the Emergency Arbitrator' (2015) 19 Young Arbitration Review 55, 60.
61. Law Commission of India, *Report No. 246 - Amendments to the Arbitration and Conciliation Act 1996* (Law Com No. 20, 2012).
62. *Id*, 37.
63. Justice BN Srikrishna Committee, *High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (July 30, 2017) 76.

a full-fledged arbitrator. The authors firmly believe that this question has an affirmative answer. To prove so, the author, in this part, assesses the characteristics of an EA based on the distinctive features of an arbitrator.

It is imperative to define an arbitrator in order to ascertain its distinctive features. Surprisingly, there is a lack of guidance under both international conventions and national legislation relevant to defining an arbitrator. Thus it is practical to rely on the general definition of an arbitrator which represents the broad consensus of the arbitration community. Practitioners and scholars have subscribed to the view that different national legislatures are gravitating toward the common definition i.e. "*An arbitrator is an independent and impartial third subject entrusted by the parties with the resolution of their dispute, who will exercise his task in an adjudicatory manner and whose decision will yield the effects of a judgement rendered by state courts.*"[64]

A conspicuous reading of the definition reveals that an arbitrator comprises both contractual and jurisdictional elements. Thus, an EA must possess both of these figures to be recognized as a full-fledged arbitrator. Along similar lines, Yesilirmak also believes that if an EA possesses these two figures, their decision can be treated tantamount to the decision rendered by the arbitral tribunal, thus, enforceable.[65] With respect to the contractual figure, the arbitrator is authorized to issue an interim relief, if required. The source of this power is derived from the agreement between the parties. Similarly, when parties intend to avail the facility of emergency arbitration, they incorporate rules that provide it.[66] The international arbitration community also has no disagreement regarding the contractual nature of an EA. However, the same is not the scenario about the jurisdictional figure. Few scholars and academicians citing their reasons[67] believe that EA lacks jurisdictional figures. On the contrary, the authors opine that EA can also be regarded as a jurisdictional figure as he is bound to follow a procedure akin to an arbitrator. Further, he has to prepare a timetable for a judicial-like procedure and render reasoned decisions based on the submission by the parties. Furthermore, there are a plethora of reasons that can be placed

64. Fabio G Santacroce, 'The Emergency Arbitrator: A Full-fledged Arbitrator Rendering an Enforceable Decision?' (2015) 31(2) Arbitr. Int. 283, 291.
65. Yesilirmak (n 6) ch. 4 para 74.
66. Fabio (n 64) 291.
67. B Baigel, 'The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis' (2014) 31(1) J. Int'l. Arb. 1–18; Gracious Timothy (n 60); Jakob Horn, *Der Emergency Arbitrator und die ZPO* (Mohr Siebeck 2019).

to buttress the argument that an EA is not merely a contractual figure but also holds a jurisdictional figure.

First, the EA's mission is just like a proper arbitrator as he is required to adjudicate the legal claims of the parties in an "*independent and impartial manner*."[68] Ergo, an EA lacking any of these requirements can be challenged.[69] In addition to that, an EA is also required to ensure compliance with due process. Accordingly, he has to provide parties with a reasonable opportunity to present their case.[70] These fundamental principles of arbitration clearly indicate that the EA's mission is not merely contractual but an exercise of jurisdictional nature.[71]

Second, the emergency provisions extend the principle of *kompetenz-kompetenz* to emergency proceedings as all institutions vest power upon an EA to define the boundaries of its own jurisdiction.[72] The principle permits an EA to assess their own competence when it is challenged; in effect, he is authorized to decide on the validity of the arbitration agreement, the ultimate source of his jurisdiction.[73] This altogether establishes that an EA

68. MCIA Rules (n 16) art. 6 - "*Every arbitrator conducting an arbitration under these Rules shall be and remain at all times independent and impartial [.....].*"; ICC Rules (n 32) app 5 art. 2.4 – "*Every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute.*"; LCIA Rules (n 19) Art 5.3 – "*All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or authorised representative of any party.*"
69. MCIA Rules (n 16) art. 10.1 – "*Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and/or independence [.....]*"; ICC Rules (n 32) arts. 14–1 - "*A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat [.....]*"; LCIA Rules (n 19) art. 10.1 - "*The LCIA Court may revoke any arbitrator's appointment if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.*"
70. Friedland & Paul, *Arbitration Clauses for International Contracts* (2nd edn. Juris, Huntington 2007) 143.
71. M Valasek & F Wilson, 'Distinguishing Expert Determination from Arbitration: The Canadian Approach in a Comparative Perspective' (2013) 29(1) Arbitr Int 63, 71.
72. MCIA Rules (n 16) art. 14.5 - "*The Emergency Arbitrator shall have the powers vested in the Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction [.....]*"; SIAC Rules (n 20) sch. 1 para 7 - "*The Emergency Arbitrator shall have the powers vested in the Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction [.....]*"; HKIAC Rules (n 17) Sch 4 para 10 - "*The emergency arbitrator shall have the power to rule on objections that the emergency arbitrator has no jurisdiction [.....]*".
73. Miguel Gómez Jene, *International Commercial Arbitration in Spain*, (Kluwer Law International 2019) 168.

possesses jurisdictional nature as it was near impossible to find such power in a mere contractual basis of arbitration.

Third, the remedial powers to grant interim relief conferred upon the EAs are almost similar to those vested with the arbitral tribunal. For instance, an EA appointed under MCIA Rules has the "*power to order or award any interim relief that he deems necessary.*"[74] And, it permits the tribunal to "*issue an order granting an injunction or any other interim relief it deems appropriate.*"[75] Thus, although MCIA does not expressly state that these powers are similar, a textual comparison of these provisions reveals that the power vested upon EAs and arbitral tribunal is the same.

Finally, just like a tribunal, an EA also has a seat.[76] The seat in the arbitration agreement governs the law of the place where arbitration is to be held,[77] the competent court exercising supervisory function and further, the legal framework in which the proceedings will be carried out. Thus, the seat of arbitration is not a geographical notion but constitutes a voluntary juridical nexus between an arbitration and a given legal system. The seat is yet another feature signifying that EA possesses jurisdictional figures.[78]

The key features mentioned above strongly suggest that an EA possesses both contractual and jurisdictional elements and can therefore be regarded as a full-fledged arbitrator. However, there is still a grey area, as mentioned, an EA is not expressly included in the term "arbitral tribunal" of the Principal Act. Thus, it is the discretion of the court as to whether it will consider the jurisdictional nature of an EA or not. In such circumstances, it majorly depends upon the judiciary's attitude towards arbitration. While, on one hand, the arbitration-friendly court will duly respect the relief of an EA considering its jurisdictional nature. But on the other hand, other courts will refrain from doing so based on the reasoning that the institutional rules

74. MCIA Rules (n 16) art. 14.7.
75. MCIA Rules (n 16) art. 15.1.
76. MCIA Rules (n 16) arts. 14.7, 30.7 and 23.1; SIAC Rules (n 20) sch. 1 para 4 - "*If the parties have agreed on the seat of the arbitration, such seat shall be the seat of the proceedings for emergency interim relief.*"; HKIAC Rules (n 17) sch. 4 para 9 - "*If the parties have agreed on the seat of arbitration, such seat shall be the seat of the Emergency Relief proceedings*".
77. *PT Garuda Indonesia v Birgen Air*, 2002 SGCA 12, para 24 (Singapore Ct. App.); Nigel Blackaby, *Redfern and Hunter on International Arbitration* (5th edn, OUP UK, 2014) ch. 3 para 51.
78. Julian (n 3) 172.

do not trump the Principal Act and therefore cannot provide something that the statutory act does not.

The Supreme Court of India in its much-awaited "Amazon.com NV Investment Holdings LLC v. Future Retail Ltd."[79] judgement dealt with the status of an EA. The Court had to determine "*as to whether an award delivered by an Emergency Arbitrator under the Arbitration Rules of the SIAC Rules can be said to be an order under Section 17(1) of the Principal Act.*" The Future Group argued that it could not since the Principal Act consciously remains silent in relation to emergency arbitration even after the suggestions of the Law Commission and the Srikrishna Report. Rejecting these arguments, the court examined various sections and pointed out how the Principal Act grants parties autonomy to choose to govern their disputes by institutional rules which also includes rendering interim reliefs by EAs. Based on this reasoning, the Court stated that emergency arbitration is endorsed by the Principal Act, not prohibited as argued by the Future Group. The court here could have possibly taken a negative stance considering the definition of the arbitral tribunal and the limited scope of Section 17. However, it applied the purposive and constructive interpretation to the existing provision of the Principal Act and recognised the EA's award in the absence of any statutory framework.

The Supreme Court has set a benchmark by delivering a judgement that is not just important for India but for nations across the globe. However, the judgement is subject to be set aside if, in future, the higher bench of the Court delivers judgement to the contrary. Nevertheless, the author after much deliberation on the nature of emergency arbitration firmly believes that if any such future events occur, the Court will once again take the liberal stance.

While the legislations of majority of the jurisdictions across the globe do not explicitly recognize an EA as a full-fledged arbitrator, their reliefs are indirectly enforced under legislation that recognizes and enforces the reliefs of the arbitral tribunal. This is done based on the reasoning that an EA is an arbitrator and serves the purpose of the regular arbitral tribunal by rendering the interim measures. Similarly, Indian courts indirectly enforce the emergency order/award under Section 17. However, this provision has its own disadvantage being restricted to enforcing the orders/awards passed by India-seated arbitral tribunals. This is so because Section 17 is present in Part I of the Principal Act and by virtue of Section 2(2), it is applicable

79. (2022) 1 SCC 209 : 2021 SCC OnLine SC 557.

only to Indian-seated arbitration. Thus, while Section 17 can indirectly enforce relief of Indian-seated EA, it becomes ineffective in enforcing relief of foreign-seated EA.

Thus, when Part I is inapplicable, the question arises as to whether the relief of foreign-seated EA is enforceable under Part II of the Principal Act. *Firstly*, Part II lacks any provisions similar to Section 17. *Secondly*, awards under Part II are enforced in accordance with the "*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*" (hereinafter the "**New York Convention**"). Going by the experts' opinion, the Convention only enforces awards of a 'final' nature. However, the interim award of an EA under the institution rules is not 'final' and is subject to modification by an EA himself and the tribunal formed thereafter.[80] Thus, due to the lack of finality, the foreign-seated emergency award is not enforceable under Part II. Moreover, the Convention only recognizes an award and any decision of an EA in the form of an order is also not enforceable under Part II.[81] Thus it is very difficult to enforce the interim order/award of foreign-seated EA under the Principal Act. This inability of the legislature compels the parties to seek relief through Indian courts.

Interestingly, Indian courts have adopted a '*hybrid approach*'[82] wherein they indirectly enforce the interim relief of an EA by granting a mirror relief under section 9. In *Avitel,*[83] the petitioner already sought interim relief from a Singapore-seated SIAC-administered EA. Subsequently, he filed a Section 9 application seeking similar relief. After an independent

80. MCIA Rules (n 16) art. 14.9 - "*Any order or award of the Emergency Arbitrator may be confirmed, varied, discharged or revoked, in whole or in part, by an order or award made by the Tribunal upon application by any party or upon its own initiative.*"; LCIA Rules (n 19) Art 9.9 - "*Any order or award of the Emergency Arbitrator [.....] may be confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative.*"; ICC Rules (n 32) art. 29(3) - "*The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator*".
81. Jasmine (n 35) 112; Tejas Karia (n 5) 241; Sai RGarimella & Poomintr Sooksripaisarnkit, 'Emergency Arbitrator Awards: Addressing Enforceability Concerns Through National Law and the New York Convention' in Katia Fach Gomez and others (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 68.
82. Grant Hanessian (n 55) 231.
83. Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. 2014 SCC OnLine Bom 929.

review of the circumstances, the court granted a mirror relief similar to one granted by SIAC. The Court, while doing so, clarified that the present application was not to enforce the emergency award, but was seeking a relief independent of the emergency award.

Similarly, the Delhi High Court in *Raffales*[84] while considering the maintainability of a petition under Section 9 clarified that "*recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted*." The court held that an emergency award cannot be enforced under the Principal Act and the parties are left with no recourse but to file a civil suit.

Thus, the parties have found a flexible approach to solve this problem, which uses the existing provisions of the Principal Act in an innovative way. However, this hybrid approach does not seem to be a feasible option, as parties would be required to again present the case before the court when the same has been done before the EA. Also, the court would also require some time to review the matter and grant relief, and during this time, if the reluctant party dissipates the assets, the whole point of getting relief from an emergency arbitration would be futile.

In 2015, Section 17 was amended to ensure that the measures rendered under this provision were statutorily enforceable.[85] The newly introduced Section 17(2) drew inspiration from Article 17H of "UNCITRAL Model Law on International Commercial Arbitration" [hereinafter "**Model Law**"]. The Parliament while drafting Section 17(2) omitted a critical element (emphasized) of Article 17H(1) of the Model Law which stipulates that "*An interim measure issued by an arbitral tribunal shall be recognized as binding... and enforced upon application to the competent court, irrespective of the country in which it was issued [.....].*"[86] While it is difficult to comprehend if this omission was deliberate or a consequence of some oversight, the mere addition of the term "*irrespective of the country in which it was issued*" in Section 17(2) would have ensured the enforceability of relief of foreign-seated EAs.

84. Raffles Design International India (P) Ltd. v Educomp Professional Education Ltd. 2016 SCC OnLine Del 5521.
85. Report No. 246 (n 61) 27.
86. *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law* (1985) art. 17-H(1).

5. CONCLUSION AND WAY FORWARD

As per Queen Mary's 2021 International Arbitration Survey, the ability to enforce the relief of EAs makes the seat 39% more attractive to users.[87] The importance of emergency arbitration was fore casted way before by arbitration-friendly seats like Hong Kong and Singapore. Accordingly, these nations made favourable amendments regarding emergency arbitration in their respective legislations as soon as the concept was introduced by the HKIAC and SIAC Rules.[88] Such an expeditious move was expected from the Parliament with the introduction of this concept in the rules of prominent arbitral institutions in India.[89] However, it remained aloof even after the recommendation of the 246th Report and the Srikrishna Report. The situation became graver when the reluctant party in *Amazon v. Future Retail* used the oversight of the Parliament as an argument to get away with the emergency award. However, the Supreme Court adopted the pro-arbitration approach and settled the matter.

Better late than never, the Parliament can still provide a statutory framework for emergency arbitration by including EA in the definition of the 'arbitral tribunal'. This revolutionary move would ensure that international parties choose Indian institutions to get their issues resolved. However, merely expanding the definition of 'arbitral tribunal' would do nothing more than mere lip service to creating an effective emergency arbitration regime as the Principal Act is incompetent to enforce awards/orders of foreign-seated EA. This drawback can be done away with by permitting a small tweak in Section 17. The legislature should simply add on the term "*irrespective of the country in which it was issued*" in Section 17(2). By virtue of this addition, a foreign-seated emergency order/award will be enforceable in India under Section 17.

Incorporating this suggestion in the Principal Act along with the recommendations of the 246th Report would ensure that emergency awards/orders of both domestic and foreign-seated EAs are enforceable in India. Nevertheless, it remains to be seen when emergency arbitration procedures will see the light of day. However, the problem is not as exaggerated as it

87. Queen Mary University of London, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* 8.

88. Kartikey Mahajan & Sagar Gupta, 'Uncertainty of Enforcement of Emergency Awards in India' (*Kluwer Arbitration Blog*, 7 December 2016) http://arbitrationblog.kluwerarbitration.com/2016/12/07/uncertainty-of-enforcement-of-emergency-awards-in-india accessed 7 June 2022.

89. Justice BN Srikrishna Committee Report (n 63) 3.

seems, the lack of cases on enforcement issues of emergency reliefs reflects parties' voluntary compliance with the decision of an EA. But, to play safe, prominent Indian institutions like MCIA can amend their rules to specify a monetary penalty for each day in which the respondent fails to comply with EAs' award. This could turn out to be extremely productive if direct enforcement via a national court is not possible.[90]

90. Ben Giaretta, 'The Practice of Emergency Arbitration' 2017 (1) Belgian Rev. Arb. 83, 98.