



Emergency arbitration under institutional arbitration rules: A comparative study

Vikrant Sopan Yadav

Assistant Professor, Modern Law College, Pune, Maharashtra, India

Abstract

In commercial disputes, there may exist a situation demanding urgent remedy. However, due to unavailability of sufficient time, parties to arbitration are forced to approach court for emergency relief. In order to remedy this drawback, modern day institutional arbitration has come up with the concept of Emergency Arbitration.

This research article contains a brief of some major institutional arbitration rules which have provided for Emergency Arbitration. It also contains the meaning, advantages and limitations of Emergency Arbitration and its recognition status in India.

Keywords: emergency arbitration, institutional arbitration rules, emergency interim relief

Introduction

“Muslim Law is an integral part of the Indian civil law – no less legally valid and socially relevant in any way than the personal law of the majority community.” – Tahir Mahmood.

Islamic law is applicable on all Muslims. Now the first thing it is an Arbitration in which an arbitrator/tribunal is appointed to provide interim relief in case of urgency/emergency, before the appointment of arbitrator/tribunal or commencement of main arbitration. Many international arbitral institutions have recognised the concept of Emergency Arbitration and have provided rules for the same. However, it lacks statutory recognition in many states.

The efficacy of an Emergency Arbitration, invoked by a party, survives on a chariot of two wheels ^[1]:

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

Singapore International Arbitration Centre (SIAC)

In July 2010, SIAC became the first international arbitral institution based in Asia to introduce provisions that permitted a party to seek the appointment of an emergency arbitrator ^[2]. Provisions relating to Emergency Arbitration are contained in Schedule 1 of the SIAC Rules.

Clause 1 of schedule 1, SIAC Rules requires the parties to the arbitration to file an application for emergency interim relief and to deliver the copy of same to the other party. This application shall also state,

- a. the nature of the relief sought;
- b. the reasons why the party is entitled to such relief; and
- c. a statement certifying that all other parties have been provided with a copy of the application

On receipt of application, the president of SIAC is empowered to appoint an arbitrator ^[3].

An interim order or Award issued by the Emergency Arbitrator may be reconsidered, modified or vacated by the Tribunal (Constituted as per the Arbitration Agreement). The rule also provides for cessation of powers of emergency arbitrator, on

constitution of Arbitration tribunal as per the Arbitration Agreement ^[4].

Emergency Arbitrator is required to disclose, to the Registrar, any circumstances that may give rise to justifiable doubts as to his impartiality or independence. This provision is absent in many other institutional rules.

Rule 12 makes the order/award passed by emergency arbitrator binding on the parties to such arbitration. However, unlike recent amendment to Sec. 8, of Indian Arbitration Act, 1996 and ICC rule on Emergency Arbitration, the rules does not mention about abidingness of award/order on the successors of parties.

International Chamber of Commerce (ICC)

Article 29: Emergency Arbitrator

Article provides for Emergency Arbitration in case of necessity of urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ^[5].

The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order passed by it. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator ^[6].

The provision under Article 29 can be availed only by the parties that are either signatories of the arbitration agreement or successors to such signatories ^[7].

The Emergency Arbitrator Provisions do not apply if ^[8]:

- the arbitration agreement under the Rules was concluded before 1 January 2012 ^[9] (the date on which the ICC Arbitration Rules came into force/ prospective application);
- the parties have opted out of the Emergency Arbitrator Provisions (Doctrine of Party Autonomy); or
- The parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.

The Hong Kong International Arbitration Centre (HKIAC)

Article 23 and Schedule 4 of the 2013 HKIAC Administered Arbitration Rules provides for the Emergency Arbitration. Like

all other institutional rules, even in HKIAC Rules, the process of Emergency Arbitration begins with notice to HKIAC and other party to arbitration agreement ^[10]. All other relevant procedural provisions are similar to other above mentioned institutional rules.

The International Centre for Dispute Resolution (ICDR)

Article 6 of ICDR rules of arbitration provides for the Emergency Arbitration. On receipt of notice for Emergency Arbitration, the Administrator of ICDR shall appoint the arbitrator within one business day ^[11]. This time limit for appointment ensures the speedy process which is absent in many other institutional rules on Emergency Arbitration. Such appointed arbitrator is expected to prepare schedule within two days.

The Stockholm Chamber of Commerce (SCC)

The SCC provides for online application (through mail) for Emergency Arbitration. Appendix II of SCC Arbitration Rules 2017 provides for detail provisions regarding Emergency Arbitration ^[12]. Unlike other institutional rules (wherein the party applying for Emergency Arbitration has to send the notice to other party), SCC Rules requires the secretariat of SCC to send the notice to the other party ^[13].

Any emergency decision on interim measures shall be made no later than 5 days from the date the application was referred to the Emergency Arbitrator ^[14]. This provision is absent in other institutional rules. Article 9 of the rules which provides for the bindingness of order/award passed in Emergency Arbitration, also provides for grounds, existence of which renders the order/award non-binding. These grounds are,

1. the Emergency Arbitrator or an Arbitral Tribunal so decides;
2. an Arbitral Tribunal makes a final award;
3. arbitration is not commenced within 30 days from the date of the emergency decision; or
4. the case is not referred to an Arbitral Tribunal within 90 days from the date of the emergency decision.

The Swiss Chambers' Arbitration Institution

Article 42 of Swiss Rules of International Arbitration (Swiss Rules) 2012 ^[15] provides for Emergency relief/arbitration prior to commencement of actual arbitration. Unless otherwise agreed, every application for Emergency Arbitration is referred to sole arbitrator.

Like Stockholm Chamber, Swiss Rules also provide time limit for Emergency Arbitration. Article 43 (7) provides that, the decision on the Application shall be made within fifteen days from the date on which the Secretariat transmitted the file to the emergency arbitrator.

London Court of International Arbitration (LCIA)

Section 9 B of LCIA Arbitration Rules (2014) provides for Emergency Arbitration. Emergency Arbitrator is appointed by the LCIA Court within three days from receipt of application, after which the arbitrator has to decide the claim within fourteen days.

The Mexico City National Chamber of Commerce (CANACO)

Article 50 of Mexico City National Chamber Of Commerce Arbitration Rules provides for Emergency Arbitration. On

receipt of application for emergency relief, Commission appoints a single interim arbitrator. Such interim arbitrator is required to prepare an agenda within two days of his appointment. He has the power to order any interim measure of protection or preliminary order he/she deems necessary, including injunctive relief and measures for the protection or conservation of title in form of interim award or order. Unlike other institutional rules, interim arbitrator is required to state reasons for his award/order.

Emergency Arbitration in India

The arbitration and conciliation act, 1996 does not expressly provide for Emergency Arbitration. The law commission of India in its 246th report on 'Amendments to the Arbitration and Conciliation Act 1996,' provided for following amendment to Sec. 2 (d),

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.

By amending the definition of Arbitral Tribunal, the commission sought to accord legislative sanction to the concept of an "emergency arbitrator" present in various rules of institutional arbitration. However the 2015 amendment to the Arbitration and Conciliation Act, 1996 has failed to take cognizance of this, and has not expressly recognised the concept of Emergency Arbitration.

Institutional recognition of Emergency Arbitration in India

- The Delhi International Arbitration Center (DAC), Established by the Delhi High Court, the DAC provides for Emergency Arbitration in Part III- A of its Arbitration Rules ^[16]. Section 18A (6) provides time limit of seven days to complete the Emergency Arbitration process form appointment of arbitrator.
- Mumbai Center for International Arbitration Established in a joint initiative between the Government of Maharashtra and the domestic and international business and legal communities, the MCIA (Rules) 2016 ^[17], under Section 3 enumerates the provisions of Emergency Arbitration.
- Madras High Court Arbitration Center (MHCAC) Established by the Madras High Court, the MHCAC (Internal Management) Rules, 2014, ^[18] under Part IV, Section 20 r/w Schedule-A and Schedule-D enumerate the provisions of Emergency Arbitration.

Advantages

- Emergency Arbitration is consistent with parties intention of avoiding court litigation (due to complex and time consuming process).
- Arbitration ensures the confidentiality.
- Expert determination of urgent relief (judge in traditional court may not be expert in subject matter of the dispute).
- Party autonomy (Parties can determine the place, arbitrator/tribunal etc.).

Limitations

- Order against third party is not available in Emergency Arbitration. Due to consensual nature of arbitration, only consenting parties and their successors are bound by the Arbitration ^[19]

- No deterrence for Breach of Interim Orders. Traditional courts can take action against noncompliance with its order, which ensures enforceability. Such kind of action, subject to agreement to the contrary, may be absent in Arbitration. This may render the entire exercise of Emergency Arbitration futile.
19. Available at, <http://www.hcmadras.tn.nic.in/arbitration-rules.pdf>, accessed on 13th June 2017.
 20. Article 29(5) of the ICC Rules expressly provides that the ICC's Emergency Arbitrator Provisions apply only to signatories to the arbitration agreement or their successors.

Conclusion

Arbitration is preferred by the parties to the commercial dispute over the traditional court process mainly due to its speedy determination of dispute. Emergency Arbitration is a recent development with an object of addressing the need for emergency relief required prior to constitution of arbitration tribunal. Though it is recognised by many arbitral institutes in their respective arbitration rules, it still lacks the recognition by national legislative system (including India). The suggestion of Law Commission of India in its 246th report is relevant and important in this regard.

Hence, the Arbitration and Conciliation Act, 1996 may be amended to recognise the Emergency Arbitration and the order/award passed in such Emergency Arbitration may be treated and enforced as an interim relief. This may render the order/award under Emergency Arbitration binding and enforceable; thereby further improving the pro-arbitration environment in India (developed subsequent to Supreme Court's decision in BALCO)

References

1. Assistant Professor, Modern Law College, Pune.
2. Madhu Sweta and Kanika Tandon, Emergency Arbitration in India: Concept and Beginning, accessed from <http://www.mondaq.com/india/x/547970/trials+appeals+compensation/Emergency+Arbitration+In+India+Concept+And+Beginning>, accessed on 12th June 2017.
3. Available.
4. Rule 3, schedule 1, SIAC Rules on Arbitration.
5. Rule 10, schedule 1, SIAC Rules on Arbitration.
6. Article 29 (1), ICC Rules.
7. Article 29 (3), ICC Rules.
8. Article 29 (5), ICC Rules.
9. Article 29 (6), ICC Rules.
10. Parties may agree that the Emergency Arbitrator Provisions apply to arbitration agreements concluded before 1 January 2012 (Party Autonomy).
11. Article 4, Hong Kong International Arbitration Centre Arbitration rules.
12. Article 6 (2), ICDR Rules And Mediation Procedures.
13. Available at, http://www.sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf
14. Article 3, Appendix II, SCC Arbitration rules, 2017.
15. Id, Article 8.
16. Available at, https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_english_2012.pdf, accessed on 14th June 2017.
17. The Delhi International Arbitration Centre (DAC) (Arbitration Proceedings) Rules, Available at, <http://www.dacdelhi.org/topics.aspx?mid=55>, accessed on 13th June 2017.
18. Available at, <http://mcia.org.in/mcia-rules/english-pdf/>, accessed on 13th June 2017.