

**EMERGENCY ARBITRATION IN INDIA: GAPS, GAINS,
AND GOALS**

~ Dr. Daniel Mathew *

ABSTRACT

The idea of arbitration is not new to India, and has existed in varying forms with mixed success. Recent years have witnessed efforts to make India a global arbitration hub. While the legislature has focused on amending the Arbitration and Conciliation Act 1996 to keep pace with global frameworks, the judiciary has, through a spate of decisions, reinforced a pro-arbitration approach. Such an approach, in turn, determines the advancement of law on crucial issues. One such issue is that of emergency arbitration, in particular, the enforcement of its orders. The response of the Indian judiciary is varied and contingent on the seat of arbitration. This conundrum has also caught the legislative eye, which attempted to articulate a framework for emergency arbitration through the recently issued amendment bill. Against this backdrop, the article attempts to explore and critically engage with the approach of the Indian judiciary on the issue of the enforcement of orders of an emergency arbitrator. Firstly, it critically engages with the decisions on this issue, both in the context of arbitration seated in and outside India, to articulate the current state of law. Secondly, it engages in a critical appraisal of the proposed framework under the 2024 amendment bill to ascertain its effectiveness, and

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finally, concludes with some recommendations on how the proposed approach could be streamlined.

Keywords: dispute resolution, arbitration, emergency arbitration, emergency arbitrator, interim relief, enforcement of emergency relief

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INTRODUCTION

Arbitration in India has had a long and contentious history. The idea of arbitration is not new to India, and has existed in some form or the other with varying degrees of success. Independent India took forward colonial legislative attempts to articulate a comprehensive set of laws to deal with various aspects of arbitration, including the enforcement of foreign awards.¹ While meeting with early success, the working of these legislations presented much grief to all involved. The anguish was succinctly captured by the Supreme Court of India in its decision *Guru Nanak Foundation v. Rattan Singh & Sons*. However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep.”² In 1996, following recommendations of the General Assembly, India legislated a completely new framework for arbitration on the lines of the United Nations Commission on International Trade Law (“**UNCITRAL**”) Model Law on International Commercial Arbitration.³ The Arbitration and Conciliation Act 1996 (“**1996 Act**”) was meant to be a clean break from the past and was done with the intention to align the Indian arbitration regulatory model with globally accepted norms.

The working of the new regime has been quite an experiment. Early judicial engagements saw the application of the 1996 Act stretched to

¹ LAW COMMISSION OF INDIA, 76TH REPORT ON ARBITRATION ACT 1940 ¶¶1.12-1.24 (1978).

² *Guru Nanak Foundation v. Rattan Singh & Sons*, (1981) 4 SCC 634.

³ UNGA Res 40/72 (1985) UN Doc A/RES/40/72), UNCITRAL, Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, annex I (June 21, 1985).

absurd limits.⁴ This expansionist approach immensely damaged the potentiality of the 1996 Act, with the effect that both domestic and foreign users actively sought to avoid the Indian arbitration regime. Of particular concern was the overreaching supervisory jurisdiction assumed by the Indian courts on foreign seated arbitration.

Much water has flowed under the bridge in the last decade and a half. In recent years, India has taken enormous strides in reforming its dispute resolution framework with the intention to create a more conducive environment for attracting and retaining foreign investment and in the process improve global perception on doing business in India. A crucial approach in this regard has focused on bolstering the arbitration framework in India by adopting a more pro-arbitration approach in the legislative, policy, and judicial arena. The 2015 Global Conference on Strengthening Arbitration and Enforcement in India⁵ organised by the National Institution for Transforming India (“**NITI Aayog**”), India’s apex public policy think-tank) heralded a clear and definite intent of the Government of India to robustly address critical concerns around the working of arbitration in India. In a similar vein, a spate of amendments (2015, 2019, and 2021) to the 1996 Act, together with a marked shift in the approach of

⁴ *Bhatia International v. Bulk Trading*, (2002) 4 SCC 105. *Venture Global Engineering v. Satyam Computer Services*, (2008) 4 SCC 190.

⁵ *President of India to Inaugurate Global Conference on 'National Initiative Towards Strengthening Arbitration and Enforcement in India' Tomorrow*, PIB, (Oct 20, 2016), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=151821>

Indian courts in favour of arbitration,⁶ affirmed the embedding of an overarching pro-arbitration outlook and approach.

The above, however, only presents one side of the story. While seemingly pro-arbitration, decisions rendered by the Indian judiciary have at times indicated otherwise on key issues. A case in point is the handling of orders of emergency arbitrators by the Indian courts. In recent years, Indian courts have had to increasingly grapple with a varied set of issues pertaining to such orders, particularly enforcement and recourse available against them. While decisions engaging with the above noted issues have been few, they remain of crucial concern, given that the concept of emergency arbitration is fast becoming a staple across jurisdictions. Additionally, the 1996 Act, the principal legislation on arbitration, is silent on the concept, leading to case-led development of law on these issues.

I. EMERGENCY ARBITRATION

As the term suggests, the idea of emergency arbitration is focused on providing relief in situations likely to be classified as an exigency. This is done with the intention of protecting assets and evidence that might be in danger of being destroyed, damaged, or in some manner altered, leaving it of no value either to the proceedings or the parties. The overriding idea is usually of conservation and doing so quickly without losing valuable time.

⁶ See generally, *Bharat Aluminium v. Kaiser Aluminium*, 2012 (9) SCC 522 (“**Balco**”). *PASL Wind Solutions Pvt Ltd v. GE Power Conversion India Private Ltd*, (2021) 7 SCC 1.

It is of particular importance in instances where the merits-arbitral tribunal has not been formed at all.

Emergency arbitration as a concept has been gaining ground for quite some time now. It is considered to be a crucial part of various arbitration regimes as it is seen to play an important role in keeping the proceedings relevant. It addresses an important concern, namely the desire to avoid national courts by the arbitrating parties even in instances where the arbitration legislation permits such recourse. This desire stems from a variety of reasons, including a lack of confidence in the courts, leakage of confidential information, high costs, extended time for resolution, etc.

Provisions relating to emergency arbitration found in various arbitration regimes adopt a similar understanding of emergency arbitration, particularly as regards the nature, scope of power, standards for determination, and timelines. The emergency arbitrator is vested with crucial powers for granting urgent relief quickly. The nature of the relief was categorically interim, directed at the sole purpose of keeping the arbitration relevant through conservation of crucial assets, evidence, or directing the party's behaviour. It is therefore for limited purpose, ad hoc in nature, and dissolves with the coming into being of the merits-arbitral tribunal. Decisions of the emergency arbitrator normally do not bind the merits arbitral tribunal.⁷ Different regimes tweak this standard model in

⁷ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 235-236 (2015).

varied ways to serve specific purposes, particularly in terms of the procedure to be adopted during such arbitration.

II. INDIAN EXPERIENCE

The Indian arbitration regime lacks the agility exhibited by some of the other prominent regimes. This holds true even for common and proven innovations such as emergency arbitration. To date, the 1996 Act does not directly incorporate the idea of emergency arbitration. That is, however, not to say that there haven't been discussions around it. A notable one was initiated by the Law Commission of India in its 246th Report, recommending the incorporation of emergency arbitration into the Indian arbitration regime by providing it with statutory recognition. The report proposed an amendment to Section 2(1)(d) of the 1996 Act, so as to provide statutory recognition to arbitral institution rules such as SIAC or ICC Rules, which provided for the appointment of an emergency arbitrator.⁸ The report suggested the following amendment to section 2(1)(d) which provided “(d) ‘arbitral tribunal’ means a sole arbitrator or a panel of arbitrators”, to these words the following addition was proposed “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”.⁹ The 2015 amendment of the 1996 Act however, failed to incorporate this progressive suggestion.

⁸ LAW COMMISSION OF INDIA, 246TH REPORT ON AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996, 37 (2014).

⁹ *Id.*

In 2017, a high-level committee constituted under the chairmanship of Justice BN Srikrishna to review the institutionalisation of the arbitration mechanism in India, *inter alia*, observed that there was significant uncertainty in the law regarding the enforceability of awards rendered in emergency arbitration.¹⁰ The report went on to recommend that “*Given that international practice is in favour of enforcing emergency awards, it is time that India permitted the enforcement of emergency awards in all arbitral proceedings. This would also provide legislative support to rules of arbitral institutions that presently provide for emergency arbitrators.*”¹¹ Yet no such incorporation was done, even though the 1996 Act had been amended twice since then. The omission is problematic considering the statutory silence on what is an emerging issue.

A. CURRENT WAY AROUND – TREATMENT BY THE INDIAN JUDICIARY

It is said that a human mind is infinitely adaptive, in that it has an infinite capacity to ascertain work-arounds for tough situations. In the case of emergency arbitration, the lack of statutory recognition has not deterred progress in this matter. This is so because the lack presents a regulatory gap, a silence in law. This silence has been plugged in by various arbitral institutions in India, incorporating provisions of emergency arbitration in their rules in line with international best practices. Examples include the rules of the Delhi International Arbitration Centre (“**DIAC**”),¹² the

¹⁰REPORT OF THE HIGH-LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA 76 (July 2017), <https://legallaffairs.gov.in/sites/default/files/Report-HLC.pdf>.

¹¹ *Id.*

¹² DIAC (Arbitration Proceedings) Rules, 2023 pt E, <https://dhcdiac.nic.in/wp-content/uploads/2025/03/DIAC-Arbitration-Proceedings-Rules.pdf>.

Mumbai Centre for International Arbitration (“**MCIA**”),¹³ the Madras High Court Arbitration Centre (“**MHCA**”),¹⁴ and International Chamber of Commerce India,¹⁵ to name a few. Given the increased focus on institutional arbitration in recent times,¹⁶ this work-around has proved to be successful. Arbitral institution rules, so long as they are not inconsistent with the mandatory provisions of the 1996 Act, are given effect to.

Over the years, the Indian judiciary has adopted a reserved approach towards what emerges from a foreign seated arbitration. From *Bhatia*¹⁷ to *Balco*,¹⁸ the Indian judiciary moved from an expansionary to a conservatory approach, i.e., first claiming jurisdiction over foreign seated arbitration and later pulling back to suggest a lack of jurisdiction as regards such arbitration with the Indian courts. While this matter was resolved to some extent, concerns surrounding the normative validity of emergency arbitration and its outcomes remained. In other words, is emergency arbitration recognised under the 1996 Act, and if so, whether adequate mechanisms exist under the 1996 Act for its enforcement? The trajectory of arbitral jurisprudence in this regard has hinged on the seat of arbitration.

¹³ MCIA Rules 2016, Rule 14, <https://mcia.org.in/arbitration-rules/>.

¹⁴ MHCA Proceedings Rules ,2017, <https://mhc.tn.gov.in/arbitration/>.

¹⁵ ICC India, Arbitration and ADR Rules Article 29, <https://iccwbo.org/dispute-resolution-services/arbitration/>.

¹⁶ *The Quest for making India as the Hub of International Arbitration*, PIB, (Jun 12, 2019), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1574071>.

¹⁷ *Bhatia International v. Bulk Trading*, (2002) 4 SCC 105.

¹⁸ *Bharat Aluminium v. Kaiser Aluminium*, 2012 (9) SCC 522.

B. EMERGENCY ARBITRATION IN AN INDIA SEATED ARBITRATION

For emergency arbitration in an Indian seated arbitration, one needs look no further than the recent Amazon-Future dispute. While this dispute has witnessed much wrangling among the parties on numerous issues both before the Supreme Court and the Delhi High Court, the present discussion is limited to discussions on emergency arbitration. The dispute concerned the attempted transfer of Future Group's retail assets worth USD 3.38bn to Reliance Industries. Amazon claimed that this transaction violated the shareholders agreement between Amazon and the Future group.¹⁹ On the other hand, Future Group categorically denied any wrongdoing and instead accused Amazon of *malafide* working. While the seat of arbitration was New Delhi, the parties had agreed to arbitration under the SIAC rules, which provided for emergency arbitration.²⁰ The emergency arbitrator granted interim relief to Amazon by putting a temporary stop to the future group-reliance transfer. Amazon then approached the Delhi High Court for enforcement of the order of the emergency arbitrator under Section 17(2) of the 1996 Act.

The Delhi High Court engaged in a combined reading of Section 2(6) and 2(8) to conclude that SIAC rules stood incorporated in the parties' arbitration agreement. This meant that the parties had to adhere to its provisions, including those relating to emergency arbitration. In a rather

¹⁹ Future Coupons Private Limited v. Amazon COM NV Investment Holding LLC, (2022) SCC Online SC 126.

²⁰ *Id.*

progressive approach, the court concluded that the current arbitration framework was adequate for recognising emergency arbitration and no further statutory recognition was needed. For the court, an emergency arbitrator was an arbitrator for all intents and purposes, and its orders were an order under section 17(1), enforceable under section 17(2) of the 1996 Act.²¹ The court observed, “By virtue of Section 2(8) of the Arbitration and Conciliation Act, the Rules of Singapore International Arbitration Centre are incorporated in the arbitration agreement between the parties. By incorporating the Rules of SIAC into the arbitration agreement, the parties have agreed to the provisions relating to Emergency Arbitration. 144. This Court is of the view that the Emergency Arbitrator is an Arbitrator for all intents and purposes, which is clear from the conjoint reading of Sections 2(1)(d), 2(6), 2(8), 19(2) of the Arbitration and Conciliation Act and the Rules of SIAC which are part of the arbitration agreement by virtue of Section 2(8). Section 2(1)(d) is wide enough to include an Emergency Arbitrator. 145. Under Section 17(1) of the Arbitration and Conciliation Act, the Arbitral Tribunal has the same powers to make interim order, as the Court has, and Section 17 (2) makes such interim order enforceable in the same manner as if it was an order of the Court. The Interim Order is appealable under Section 37 of the Arbitration and Conciliation Act.” The court took a stern view of the wilful disobedience by the respondent, and initiated various actions including imposition of cost, and attachment of properties. Operation of the order was stayed by the division bench and the matter reached the apex court.²²

²¹ Amazon COM NV Investment Holding LLC v. Future Coupons Private Limited, (2021) 280 DLT 618.

²² *Id.*

Further, In *Future Coupons Private Limited v. Amazon COM NV Investment Holding LLC*,²³ the above decision was set aside, for failing to provide the respondent adequate time to respond to various application and in the process violating principles of natural justice. This was a 3-judge bench and rendered after the 2-judge bench apex court decision which had engaged with legality of emergency arbitration within the Indian arbitration jurisprudence. The 3-judge bench did not express an opinion on the exposition of law done earlier.

In appeal, the Supreme Court of India in *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd*²⁴ (Amazon) confirmed that an interim relief rendered by an emergency arbitrator in an arbitration seated in India was enforceable under the 1996 Act. The court observed “*Given the fact that party autonomy is respected by the Act and that there is otherwise no interdict against an Emergency Arbitrator being appointed, as has been held by us hereinabove, it is clear that an Emergency Arbitrator’s order, which is exactly like an order of an arbitral tribunal once properly constituted, in that parties have to be heard and reasons are to be given, would fall within the institutional rules to which the parties have agreed, and would consequently be covered by Section 17(1), when read with the other provisions of the Act, as delineated above. [...] We, therefore, answer the first question by declaring that full party autonomy is given by the Arbitration Act to have a dispute decided in accordance with institutional rules which can include Emergency Arbitrators delivering interim orders, described as “awards”. Such orders are an important step in aid of decongesting*

²³ *Future Coupons Private Limited v. Amazon COM NV Investment Holding LLC*, (2022) SCC Online SC 126.

²⁴ *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd* (2022) 1 SCC 209.

*the civil courts and affording expeditious interim relief to the parties. Such orders are referable to and are made under Section 17(1) of the Arbitration Act.*²⁵ Its reasoning hinged on a five-fold justification, namely:

- a. Party autonomy – the 1996 Act [Sections 2(1)(a), (6) and (8)] permits parties to select any institutional rules, including ones providing for emergency arbitration.²⁶
- b. The only instance where this is problematic is if such rules are against mandatory rules of the 1996 Act. There was no express or implied exclusion of an emergency arbitrator under the statutory framework.²⁷
- c. The term ‘arbitral proceedings’ utilised in Section 17 clearly contemplated arbitral proceedings commenced after the receipt of notice of arbitration as provided in Section 21. This accordingly, would include emergency arbitration proceedings.²⁸
- d. Contextually, understood the term ‘arbitral tribunal’ utilised in Section 17 envisages an emergency arbitrator.²⁹
- e. Finally, the very idea of an emergency arbitrator fell within the broader ethos and objectives of the 1996 Act, namely (a) decongestion of the court system, and (b) provision of a more efficacious and speedy remedy by a tribunal

²⁵ *Id.*

²⁶ *Id.* ¶17.

²⁷ *Id.* ¶¶14 and 21.

²⁸ *Id.* ¶13.

²⁹ *Id.* ¶23

specifically created to adjudicate the dispute.³⁰ For the court, the design of the 1996 Act, particularly in view of provisions such as Section 9(3), was meant to reduce recourse to the court given an arbitral tribunal could look into the matter.

While the decision provided a meaningful extension of the 1996 Act, its approach is not without difficulty. Some points of concern are outlined below.

i. Arbitral Tribunal – Meaning

A key concern arises as regards its understanding of an ‘arbitral tribunal’. It was argued that an ‘arbitral tribunal’ contemplated under Sections 2(1)(d) and 17, was one which, in addition to interim relief, could grant final relief as well. Clearly, an emergency arbitrator does not adjudicate and therefore, cannot render an award. As a result, it could not be an arbitral tribunal within the contemplation of the 1996 Act. To support this argument, a contrast was drawn with Section 9, which provided for the availing of interim relief before the commencement of arbitral proceedings. In contrast, Section 17 did not provide for the term ‘before’ and accordingly, an emergency arbitrator was outside the contemplation of the 1996 Act.³¹

³⁰ *Id.* ¶¶39 and 40.

³¹ *Id.* ¶22.

The court agreed with the understanding that the arbitral tribunal contemplated under Section 17 was a tribunal that had the authority to grant both interim and final reliefs. However, this could not be read as an exclusion of the emergency arbitrator from the ambit of the 1996 Act. The court refuted the exclusion argument by proposing a three-pronged counter – (a) the definition of an arbitral tribunal contemplated under section 2(1)(d) was subject to ‘unless the context otherwise requires’ argument; (b) the term ‘arbitration’ was defined as ‘any arbitration whether or not administered by permanent arbitral institution’, the natural meaning of which therefore would include emergency arbitration as well specifically when read with Sections 2(6) and (8); and (c) Section 17 utilises the phrase ‘during arbitral proceedings’ which when read in conjunction with Section 21, was elastic enough to include emergency arbitration proceedings.

But as the court conceded that the definition of arbitral tribunal in Section 2(1)(d) tied the understanding of the arbitral tribunal to one that could give both interim and final relief,³² it was faced with the task of reconciling this with its inclusive reading of Section 17. It did so by distinguishing the meaning of the arbitral tribunal as provided under Sections 2(1)(d) and 17. Reading the context of Section 17 as interim measures ordered by the arbitral tribunal, the court concluded that this context required a different reading of the term arbitral tribunal. This is because there was no restriction on party autonomy to choose institutional rules that provided for emergency arbitration under the 1996 Act. Secondly,

³² *Id.* ¶23.

the term ‘arbitral proceedings’ had a scope larger than merely ‘proceedings’ before the arbitral tribunal. As a result, for Section 17, the meaning of the term arbitral tribunal could not be limited to an arbitral tribunal which could grant both interim and final relief.

This is a highly convoluted reading. For instance, it is unclear why the court agreed to the suggestion that the 1996 Act defines an arbitral tribunal as one that could give both interim and final relief. On a plain reading, the definition contained in Section 2(1)(d) merely provides that an arbitral tribunal means a sole arbitrator or a panel of arbitrators. It does not tie the meaning of an arbitral tribunal to the ability of the tribunal to grant a type of relief or the nature of the relief. This alone should have been enough for the court to conclude that an emergency arbitrator was contemplated in the 1996 Act. Even otherwise once it had given an expansive understanding to the term ‘arbitral proceedings’ under section 17, this differentiated understanding of the arbitral tribunal was unnecessary. Rather, the court should have begun with the ordinary meaning of the term since Section 2(1)(d) is clearly without limitations. Its application under different provisions could have contextual application, i.e., with suitable restrictions where needed. Such expansive reading would enable other relevant provisions to apply in instances such as those safeguarding independence, impartiality, and confidentiality, which remain critical concerns even in emergency arbitration. Such an expanded reading would also have better served the justification put forward by the court to argue that emergency arbitration was within the purview of the Indian arbitration framework.

ii. Arbitration-Meaning

Another way to approach this would be to read emergency arbitration within the definition of the term arbitration itself. The apex court in *Shri Balaganesan Metals v. M.N. Shanmugham Chetty*, a judgment cited with approval by the Amazon bench, had explained the word ‘any’, observing that the term was of wide ambit and its understanding depended on context and the subject matter of the statute.³³ The 1996 Act was enacted with the purpose of providing comprehensive legislation for the conduct and regulation of all aspects of arbitration. It does not distinguish between types of arbitration, an idea evident from the use of the term ‘any’. To read a limitation within the definition would be an artificial restriction. With the march of time, types and manner of conduct of arbitration are likely to evolve. It would be problematic to suggest that such evolution would be outside the ambit of the 1996 Act since the legislation does not specifically mention it. Hence, it would have been more apt to read the definition provided in Section 2(1)(d) as encompassing all types of arbitration, including emergency arbitration, while restricting its meaning in accordance with the particular context articulated by a specific provision.

A similar concern had been witnessed with the 246th law commission report, which had suggested amending section 2(1)(d) to include the word ‘*and in case of an arbitration conducted under the rule of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator.*’ Scholars have argued that considering this suggestion failed to

³³ *Shri Balaganesan Metals v. M.N. Shanmugham Chetty*, (1987) 2 SCC 707.

make its way into the amendment act, it should be viewed as the legislature's disinclination to endorse the concept of emergency arbitration within the 1996 Act. There is perhaps an alternate, and more positive, way of reading this omission, namely that it was felt that the extant definition of arbitral tribunal contained in Section 2(1)(d) was broad enough to encompass within it the understanding of emergency arbitration, and therefore required no amendment.

iii. Institutional Linkage

The decision was at pains to emphasise the 'institutional rules' link,³⁴ which formed a critical aspect of its party autonomy argument. While the emergency arbitration in the present case was conducted under the SIAC rules, normatively locating emergency arbitration within 1996 Act did not require continuing focus on institutional rules in the manner in which the court does. In this context, how would a situation where the arbitration agreement provides for emergency arbitration but no more, or institutional arbitration where institutional rules do not provide for emergency arbitration, be treated by the courts? Given the repeated emphasis of the link, is the requirement of institutional arbitration part of the context expressed by Section 17? It is doubtful if such was the intended outcome of the case. Yet, a mere provision of emergency arbitration in an arbitration agreement in the two instances noted above would be difficult to operationalise, considering the lack of any guidance within the 1996 Act. While it could be argued that once such a situation has arisen, the parties

³⁴ *Supra* note 13. ¶¶14, 21, 24, 40, 41, 45, 46.

could further agree on various modalities pertaining to the working of emergency arbitration, in reality, however, this is unlikely. The need for emergency arbitration arises when imminent actions of a party are likely to adversely affect the other party. In such a situation, a further agreement to operationalize emergency arbitration is extremely improbable. At the same time, justifications provided by the court, namely that of party autonomy and emergency arbitration not being contrary to any mandatory provision of the 1996 Act, would necessarily imply that the institutional link is not mandatory, and agreement regarding emergency arbitration without appropriate institutional rules remains a valid agreement. The issue is operationalizing it. This confusion perhaps, could have been avoided had the court read the definition of arbitral tribunal in Section 2(1)(d) in an unrestricted manner. By doing so, the court would have extended various relevant provisions relating to the arbitral tribunal (number, selection, removal, procedure to be adopted, etc.) to an emergency arbitration as well. Arduous as it might have been, such a situation remains preferable to one lacking any guidance whatsoever.

iv. Nevertheless, a Progressive Stance

While some concerns remain, it is important not to lose sight of the fact that by recognizing the concept of emergency arbitration within the Indian jurisdiction, the courts have once again confirmed their pro-arbitration approach.³⁵ The decision remains significant for clarifying an

³⁵ *Indian Supreme Court confirms enforceability of India-seated emergency arbitration awards*, HSF, (Oct 1, 2021), <https://hsfnotes.com/arbitration/2021/10/01/indian-supreme-court-confirms-enforceability-of-india-seated-emergency-arbitration-awards/>.

earlier ambiguous area by clearly articulating that the enforcement of interim reliefs rendered by an emergency arbitrator in a domestic arbitration is both recognised and enforceable under the 1996 Act.

The position of law as it now stands is that in an India seated arbitration, emergency awards (interim relief) would be considered to have been made under Section 17(1) and enforceable under Section 17(2) read with the Code of Civil Procedure 1908.³⁶ Prior to enforcement under Section 17(2), the interim orders can be challenged under Section 37(1)(a), even if institutional rules make no provision for a challenge. However, an enforcement order made under Section 17(2) cannot be appealed against under Section 37.³⁷ This effectively establishes emergency arbitration within the Indian arbitration jurisdiction, providing both normative recognition and procedural clarity as regards its integration and enforceability under the 1996 Act. That said, as highlighted before, there is no clarity on the procedure to be followed in instances where emergency arbitration is provisioned in an adhoc arbitration. In such instances, the only option for the parties is to approach the court for a remedy under Section 9.

C. EMERGENCY ARBITRATION IN ARBITRATION SEATED OUTSIDE INDIA

This is one side of the story. What remains unaddressed is the question whether an emergency award rendered in a foreign seated arbitration could be enforced by the Indian courts. Practically, this is of

³⁶ *Supra* note 13. ¶¶45 and 71.

³⁷ *Id.* ¶¶100 and 101

concern given the increasing use of arbitration to resolve transnational disputes. Normatively, it is of concern, as Part II of the 1996 Act only deals with the enforcement of foreign awards. It has no provision similar to Section 17 enabling recognition and enforcement of interim reliefs granted by an emergency arbitral tribunal. Post the *Balco* decision and the amendments, parts of Part I do not extend to Part II unless specifically extended. As a result, substantial gap remains concerning recognition and enforcement of interim reliefs rendered by arbitral tribunals, including emergency arbitrators, in arbitrations seated outside India. Put differently, can interim reliefs rendered by an emergency arbitrator in a foreign seated arbitration be enforced in India? This question has been engaged with to varying degrees by the Indian courts.

In *Raffles Design International Pvt Ltd v. Educomp Professional Education Limited & Ors*,³⁸ (Raffles) the party that had obtained interim relief from an emergency arbitrator in a Singapore seated arbitration. It filed an application under section 9 of the 1996 Act seeking interim reliefs against the other party, on the grounds that the opposite party had acted in contravention of the emergency award. In this instance, the Delhi High Court categorically observed that the emergency award passed by the emergency arbitrator could not be enforced under the 1996 Act, and the only method for enforcing the same would be for the petitioner to file a suit. Further, a party could not enforce orders of an arbitral tribunal by taking recourse to Section 9 of the 1996 Act. That said, the parties were

³⁸ *Raffles Design International India Private Limited v. Educomp Professional Education Limited & Ors*, 2016 SCC Online Del 5521, ¶104.

free to approach the court under Section 9 of the 1996 Act to seek interim reliefs. The court observed, “*a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. Needless to state that the question whether the interim orders should be granted under section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal. 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’s conclusion was based on the fact that there was no provision in the 1996 Act explicitly providing for the enforcement of interim measures granted by an arbitral tribunal (including by an emergency arbitrator) seated outside India.

In *Ashwani Minda & Anr v. U-Shin Ltd*,³⁹ which concerned a Japan seated arbitration, the Delhi High Court dismissed an application by the party for interim relief under Section 9 of the 1996 Act on the ground that the applicant’s earlier attempt to obtain identical relief from an emergency arbitrator seated in Japan had resulted in failure. This was done in view of Article 77 of the Japan Commercial Arbitration Association Rules, which the court interpreted as an exclusion of Section 9 of the 1996 Act. It observed “*The Dispute Resolution Mechanism agreed to, in the present case envisages conduct of Arbitration in Japan and regulated by the JCAA Rules. JCAA Rules provide a detailed mechanism for seeking interim and emergency measures and was known to the parties when entering into the Agreement. Reading of the Arbitration clauses clearly*

³⁹ *Ashwani Minda & Anr v. U-Shin Ltd*, 2020 SCC OnLine Del 1648

*evinces the intention of the parties to exclude the applicability of part I of the Act. There is another important facet of this case. Article 77 (5) of the JCAA Rules makes it clear that the emergency measures are deemed to be interim measures granted by the Arbitral Tribunal, when it is constituted.”*⁴⁰For the court, the applicant could not take the proverbial *second bite* at the cherry given the continuing mandate of emergency arbitrator pending the constitution of an arbitral tribunal. Additionally, having excluded the application of Part I, it could not challenge the orders of the emergency arbitrator under the garb of filing a Section 9 application. The *Ashwini Minda* case, however, can be distinguished from the *Raffles* case on two counts – (a) unlike in *Raffles*, in the present case the applicability of Section 9 of the 1996 Act was excluded, and (b) in *Raffles*, the rules governing arbitration were the SIAC rules, which enabled approaching the courts for interim relief.⁴¹

In *Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd.*, (Shanghai) a division bench of the Delhi High Court hearing an appeal under Section 37 of the 1996 Act, against an order refusing to issue Section 9 interim relief to the appellant, endorsed the observations of the single judge bench noting “*The learned single judge has noticed that it would not be efficacious for the Appellant to obtain an order of interim protection from the Arbitral Tribunal as such an order, even if granted, would not be directly enforceable by the Courts in India and unlike Section 17(2), there was no corresponding provision under the Act for enforcement of interim orders passed by a foreign tribunal. The Act only contemplated enforcement of foreign awards and not foreign interim orders passed by the Arbitral*

⁴⁰ *Id.* ¶¶ 55 and 56.

⁴¹ *Id.* ¶ 61.

Tribunal.[...]We are in agreement with the view taken by the learned single judge.”⁴²

Though the matter did not directly pertain to emergency arbitration, the observations of the court are pertinent as stating the extant law on the issue. These observations would in equal measure apply to relief granted in emergency arbitration seated outside India.

Uphealth Holdings INC. v. Glocal Healthcare Systems (P) Ltd.,⁴³ (Uphealth) concerned failure of the respondent to comply with interim relief granted by the emergency arbitrator in a foreign seated arbitration. The petitioner filed a Section 9 application before the Calcutta High Court for interim relief in aid of the arbitration proceedings. The court cited the *Raffles* decision to observe that orders of emergency arbitrator in a foreign seated arbitration could not be enforced by filing a Section 9 application. Additionally, such orders could not be enforced since Part II lacked any provision similar to Section 17(2). However, instead of ignoring the order, it held that such an order could be taken into consideration in adjudicating the application before the court. It justified its approach in view of the behaviour of the parties, and lack of illegality or perversity in the order of the emergency arbitrator.⁴⁴ The court went on to observe, “*The prayers made before the Emergency Arbitrator can always be the subject matter of an application under section 9 of the Act meant for protection and preservation of the rights of the parties pending the arbitral proceedings.*” While the weightage accorded by the court

⁴² Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd., 2024 SCC OnLine Del 1606.

⁴³ Uphealth Holdings INC. v. Glocal Healthcare Systems (P) Ltd., 2023 SCC OnLine Cal 2442.

⁴⁴ *Id.* ¶14.

through use of the term ‘taking into consideration’ or implications of ‘subject matter of application under Section 9’ remains unclear, yet what is crucial is the overall approach of the court of not completely disregarding the orders of the emergency arbitrator.⁴⁵ The court also observed, “Nevertheless, it cannot be ignored that both parties had participated in the proceeding before the Emergency Arbitrator. The order of the Emergency Arbitrator is reasoned. The parties agreed to be bound by the orders. The orders of the Emergency Arbitrator have not been interfered with nor challenged. There appears to be no illegality nor perversity nor contravention of any law shown in the order of the Emergency Arbitrator. Accordingly, the orders of the Emergency Arbitrator are a supplemental factor which may be taken into consideration at this stage of the proceedings.”⁴⁶

The above discussion indicates that interim reliefs granted by foreign seated emergency arbitrator are not directly enforceable in India. This is specifically on account of the lack of provision similar to Section 17 in Part II. As a result, parties would have to file a civil suit to enforce the right created by such an interim order, as they are not directly enforceable by way of an execution petition. This is because such interim orders would not qualify as a ‘judgment’ or ‘decree’, for the purposes of Sections 13 and 44A of the Code of Civil Procedure 1908. This is not a practical remedy at all, and is likely to defeat the urgency in the matter. In practice though, parties file a Section 9 application to procure the same interim relief

⁴⁵ *Id.* ¶15

⁴⁶ *Id.*

as contained in the order of the emergency arbitrator. This is done as an independent remedy provided parties have not excluded the application of Part I of the 1996 Act. Courts in India have acknowledged this practice and have adopted varying approaches towards it.⁴⁷

III. WAY FORWARD

This remains a significant lacuna and, given the categorical statutory gap, requires legislative resolution. Recently, the Government of India constituted an expert committee to examine the working of the arbitration law in India and recommend reforms.⁴⁸ The committee recommended against the expansion of the definition of arbitral tribunal to include emergency arbitrators. Its rationale was to avoid the availability of an appellate mechanism under Section 37, particularly in view of the availability of - (a) recourses against such awards under rules of relevant arbitral institutions, and (b) subsequent review by the arbitral tribunal.⁴⁹ It

⁴⁷ See *Raffles Design International India Private Limited v. Educomp Professional Education Limited & Ors*, 2016 SCC Online Del 5521; *Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd.*, 2024 SCC OnLine Del 1606; *Uphealth Holdings INC. v. Glocal Healthcare Systems (P) Ltd.*, 2023 SCC OnLine Cal 2442. See also *HSBC PI Holding (Mauritius) Ltd. v. Avitel Post Studioz*, 2014 SCC OnLine Bom 102 and *Plus Holdings Ltd v. Xeitgeist Entertainment Group Ltd. and Others*, 2019 SCC OnLine Bom 13069; *DUSHYANT DAVE & MARIN HUNTER et al, ARBITRAL AWARDS IN INDIAN ARBITRATION* 181-182 (2021).

⁴⁸ *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India*, 76 (July 2017) <https://legallaffairs.gov.in/sites/default/files/Report-HLC.pdf>. *Report of the Expert Committee to Examine the working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to make it alternative in the letter and spirit.* (Feb. 2024), https://www.livelaw.in/pdf_upload/report-of-the-expert-committee-members-on-arbitration-law-2-526205.pdf.

⁴⁹ *Id.* ¶3.13.16

further recommended the insertion of Section 12B, providing statutory recognition to emergency arbitration and its outcomes.

The recommendations are noteworthy for endorsing the position of law articulated in the *Amazon* case. Such an approach also provides some guidance to the emergency arbitrator even in instances of an ad hoc arbitration. The committee's overall approach is very sensible, as it remains focused on the nature and exigent requirement of emergency interim relief and the consequential need to limit judicial intervention and avenues that could be exploited by the parties to delay the enforcement of such emergency relief. However, its justification against the inclusion of emergency arbitrator within the definition of an arbitral tribunal seems to be on thin ground. All definitions are read contextually, something that Section 2(1) explicitly provides for. As a result, the arbitral tribunal mentioned in Section 37 could be contextually read to not include an emergency arbitration, thereby alleviating concerns of appeal. As correctly noted by the committee, a review of orders by the emergency tribunal would in any way be available before the merits-arbitral tribunal.

However, to the issue of enforcement of orders of emergency arbitrator in a foreign seated arbitration, it recommended no modification in the existing setup, noting "3.13.15. The Committee is of the opinion that the present position be retained and *enforcement of orders from foreign-seated emergency arbitrators be implemented by way of a section 9 application before the Courts*". (Emphasis supplied.) In support of this recommendation, it cited *Raffles*, *Shanghai*, and *Uphealth* decisions. It is important to note that in none of them

was the order of the emergency arbitrator enforced. All three categorically noted the absence of a statutory provision to enable such enforcement. The courts merely took into consideration the orders and were at pains to clarify that the decision of the emergency arbitrator played no role in their decisions that they had arrived at the decision on Section 9 independently.⁵⁰ It was observed, “*Needless to state that the question whether the interim orders should be granted under section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal. 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.*”⁵¹

The recent 2024 Amendment Bill to the 1996 Act addresses some of these concerns. It provides statutory recognition to emergency arbitration in India seated arbitration and in some instances of foreign seated arbitration (i.e., when parties expressly extend application of Part I to arbitration seated outside India). While it does not explicitly include the idea of emergency arbitration within the definition of ‘arbitration’ under Section 2(1)(a), it does provide a definition for emergency arbitrator and articulate a framework for direct enforceability of orders of emergency arbitrator operating under institutional rules in a foreign seated arbitration.⁵²

⁵⁰ *Supra* note 28. ¶105.

⁵¹ *Id.*

⁵² *Draft Arbitration and Conciliation (Amendment) Bill (2024)*, [https://cdn.ibclaw.online/legalcontent/ACM/Other/Inviting+Comments+on+the+draft+Arbitration+and+Conciliation+\(Amendment\)+Bill%2C+2024+18.10.2024.pdf](https://cdn.ibclaw.online/legalcontent/ACM/Other/Inviting+Comments+on+the+draft+Arbitration+and+Conciliation+(Amendment)+Bill%2C+2024+18.10.2024.pdf).

It further enables the arbitral tribunal to confirm, modify, or vacate orders of the emergency arbitrator.

However, this articulation is not without concern. One pertains to the retention of institutional links within the emergency arbitrations framework. The proposed Section 9A(2) refers back to Section 9A(1), which in turn refers solely to arbitral institutions endorsing their ability to provide for emergency arbitration. It is interesting that such a framing was adopted, even when the framing as suggested by the expert committee was available.

Expert Committee recommendation	2024 Amendment Bill
<p>The expert committee recommended to insert new section 12B. Basis this section, arbitral institutions are permitted to allow for appointment of emergency arbitrators. An emergency arbitrator appointed under this section shall enter upon the reference without delay and pass his order or award of interim relief as expeditiously as possible and in any event not exceeding 30 days from the date on</p>	<p>9A. Emergency arbitrators – (1) Arbitral institutions may, for the purpose of grant of interim measures referred to in section 9, provide for appointment of emergency arbitrator prior to the constitution of an arbitral tribunal. (2) The emergency arbitrator appointed under subsection (1) shall conduct proceedings in the manner as may be specified by the Council. (3) Any order passed by an</p>

<p>which s/he was appointed. Additionally, any order issued by an emergency arbitrator shall be enforced akin to an order of an arbitral tribunal under section 17(2).</p> <p>(2) It is proposed to amend section 2(1) to insert a new clause (ea) defining emergency arbitrator as the emergency arbitrator appointed under section 12B.</p>	<p>emergency arbitrator under sub-section (2) shall be enforced in the same manner as if it is an order of an arbitral tribunal under subsection (2) of section 17 of the Act. (4) An order of the emergency arbitrator may be confirmed, modified, or vacated, in whole or in part, by an order or arbitral award made by the arbitral tribunal.</p>
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Contrasting the two, it is clear that while Section 12B(i) and (ii) as proposed by the expert committee, could be read disjunctively, the same cannot be done for the proposed Section 9A. Under the proposed Section 9A, sub sections (1) and (2) have to be read together on account of a specific reference in sub section (2) to sub-section (1). Section 9A(2) specifically talks of an emergency arbitrator appointed under 9A(1). The two form one unit and therefore cannot be separated without doing damage to the language of the provision itself. The wording does not accommodate the appointment of an emergency arbitration in a non-institutional setting. It, therefore, brings us back to an earlier question, what of ad hoc arbitration which provides for emergency arbitration without anything more.

The extension of Section 9A(2) to arbitration seated outside India creates another conundrum, namely, in instances where the arbitral institutions outside India carry specific provisions for emergency arbitration within their rules. While it accommodates emergency arbitrators appointed by an arbitral institution outside India in a foreign seated arbitration, it provides that such an arbitrator *shall* conduct proceedings in the manner as may be specified by the Arbitration Council of India (“ACI”). The bill thus, provides; “*In particular, and without prejudice to the generality of the foregoing power, such regulations may make provision for [...]manner of conduct of proceedings by emergency arbitrator under sub-section (2) of section 9A*”.

Clearly, such an emergency arbitrator will operate in accordance with the institutional rules, even in instances when such rules conflict with rules outlined by the ACI. One way to avoid such a situation could be by providing an expanded reading to the opening phrase of proviso to 2(2), namely ‘Provided that subject to an agreement to the contrary’. A choice of arbitral institution could be considered to be an agreement to the contrary as regards the choice of institutional rules. However, this might be a stretched reading, considering the agreement pertains to extension of provision as a whole or otherwise, i.e., whether proposed Section 9A(2) would apply to foreign seated arbitration or not. It cannot be extended to read that if it did apply, parties would have the power to select which specific aspects of the noted provision would apply. This is because the noted provision itself has not been made subject to party agreement.

While incentivization of institutional arbitration has been the stated objective of previous amendments, it is a myopic view to focus only on commercial arbitration, who remain the primary users of institutional arbitration. Given the dire need to decongest the court system, alternative methods of dispute resolution, including arbitration, should be promoted in non-commercial instances as well. Providing for a categorical statutory recognition of emergency arbitration (which the amendment does) and delinking it from institutional arbitration (by delinking proposed Section 9A(2) and (1)) will go a long way in promoting the use of arbitration for non-commercial matters as well. As discussed above, the expert committee framing in the proposed Section 12B(1)(ii) ‘(ii) *An emergency arbitrator appointed under this section shall...*’ would also alleviate concerns outlined above.

India clearly lags behind when it comes to the enforcement of reliefs granted by an emergency arbitrator in a foreign seated arbitration. While various approaches have been attempted, perhaps inspiration could also be had from the amended UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006, which specifically provides for recognition, enforcement, and grounds for refusal to enforce interim measures in Articles 17H and 17I. These provisions are comprehensive and could well be adapted into the Indian arbitration framework.

IV. CONCLUSION

The Indian arbitration regime has had an ambivalent relationship with foreign seated arbitration. While to begin with an extremely expansive approach had been adopted, the Indian judiciary has consciously ploughed back its jurisdiction and limited avenues for judicial interference with an arbitration. The attempts have come on the back of efforts to make India an international arbitration hub. The argument thus runs that a robust dispute resolution mechanism is likely to bolster the capacity of India to be considered as a genuine destination both for investment and business.

A recent challenge to this aim has emerged from the question of how orders and reliefs provided by emergency arbitrators should be enforced in India. While to begin with, a rather conservative approach had been adopted by the Indian courts, more recently they have come around, moving from suggesting a lack of statutory guidance to noting that the concept of emergency arbitrator was not in contravention of the provisions of the 1996 Act. This has led to normative grounding and procedural clarity at least as regards the enforcement of orders of emergency arbitrators for arbitration seated in India. Conundrum remains as to such orders from an arbitration seated outside India. Recent legislative attempts to plug this substantial gap, though welcome, need critical fine-tuning. Till then, the issue continues to be litigated, and a final word from the apex court in this regard remains keenly awaited.