Emergency Arbitrator: Indian Prospects

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ABSTRACT

International commercial arbitration is one of the most favourite mode of dispute resolution in world for resolving commercial disputes. Speed and cost are two important features what makes arbitration a sought-after mode for dispute resolution because in conventional dispute resolution by courts ‘Remedy becomes worse than malady’ due to delay and cost. Legalism and authoritative courts in Anglo Saxon societies make the justice dilatory and expensive which is termed analogically as a disease of ‘Adversariasis’. Judicial minimalism is encouraged by entrepreneurs and business class of world which results in enhanced thrust on international commercial arbitration. In any arbitration interim measures are sine quo non. The irreparable loss and balance of convenience demands intervention by authoritative body to order and issue processes which can binds parties and third parties. In such cases unless interim measures are sought by municipal national courts no effective and binding interim remedies can be granted to the parties and third parties. The arbitrator once appointed is competent enough to grant interim measures and it can also decide about its jurisdiction based on doctrine of Kompetenz-Kompetenz. However, if before the appointment of arbitrator, the need of urgent interim measures arises then obviously parties have to go to the municipal national courts but this judicial intervention is not the intent of parties as they are seeking judicial minimalism. In such situations the urgent interim measures can be granted by emergency arbitrator. The Arbitration and Conciliation Act, 1996 is silent about emergency arbitrator but Delhi and Bombay High Courts have given some pragmatic judgments, making the provision of emergency arbitrator, a reality. The real problem in emergency arbitrator is how one can grant interim relief even without being in existence i.e. when arbitrator itself is non est. ICC, SIAC and LCIA provide for emergency arbitrator. In this paper the author has tried to make an analytical and comparative overview of emergency arbitrator in Indian Perspective.

INTRODUCTION

In dispute resolution preliminary issues can be very tricky if they are not properly resolved the aftermath of dispute resolution can be quiet devastating. In any dispute resolution process, the parties in the dispute crave mostly for instant and effective interim relief. Interim relief are given by authoritative courts by perusing the fundamental principles of law like ‘balance of convenience’ and ‘irreparable loss’ etc. The interim measures in long run proves very pivotal in substantiating the rights and duties amongst the parties.

In arbitration of lately the practice has been that the arbitrators after appointment are duly authorized to grant interim remedies. The parties can seek interim measures in courts also which have competency to enforce the measures amongst parties inter se. Courts have all kinds of competency in territory of a nation.

DOMESTIC COURTS AND INTERIM MEASURES

Before appointment of arbitral tribunal if one must seek interim measures then regular domestic courts are competent to award interim measures in the nature of interlocutory orders, injunction, prohibitive orders, cease and desist orders etc. However, seeking interim remedies in courts are not very convenient and it has inherent vices.

One goes to arbitration to speedy and cost-effective justice. Going to courts for interim measures has adverse impact to this very purpose as when one approaches courts then he is bound by formalities, cost of litigation, legal constraints of domestic courts. Sometimes courts are not competent to render the effective and needed interim measures in the concerned matter and sometimes courts are entangled in concocted or fabricated facts because parties may indulge in such activities for getting favourable interim measures.

Arbitral tribunal are equally competent to award interim measures however this power is conferred to tribunal after their constitution and before its constitution it is a non est. Therefore, the urgent need of interim relief before appointment of arbitrator can be responded by emergency arbitrator who can be very effective in awarding interim relief.
EMERGENCY ARBITRATOR

In normal situations appointment of commencement of arbitration takes time which can damage the subject of contract if the same are of perishable character or its value has cascading effect. To fill this kind of void procedure can supplement via emergency arbitrator. Netherlands Arbitration Institute provide for summary arbitral proceedings for interim relief and London Court of International Arbitration (LCIA) provides for expedited formation of the arbitral tribunal and likewise International Court of Dispute Resolution provides for Pre-Arbitral Referee Procedure. Such initiatives by such institutions come to rescue the parties in need and emergency arbitrator at very pre-mature stage can award very effective interim measures.

Emergency arbitrator is a safety valve which without compromising on the merits of arbitration provides for temporary interim reliefs in the form of interim measures much before proper constitution of arbitral tribunal.

BACKDROP

In 2006 the concept of emergency arbitrator was introduced by International Centre for Dispute Resolution which is part and parcel of American Arbitration Association (AAA). In 2010 Stockholm Chamber of Commerce (SCC), in 2012 International Chamber of Commerce (ICC), in 2013 Hong Kong International Arbitration Centre (HKIAC) and Singapore International Arbitration Centre (SIAC) introduced the emergency arbitrator provisions. This practice was followed by Swiss Chambers’ Arbitration Institution, Australian Centre for International Commercial Arbitration, Mexico City National Chamber of Commerce, Netherlands Arbitration Institute, Madrid Court of Arbitration and the Arbitration Centre of the Portuguese Chamber of Commerce and Industry.

In most of the rules the provision of emergency arbitrator is automatic, if the parties are exempted then they have to specifically opt out by arbitration agreement. Rules in various jurisdiction and of various institutions differ in its approach like some rules say that no emergency arbitrator provision can be invoked before notice of arbitration some say it can be applied before notice of arbitration. However, there are limitations on power of emergency arbitrator as they may not be able to grant interim measures to bind third parties and it is equally not amenable to ex parte orders and in such situations, parties have to rely upon national courts.

LEGAL REGIME OF EMERGENCY ARBITRATOR

Article 29 of ICC Rules provides for emergency arbitrator. It also clarifies that such application lies without request of arbitration. Article 29 (2) says that parties undertake to comply with any order made by the emergency arbitrator. Article 29 (6) says that emergency arbitrator provisions would not apply to arbitration agreement concluded before the new Rules come in force. Article 29 (6) also provides for opt out mechanism which says parties must specifically exclude themselves from application of emergency arbitrator mechanism.

In LCIA provisions are alike of ICC. Articles 9.6 of LCIA Rules 2014 two-fold process of hearing before emergency arbitrators. LCIA court shall determine on the application regarding emergency arbitrators and on any such application within three days emergency arbitrator must be appointed. Article 9.7 says that emergency arbitrator shall consult with each party and is not required to hold any hearings regarding grant of interim measures. Article 9.8 says that within 14 days of his appointment the emergency arbitrator shall pass interim orders.

In SIAC Rules Article 1.5 says that an award also includes awards of emergency arbitrator. Article 26.2 read with Schedule I provides for emergency arbitrator and award of interim measures before constitution of arbitral tribunal.

There are some illustrative cases wherein the provisions of emergency arbitrator have been invoked. In an SIAC arbitration an Indian party applied for invoking emergency arbitrator for interim relief alleging non-payment of 100 million USD. The party wanted to have injunctive order against the party because Indian claimant apprehended that the other party could have encashed a bank guarantee. The SIAC determined on the application and appointed an emergency arbitrator which passed an order against the party.

In an SCC arbitration Dutch claimant applied for emergency arbitrator against Cypriot respondent to secure claimed amount of 145 million USD. The SCC appointed an emergency arbitrator within 13 hours of application and an interim order was passed within eight days. The emergency arbitrator rejected two out of four interim measures on the issue of third parties’ entities.

In an SIAC arbitration an Indonesian and a Chinese company were involved in a matter of sale of coal. The claimant who was shipper of coal requested for appointment of emergency arbitrator on a day at 2 P.M. and emergency arbitrator was appointed at 5 P.M. on the same day. The arbitrator scheduled the hearing for next day and passed interim order on the same day for sale of coal on the issue of perishability.
ENFORCEMENT OF DECISION OF EMERGENCY ARBITRATOR

The cases here suggest that now it is order of day to have provisions of emergency arbitrators. New York Convention has been adopted by most of the countries. New York Convention is blind on the issue of emergency arbitrator because the concept evolved of lately. The definition of tribunal or award does not fit in the criterion of emergency arbitrator or his decision. The New York convention needs an amendment to incorporate the provisions relating to emergency arbitrator. Singapore and Hong Kong have included the provisions of emergency arbitrator in their legislative framework.

CONSTRAINTS REGARDING EMERGENCY ARBITRATOR

There are some inherent constraints regarding mechanism of emergency arbitrator. The arbitration stands for ‘party autonomy’ as the disputes are resolved by arbitrator appointed by parties while emergency arbitrator is appointed by third party Institutions without any reference of parties.

The second hurdle is that in most of the jurisdiction except Singapore and Hong Kong the orders of emergency arbitrators are neither considered orders nor awards. This kind of confusion leads to issue of improper implementation and enforcement of orders of emergency arbitrators. However, if the applicable rules provide for emergency arbitrator then that brings some support. Even then in SIAC arbitration the experience says that parties have duly complied with orders of emergency arbitrators. In Yahoo Inc. v Microsoft Corporation, the U.S. District Court held that the relief award granted by emergency arbitrator was in essence final even if final award may be passed by regular arbitrator subsequently. The emergency arbitrator may pass interim order in respect of subject matter for preserving the status quo of subject of dispute.

The third constraint is that the ‘due process’ or procedure adopted by emergency arbitrator may be challenged or its legitimacy may be questioned. Ex parte order and third party related orders are other major issues in the area of emergency arbitrator.

EMERGENCY ARBITRATOR: INDIAN PERSPECTIVE

Emergency arbitrator is now evolving in Indian regime. Law Commission of India suggested for an amendment to arbitral tribunal to include emergency arbitrator. Law Commission of India suggested that this amendment is needed to confirm Indian law to SIAC Arbitration Rules. Recommendation of Law Commission of India was not paid heed by Legislature while bringing 2015 amendment in Arbitration and Conciliation Act, 1996.


JUDICIAL APPROACH ON EMERGENCY ARBITRATOR

In HSBC PI Holdings (Mauritius) Limited v. Avitel Post Studioz Limited & Others, Avitel in order to seize an opportunity with BBC required finance from HSBC and financial agreement had provision of dispute resolution via SIAC arbitration and seat in Singapore. Regarding a dispute a request under SIAC was made and SIAC appointed Mr. Thio Shen Yi S.C. as emergency arbitrator. Avitel was an Indian party while HSBC was a foreign party. HSBC got an interim order in Singapore by emergency arbitrator which was to be enforced in India as it required freezing assets of Avitel in India. Bombay High Court passed interim reliefs on similar terms to those in the emergency arbitrator order. It held that, “As regards the Petitioners right to obtain reliefs under Section 9 in the present case, the same is based on two premises. First, the emergency arbitrator has passed an interim award dated 28 May 2012 holding that protective orders are required to be passed. The said interim award has not been challenged by the Respondent(s). The issue therefore has been decided by a competent forum and this decision has become final and binding on the parties. On the basis of the principles of issue estoppel the said decision is binding and the Respondent(s) are not entitled to re-agitate the question as to whether the Petitioner is entitled to any protective order. The second premise is that independently of the interim award passed by the Arbitral forum, the Petitioner has made out a case for grant of reliefs.” The order of single bench was subsequently challenged before division bench and it was partly allowed.

In Montblanc Simplo GMBH v. Entrack International Trading Pvt Ltd in a distribution agreement between the party sought interim relief from emergency arbitrator under applicable Swiss Arbitration Rules in Geneva and emergency arbitrator appointed by Swiss Chamber of Arbitration granted interim remedies which was upheld by Gujarat High Court which held that, “The upshot of the above discussion is that the arbitral proceedings initiated by the petitioner...
before the Swiss Chambers Arbitration Institution cannot be said to be vexatious or oppressive. Having regard to the fact that the Arbitral Tribunals under the respective agreements have been chosen by the parties themselves, in the absence of the proceedings being vexatious and oppressive, the petitioner(s) cannot be prevented from approaching the chosen forum as the same would amount to aiding breach of the contract.”

In Raffles Design International India Private Limited & Anr. v. Educomp Professional Education Limited & Ors. an emergency award was passed by an emergency arbitrator and some interim relief were granted. Thereafter, the High Court of the Republic of Singapore was moved under Section 3 of the International Arbitration Act seeking enforcement of the emergency award and ultimately a consent order was passed wherein certain parts of the Emergency Award were reiterated and parties agreed that the said paragraphs of the emergency award would operate notwithstanding those reiterated portion of the Emergency Award. Delhi High Court held that, In the circumstances, the emergency award passed by the Arbitral Tribunal cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit. However, in my view, 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.”

These judgments are encouraging because it promoted the idea and concept of emergency award in India. However, the legal position regarding emergency arbitrator depends upon various factors like there is no guarantee that Indian courts will grant similar relief like emergency arbitrator.

As we know Part I is inapplicable to except section 9 which has been duly amended by 2015 amendment. If parties have excluded Part I entirely then interim relief under section 9 via national courts shall not be available. That is because interim relief can be obtained by Indian Court within few days on ex parte basis.

EMERGENCY ARBITRATOR: PROSPECTS

The success of commercial arbitration depends upon interim measures granted by courts or arbitral tribunal. Indian legal regime under the Arbitration & Conciliation Act, 1996 does not provide anything for emergency arbitrator and interim relief by them. The Bombay High Court introduced the concept of emergency arbitrator in HSBC v Avitel case. The Delhi and Gujarat High Court have also followed the trend. The recourse and remedies of interim measures decide the fate of arbitration subsequently. Therefore, the need of hour is that we should make a formal amendment in Arbitration & Conciliation Act, 1996 to provide for emergency arbitrator. Emergency arbitrator will prove beneficial in bringing the traits of party autonomy, confidentiality and efficacious interim remedies without judicial intervention and therefore will prove a boon for judicial minimalism.

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