

EMERGENCY ARBITRATION IN INDIA: A CRITICAL APPRAISAL OF THE INSTITUTIONAL FRAMEWORK

*Abhinav Gupta & Sriroopa Neogi**

Over the years, the Indian government, as well as the courts, have consistently furthered a pro-arbitration approach in order to establish an efficient dispute resolution mechanism that can improve contract enforcement and the ease of doing business. Emergency arbitration is considered to be one such process that can assist in establishing an effective resolution mechanism. This paper attempts to focus on and understand the modalities of prominent domestic institutional rules which govern the emergency arbitration proceedings. It provides a comparative critique of the domestic rules as against their international counterparts through the identification of certain key features present in the latter. Thereafter, the paper recommends numerous amendments for the domestic institutional framework that can assist in formulating a robust emergency arbitration procedure in India. In conducting this analysis, the paper also analyses the concerns surrounding the recognition and enforcement of emergency arbitration orders, which arguably constitute the backbone of an efficient emergency mechanism.

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I. INTRODUCTION

Emergency arbitration ('EA'), has emerged as a popular mechanism for parties to obtain urgent relief from an emergency arbitrator.¹ It refers to an arbitral mechanism that takes place before the formation of the main tribunal in order to deliver urgent interim relief for protecting the assets and evidence that cannot wait for the formation of the tribunal and may otherwise get altered or lost.² The EA mechanism is based on four founding principles, which are the likelihood of success on merits, the risk of irreparable harm, the risk of the aggravation of the dispute, and the balance of equities.³ Due to the aforesaid important goals and functions that EA serves, it is frequently referred to as the 'Achilles' heel' of arbitration.⁴

With the recently concluded dispute of *Amazon COM NV Investment Holdings LLC v. Future Coupons (P) Ltd.*,⁵ ('Amazon'), the concept of EA has fallen into the limelight of the Indian legal system. This is due to the core principles of arbitration, such as party autonomy, that is dealt with in the case, as well as the popularity of the parties involved. The dispute, which shall be discussed subsequently in detail, highlights the fundamental challenges regarding EA that

* 3rd and 2nd year students of law at the West Bengal National University of Juridical Sciences, Kolkata. The authors are grateful to Kaira Pinheiro and Chandrika Bothra, Editors at the NUJS Law Review, for their guidance and support while researching and writing this paper. The authors thank them for providing insightful comments, feedback and suggestions to the drafts of this article. All errors, however, are the sole responsibility of the authors. They may be reached at abhinav219066@nujs.edu and sriroopa220063@nujs.edu for any comments or feedback.

¹ Grant Hanessian & E. Alexandra Dosman, *Songs of Innocence and Experience: Ten Years of Emergency Arbitration*, Vol. 27(2), AM. REV. INT'L ARB., 215 (2016).

² Madhu Sweta & Kanika Tandon, *Emergency Arbitration in India: Concept and Beginning*, MONDAQ, November 25, 2016, available at mondaq.com/india/trials-appeals-compensation/547970/emergency-arbitration-in-india-concept-and-beginning (Last visited on November 2, 2021).

³ International Chamber of Commerce, *Report of the ICC Commission on Arbitration and ADR Task Force on Emergency Arbitrator Proceedings*, available at https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0058.htm?11=Commission+Reports (Last visited on November 2, 2021).

⁴ Martin Davies, *Court Ordered Interim Measures in Aid of International Commercial Arbitration*, Vol. 17(3), AM. REV. INT'L ARB., 300 (2006).

⁵ 2021 SCC OnLine Del 1279 ('Amazon').

persist under the Indian jurisdiction. These challenges range from recognition to the enforcement of EA orders with respect to both foreign and domestic seated arbitration.

This paper, however, focuses on a critical appraisal of the Indian institutional framework for EA and the challenges that persist at an institutional level. In this regard, the paper analyses the institutional rules of seven domestic arbitral institutions, namely the Mumbai Centre for International Arbitration ('MCIA'), the New Delhi International Arbitration Centre ('NDIAC'), the Indian Council of Arbitration ('ICA'), the Madras High Court Arbitration Centre ('MHCAC'), the Nani Palkhivala Arbitration Centre ('NPAC'), the Bangalore International Mediation, Arbitration and Conciliation Centre ('BIMACC') and the Indian Institute of Arbitration and Mediation ('IIAM'). The paper also addresses various lingering issues regarding the recognition and enforcement of an EA order since amendments to the institutional framework would be rendered meaningless without resolving such concerns.

Part II of the paper focuses on the general rise of EA as a popular mechanism for urgent interim relief. This part first highlights the history and the statistical data to trace the development of the mechanism. Thereafter, it proceeds to analyse the varying advantages that the EA mechanism professes, which arguably makes it preferable over court-ordered interim measures. The paper under Part III addresses the issue of the recognition of EA under the Indian jurisprudence. It traces the statutory framework for the interim measures under the Arbitration and Conciliation Act, 1996 ('the 1996 Act') and recommendations from committees for explicitly incorporating the EA mechanism under the said statute. The part then proceeds to analyse the opinions of the Indian court with respect to the recognition of the EA mechanism under the 1996 Act.

Part IV conducts a survey of the EA mechanism of seven prominent international institutional rules such as the Singapore International Arbitration Centre ('SIAC'). The objective of such a study is to trace the underlying common features present under the said rules that arguably, are the core features of an EA mechanism. These key features are thereafter juxtaposed with the domestic EA rules in Part V. Herein, the paper highlights the shortfalls as well as the compliances to these features that the domestic rules profess.

After the aforesaid critical comparison, Part VI proceeds to offer recommendations regarding the various amendments to the domestic EA rules. The part provides recommendations concerning the duration of the process, powers and duties of the emergency arbitrator, the nature of the EA order, and the rights of the parties to opt-out of such a mechanism and parallelly approach a domestic court. Part VII of the paper discusses the complex issue of the enforcement of an EA order under the Indian jurisdiction. The paper focuses on the enforcement of an EA order under both foreign and domestic seated arbitrations. Part VIII of the

paper offers concluding remarks. The part calls for a basic level of uniformity that ought to be followed by the domestic EA rules and encourages discussion on this issue.

II. THE ADVENT OF EMERGENCY ARBITRATION

The paper in this part attempts to review the development of EA from a mere experiment to an important mechanism that is practiced worldwide. Thereafter, the part traces the benefits of EA over an interim measure proceeding before a domestic court.

A. DEVELOPMENT OF EMERGENCY ARBITRATION

The roots of the current EA mechanism can be traced to the measures taken in the early 1990s.⁶ The International Chamber of Commerce ('ICC') in 1990 was the first arbitral institution to offer pre-arbitral emergency measures that permitted parties to submit disputes for, amongst other things, an EA order.⁷ The ICC recognised that during the course of many contracts, particularly long-term contracts, issues might arise that require urgent responses.⁸ In such limited time, it is frequently not possible to arrive at a binding decision from a tribunal or a court.⁹ Accordingly, the ICC incorporated a pre-arbitral referee procedure in order to provide a temporary resolution to the dispute and lay the foundation for its final settlement.¹⁰ Such provisions were optional, and parties were required to 'opt-in' in order to be bound by them.¹¹

Notably thereafter, the World Intellectual Property Organisation ('WIPO') in the mid-1990s proposed an amendment to their arbitration rules and incorporated the emergency relief mechanism.¹² However, the same did not materialise until 2014.¹³ In 1999, the American Arbitration Association also adopted an

⁶ Hanessian & Dosman, *supra* note 1, at 216.

⁷ International Chamber of Commerce, *Rules for a Pre-Arbitral Referee Procedure*, available at <https://iccwbo.org/publication/rules-pre-arbitral-referee-procedure/> (Last visited on November 2, 2021).

⁸ International Chamber of Commerce, *Pre-Arbitral Referee Rules*, available at <https://iccwbo.org/dispute-resolution-services/pre-arbitral-referee/rules/> (Last visited on November 2, 2021).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Pre-Arbitral Referee Procedure, 1999, Art. 3.1; For a comprehensive overview of the referee procedure, see Jan Paulsson, *A Better Mousetrap: 1990 ICC Rules for a Pre-Arbitral Referee Procedure*, Vol. 18, INT'L BUS. LAW, 214 (1990).

¹² Richard Allan Horning, *Interim Measures of Protection: Security for Claims and Costs and Commentary on the WIPO Emergency Relief Rules (In Toto)*, Vol. 9, AM. REV. INT'L ARB., 170 (1998).

¹³ WIPO Arbitration Rules, 2014, Art. 49(a).

Optional Rules for Emergency Measures of Protection as part of its commercial arbitration rules.¹⁴

Within the next two decades, several arbitral institutions, realising the relevance and importance of emergency mechanisms, incorporated rules for EA – resulting in the availability of EA becoming the norm. SIAC and the Stockholm Chamber of Commerce (‘SCC’) both adopted the rules in 2010.¹⁵ This was followed by the ICC overhauling its rules and the Swiss Arbitration Centre (‘SAC’) introducing the EA rules in 2012.¹⁶ The Hong Kong International Arbitration Centre (‘HKIAC’), the London Court of International Arbitration (‘LCIA’), and the China International Economic and Trade Arbitration Commission (‘CIETAC’) followed suit in 2013,¹⁷ 2014,¹⁸ and 2015,¹⁹ respectively.

The spread in the availability of the EA mechanism has been complemented by the rise in the usage of the said process, as compiled in the table below by reference to the available data at the time of writing.

Arbitral Institution	Cases Administered	Sectors/Agreements Covered
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¹⁴ The American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, 1999, Optional Rules for Emergency Measures of Protection, O-1-O-8.

¹⁵ Singapore International Arbitration Centre, *The Emergency Arbitrator and Expedited Procedure in SIAC*, available at <https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/420-the-emergency-arbitrator-and-expedited-procedure-in-siac-a-new-direction-for-arbitration-in-asia> (Last visited on November 2, 2021); N. Vivekananda, *The SIAC Emergency Arbitrator Experience*, SIAC, available at <https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience> (Last visited on November 2, 2021); Nicholas Peacock & Jake Savile-Tucker, *A Decade of Emergencies in Stockholm*, HERBERT SMITH FREEHILLS, June 18, 2020, available at <https://hsfnotes.com/arbitration/2020/06/18/a-decade-of-emergencies-in-stockholm/> (Last visited on November 2, 2021).

¹⁶ Andrew de Lotbinière McDougall QC et al., *ICC Task Force on Emergency Arbitrator Proceedings Releases Findings*, WHITE AND CASE LLP, April 15, 2019, available at <https://www.whitecase.com/publications/alert/icc-task-force-emergency-arbitrator-proceedings-releases-findings> (Last visited on November 2, 2021); Xavier Favre-Bulle, *2012 Revisions to the ICC and Swiss Rules on Arbitration: The Codification of New Trends in International Arbitration*, THOMAS REUTERS, June 2, 2012, available at [https://content.next.westlaw.com/3-520-1884?__lrTS=20201204112217750&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/3-520-1884?__lrTS=20201204112217750&transitionType=Default&contextData=(sc.Default)&firstPage=true) (Last visited on November 2, 2021).

¹⁷ Hong Kong International Arbitration Centre, *Emergency Arbitration Procedures*, available at <https://www.hkiac.org/arbitration/process/emergency-arbitrator-procedures> (Last visited on November 2, 2021).

¹⁸ Field Fisher, *New LCIA Arbitration Rules in Force from 1 October 2014*, August 7, 2014, available at <https://www.fieldfisher.com/en/insights/new-lcia-arbitration-rules-in-force-from-1-october-2014> (Last visited on November 2, 2021).

¹⁹ James Rogers & Matthew Townsend, *CIETAC’s New Arbitration Rules, 2015*, KLUWER ARBITRATION BLOG, February 17, 2015, available at <http://arbitrationblog.kluwerarbitration.com/2015/02/17/cietacs-new-arbitration-rules-2015/> (Last visited on November 2, 2021).

SIAC ²⁰	114	Maritime and shipping, corporate, construction, infrastructure, and trade
SCC ²¹	47	Investment protection treaty, shareholders agreement, construction, service and delivery agreements
LCIA ²²	11	Data not available
ICC ²³	117	Construction, engineering, energy, share and purchase agreement, and transportation
HKIAC ²⁴	27	Data not available

Therefore, through an analysis of the statistical data, it is clear that there has been an exponential increase in the usage of the EA mechanism across different forms of transactional sectors.²⁵ Such an increase can be attributed to the advantages that EA manifests over court-ordered interim measures. These advantages are discussed in the next sub-part.

²⁰ Singapore International Arbitration Centre, *Annual Report 2020*, available at https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf (Last visited on November 2, 2021).

²¹ Forty-two applications for EA were accepted from 2010 to 2019. For an assessment of the data, see Arbitration Institute of the Stockholm Chamber of Commerce, *Emergency Arbitration at the SCC—A Decade in Review*, April 16, 2020, available at <https://sccinstitute.com/about-the-scc/news/2020/emergency-arbitration-at-the-scc-a-decade-in-review/> (Last visited on November 2, 2021); In 2020 there were five applications accepted by SCC, bringing the total number of EA applications accepted to forty-seven. For the data of 2020, see Arbitration Institute of the Stockholm Chamber of Commerce, *New Practice Note on Emergency Arbitrator Applications*, December 11, 2020, available at <https://sccinstitute.com/about-the-scc/news/2020/new-practice-note-on-emergency-arbitrator-applications/> (Last visited on November 2, 2021).

²² London Court of International Arbitration, *2020 Annual Casework Report*, available at <https://www.lcia.org/media/download.aspx?MediaId=855> (Last visited on November 2, 2021); From 2013 to 2015, LCIA did not receive any EA applications, see London Court of International Arbitration, *Registrar's Report 2015*, available at <https://www.lcia.org//media/download.aspx?MediaId=500> (Last visited on November 2, 2021); London Court of International Arbitration, *Registrar's Report 2014*, available at <https://www.lcia.org//media/download.aspx?MediaId=499> (Last visited on November 2, 2021); London Court of International Arbitration, *Registrar's Report 2013*, available at <https://www.lcia.org//media/download.aspx?MediaId=376> (Last visited on November 2, 2021).

²³ International Chamber of Commerce, *ICC Releases 2019 Dispute Resolution Statistics*, July 15, 2020, available at <https://iccwbo.org/media-wall/news-speeches/icc-releases-2019-dispute-resolution-statistics/> (Last visited on November 2, 2021); At the time of writing, the ICC has only released a preliminary report for 2020 which does not cover data on EA, see International Chamber of Commerce, *ICC Announces Record 2020 Caseloads in Arbitration and ADR*, January 12, 2021, available at <https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/> (Last visited on November 2, 2021); ICC Commission on Arbitration and ADR, *ICC Commission Report—Emergency Arbitrator Proceedings*, available at <https://iccwbo.org/content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf> (Last visited on November 2, 2021).

²⁴ The Hong Kong International Arbitration Centre, *Statistics*, available at <https://www.hkiac.org/about-us/statistics> (Last visited on November 2, 2021).

²⁵ Official data for SAC and CIETAC could not be found on their annual reports or website.

B. BENEFITS OF EMERGENCY ARBITRATION OVER COURT-ORDERED INTERIM MEASURES

This sub-part shall trace the benefits of an EA over an interim measure proceedings before a court. While the right to approach a court for a grant of interim relief has been preserved, the benefits of seeking an EA order have resulted in the rise in the popularity of EA around the world. These benefits include privacy, confidentiality of parties and proceedings, party autonomy, expediency of proceedings, flexibility and transparency of arbitrators, to name a few.

EA is also promising due to the numerous deficiencies in the traditional judicial system.²⁶ By resorting to a court for interim relief, the parties may have to sacrifice the benefits that they had hoped to take advantage of while choosing arbitration for dispute resolution.²⁷

1. Expediency

An emergency arbitrator is appointed before the constitution of an arbitral tribunal and is empowered to grant interim orders.²⁸ The international arbitral institutions provide for an expedited procedure for interim relief in their rules that must be followed by an emergency arbitrator.²⁹ These rules stipulate specific time frames for procedures such as the appointment of emergency arbitrator and the delivery of final orders.³⁰ By following such a procedure, emergency arbitrators are distinguished from the mechanisms of the courts. Such a procedure expressly stipulates expedited proceedings in order to grant quick and effective interim relief to a party.³¹

A study by SIAC demonstrates that the orders for a majority of cases before an emergency arbitrator were rendered within five days from the date of request for emergency relief.³² However, quick relief may often not be granted by a

²⁶ Patricia Louise Shaughnessy, *Chapter 32: The Emergency Arbitrator* in *THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER*, 341 (Kluwer Law International, 2017); Singhania & Partners LLP, *Emergency Arbitration in India: Concept and Beginning*, MONDAQ, available at <https://www.mondaq.com/advicecentre/content/3958/Emergency-Arbitration-In-India-Concept-And-Beginning> (Last visited on November 2, 2021).

²⁷ Peter J.W. Sherwin & Douglas C. Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, Vol. 20(3), *AM. REV. INT'L. ARB.* 319-320 (2009).

²⁸ Jason Fry, *The Emergency Arbitrator-Flawed Fashion or Sensible Solution*, vol. 7, *DISP. RES. INT'L.* 179 (2013); The HKIAC Administered Arbitration Rules, 2018, Art. 41.

²⁹ The HKIAC Administered Arbitration Rules, 2018, Art. 41; The LCIA Rules, 2020, Art. 9; The SIAC Rules, 2016, Art. 26.2; The Swiss Rules of International Arbitration, 2021, Arts. 42-43.

³⁰ The SCC Arbitration Rules, 2017, Appendix I, Art. 8(1); The SIAC Rules, 2016, Schedule 1, Cl. 7. Fry, *supra* note 28, at 183.

³² The Arbitration Institute of the Stockholm Chamber of Commerce, *SCC Emergency Arbitrator Proceedings*, available at https://sccinstitute.com/media/56037/aprag-2013_scc-practice-2010-2013-emergency-arbitrator-2.pdf (Last visited November 2, 2021) (according to statistics provided by the SCC, six out of nine decisions of emergency arbitrators were rendered within five days); N. Vivekananda, *The SIAC Emergency Arbitrator Experience*, SIAC, avail-

domestic court if its jurisdiction is perceived to be insufficient or if the court lacks the experience to accommodate a request for interim relief.³³ In a typical scenario where the issue relates to multiple jurisdictions, instead of making applications to multiple courts, making just one application to the emergency arbitrator expedites the process.³⁴ Hence, in countries where courts require excessive procedural formalities and are working slowly, parties tend to opt for EA since they can rely on its mechanism to expediently pass orders, unlike conventional courts.³⁵

2. Flexibility

Typically, arbitration rules do not specify strict standards for the decision-making process of the emergency arbitrator.³⁶ Rather, they generally state that an emergency arbitrator may order any measures “it deems necessary or appropriate”.³⁷ There is no universal approach to EA proceedings such as threshold issues, procedural matters, substantive standards and post-arbitration considerations.³⁸ However, unlike EA proceedings, domestic courts are bound by the laws of the relevant jurisdiction and may not have room to exercise their discretion. Therefore, there is a fair advantage on approaching an arbitrator over a conventional court since most arbitration rules leave a considerable amount of discretion to emergency arbitrators in delivering the order.

3. Persuasive Powers of the Arbitrator

A very important consideration in choosing the forum for interim measures is the persuasive power of the arbitrator. The orders for interim relief granted by the arbitrators are often voluntarily complied with since a party against whom such an order has been imposed would not want to be seen disobeying such orders before the arbitrator has formulated an opinion on the merits of the case.³⁹ Further, in certain cases, the arbitrators may draw an adverse inference from the non-compliance of their interim orders by a party and take the same into account while deciding the case and the costs.⁴⁰

able at <https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience> (Last visited on November 2, 2021).

³³ Fry, *supra* note 28, at 180.

³⁴ *Id.*

³⁵ Wolfram Buchwitz, *ICC Young Arbitrators Forum on Emergency Arbitrator-Success Stories and Challenges*, Vol. 13(4), GERMAN ARBITRATION JOURNAL, 197 (2015).

³⁶ The SCC Arbitration Rules, 2017, Art. 37(1); The SCC Arbitration Rules, 2017, Appendix II, Art. 1.

³⁷ The SIAC Rules, 2016, Schedule 1, Art. 6; The ICDR Rules, 2021, Art. 37(5).

³⁸ ICC Commission on Arbitration and ADR, *ICC Commission Report—Emergency Arbitrator Proceedings*, available at <https://iccwbo.org/content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf> (Last visited on November 2, 2021).

³⁹ Maxi Scherer, *Expedited Formation of the Arbitral Tribunal, Emergency Arbitrator and Expedited Replacement of Arbitrators* in *ARBITRATING UNDER THE 2020 LCIA RULES: A USER’S GUIDE*, 17 (Kluwer Law International, 2021).

⁴⁰ *Id.*

However, the domestic courts granting interim relief in arbitration would naturally not be rendering a decision on the merits of the case due to the lack of jurisdiction. Therefore, the opposite party would be less willing to comply with such court orders due to the lack of repercussions for the same. Hence, a party requesting interim relief is persuaded to opt for an arbitral proceeding over a domestic court proceeding.

4. Other Advantages

When parties invoke EA proceedings, it usually involves substantial amounts of money, value and risk, which urges parties to seek emergency relief due to its urgent and quick nature. In certain cases where the issues relate to several jurisdictions, applications may have to be made to multiple courts in several different countries. However, this can be simply avoided by approaching a tribunal for interim relief where only one application will have to be made.⁴¹ Moreover, domestic courts may not provide the most efficient solution to the problem. Courts may result in being an ineffective forum as they may use national language and national civil procedures, which would require using local counsel and involve other complications arising out of domestic procedures.⁴²

Some advantages common to arbitration and EA proceedings over domestic courts is party autonomy, privacy, confidentiality and transparency. Party autonomy is the cornerstone of EA.⁴³ Much like regular arbitral proceedings, the emergency arbitrator derives its authority from an agreement between the parties. The EA is governed by the agreement between the parties and the rules that the parties themselves consent to.⁴⁴ Through this practice of electing rules of arbitral institutions that provide for EA procedures, parties are in a position to freely exercise their autonomy. Privacy of the parties and confidentiality of information is another principle of arbitration that flows into the EA proceedings.⁴⁵ Most arbitral rules stipulate that confidentiality must be observed by the parties unless agreed otherwise.⁴⁶ Typically, no party is permitted to publish, disclose or communicate any information relating to the arbitral proceedings or an award made in the arbitration.⁴⁷ Unlike EA proceedings, court proceedings in many jurisdictions are public in nature and can result in the publication of confidential information that may have otherwise not been disclosed in an EA proceeding.

⁴¹ Nikolaus Pitkowitz & Alice Fremuth Wolf, *The Vienna Repositioning Propositions Repositioning Actors and Actions* in INTERNATIONAL ARBITRATION, AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2018 (Wien, 2018).

⁴² Shaughnessy, *supra* note 26, at 341.

⁴³ Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126, ¶5; Centrotech Minerals & Metal Inc. v. Hindustan Copper Ltd., (2017) 2 SCC 228, ¶38.

⁴⁴ NTPC v. Singer Co., (1992) 3 SCC 551, ¶¶45-46; Amazon, *supra* note 5.

⁴⁵ Fry, *supra* note 28, at 185; The HKIAC Administered Arbitration Rules, 2018, art. 42.2.

⁴⁶ The HKIAC Administered Arbitration Rules, 2018, Art. 42.1.

⁴⁷ *Id.*

EA proceedings prove to be more transparent than domestic court proceedings since most arbitration rules stipulate that prospective arbitrators will have to disclose circumstances that could possibly give rise to any doubts with regard to their impartiality and independence.⁴⁸ Even after such a declaration is made by the emergency arbitrators, the parties are entitled to question and challenge the appointment of the emergency arbitrator.⁴⁹ An emergency arbitrator is also not allowed to participate in a future related arbitration regarding the said dispute.⁵⁰ However, no such challenges can be made before domestic courts. Furthermore, courts are generally associated with a perception of bias, especially in cases where one of the parties is a national of the jurisdiction of the said court, and the other is a foreign entity.⁵¹ Additionally, unlike emergency arbitrators, judges of domestic courts may not have the specialised legal or technical knowledge required to decide a particular dispute.

The inherent benefits of the EA mechanism, coupled with the shortcomings in the mechanisms of the conventional court system, demonstrate that the former is more promising in seeking quick and efficient relief.

III. RECOGNITION OF EMERGENCY ARBITRATION IN INDIA

This part seeks to first analyse the basic difference between the interim measure relief sought through §9 and §17 of the 1996 Act. Herein, we also highlight the recommendations made by certain prominent committee reports concerning the recognition of EA in India. Lastly, the part shall analyse the judgments of the courts which have enabled, though in a limited manner, the recognition of EA under the Indian jurisprudence.

A. INTERIM MEASURES

While international arbitration practices were codified across various statutes and rules, the lack of any regulation for interim measures called for an amendment to introduce the concept under the UNCITRAL Model Law on International Arbitration, 1985, ('UNCITRAL Model Law') in 2006.⁵² This revision was aimed to promote greater efficiency in international arbitration.⁵³

⁴⁸ The ICC Arbitration Rules, 2021, Appendix V, Art. 2(5).

⁴⁹ The ICC Arbitration Rules, 2021, Appendix V, Art. 3; The ICDR Rules, 2021, Art. 37(3); The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Art. 10.

⁵⁰ The ICC Arbitration Rules, 2021, Appendix V, Art. 2(6); The SIAC Rules, 2016, Schedule 1, Arts. 4, 7; The SCC Arbitration Rules, 2017, Appendix II, Art. 1(2).

⁵¹ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, ¶7.30 (Oxford University Press, 6th ed., 2015).

⁵² United Nations Commission on International Trade Law (UNCITRAL), *Model Law on Commercial Arbitration*, Art. 17, U.N. Doc. A/40/17 (June 21, 2008) ('UNCITRAL Model Law').

⁵³ UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-Fifth Session delivered to the General Assembly*, ¶¶104-105, U.N. Doc. A/CN.9/614 (October 5,

Interim measures may be described as the grant of temporary relief delivered by a court or arbitral tribunal in order to protect a party's rights prior to the final award.⁵⁴ In most cases, interim measures are designed with an aim to effectively minimise loss, damage, or prejudice before or during arbitral proceedings or to complement the enforcement of the final award.⁵⁵ With the development of international arbitration as an efficacious alternative dispute resolution mechanism, the need for interim measures has also increased. Under the 1996 Act, the grant of interim measures is primarily located under two provisions – §9 and §17. As a general understanding, §9 provides powers to the court to grant interim measures, while §17 equips the arbitral tribunal with similar powers.⁵⁶ Notably, these provisions have been adopted in furtherance of and in consonance with Articles 9 and 17 of the UNCITRAL Model Law, respectively.⁵⁷ The characteristics of the said provisions are discussed hereunder.

1. §9 of the Arbitration and Conciliation Act, 1996

Until the constitution of the arbitral tribunal, the power to grant interim relief is primarily derived from §9 of the 1996 Act. It provides that a party may, before or during arbitral proceedings or at any time after the making of the arbitral tribunal (but before its enforcement), approach the court to seek an interim measure.⁵⁸ A party may approach the court for protection with respect to matters delineated under the provision such as preservation, interim custody or securing the amount in dispute, or any other interim measures of protection as the court may find just and convenient.⁵⁹ It is also provided that the court shall have the authority to enforce its order, as any other competent court.⁶⁰

With developments in jurisprudential trends in this subject, §9 has resulted in becoming the primary choice for parties that seek to invoke the mechanism for interim measures.⁶¹ In order to obtain such an order for interim measures by the court, the following prerequisites have evolved over time:

2006).

⁵⁴ Lee Anna Tucker, *Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty*, Vol. 1(2), INT'L COMM. ARB. BRIEF 15 (2011); Julian D.M. Lew, *Foreword in PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION*, 6 (Kluwer Law International, 2005).

⁵⁵ Markus S. Reider, *UNCITRAL Arbitration Rules-Institutional Reform*, Vol. 16(6), INT'L A.L.R., 179 (2013); Nikhil J. Variyar, *Tribunal-Ordered Interim Measures and Emergency Arbitrators: Recent Developments Across the World and in India*, Vol. 4(1), INDIAN J. ARB. L., 33 (2015).

⁵⁶ The Arbitration and Conciliation Act, 1996, §§9, 17.

⁵⁷ Variyar, *supra* note 55; Law Commission of India, *Amendments to the Arbitration and Conciliation Act, 1996*, Report No. 246, 4 (August 2014) ('246th Law Commission Report').

⁵⁸ The Arbitration and Conciliation Act, 1996, §2(e) ('court' may be the principle civil court of original jurisdiction, i.e. District Court, over the subject-matter of the dispute).

⁵⁹ *Id.*, §9(1)(ii)(c).

⁶⁰ *Id.*, §9(1).

⁶¹ Variyar, *supra* note 55, at 36.

- i. The pre-existence of an arbitration agreement or an arbitration clause;⁶²
- ii. A dispute between the respective parties to the above mentioned agreement or clause, over the subject matter of the contract, which must be referred to arbitration;⁶³
- iii. The unequivocal and manifest intention of the respective parties to take recourse to arbitration at the time of filing;⁶⁴ and
- iv. The subject matter of the dispute must fall under the original jurisdiction of the civil court, before an interim relief is sought.⁶⁵

As can be noticed, §9(1) provides the court with the power to grant interim measures during an arbitral proceeding as well. The 2015 Amendment to the 1996 Act brought clarity to the position of law in this regard.⁶⁶ With the insertion of sub-section 3, it is now clearly established that once an arbitral tribunal has been constituted, the court shall not entertain any application for interim measures unless it finds that the circumstances of the case may render the remedy under §17 ineffective.⁶⁷

Thus, in doing so, the legislature attempted to align the actual intention of the provision and its practical application. With these amendments, the legislature was able to minimise the role of courts in arbitration, thus furthering a pro-arbitration regime.⁶⁸ The power of courts to grant interim measures under §9 was only expressed as a principle and to show that it was not incompatible with circumstances where arbitration was preferred, along with the spirit of its parent provision under the UNCITRAL Model Law.

2. §17 of the Arbitration and Conciliation Act, 1996

Under §17(1), an arbitral tribunal is vested with the powers to order interim measures. §17, much like §9, provides a list of matters for which the parties can seek interim measures.⁶⁹ However, prior to the 2015 Amendment, the statute had failed to incorporate any provision for the arbitral tribunal to enforce its or-

⁶² *Punj Lloyd Ltd. v. Valentine Maritime (Mauritius) Ltd.*, 2008 SCC OnLine Del 60; *Ramji Bharany v. Ambience Developers and Infrastructure (P) Ltd.*, 2010 SCC OnLine P&H 5092.

⁶³ *PASL Wind Solutions (P) Ltd. v. GE Power Conversion India (P) Ltd.*, (2021) 7 SCC 1; Ajar Rab, *Arbitration & Conciliation Amendment Act, 2015 – Enforcing Interim Orders, Where is the Relief?*, Vol. 4, NLUD STUDENT LAW JOURNAL 92 (2017).

⁶⁴ *See also Sundaran Finance Ltd. v. NEPC India Ltd.*, (1999) 2 SCC 479 (an issue of notice to refer to arbitration is sufficient to prove such a manifest intention).

⁶⁵ *The Arbitration and Conciliation Act, 1996*, §2(1)(e); *Fountain Head Developers v. Maria Arcangela Sequeira*, 2007 SCC OnLine Bom 340.

⁶⁶ *The Arbitration and Conciliation (Amendment) Act, 2015*.

⁶⁷ *The Arbitration and Conciliation Act, 1996*, §9(3).

⁶⁸ 246th Law Commission Report, *supra* note 57.

⁶⁹ *The Arbitration and Conciliation Act, 1996*, §17(1)(ii).

ders, rendering the mechanism under it completely ineffective. The only statutory backing that arbitral tribunals had for such orders, was to be found under §27(5) of the 1996 Act, which provided the repercussions for failing to observe the orders of the tribunal, ultimately leading to contempt.⁷⁰ Though even under this provision, the arbitral tribunal would have had to seek the assistance of the court in order to enforce its orders. In case of failure to observe the order or a refusal thereby, the arbitral tribunal would have to present a case and seek the assistance of the court in deciding the defaulting party's disadvantages, penalties and punishments.⁷¹

For instance, in *Alka Chandewar v. Shamshul Ishrar Khan*,⁷² the Supreme Court held that §27(5) of the 1996 Act empowered tribunals to make representation to courts for contempt of its orders. The Court further held that the case be remanded to the High Court to decide the alleged contempt on the basis of the facts at hand and interpretation of the statutes in question and determine the defaulting party's repercussions for the contempt.⁷³ Thus, there was a clear distinction between the order of the arbitrator and the court, and only the latter was empowered with the authority to enforce its orders, as provided under §9. Such a provision was absent from §17. Hence, a defaulting party that failed to observe the orders of the arbitral tribunal could not be penalised either under the Contempt of Courts Act, 1971, ('Contempt Act') or the Code of Civil Procedure, 1908, ('CPC') – as an arbitral tribunal is not a court.⁷⁴

The 2015 Amendment sought to eliminate this disparity and bring §17 at par with §9. It inserted §17(2), which stipulates that the orders passed under §17 shall be deemed to be orders of the court and shall be enforceable under the CPC.⁷⁵ While it may seem as though a lacuna in the law was plugged, the 2015 Amendment does not answer key concerns raised regarding enforceability. The 1996 Act does not explicitly state the actual procedure for enforcement of the order issued by the arbitral tribunal. This leaves its enforcement under the CPC open to several interpretations. It is uncertain whether such an order would be enforced under §94 of the CPC, or Order XXXIX Rule 1 or 2 of the CPC, or §151 of the CPC.⁷⁶ Ultimately, the interpretation of the CPC is determined by the subject satisfaction of the courts.

⁷⁰ *Id.*, §27(5).

⁷¹ *Id.*

⁷² (2017) 16 SCC 119 ('Alka Chandewar').

⁷³ *Id.*, ¶¶6-8.

⁷⁴ Rab, *supra* note 63, at 93.

⁷⁵ The Arbitration and Conciliation Act, 1996, §17(2).

⁷⁶ Rab, *supra* note 63, at 96; §94 of the CPC provides that the powers of the court to enforce any order, such as issue a warrant against the defaulting party, or direct them to furnish any property belonging to them and place it at the disposal of the Court, or even grant a temporary injunction; Order XXXIX Rule 1 or 2 of the CPC provides for temporary injunctions or injunctions to restrain repetition or continuance of breach; §151 of the CPC authorises the courts to make orders as necessary for the ends of justice or prevent abuse of the process of the court.

The impact of such interpretation of the aforesaid provisions and enforcement under the CPC will be analysed and discussed extensively later in Part VII. At this juncture, we can observe that §17, which deals with interim measures granted by the arbitral tribunal, does not mention the concept of EA. This absence has resulted in parties arguing for the non-recognition of EA under the Indian jurisprudence.⁷⁷ In order to prevent such objections, certain recommendations had been made by the Law Commission of India ('Law Commission') and the Ministry of Law and Justice, which have been discussed below.

a. The 246th Law Commission Report

The 20th Law Commission, constituted under chairman Justice A. P. Shah, undertook the task of reviewing the provisions under the 1996 Act, and finally presented the 246th Law Commission Report ('the Report') before the Ministry of Law and Justice.⁷⁸

To give legal sanctity to rules of institutional arbitration, the Report recommends that several amendments be made to the 1996 Act in order to incorporate the concept of EA. It generally suggested that the High Courts and the Supreme Court promote and encourage the concept of EA and take effective steps to refer disputes to institutionalised arbitration.⁷⁹ Further, the Report strongly recommended that appropriate amendment be made to the definition of 'arbitral tribunal' under §2(1)(d) of the 1996 Act and that the provision explicitly include the emergency arbitrator under its ambit.⁸⁰ Such an amendment would come in light of an active recognition of institutional rules, such as those of SIAC and MCIA, which already provide for an emergency arbitrator.⁸¹ However, the government did not incorporate these recommendations under the 2015 or the 2019 Amendments and thereby failed to provide statutory support to the concept and mechanism for EA in India.

b. The High-Level Committee Report

In addition to the series of pro-arbitration initiatives, the Ministry of Law and Justice constituted a High-Level Committee ('the Committee') on January 13, 2017, to review the institutionalisation of arbitration under the chairmanship of Justice B. N. Srikrishna.⁸² The Committee was entrusted with the task of making recommendations for the reformation of arbitration in India and submit-

⁷⁷ For challenges to the recognition of EA before Indian courts, see *infra* Part III.B on "Rulings of the Indian Court".

⁷⁸ 246th Law Commission Report, *supra* note 57, at ¶10(c).

⁷⁹ *Id.*, ¶7(iv).

⁸⁰ *Id.*, ¶7.

⁸¹ The SIAC Rules, 2016, Rule 26, Schedule 1.

⁸² The High Level Committee, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (July 2017) available at <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> (Last visited on November 2, 2021) ('High Level Committee Report').

ted its report on August 3, 2017, to the Minister of Law and Justice and Electronics and Information Technology, Ravi Shankar Prasad.⁸³

The report of the Committee examined the reasons for preference displayed towards *ad hoc* arbitration over institutional arbitration in India.⁸⁴ While each of the mechanisms has its own set of advantages and disadvantages, the report highlights that the reasons for such a preference include the lack of credible arbitral institutions, preconceived notions and misconceptions surrounding institutional arbitration, lack of support from the government and legislations towards institutional arbitration, along with judicial biases against arbitration in general.⁸⁵ In this vein, to strengthen institutional arbitration, the Committee suggested an amendment to the definition of an arbitral award under §2(1)(c) of the 1996 Act to include ‘emergency award’.⁸⁶ This was recommended in order to enforce emergency decisions rendered by foreign seated tribunals.⁸⁷ Such a recommendation raises theoretical and practical concerns regarding the nature of an EA decision as an ‘award’ or an ‘order’.

The international community is itself divided on the issue of whether a decision on interim measure can qualify as an award.⁸⁸ Certain scholars argue that interim measures do not resolve any substantive dispute between the parties with finality and therefore cannot represent an award as stated under Article V(1) (e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (‘New York Convention’).⁸⁹ In contrast, other scholars have argued that the New York Convention is primarily intended to ensure certainty and effectiveness of the agreement to arbitrate and its resolution, and therefore, since it does not explicitly limit such nature of awards, interpreters should also refrain from imposing such limitations.⁹⁰

⁸³ *Id.*, Chapter II; Press Release, MINISTRY OF LAW AND JUSTICE, August 4, 2017, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=169621> (Last visited on November 2, 2021).

⁸⁴ High Level Committee Report, *supra* note 82, at Part I, Chapter III, §B.

⁸⁵ *Id.*, Part I, Chapter III, §B(2).

⁸⁶ *Id.*, Part I, Chapter VI, §E.

⁸⁷ For further discussion, see *infra* Part III.B on “Rulings of the Indian Courts”.

⁸⁸ JIANLONG YU & LIJUN CAO, A GUIDE TO THE CIETAC ARBITRATION RULES, 254 (Oxford University Press, 2020).

⁸⁹ Art. V(1)(e) of the New York Convention stipulates that the recognition and enforcement of an award may be refused if it is proved that the award has not become binding in nature; For a brief on this stance, see ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, 47 (Kluwer Law, 1981); Chester Brown, *Enforcement of Interim Measures Ordered by Tribunals and Emergency Arbitrators in International Arbitration* in INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE?, ¶17:286 (Kluwer Law International, 2013).

⁹⁰ GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 2514 (Kluwer Law, 2014); Luis Enrique Graham, *Interim Measures: Ongoing Regulation and Practices (A View from the UNCITRAL Arbitration Regime)* in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, ¶17:567 (Kluwer Law International, 2009); James E. Castello & Rami Chahine, *Enforcement of Interim Measures*, GLOBAL ARBITRATION REVIEW, 12 (2019).

This impasse is also present amongst the domestic courts across different jurisdictions. Singapore law does not recognise interim relief as an award, and it can be only enforced as an order with the leave of the court.⁹¹ The same school of thought is followed under the English law, wherein the interim relief is treated as an order and can be enforced with the assistance of the court.⁹² In contrast, other jurisdictions such as the United States of America consider interim relief also as an award within the ambit of the New York Convention.⁹³ Regardless of these conflicting opinions, since the recommendation of the Committee with respect to §2(1)(c) has not been accepted, interim relief continues to fall under the category of ‘orders’ in accordance with §9 and §17 of the 1996 Act.⁹⁴

Further, recommendations of the Committee regarding amending the definition of ‘arbitral tribunal’ under §2(1)(d) were also not implemented by the legislature under the 2015 and 2019 Amendments to the 1996 Act. Naturally, in the absence of such a statutory recognition of EA, the Indian courts have dealt with cases involving challenges to the validity of EA orders, as discussed in the next sub-part.

B. RULINGS OF THE INDIAN COURTS

Courts in India have rendered three notable decisions that deal with the issue of the recognition of the concept of EA under the Indian jurisprudence. The same have been discussed below.

1. HSBC PI Holdings v. Avitel Post

The judgment in *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studios Ltd.*,⁹⁵ (‘HSBC’) delivered by the Bombay High Court was the first case to deal with the recognition of EA in India. The seat of arbitration, in this case, was Singapore and the SIAC Rules, 2016, (‘SIAC Rules’) governed the arbitral proceedings.⁹⁶ The petitioner had invoked the EA mechanism present under the said rules that resulted in an order by the emergency arbitrator.⁹⁷ Thereafter, it filed a petition under §9 of the 1996 Act in order to enforce the said order under Indian law.⁹⁸

⁹¹ P.T. Pukuafu Indah v. Newmont Indonesia Ltd., (2012) 4 SLR 1157, ¶119 (Singapore High Court).

⁹² Philip Ahley & Louise Bowell, *Interim Measures in England and Wales*, CMS, November 29, 2018, available at <https://cms.law/en/int/expert-guides/cms-expert-guide-to-interim-measures/england-wales> (Last visited on November 2, 2021).

⁹³ *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F 2d 1046 (6th Cir 1984) (Court of Appeals for the Sixth Circuit, United States); *Yahoo! Inc. v. Microsoft Corpn.*, 983 F Supp 2d 310, 319 (Southern District of New York).

⁹⁴ Due to this stance, for the sake of simplicity, this paper shall refer to emergency relief as EA orders.

⁹⁵ 2014 SCC OnLine Bom 102 (‘HSBC’).

⁹⁶ *Id.*, ¶1(f).

⁹⁷ *Id.*, ¶1(q).

⁹⁸ *Id.*, ¶1.

Importantly, the first issue that the Court had to resolve was whether §9 of the 1996 Act, which falls under Part I, would apply to foreign seated arbitrations. This was in lieu of the decision in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*,⁹⁹ ('BALCO') that explicitly prohibited the application of Part I of the 1996 Act to foreign seated arbitrations. In this regard, the Court noted that since the agreement between the parties was entered into before the decision in BALCO and the said decision applied prospectively, the ratio of the decision would not apply to the instant case.¹⁰⁰ Moreover, the arbitration agreement between the parties specifically excluded the applicability of Part I, except for §9 of the 1996 Act.¹⁰¹ Therefore, it concluded that the parties had undoubtedly chosen to retain the applicability of §9. Thereafter, the Court delivered an order in lines of and reflecting the decision of the emergency arbitrator.¹⁰²

Though the Court did not directly engage into whether the concept of EA is recognised under the 1996 Act, it utilised the EA order to pass a similar relief under §9. Thus, it implied that the EA orders were recognised and deemed relevant by the Indian courts for granting urgent interim orders, as long as §9 applied to the case.

2. Raffles Design v. Edu comp Professional

After HSBC, the Delhi High Court dealt with a similar matter in *Raffles Design International India (P) Ltd. v. Educomp Professional Education Ltd.*¹⁰³ ('Raffles Design'). The seat of arbitration, in this case, was also Singapore,¹⁰⁴ and the petitioner had attained an EA order from the emergency arbitrator under the SIAC Rules.¹⁰⁵ However, unlike HSBC, the agreement in the present case was entered into force after BALCO, and the parties had not specifically agreed to be governed by §9 of the 1996 Act.¹⁰⁶ Therefore, the respondent argued for the non-maintainability of the petition due to the foreign seat of arbitration.¹⁰⁷

Herein, the Court took recourse to the 2015 Amendment to §2(2) of the 1996 Act, which came into effect after the decision in HSBC and marginally amended the position laid down in BALCO.¹⁰⁸ §2(2), after the amendment, states that certain provisions of Part I, including §9 shall be applicable to international commercial arbitration even if the seat is outside India.¹⁰⁹

⁹⁹ (2012) 9 SCC 552.

¹⁰⁰ HSBC, *supra* note 95, at ¶88.

¹⁰¹ *Id.*

¹⁰² *Id.*, ¶¶99-101.

¹⁰³ 2016 SCC OnLine Del 5521 ('Raffles Design').

¹⁰⁴ *Id.*, ¶6.

¹⁰⁵ *Id.*, ¶5.

¹⁰⁶ *Id.*, ¶4.

¹⁰⁷ *Id.*, ¶8.

¹⁰⁸ *Id.*, ¶62.

¹⁰⁹ The Arbitration and Conciliation Act, 1996, §2(2) (Further, §2(1)(f) defines international commercial arbitration as an arbitration wherein at least one of the parties is a national, resident,

The Court thereafter examined the purpose behind the aforesaid amendment to §2(2). It noted that the rationale behind such an amendment was to enable a party to approach the Indian courts for interim relief in respect to arbitration seated outside India.¹¹⁰ It also brought the 1996 Act in consonance with the UNCITRAL Model Law, which permits its Article 9 to be applied to foreign seated arbitration.¹¹¹ Hence, before this amendment, an Indian party in the absence of a specific agreement would have been prohibited from seeking interim measures from Indian courts.¹¹² This raised grave concerns since Indian parties were unable to obtain interim relief from the courts if the property or assets of the foreign entity were located in India.¹¹³ Herein, the Indian party would have to apply to courts of the country in which the seat of the arbitration is located, and by that time, the property or assets were usually removed or transferred by the foreign entity.¹¹⁴ Thus, the amendment to §2(2) was recommended to rectify this situation and bring the 1996 Act at par with other foreign legislations.¹¹⁵

Thereafter, the Court observed that under Rule 30.3 of the SIAC Rules, a party could also approach the judicial authority for interim measures.¹¹⁶ This led to the conclusion that the parties had agreed that seeking an interim measure from the courts would not be incompatible with the arbitral proceedings.¹¹⁷ Hence, the parties had not, through agreement, prevented the application of §2(2) of the 1996 Act.¹¹⁸ Further, the Court also noted that the enforcement mechanism under §17 would not be available to the parties due to the foreign seat of arbitration.¹¹⁹ In such circumstances, the party can either file a separate suit under CPC to enforce the order¹²⁰ or a petition under §9 as in the present case.¹²¹ However, the Court observed that under §9, the Court will consider the request for interim relief independent of the EA order.¹²² §9 could not be used to inadvertently enforce an EA order, and the Court will independently apply its mind and grant the relief.¹²³ Thus, unlike HSBC, which delivered a similar automatic relief to the EA order and therefore inadvertently enforced it, the Court in Raffles Design sought to independently review the case and then deliver its decision.

incorporated or associated with a body that is managed and controlled outside India, or a government of a foreign country).

¹¹⁰ *Id.*, ¶86.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*, ¶87.

¹¹⁴ *Id.*

¹¹⁵ *Id.*, ¶86.

¹¹⁶ *Id.*, ¶93.

¹¹⁷ *Id.*, ¶94.

¹¹⁸ *Id.*, ¶95.

¹¹⁹ *Id.*, ¶98.

¹²⁰ *Id.*, ¶99.

¹²¹ *Id.*, ¶100.

¹²² *Id.*

¹²³ *Id.*

The Court in *Raffles Design* ultimately concluded that for cases dealing with international commercial arbitration, even with a foreign seat, the parties would have recourse to §9 of the 1996 Act to obtain interim relief. However, prior EA orders rendered by an arbitral tribunal would not be relevant to the determination of the Court and cannot be enforced under §9. Thus, it nullified the relevancy and de-recognised prior decisions of the emergency arbitrator in foreign seated cases.

3. Amazon v. Future Retail

The decision in *Amazon*¹²⁴ covers a different sphere of the recognition of EA in India than *Raffles Design* and *HSBC* since it dealt with a domestic seated arbitration in New Delhi.¹²⁵ Therefore, the entirety of Part I of the 1996 Act applied to the instant case. The parties had engaged in a SIAC EA that delivered an EA order.¹²⁶ Due to the domestic seat of arbitration, the petitioner directly approached the Court under §17(2) read with Order XXXIX Rule 2A and §151 of the CPC to enforce the said order.¹²⁷ However, the respondent raised objections stating that an emergency arbitrator is not recognised as an arbitrator under §2(1)(d), and an EA order is also not recognised as an order under §17(1), and thus not enforceable under §17(2) of the 1996 Act.¹²⁸

The Delhi High Court relied on §2(6) of the 1996 Act, which provides freedom to the parties to authorise any person, including an arbitral institution, to determine the disputes between the parties.¹²⁹ Further, §2(8) stipulates that such an agreement to authorise an institution would include the arbitral rules referred in the agreement.¹³⁰ Moreover, §19(2) permits the parties to agree on the procedure to be followed by the arbitral tribunal.¹³¹ Thus, through the operation of §2(8), the Court observed that the parties had incorporated the SIAC Rules under the arbitration agreement and thereby had agreed to be bound by the provisions regarding EA.¹³² Therefore, the Court held that on the conjoint reading of §2(6), §2(8), §19(2), and the SIAC Rules, the emergency arbitrator would fall under the definition of an arbitrator under the §2(1)(d) of the 1996 Act.¹³³ It viewed that this current framework was sufficient to recognise the concept of EA, and no amendments as suggested by the Law Commission or the Committee were required.¹³⁴ Hence, the Court concluded that the EA order was an interim order of an arbitral

¹²⁴ 2021 SCC OnLine Del 1279.

¹²⁵ *Id.*, ¶10.

¹²⁶ *Id.*, ¶11.

¹²⁷ *Id.*, ¶1.

¹²⁸ *Id.*

¹²⁹ *Id.*, ¶140.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*, ¶143.

¹³³ *Id.*, ¶144.

¹³⁴ *Id.*, ¶146.

tribunal under §17(1) and enforceable under §17(2) of the 1996 Act.¹³⁵ The decision in Amazon was appealed before the Supreme Court,¹³⁶ wherein the Court made observations that were on similar lines as those of the High Court.¹³⁷

Therefore, the EA order made in domestic seated arbitrations is currently recognisable under §17 of the 1996 Act. On the other hand, EA orders delivered under a foreign seated arbitration dealing with international commercial arbitration, as observed in Raffles Design, do not enjoy such recognition under §17 due to the inapplicability of Part I. The parties would be required to approach the Court under §9 or file a fresh suit under the CPC. Herein, while determining the claims under §9, the EA orders are not recognised or considered by the courts and cannot be directly enforced under the mechanism. Only the resulting order of the Court under §9, which will be based on its independent application of mind, is recognisable under the said provision.

Herein, another consideration that arises is with respect to the recognition of EA orders issued under a foreign seated tribunal but not dealing with international commercial arbitration as defined under §2(1)(f) 1996 Act – which necessitates the involvement of a foreign party. This situation can arise due to the recent decision in *PASL Wind Solutions (P) Ltd. v. GE Powers Conversion India (P) Ltd.*,¹³⁸ ('PASL') where the Supreme Court upheld the ability of two Indian parties to choose a foreign seat of arbitration. Therefore, in such a scenario, the arbitration, though seated in a foreign nation, would only be categorised as domestic arbitration, and thus, §2(2) of the 1996 Act would not be applicable. However, the Court in PASL had held that irrespective of such omission, §9 remedies for interim measures by domestic courts should be available to Indian parties who choose a foreign seat of arbitration. Conclusively, in such situations as well, it can be noticed that the ratio of Raffles Design shall be applicable since it is a foreign seated arbitration, and only §9 of the 1996 Act is applicable.

As has been recommended before,¹³⁹ in order to expressly recognise EA in foreign seated arbitration, a provision similar to §17 would have to be inserted in Part II of the 1996 Act. Another way to achieve this can be through adopting the recommendations made by the Committee to include EA orders under the ambit of an arbitral award under §2(1)(c). However, this will carry theoretical concerns regarding the connotation of interim relief as an award, as discussed earlier.

¹³⁵ *Id.*, ¶188.

¹³⁶ Radhika Roy, *Future Retail's Appeal Against Emergency Award Not Maintainable, Amazon Argues in Supreme Court*, LIVE LAW, July 21, 2021, available at <https://www.livelaw.in/top-stories/future-retails-appeal-against-emergency-award-not-maintainable-amazon-argues-in-supreme-court-177898> (Last visited on November 2, 2021).

¹³⁷ Amazon, *supra* note 5.

¹³⁸ 2021 SCC OnLine SC 331.

¹³⁹ Kartikey Mahajan & Sagar Gupta, *Uncertainty of Enforcement of Emergency Awards in India*, KLUWER ARBITRATION BLOG, December 7, 2016, available at <http://arbitrationblog.kluwerarbitration.com/2016/12/07/uncertainty-of-enforcement-of-emergency-awards-in-india/> (Last visited on November 2, 2021).

IV. INTERNATIONAL RULES AND THE KEY FEATURES OF EMERGENCY ARBITRATION MECHANISM

Through this part, the paper will attempt to explore the EA mechanism present under the various arbitral rules of prominent international arbitration institutions. Such a survey shall enable us to flesh out the underlying commonalities that flow through these rules – which create an efficient and robust EA mechanism. This identification shall enable us to analyse the robustness of the domestic institutional rules in the succeeding parts. The minimum threshold requirements, and the obligation and duties of the emergency arbitrator and the parties, are essential to eliminate the abuse of the EA process by a claimant while simultaneously determining the claims quickly in order to reduce the delaying tactics adopted by respondents to frustrate the effect of an EA order. The rationale behind such features shall be discussed in detail under Part VI.

A. IDENTIFIED INTERNATIONAL ARBITRAL INSTITUTIONS

Seven prominent international arbitral institutes have been identified for understanding the key common features of EA. These include SIAC, LCIA, HKIAC, SAC, SCC, ICC, and CIETAC. These are the leading institutions at the global level due to their high level of penetration in settlement of international disputes. For instance, SIAC arbitration is immensely popular and frequently used by Indian companies and corporations.¹⁴⁰ Even in the three cases in India that relate to EA, the SIAC Rules governed the arbitration proceedings.¹⁴¹ Their popularity is also evinced from the SIAC 2020 Annual Report, where India emerged as the top foreign user of SIAC's institutional mechanism, with 690 of the 1,083 administered cases comprising an Indian party.¹⁴² On the other hand, LCIA is one of the world's leading arbitral institutions for the resolution of commercial disputes.¹⁴³ As per the LCIA 2020 Annual Report, the institution witnessed an eighteen per-cent increase in the cases administered by it from the previous year.¹⁴⁴ Indian parties have also increasingly opted for the LCIA Rules, 2020 ("LCIA Rules") due to their

¹⁴⁰ Herbert Smith, *Dispute Resolution and Governing Clauses in India-Related Commercial Contracts*, HERBERT SMITH FREEHILLS, January 1, 2011, available at <https://hsfnotes.com/wp-content/uploads/sites/4/2012/02/8619-Dispute-resolution-and-governing-law-clauses-in-India-related-commercial-contracts-d11.pdf> (Last visited on November 2, 2021).

¹⁴¹ For details, see *supra* Part III.B on "Rulings of the Indian Courts".

¹⁴² Singapore International Arbitration Centre, *Annual Report 2020*, available at https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf (Last visited on November 2, 2021).

¹⁴³ Ana Coimbra Trigo & Gustavo Becker, *The LCIA 2019 Annual Report: An Analysis of the Developments in International Arbitration*, KLUWER ARBITRATION BLOG, June 30, 2020, available at <http://arbitrationblog.kluwerarbitration.com/2020/06/30/the-lcia-2019-annual-report-an-analysis-of-the-developments-in-international-arbitration/> (Last visited on November 2, 2021).

¹⁴⁴ London Court of International Arbitration, *Annual Report 2020*, January 21, 2021, available at <file:///C:/Users/hp/Downloads/2020%20LCIA%20Annual%20Casework%20Report.pdf> (Last visited on November 2, 2021).

compliances with the best practices and the efficient and professional functioning of the institution.¹⁴⁵

HKIAC is known to offer efficient and reasonably priced arbitration, as well as an expedited EA process.¹⁴⁶ The HKIAC Administered Arbitration Rules, 2018 ('HKIAC Rules') are innovative and progressive, especially with respect to cases involving multiple parties or contracts.¹⁴⁷ Despite the COVID-19 pandemic, the institution has seen an increase in the number of cases administered by it.¹⁴⁸ The ICC, with its progressive and efficient mechanism under the ICC Arbitration Rules, 2021 ('ICC Rules'), has continued to remain one of the most popular arbitral institutions in the world.¹⁴⁹ ICC, in particular, has made significant breakthroughs in the Asian market.¹⁵⁰ Indian parties have increasingly opted for the ICC Rules, with the number growing three-folds between 2018 and 2019.¹⁵¹ India is currently second in the number of parties choosing ICC arbitration worldwide.¹⁵²

SCC, since its establishment in 1917, has witnessed a steady increase in its popularity.¹⁵³ In 2020, around half of the cases administered by the institute were international disputes involving parties from over forty-three countries,

¹⁴⁵ Manoj K. Singh, *The Future of Arbitration in India: Strengthening the Process of Alternative Dispute Resolution*, THE ECONOMIC TIMES, April 17, 2021, available at <https://economictimes.indiatimes.com/small-biz/legal/the-future-of-arbitration-in-india-strengthening-the-process-of-alternative-dispute-resolution/articleshow/82114707.cms> (Last visited on November 2, 2021).

¹⁴⁶ Hong Kong International Arbitration Centre, *HKIAC Releases Average Costs and Duration Report*, June 22, 2021, available at <https://www.hkiac.org/news/hkiac-releases-average-costs-and-duration-report> (Last visited on November 2, 2021).

¹⁴⁷ Latham & Watkins LLP, *Taking Stock of Hong Kong as an Arbitral Seat*, December 17, 2020, available at <https://www.lw.com/thoughtLeadership/Taking-Stock-of-Hong-Kong-as-an-Arbitral-Seat> (Last visited on November 2, 2021).

¹⁴⁸ Timothy Blakely et al., *Latest HKIAC Statistics Reveal that Arbitration Continues to Thrive in Hong Kong despite COVID-19*, JD SUPRA, February 16, 2021, available at <https://www.jdsupra.com/legalnews/latest-hkiac-statistics-reveal-that-6911580/> (Last visited on November 2, 2021).

¹⁴⁹ International Chamber of Commerce, *ICC Announces Record 2020 Caseloads in Arbitration and ADR*, January 12, 2021, available at <https://iccwbo.org/media-wall/news-speeches/icc-announces-record-2020-caseloads-in-arbitration-and-adr/> (Last visited on November 2, 2021); White & Case, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, May 6, 2021, available at <https://www.whitecase.com/publications/insight/2021-international-arbitration-survey/current-choices-future-adaptations> (Last visited on November 2, 2021).

¹⁵⁰ Anna Maxwell et al., *Records set in International Chamber of Commerce 2019 Dispute Resolution Statistics*, ENYO LAW, September 9, 2020, available at <https://www.enyolaw.com/posts/151/records-set-in-international-chamber-of-commerce-s-icc-2019-dispute-resolution-statistics> (Last visited on November 2, 2021).

¹⁵¹ Adrienne Goins & Eydya La Paz, *ICC Arbitration Case Statistics Show Positive Trends in Global Reach, Diversity & Efficiency*, JD SUPRA, July 23, 2020, available at <https://www.jdsupra.com/legalnews/icc-arbitration-case-statistics-show-41108/> (Last visited on November 2, 2021).

¹⁵² Jonathan Rea, *Records Set for the ICC in its 2019 Dispute Resolution Statistics*, LINKLATERS, available at <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/august/records-set-for-the-icc-in-its-2019-dispute-resolution-statistics> (Last visited on November 2, 2021).

¹⁵³ Aceris Law LLC, *Arbitral Institutions and Arbitration Courts*, available at <https://www.international-arbitration-attorney.com/arbitral-institutions-and-arbitration-courts/> (Last visited on November 2, 2021).

including India.¹⁵⁴ One of the main reasons that SCC is a popular venue for arbitration is Sweden's reputation as a relatively neutral State in world affairs and geopolitics.¹⁵⁵ Further, CIETAC is the leading arbitration institution in China and one of the busiest arbitration centres in the world.¹⁵⁶ In 2020, the institute saw an 8.5 per-cent growth in the caseload and handled disputes amounting in total to 17.3 billion dollars.¹⁵⁷ Further, over one-fifth of the cases administered by the institute involved a foreign party.¹⁵⁸

Lastly, SAC has been involved in offering arbitration as well as mediation services for more than 150 years.¹⁵⁹ The caseload handled by the institute has been increasing steadily, with over seventy-three per-cent of the cases in 2020 dealing with international arbitration.¹⁶⁰ In June 2021, the centre converted from Swiss Chambers' Arbitration Institute to SAC due to changes in the structuring of the organisation and introduced the new Swiss Rules of International Arbitration, 2021 ('SAC Rules').¹⁶¹

B. DELINEATING THE KEY FEATURES OF EMERGENCY ARBITRATION

1. Expedited Process

Through the survey of the various EA mechanisms, we can observe an expedited process for the determination of EA application, the appointment of

¹⁵⁴ Arbitration Institute of the Stockholm Chamber of Commerce, *SCC Statistics 2020*, available at <https://sccinstitute.com/statistics/> (Last visited on November 2, 2021).

¹⁵⁵ Fredrik Lundblom & Sebastian Berglind Vinge, *Country Chapter: SCC Sweden*, GLOBAL ARBITRATION REVIEW, December 3, 2020, available at <https://globalarbitrationreview.com/review/the-european-arbitration-review/2021/article/sweden#footnote-001-backlink> (Last visited on November 2, 2021).

¹⁵⁶ Jones Day, *Arbitration in Asia: An Overview of the CIETAC, HKIAC, SIAC, AND UNCITRAL Arbitration Rules*, LEXOLOGY, December 10, 2012, available at <https://www.lexology.com/library/detail.aspx?g=f5d02a0e-3a8b-4b34-bb30-bc7aff0d2d1d> (Last visited on November 2, 2021).

¹⁵⁷ China International Economic and Trade Arbitration Commission, *CIETAC'S Work Summary for 2020 and the Work Plan for 2021*, January 29, 2021, available at <http://www.cietac.org/index.php?m=Article&a=show&id=17427> (Last visited on November 2, 2021); Herbert Smith Freehills LLP, *Rise in Arbitration Cases in 2020 Despite Reduced Volume of in Person Hearing Due to Coronavirus Pandemic*, March 3, 2021, available at <https://www.lexology.com/library/detail.aspx?g=caa661ab-434a-4856-8783-84f349e06036> (Last visited on November 2, 2021).

¹⁵⁸ Cranfill Sumner LLP, *2021 Trends in International Arbitration*, JD SUPRA, April 26, 2021, available at https://www.jdsupra.com/legalnews/2021-trends-in-international-arbitration-6311785/#_ftn6 (Last visited on November 2, 2021).

¹⁵⁹ Global Arbitration Review, *Swiss Chambers' Arbitration Institution*, January 2, 2019, available at <https://globalarbitrationreview.com/survey/the-guide-regional-arbitration/2019/organization-profile/swiss-chambers-arbitration-institution-scai> (Last visited on November 2, 2021).

¹⁶⁰ Simon Chapman et al., *Rise in Arbitration Cases in 2020*, HERBERT SMITH FREEHILLS, March 3, 2021, available at <https://hsfnotes.com/arbitration/tag/scai/> (Last visited on November 2, 2021).

¹⁶¹ Sebastiano Nesi, *A Swiss "(R)Evolution": SCAI Becomes the Swiss Arbitration Centre and Enacts New Arbitration Rules*, KLUWER ARBITRATION BLOG, June 15, 2021, available at <http://arbitrationblog.kluwerarbitration.com/2021/06/15/a-swiss-revolution-scai-becomes-the-swiss-arbitration-centre-and-enacts-new-arbitration-rules/> (Last visited on November 2, 2021).

the emergency arbitrator, challenges to such appointment, and the determination of the claims by the emergency arbitrator. The determination of the EA application and the subsequent appointment of the emergency arbitrator is generally done within one to three days.¹⁶² The same is significantly shorter than the general practice for the appointment of the arbitrator. For instance, in an ordinary arbitration proceeding, the LCIA Rules provide for a twenty-eight day period from the date when the request for arbitration is received for such an appointment.¹⁶³ The HKIAC Rules provide for a fifteen to thirty day period for the selection of the arbitral tribunal.¹⁶⁴ On the other hand, the SIAC Rules stipulate the appointment to be done “as soon as practicable”.¹⁶⁵

Similarly, the challenges to the appointment of the emergency arbitrator have to be made generally within one to three days under the international arbitral rules.¹⁶⁶ The permitted period for such a challenge is much longer under the normal procedure. For instance, under the SIAC Rules, a challenge to the appointment of an arbitrator can be made within fourteen days from such an appointment or the disclosure of any fact which raises issues regarding independence and impartiality of the arbitrator.¹⁶⁷ Similarly, the CIETAC Arbitration Rules, 2015 (‘CIETAC Rules’) provide a fifteen-day period for challenging the appointment of an arbitrator.¹⁶⁸ The ICC Rules, on the other hand, provide a thirty period to the parties for such a challenge.¹⁶⁹

Further, the emergency arbitrator generally has to deliver the EA order within fourteen to fifteen days under the international rules.¹⁷⁰ The SCC Arbitration Rules, 2017 (‘SCC Rules’), though provide for a highly expedited five day period for delivering such an order.¹⁷¹ Such an expedited and time-bound deci-

¹⁶² The SIAC Rules, 2016, Schedule 1, Cl. 2; The LCIA Rules, 2020, Art. 9.6; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. 4; The ICC Arbitration Rules, 2021, Appendix V, Art. 2(1); The SCC Arbitration Rules, 2017, Appendix II, Art. 3 read with Art. 4(1); The Swiss Rules of International Arbitration, 2021, Art. 43(1)(c) read with Art. 12(2); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 2(1).

¹⁶³ The LCIA Rules, 2020, Art. 5.6.

¹⁶⁴ The HKIAC Administered Arbitration Rules, 2018, Arts. 6-7.

¹⁶⁵ The SIAC Rules, 2016, Rule 9.4.

¹⁶⁶ The SIAC Rules, 2016, Schedule 1, Cl. 5; The LCIA Rules, 2020, Art. 10; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. 7 read with Art. 11.7; The ICC Arbitration Rules, 2021, Appendix V, Art. 3(1); The SCC Arbitration Rules, 2017, Art. 4(3) read with Art. 19(3); The Swiss Rules of International Arbitration, 2021, Art. 13(2) read with Art. 43(4); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 3(4).

¹⁶⁷ The SIAC Rules, 2016, Rule 15.1.

¹⁶⁸ The CIETAC Arbitration Rules, 2015, Art. 32(3).

¹⁶⁹ The ICC Arbitration Rules, 2021, Art. 14(2).

¹⁷⁰ The SIAC Rules, 2016, Schedule 1, Cl. 9; The LCIA Rules, 2020, Art. 9.8; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. 12; The ICC Arbitration Rules, 2021, Appendix V, Art. 6(4); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 6(2); The Swiss Rules of International Arbitration, 2021, Art. 43(7) read with Art. 42(1)(e); Sandra de Vito Bieri & Raphaelle Favre Schnyder, *Other Provisions: Emergency Relief (Art. 43)* in SWISS RULES OF INTERNATIONAL ARBITRATION COMMENTARY, 457 (Schulthess Juristische Medien AG, 2nd ed., 2013).

¹⁷¹ The SCC Arbitration Rules, 2017, Appendix II, Art. 8(1).

sion for interim measures is absent when similar measures are granted after the formation of an arbitral tribunal. The institution rules generally do not provide any time period for the adjudication of interim claims, and the determination is at the discretion of the arbitral tribunal.

Furthermore, the emergency arbitrator is also usually obligated to form a schedule for the EA proceedings within one or three days of their appointment.¹⁷² Under normal procedure, there is no such time limit, and the arbitrators are generally encouraged to establish the procedure and the schedule for the arbitral proceedings promptly and as soon as possible.¹⁷³ The schedule formulated by the emergency arbitrator should provide the parties with a reasonable opportunity to be heard and may also provide for virtual or document-only hearings as a substitute to a formal hearing. Lastly, the international rules include non-business days for the purpose of calculating the deadlines instead of only 'business' days. The reasons and the importance of such a difference will be discussed extensively in Part VI.

2. Ingredients of the Application

It can be noticed that the international EA rules provide for three common and basic ingredients on an EA application. The applicant is required to provide

- i. the background and nature of the urgent claim,
- ii. the reasons why such an urgent claim is required, and
- iii. proof of notification to the other parties regarding such application.¹⁷⁴

While elucidating the reasons for the emergency relief, the applicant is generally required to show that the relief sought is fair and proportional, and if the same is not granted, the applicant will face irreparable harm.¹⁷⁵ The standard

¹⁷² The SIAC Rules, 2016, Schedule 1, Cl. 7; The LCIA Rules, 2020, Art. 9.7; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. 10; MICHAEL MOSER & CHIANN BAO, A GUIDE TO THE HKIAC ARBITRATION RULES, 140 (Oxford University Press, 2017); The ICC Arbitration Rules, 2021, Appendix V, Art. 5(1); The SCC Arbitration Rules, 2017, Appendix II, Art. 10(5); The Swiss Rules of International Arbitration, 2021, Art. 43(6); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 5(1).

¹⁷³ See The Swiss Rules of International Arbitration, 2021, Art. 19(2), the SCC Arbitration Rules, 2017, Art. 28(1), and the SIAC Rules, 2016, Rule 19.3.

¹⁷⁴ The SIAC Rules, 2016, Schedule 1, Cl. 1; The LCIA Rules, 2020, Art. 9.5; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. 2; The ICC Arbitration Rules, 2021, Appendix V, Art. 1(2); The SCC Arbitration Rules, 2017, Appendix II, Art. 2; The Swiss Rules of International Arbitration, 2021, Art. 43(1)(c); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 1(3).

¹⁷⁵ YU & CAO, *supra* note 88, at 258; UNCITRAL Model Law, *supra* note 52, at Art. 17(2).

for urgency required is intrinsically higher in EA and must be such that it cannot avoid the formation of the arbitral tribunal.¹⁷⁶

The information provided in the application enables the arbitral institution to assess whether there is a *prima facie* jurisdiction to the claims and also provides time to the respondent to prepare a response.¹⁷⁷ This avoids the hassle of organising EA proceedings for trivial and vexatious claims – preventing the wastage of time of the opposite parties, the arbitrators as well as the institution. Further, a notification to the other relevant parties seeks to avoid an *ex-parte* proceeding for the determination of the claim and also provides more time to the opposite parties to prepare their responses.¹⁷⁸ However, a refusal by the opposite party to participate in the EA proceedings will not prevent the proceedings from taking place.¹⁷⁹ The principle is to provide every reasonable opportunity to the opposite party to participate in the EA proceedings.

3. Special Procedure for the Determination of the Seat of Arbitration

The international rules for EA contain a specific and distinct process for ascertaining the seat of arbitration during an EA proceeding.¹⁸⁰ Generally, the rules provide that if the parties have expressly agreed to a particular place as the seat of arbitration, the same shall also be the seat for the EA proceedings. However, if the emergency arbitrator cannot delineate any express agreement with respect to the seat, the domicile of the arbitral institute shall automatically be adjudged as the seat.

For instance, the LCIA Rules provide that in the absence of an express agreement, the seat of arbitration shall be London.¹⁸¹ Similarly, the SIAC Rules stipulate Singapore as the seat of arbitration in the absence of an express agreement.¹⁸² Such a process is distinct from the normal procedure where the

¹⁷⁶ Edgardo Muñoz, *How Urgent Shall an Emergency Be?—The Standards Required to Grant Urgent Relief by Emergency Arbitrators* in YEARBOOK ON INTERNATIONAL ARBITRATION, Vol. IV, 61 (Brill Books, 2007); Bieri & Schnyder, *supra* note 170, at 459; MOSER & BAO, *supra* note 172, at 132.

¹⁷⁷ JAKOB RAGN WALDH ET AL., A GUIDE TO THE SCC ARBITRATION RULES, 184 (Kluwer Law International, 2019); YU & CAO, *supra* note 88, at 260.

¹⁷⁸ JOHN CHOONG ET AL., A GUIDE TO THE SIAC ARBITRATION RULES, 242 (Oxford University Press, 2nd ed., 2018).

¹⁷⁹ RAGN WALDH, *supra* note 177, at 187.

¹⁸⁰ The SIAC Rules, 2016, Schedule 1, Cl. 5; The LCIA Rules, 2020, Art. 16.2; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. 9; The ICC Arbitration Rules, 2021, Appendix V, Art. 4(1) read with Art. 18(1); The SCC Arbitration Rules, 2017, Appendix II, Art. 5; The Swiss Rules of International Arbitration, 2021, Art. 43(5); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 4 read with Art. 7(2).

¹⁸¹ The LCIA Rules, 2020, Art. 16.2.

¹⁸² The SIAC Rules, 2016, Schedule 1, Cl. 5.

arbitral tribunal has to generally determine the seat of the arbitration based on all the relevant circumstances of the case.¹⁸³

It is important to note that certain rules such as ICC Rules, SCC Rules and SAC Rules instead provide that, in the absence of an express agreement, the President or the Board shall determine the seat of the arbitration. However, even in such circumstances, the seat of arbitration is mostly delineated to be the domicile of the institution.¹⁸⁴ Further, the determination of the seat can be based on factors suitable for an EA proceeding and distinct from the tests usually applied.¹⁸⁵ Such factors may include whether the seat has a law permitting for emergency measures, the general time constraint for granting an EA order and whether the measure will be enforced.¹⁸⁶ Moreover, the principle or the key feature here is not regarding an automatic process for the determination of the seat. Instead, the underlying principle is to avoid the utilisation of the time of the emergency arbitrator to determine such complex challenges regarding the seat of arbitration.

Further, such an automatic decision or the determination by the President or the Board regarding the seat of the arbitration is only applicable for the EA proceedings. In other words, the arbitral tribunal is not bound by such a determination and may ascertain the seat of arbitration as per the applicable law.

4. Disclosure of Matters concerning Impartiality and Independence of Emergency Arbitrator

It can be evinced that the international rules for EA stipulate an explicit duty on behalf of the emergency arbitrator to disclose any facts or circumstances that may affect their impartiality or independence while adjudicating the claims.¹⁸⁷ Such a disclosure has to be made by the emergency arbitrator before their appointment under the relevant rules. It is noteworthy that since the appointment under the EA rules usually takes place in one to three days, this self-determination by the emergency arbitrator has to also be completed in an expedited manner keeping in mind the short deadlines.

Moreover, this duty of disclosure is a continuing duty that lasts for the entire EA process. Thus, the emergency arbitrator, even after their appointment, is duty-bound to disclose any facts or circumstances that endanger their

¹⁸³ See The SIAC Rules, 2016, Rule 21.1, the ICC Arbitration Rules, 2021, Art. 18, and the HKIAC Administered Arbitration Rules, 2018, Art. 14.1.

¹⁸⁴ RAGN WALDH, *supra* note 177, at 191.

¹⁸⁵ Bieri & Schnyder, *supra* note 170, at 465.

¹⁸⁶ *Id.*

¹⁸⁷ The SIAC Rules, 2016, Schedule 1, Cl. 5; The LCIA Rules, 2020, Art. 9.7; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. 7 read with Art. 11.4; The ICC Arbitration Rules, 2021, Appendix V, Art. 2(5) read with Art. 2(4); The SCC Arbitration Rules, 2017, Art. 18(2); The Swiss Rules of International Arbitration, 2021, Art. 12(2); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 3(2).

impartiality or independence. Challenges to the appointment, as stated before, have to be made generally within one or three days from such appointment or the disclosure of the facts and circumstances by the emergency arbitrator.

5. No Strict Requirement for a Formal Hearing

The international EA rules provide wide discretion to the emergency arbitrator with respect to the manner in which the proceedings have to be conducted. The main consideration that the emergency arbitrator has to keep in mind is the requirement for an expedited resolution of the claims. In light of the same, though the emergency arbitrator has to provide a reasonable opportunity to be heard, in the interest of expediency, the EA rules specifically provide that virtual hearings through tele or video conferencing or proceedings based only on the documents presented can act as alternatives to the requirement of a formal hearing.¹⁸⁸

The provision for document only proceedings is in contrast to the general rule where such proceedings can only take place if the parties have agreed to the same or no party has requested for a hearing.¹⁸⁹ It is important to mention that such measures of documents only proceeding for an EA process should only be taken by the emergency arbitrator in exceptional circumstances and not as a matter of rule.

6. Availability of Parallel Domestic Court Proceedings

The EA mechanism present under the various rules does not act as a substitute to the right of the parties to approach any judicial authority having jurisdiction to hear an interim relief application by the concerned party. As discussed before, the EA process is a parallel mechanism to the process of adjudicating interim relief present under a domestic court, despite possessing certain inherent advantages.

In light of the same, the international rules specifically state that the parties are free to approach a domestic court for such emergency relief even during an ongoing EA proceeding before an emergency arbitrator.¹⁹⁰

¹⁸⁸ The SIAC Rules, 2016, Schedule 1, Cl. 7; The LCIA Rules, 2020, Art. 5.4; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. Cl. 10; MOSER & BAO, *supra* note 172, at 140; The ICC Arbitration Rules, 2021, Appendix V, Art. 5(2); The SCC Arbitration Rules, 2017, Art. 7 read with Art. 23(1); RAGNWALDH, *supra* note 177, at 193; The Swiss Rules of International Arbitration, 2021, Art. 43(6); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 5(1).

¹⁸⁹ See The ICC Arbitration Rules, 2021, Art. 26(1), and the SIAC Rules, 2016, Rule 24.1.

¹⁹⁰ The SIAC Rules, 2016, Schedule 1, Cl. 30.3; The LCIA Rules, 2020, Arts. 9.12-9.13; The HKIAC Administered Arbitration Rules, 2018, Schedule 4, Cl. 20; The ICC Arbitration Rules, 2021, Art. 29(7); The SCC Arbitration Rules, 2017, Art. 9(4); The Swiss Rules of International Arbitration, 2021, Art. 29(5); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 5(4).

7. Power of the Emergency Arbitrator to Adjudicate on Issues Arising out of an Arbitration Agreement

The emergency arbitrator is considered by the EA rules to possess the same power as a regular arbitrator to adjudicate on disputes and issues arising out of an arbitration agreement. Thereby, the international EA rules specifically state that the emergency arbitrator shall them self determine issues regarding jurisdiction such as arbitrability of a dispute, validity of the arbitration agreement and other issues that arise out of an arbitration agreement.¹⁹¹ Such a provision, in the EA context, also reinforces the principle of *kompetenz-kompetenz*, which deals with the power of an arbitral tribunal to determine its own jurisdiction.¹⁹²

8. Authority of the Emergency Arbitrator to make ‘Necessary’ Decisions

The international EA rules uniformly provide the emergency arbitrators with the power and discretion to make any necessary decision and grant any necessary relief to the parties.¹⁹³ This results in the emergency arbitrator not being confined to a specific jurisprudence of a legal system in determining the order, unlike the domestic courts. Further implications of such a provision are discussed subsequently in Part VI.

9. Emergency Arbitrator’s Discretion to State only Brief Reasons

It can be observed that the EA rules specifically provide emergency arbitrators with the option to state reasons for the final EA order in a brief

¹⁹¹ The SIAC Rules, 2016, Schedule 1, Cl. 13; The LCIA Rules, 2020, Art. 9.8; The HKIAC Administered Rules, 2018, Schedule 4, Cl. 10; The ICC Arbitration Rules, 2021, Art. 29(4); The SCC Arbitration Rules, 2017, Appendix II, Art. 7; The Swiss Rules of International Arbitration, 2021, Art. 43(7); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 6(2).

¹⁹² Sai Anukaran & Niyati Raval, *The Negative Affect of Negative Effect of Kompetenz-Kompetenz on International Arbitration: Notes from the Devas v. Antrix Saga*, KLUWER ARBITRATION BLOG, June 9, 2020, available at <http://arbitrationblog.kluwerarbitration.com/2020/06/09/the-negative-affect-of-negative-effect-of-kompetenz-kompetenz-on-international-arbitration-notes-from-the-devas-v-antrix-saga/> (Last visited on November 2, 2021).

¹⁹³ The SIAC Rules, 2016, Schedule 1, Cl. 8; The LCIA Rules, 2020, Art. 9.8; The HKIAC Administered Rules, 2018, Art. 23.2; The ICC Arbitration Rules, 2021, Art. 29(4); The SCC Arbitration Rules, 2017, Appendix II, Art. 37(1) read with Appendix II, Art. 1(2); The Swiss Rules of International Arbitration, 2021, Art. 43(7); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 6(1).

manner.¹⁹⁴ This is in contrast to the general rule where the arbitral tribunal has to provide detailed reasons for the determinations of the issues.¹⁹⁵

10. No Right to Appeal the EA Order

The international EA rules explicitly bind the parties to the EA order that is determined by the emergency arbitrator.¹⁹⁶ Herein, the parties are prohibited from appealing or reviewing the EA order before a domestic court or any other judicial authority.¹⁹⁷ The parties are mandated by the rules to carry out the order in an expedited manner.

11. Emergency Arbitrator to not act as an Arbitrator in Future Arbitration Regarding the Dispute

It can be observed that the international rules explicitly prohibit the emergency arbitrator from being a member of the arbitral tribunal in any future arbitration regarding the concerned dispute between the parties.¹⁹⁸ Such an automatic bar is unique to the EA mechanism. However, it is important to note that parties are free to agree to have the same emergency arbitrator as an arbitrator in future proceedings.¹⁹⁹ This may be inspired due to the professional functioning of the arbitrator, prior understanding of the issues, or any other factor that the parties may deem important and relevant.²⁰⁰

12. Arbitral Tribunal has the Authority to Review the EA Order

The arbitral tribunal, upon its constitution, is granted the discretion to vary, confirm, suspend, or discharge the EA order.²⁰¹ This highlights the tempo-

¹⁹⁴ The SIAC Rules, 2016, Schedule 1, Cl. 8; The LCIA Rules, 2020, Art. 9.8; The HKIAC Administered Rules, 2018, Schedule 4, Cl. 14(b); The ICC Arbitration Rules, 2021, Art. 6(4); The SCC Arbitration Rules, 2017, Appendix II, Art. 8(1); The Swiss Rules of International Arbitration, 2021, Art. 43(7); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 6(2).

¹⁹⁵ See The SIAC Rules, 2016, Rule 32.4, the ICC Arbitration Rules, 2021, Art. 32(2), and the HKIAC Administered Arbitration Rules, Art. 35(4).

¹⁹⁶ The SIAC Rules, 2016, Schedule 1, Cl. 10; The LCIA Rules, 2020, Art. 26.8; The HKIAC Administered Rules, 2018, Schedule 4, Cl. 16 read with Art. 35.3; The ICC Arbitration Rules, 2021, Art. 29(4); The SCC Arbitration Rules, 2017, Appendix II, Art. 9(3); The Swiss Rules of International Arbitration, 2021, Art. 16(1); The CIETAC Arbitration Rules, 2015, Art. 23(2).

¹⁹⁷ *Id.*

¹⁹⁸ The SIAC Rules, 2016, Schedule 1, Cl. 6; The LCIA Rules, 2020, Art. 9.4; Scherer, *supra* note 39, at 8; The HKIAC Administered Rules, 2018, Schedule 4, Cl. 19; The ICC Arbitration Rules, 2021, Art. 2(6); The SCC Arbitration Rules, 2017, Appendix II, Art. 4(4); The Swiss Rules of International Arbitration, 2021, Art. 43(11); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 3(8).

¹⁹⁹ *Id.*

²⁰⁰ MOSER & BAO, *supra* note 172, at 132.

²⁰¹ The SIAC Rules, 2016, Schedule 1, Cl. 10; The LCIA Rules, 2020, Art. 9.11; The HKIAC Administered Rules, 2018, Art. 23.5; The ICC Arbitration Rules, 2021, Art. 29(3); The SCC Arbitration Rules, 2017, Appendix II, Art. 9(1), Art. 9(5); The Swiss Rules of International

rary nature of an EA order. Such a measure can be taken by the tribunal upon its own volition or at the request of the party. If the arbitral tribunal confirms the EA order, the order becomes final in nature.

The arbitral tribunal, due to the availability of more time, has the chance to review the case in a more detailed manner than the emergency arbitrator. The tribunal can attain a more proper understanding of the issues and may discover that the emergency arbitrator's decision should not be upheld, either partially or wholly.²⁰² Therefore, the arbitral tribunal is situated better to determine the relief granted by the emergency arbitrator.

Further, the arbitral tribunal may be inclined to review the EA order if one of the parties, due to the speediness of the EA proceedings, was not provided with a full chance to put forth their case before the emergency arbitrator.²⁰³ Moreover, factual or legal circumstances may emerge subsequent to the EA proceedings, which the emergency arbitrator could not take into account. Thus, the arbitral tribunal may make a reviewed decision based on such new facts and legal elements and vary, suspend, or discharge the EA order.

13. The Emergency Arbitrator is Permitted to Amend the EA Order

The international EA rules also enable the emergency arbitrators to modify or vacate the EA order issued by them.²⁰⁴ Such an amendment can be made by the emergency arbitrator upon any party showcasing a good cause.²⁰⁵ This essential feature also reflects the temporary nature of the EA orders.

However, such powers to amend the EA order by the emergency arbitrator only last till the formation of the arbitral tribunal. Therefore, the emergency arbitrator can only amend or vacate the order after they have delivered it, but before the constitution of the arbitral tribunal. After the arbitral tribunal has been constituted, the power to amend or vacate the EA order lies with the tribunal itself, as discussed above.

14. The EA Order Ceases to be Binding after a Certain Period

It can be noticed that the international EA rules generally provide for a specific period after which the EA order shall automatically cease to be binding

Arbitration, 2021, Art. 43(8); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 6(4) read with Art. 6(6).

²⁰² Scherer, *supra* note 39, at 15.

²⁰³ *Id.*

²⁰⁴ The SIAC Rules, 2016, Schedule 1, Cl. 8; The LCIA Rules, 2020, Art. 9.12; The HKIAC Administered Rules, 2018, Art. 23.5; The ICC Arbitration Rules, 2021, Appendix V, Art. 6(8); The SCC Arbitration Rules, 2017, Appendix II, Art. 9(2); The Swiss Rules of International Arbitration, 2021, Art. 43(8); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 6(4) read with Art. 6(6).

²⁰⁵ *Id.*

if the arbitral tribunal has not been constituted.²⁰⁶ Such a period usually ranges from sixty to ninety days.²⁰⁷ Therefore, in case the parties fail to constitute the arbitral tribunal within the respective period, the EA order shall cease to have any effect forthwith.

15. The Emergency Arbitrator has the Authority to Apportion the Costs

Under the various international EA rules, the emergency arbitrator has the primary responsibility to apportion the costs of the EA proceedings between the parties.²⁰⁸ However, the same is always subject to review by the arbitral tribunal, which may amend the costs apportioned.

16. The Emergency Arbitrator is Permitted to Obtain Security from the Applicant

The international EA rules provide for a mechanism to attain security from the party which seeks the emergency relief.²⁰⁹ Such powers are similar to the ones granted to the arbitral tribunal to obtain security for the legal costs awarded by it.²¹⁰ The UNCITRAL Model Law also provides similar powers to an arbitral tribunal to impose security while granting interim measures.²¹¹

This provision works in conjunction with the powers of the arbitral tribunal and the emergency arbitrator to vary and vacate the EA order. Therefore, after the security has been attained, the emergency arbitrator or the arbitral tribunal can utilise it for compensating the opposite party.

²⁰⁶ The SIAC Rules, 2016, Schedule 1, Cl. 10; The LCIA Rules, 2020, Art. 26.8; The HKIAC Administered Rules, 2018, Schedule 4, Cl. 17; The ICC Arbitration Rules, 2021, Appendix V, Art. 6(6); The SCC Arbitration Rules, 2017, Appendix II, Art. 9(4); The Swiss Rules of International Arbitration, 2021, Art. 29(5); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 6(6).

²⁰⁷ *Id.*

²⁰⁸ The SIAC Rules, 2016, Schedule 1, Cl. 13; The LCIA Rules, 2020, Art. 9.10; The HKIAC Administered Rules, 2018, Schedule 4, Cl. 15; The ICC Arbitration Rules, 2021, Art. 29(4); The SCC Arbitration Rules, 2017, Appendix II, Art. 10(5); The Swiss Rules of International Arbitration, 2021, Art. 43(9) read with Art. 38(g); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 7(2).

²⁰⁹ The SIAC Rules, 2016, Schedule 1, Cl. 11; The LCIA Rules, 2020, Art. 25.1; The HKIAC Administered Rules, 2018, Art. 23.6; The ICC Arbitration Rules, 2021, Appendix V, Art. 6(7); The SCC Arbitration Rules, 2017, Art. 37(2); The Swiss Rules of International Arbitration, 2021, Art. 29(2); The CIETAC Arbitration Rules, 2015, Appendix III, Art. 5(2).

²¹⁰ See The SIAC Rules, 2016, Rule 27, and the HKIAC Administered Arbitration Rules, 2018, Art. 24.

²¹¹ UNCITRAL Model Law, *supra* note 52, at Art. 17-E.

17. Provision for an Opt-Out Mechanism

It can be observed that the international EA rules generally provide for a specific opt-out mechanism for the parties.²¹² Such a mechanism provides an option to the parties to, through agreement, avoid the application of the EA rules and the proceedings. This instead implies that in case the parties do not opt-out of the EA mechanism, they are assumed to have agreed to be bound by the relevant EA rules.

V. REVIEW OF THE DOMESTIC RULES ON EMERGENCY ARBITRATION

This part focuses on the compliances and the non-compliances of the domestic EA rules with the identified key features in Part IV. While Part V.A will highlight the compliances, Part V.B shall identify the lacunae and shortfalls present under the domestic EA rules. Seven domestic institutions were identified for the purpose of this study, which includes the MCIA, NDIAC, ICA, MHCAC, NPAC, BIMACC, and IIAM.

Factors such as the prominence, credibility, and popularity of the domestic institutions were considered to include the aforesaid institutions for this study. For instance, MCIA, which was set up in 2016 in order to bridge the gap in the Indian market for credible and experienced arbitration institutions,²¹³ has attracted several notable international arbitration practitioners, and its rules are opined to reflect the international best practices.²¹⁴ It is now the most prominent Indian institution and is a growing hub in arbitration for both Indian and foreign corporations.²¹⁵ In the recent Annual Report for 2020, MCIA recorded a 150%

²¹² The SIAC Rules, 2016, Rule 1.1; The LCIA Rules, 2020, Art. 9.16; The HKIAC Administered Rules, 2018, Art. 1.3; The ICC Arbitration Rules, 2021, Art. 29(6); The SCC Arbitration Rules, 2017, Appendix II, Art. 1(1); The Swiss Rules of International Arbitration, 2021, Art. 43(1); The CIETAC Arbitration Rules, 2015, Art. 77(2).

²¹³ Aceris Law LLC, *Mumbai Centre for International Arbitration (MCIA)*, October 2, 2016, available at <https://www.acerislaw.com/mumbai-centre-international-arbitration-mcia/> (Last visited on November 2, 2021).

²¹⁴ Ashutosh Ray, *Interview with Our Editors: Mapping India's Institutional Arbitration Journey with Mumbai Centre for International Arbitration*, KLUWER ARBITRATION BLOG, February 19, 2021, available at <http://arbitrationblog.kluwerarbitration.com/2021/02/19/interviews-with-our-editors-mapping-indias-institutional-arbitration-journey-with-mumbai-centre-for-international-arbitration-mcia/> (Last visited on November 2, 2021).

²¹⁵ See Nicholas Peacock et al., *MCIA Recognised by the Supreme Court of India as an Appointing Institution*, HERBERT SMITH FREEHILLS ARBITRATION NOTES, August 3, 2017, available at <https://hsfnotes.com/arbitration/2017/08/03/mcia-recognised-by-the-supreme-court-of-india-as-an-appointing-institution/> (Last visited on November 2, 2021) (discussing that MCIA is the first Indian arbitration institution to be recognised by the Supreme Court of India as an appointing authority under §11 of the Arbitration and Conciliation Act, 1996); Sonam Saigal, *Arbitration Centre in City Pushes to be Among Global Best*, THE HINDU, August 5, 2019, available at <https://www.thehindu.com/news/cities/mumbai/arbitration-centre-in-city-pushes-to-be-among-global-best/article28816946.ece> (Last visited on November 2, 2021).

increase in the total number of cases administered by the institution.²¹⁶ Similarly, NDIAC was set up in 2009 to facilitate and encourage institutional arbitration for the resolution of disputes.²¹⁷ Annexed with the Delhi High Court, it is the first arbitration institution that is felicitated by a High Court in India.²¹⁸ NDIAC has witnessed exponential growth over the years, with the number of referred cases increasing drastically from three in 2009 to 2338 in 2018.²¹⁹ Recognising this increasing role of NDIAC as a hub of arbitration, the New Delhi International Arbitration Centre Act, 2019, was passed by the Parliament, which established NDIAC as an institute of national importance.²²⁰ More recently, Law Minister Kiren Rijju backed NDIAC to promote India as a hub of international arbitration and reduce litigation in the country.²²¹

The ICA was established in 1965 under the aegis of the government of India.²²² Being a prominent institution in the Asia-Pacific region, ICA handles over 400 domestic as well as international disputes each year.²²³ NPAC, established in 2005 and located in Chennai,²²⁴ consists of various distinguished members and arbitrators and has become a pioneer in institutional arbitration in India.²²⁵ Having adopted some of the best international practices, the institute has become an increasingly popular and preferred location for arbitration.²²⁶ On the other hand, IIAM is a non-profit organisation that started functioning from 2001.²²⁷ Over the years, the institution has become a pioneer in administering and facilitating dis-

²¹⁶ The Mumbai Centre for International Arbitration, *Annual Report 2020*, available at https://mcia.org.in/wp-content/uploads/2016/05/Annual-Report_2020.pdf (Last visited on November 2, 2021).

²¹⁷ The New Delhi International Arbitration Centre, *About Us*, available at <http://www.dacdelhi.org/topics.aspx?mid=1> (Last visited on November 2, 2021).

²¹⁸ The New Delhi International Arbitration Centre, *Newsletter*, July, 2019, available at <http://dacdelhi.org/DataFiles/CMS/file/Newsletter%20July,%202019.pdf> (Last visited on November 2, 2021).

²¹⁹ The New Delhi International Arbitration Centre, *Newsletter*, March, 2019, available at http://dacdelhi.org/DataFiles/CMS/file/NEWS%20LETTERFINAL%20PRINTING%20CURVE_Col%20change.pdf (Last visited on November 2, 2021).

²²⁰ The New Delhi International Arbitration Centre Act, 2019, §4(1).

²²¹ (PTI), *India Becoming Hub of International Arbitration will also Promote Ease of Doing Business: Kiren Rijju*, ECONOMIC TIMES, July 15, 2021, available at <https://economictimes.indiatimes.com/news/india/india-becoming-hub-of-international-arbitration-will-also-promote-ease-of-doing-business-kiren-rijju/articleshow/84449793.cms> (Last visited on November 2, 2021).

²²² S.C. Nirwani, *The Indian Council of Arbitration and the Practice of Arbitration in India*, Vol. 1(3), J. INT'L ARB., 255 (1984).

²²³ Indian Council of Arbitration, *About Us*, available at <https://www.icaindia.co.in/htm/about-us.html> (Last visited on November 2, 2021).

²²⁴ Hemamalini Venkatraman, *NPAC gives Teeth to Indian Institutional Arbitration*, DAILY THANTHI, August 22, 2019, available at <https://www.dnnext.in/News/TopNews/2019/08/22013017/1172803/NPAC-gives-teeth-to-Indian-institutional-arbitration.vpf> (Last visited on November 2, 2021).

²²⁵ Nani Palkhivala Arbitration Centre, *About Us*, available at <http://www.nparbitration.com/AboutUs/About> (Last visited on November 2, 2021).

²²⁶ Nani Palkhivala Arbitration Centre, *Home*, available at <http://www.nparbitration.com/Home/Index> (Last visited on November 2, 2021).

²²⁷ Aasavari Rai, *Indian Institute of Arbitration & Mediation Starts its Chapter in New Delhi*, LIVE LAW, November 21, 2019, available at <https://www.livelaw.in/events-corner/indian-institute-of-arbitration-mediation-starts-its-chapter-in-new-delhi-150011> (Last visited on November 2, 2021).

pute resolution services, including international as well as domestic arbitration.²²⁸ The institute consists of notable personalities as its members and arbitration²²⁹ and is also one of the few arbitration institutes to be recognised by the Department of Justice.²³⁰ Correspondingly, MHCAC and BIMACC also facilitate arbitration for international and domestic disputes in the country.²³¹

A. COMPLIANCES TO THE KEY FEATURES

All domestic EA rules permit parties, in urgent situations, to present an application stipulating the nature of the relief, the grounds for such relief, and proof of notification to the other parties.²³² However, only the IIAM Arbitration Rules, 2021 ('IIAM Rules') provide an appropriate period of three days, which includes non-business days, for the determination of this application and the subsequent appointment of the emergency arbitrator.²³³ Further, for challenging such an appointment also, only the IIAM Rules provide an appropriate period of three days.²³⁴ The time period for determining the claim and issuing an EA order under the Arbitration Rules of the Mumbai Centre for International Arbitration, 2016 ('MCIA Rules') and IIAM Rules are fourteen days²³⁵ and seven days,²³⁶ respectively. These deadlines are suitable for their mechanism and in consonance with the key feature with respect to an expedited EA process.

Furthermore, most rules provide liberty to the emergency arbitrator to conduct the proceedings through virtual mode—video or teleconferencing— or only on the basis of documents.²³⁷ The NDIAC (Arbitration Proceedings) Rules,

²²⁸ Indian Institute of Arbitration & Mechanism, *Members of APCAM*, available at <https://apcam.asia/members-of-apcam/> (Last visited on November 2, 2021).

²²⁹ Indian Institute of Arbitration & Mechanism, *About IIAM*, available at https://www.arbitrationindia.com/about_us.html (Last visited on November 2, 2021).

²³⁰ Department of Justice, *Online Dispute Resolution through Mediation, Arbitration, Conciliation*, available at https://www.arbitrationindia.com/pdf/pr_doj.pdf (Last visited on November 2, 2021).

²³¹ Badrinath Srinivasan, *Madras High Court Arbitration Centre Rules*, LEGALLY INDIA, April 18, 2015, available at <https://www.legallyindia.com/Blogs/madras-high-court-arbitration-centre-rules> (Last visited on November 2, 2021); BIMACC, *Inauguration Blog*, October 30, 2019, available at <http://www.bimacc.org/inauguration/> (Last visited on November 2, 2021); P. Vasanth Kumar, *Bangalore Gets an International Level Dispute Resolution Centre*, THE TIMES OF INDIA, September 8, 2013, available at <https://timesofindia.indiatimes.com/city/bengaluru/bangalore-gets-an-international-level-dispute-resolution-centre/articleshow/23217964.cms> (Last visited on November 2, 2021).

²³² The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.1; The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.2; The Rules of Domestic Commercial Arbitration, 2016, Rule 57(b)(b); The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(a); Rule of Arbitration for NPAC, 2005, Rule 20(A)(i); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.01; The IIAM Arbitration Rules, 2021, Schedule-2, §2(a).

²³³ The IIAM Arbitration Rules, 2021, Schedule-2, §3(a).

²³⁴ *Id.*, Schedule-2, §4(a).

²³⁵ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.6.

²³⁶ The IIAM Arbitration Rules, 2021, Schedule-2, §7(a).

²³⁷ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.5; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(f); Rule of Arbitration for NPAC,

2018 ('NDIAC Rules'), MCIA and IIAM Rules permit the emergency arbitrator to state only brief reasons for the EA order.²³⁸ The right to appeal such EA orders is also curtailed under certain rules.²³⁹ However, only the IIAM Rules provide for a special process to determine the seat of the arbitration, in the absence of an express agreement, during an EA proceeding.²⁴⁰

The express delineation of the power of the emergency arbitrator to adjudicate on disputes arising out of an arbitration agreement is provided by certain domestic EA rules.²⁴¹ Similarly, the duty of disclosure on the emergency arbitrator of facts and circumstances that may affect their impartiality or independence is delineated under such rules.²⁴² Emergency arbitrators are also provided with the power to make any 'necessary' decision under the EA order.²⁴³ Most domestic EA rules prohibit the emergency arbitrators from participating as an arbitrator in any future arbitration regarding the dispute unless agreed by the parties.²⁴⁴ A few rules also permit the emergency arbitrator to obtain security from the applicant for the EA order.²⁴⁵ On the other hand, the authority of such arbitrator to apportion costs for the EA proceedings is present in a majority of the domestic rules.²⁴⁶

2005, Rule 20(A)(v); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.05; The IIAM Arbitration Rules, 2021, Schedule-2, §6(a).

²³⁸ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.7; The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.8; The IIAM Arbitration Rules, 2021, Schedule-2, §7(b)(ii).

²³⁹ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.7 read with Rule 30.12; The Rules of Domestic Commercial Arbitration, 2016, Rule 57(b)(f); The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(j); Rule of Arbitration for NPAC, 2005, Rule 20(A)(viii); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.08; The IIAM Arbitration Rules, 2021, Schedule-2, §7(c).

²⁴⁰ The IIAM Arbitration Rules, 2021, Schedule-2, §5(a).

²⁴¹ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.5; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(f); Rule of Arbitration for NPAC, 2005, Rule 20(A)(v); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.05; The IIAM Arbitration Rules, 2021, Schedule-2, §6(c).

²⁴² The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.3; The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.5; The MHCAC (Internal Management) Rules, 2017, Rule 19(1); Rule of Arbitration for NPAC, 2005, Rule 20(A)(iii); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.03.

²⁴³ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.7; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(g); Rule of Arbitration for NPAC, 2005, Rule 20(A)(vi); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.07; The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.8.

²⁴⁴ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.4; The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.6; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(e); Rule of Arbitration for NPAC, 2005, Rule 20(A)(iv); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.04; The IIAM Arbitration Rules, 2021, Schedule-2, §11(a).

²⁴⁵ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.10; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(i); The IIAM Arbitration Rules, 2021, Schedule-2, §7(d).

²⁴⁶ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.11; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(k); Rule of Arbitration for NPAC,

The domestic EA rules, namely the MHCAC (Internal Management) Rules, 2017 ('MHCAC Rules'), Rules of Arbitration for NPAC, 2005 ('NPAC Rules'), BIMACC Institutional Arbitration Rules, 2013 ('BIMACC Rules'), MCIA and IIAM Rules, provide the powers to the emergency arbitrator to vary or vacate the EA order.²⁴⁷ All domestic EA rules permit the arbitral tribunal to confirm, vary, revoke, or vacate the EA order.²⁴⁸ Further, the EA order also ceases to be binding, without the formation of the arbitral tribunal, after a period of ninety²⁴⁹ or sixty days,²⁵⁰ under some rules. However, only the IIAM Rules allow a parallel option to the parties to approach a judicial authority for interim measures.²⁵¹

B. LACUNAE UNDER THE DOMESTIC RULES

There are various noticeable lacunae and non-compliances to the international key features under the domestic EA rules. The absence of an opt-out mechanism for the parties is one such shortcoming that is present across all domestic rules. Another widely existing shortcoming is the non-inclusion of non-business days under the deadlines for determining the application and appointment of the emergency arbitrator, challenging such appointment, and forming a schedule for the EA proceeding.²⁵² Other deficiencies under the domestic EA mechanism are discussed separately hereinafter.

1. Mumbai Centre for International Arbitration

The MCIA Rules do not provide a special procedure for the determination of the seat of arbitration. Further, they are also silent on the expedited formation of a timeline or a schedule by the emergency arbitrator, the right of the parties to avail parallel domestic court remedies, and a period after which an EA order ceases to be binding.

2005, Rule 20(A)(ix); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.09; The IIAM Arbitration Rules, 2021, Schedule-2, §8(a).

²⁴⁷ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.7; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(g); Rule of Arbitration for NPAC, 2005, Rule 20(A)(vi); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.07; The IIAM Arbitration Rules, 2021, Schedule-2, §7(e).

²⁴⁸ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.9; The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.13; The Rules of Domestic Commercial Arbitration, 2016, Rule 57(b)(j); The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(h); Rule of Arbitration for NPAC, 2005, Rule 20(A)(vii); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.07; The IIAM Arbitration Rules, 2021, Schedule-2, §7(e).

²⁴⁹ The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(h); Rule of Arbitration for NPAC, 2005, Rule 20(A)(vii); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.07.

²⁵⁰ The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.12.

²⁵¹ The IIAM Arbitration Rules, 2021, Schedule-2, §11(b).

²⁵² The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.2; The NDIAC (Arbitration Proceedings) Rules, 2018, Rules 14.4, 14.7; The ICA's Rules of Domestic Commercial Arbitration, 2016, Rule 57(b)(f); The MHCAC (Internal Management) Rules, 2017, Rules 19(1)(b), 19(1)(d), 19(1)(f); The Rules of Arbitration for NPAC, 2005, Rules 20(A)(ii), 20(A)(v); The BIMACC Institutional Arbitration Rules, 2013, Rules 35.02, 35.05.

2. New Delhi International Arbitration Centre

The entire process from appointment to the delivery of the order has to be completed within seven days under the NDIAC Rules.²⁵³ The same is opined to be unsuited for the said rules, and the reasons for the same are discussed in Part VI. The NDIAC Rules also do not provide for a special procedure for the determination of the seat of arbitration and the parallel right of the parties to approach the domestic courts. They do not enable written submissions, and video conferences as alternatives to an in-person hearing, and the emergency arbitrator is not provided with the powers to conduct the proceedings as per their discretion.

Further, they neither provide power to the emergency arbitrator to rule on procedural issues such as jurisdiction nor modify the EA order. The powers of an emergency arbitrator to apportion the costs and obtain security from the party claiming the relief are also absent under the NDIAC Rules. Lastly, they do not limit the option of appeal and review of the EA order in a domestic court by a losing party.

3. Indian Council of Arbitration

The ICA's Rules of Domestic Commercial Arbitration, 2016 ('ICA Rules') fall short on several avenues. The said rules provide a seven day window for the party to submit the fees from the date of making the application.²⁵⁴ Thereafter, the appointment of an emergency arbitrator takes place within seven days of the receipt of such fees.²⁵⁵ This period is fairly long.

The ICA Rules do not provide for disclosure of independence and impartiality by an emergency arbitrator, challenge by parties to the appointment of such arbitrator, or a special seat determination process. Further, though they specify that the powers of an emergency arbitrator shall cease after the order is made,²⁵⁶ it does not stipulate whether such person can act as an arbitrator in a future arbitration regarding the disputes. The same has the potential to adversely impact the impartiality and independence of the review of the EA order by the arbitral tribunal subsequently.

The concerned rules also do not provide for alternatives to in-person hearings and do not grant powers to the emergency arbitrator to conduct the proceedings as per their discretion. Further, the availability of parallel domestic court remedies, and a default period for the operation of an EA order without the formation of an arbitral tribunal, are also absent from the ICA Rules. Powers of an emergency arbitrator with respect to determining jurisdictional issues, making

²⁵³ The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.9.

²⁵⁴ The ICA's Rules of Domestic Commercial Arbitration, 2016, Rule 57(b)(c).

²⁵⁵ *Id.*, Rule 57(b)(d).

²⁵⁶ *Id.*, Rule 57(b)(g).

‘necessary’ decisions, stating brief reasons in the order, amending the EA order, apportioning costs, and obtaining security from the applicant are lacking under the said rules.

4. Madras High Court Arbitration Centre

The MHCAC Rules do not provide for a special procedure for the determination of the seat of arbitration, a timeframe for rendering the EA order, and the availability of parallel domestic court remedies to the parties. Further, the said rules do not enable the emergency arbitrator to state brief reasons for the EA order.

5. Nani Palkhivala Arbitration Centre

The NPAC Rules do not provide for a special procedure for the determination of the seat of arbitration, timeframe for delivering an EA order, and the availability of parallel domestic court remedies to the parties. Further, the powers of the emergency arbitrator to state only brief reasons for the EA order and obtain appropriate security from the applicant are also absent from the NPAC Rules.

6. Bangalore International Mediation, Arbitration and Conciliation Centre

The BIMACC Rules do not provide for a timeframe for rendering the EA order, special procedure for the determination of the seat of arbitration, and the availability of parallel relief before the domestic court. Moreover, the emergency arbitrator can neither state brief reasons for the EA order nor obtain security from the applicant.

7. Indian Institute of Arbitration and Mediation

It can be observed that the IIAM Rules do not mandate the emergency arbitrator to disclose any circumstances that may raise doubts regarding their impartiality, form a schedule for the EA proceedings, and provide power to the emergency arbitrator to make ‘necessary’ decisions. Further, there is no default time period after which the EA order shall cease to be binding under the IIAM Rules.

C. SUMMARY OF THE FINDINGS

This sub-part provides a tabular summary of the study conducted on the domestic EA rules. The summary highlights the domestic procedure’s compliance as well as non-compliance to the identified key features of the international EA mechanism.

S. No.	Identified Common Features	NDIAC	ICA	MHCAC	MCIA	NPAC	BIMACC	IIAM
1	The EA application shall contain: i. Grounds for emergency relief ii. Nature of the relief iii. Proof of notification to the opposite party	✓	✓	✓	✓	✓	✓	✓
2	Expedited process for the determination of disputes, applications and challenges during the EA proceeding	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓
3	Special procedure for the determination of the seat of arbitration	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓
4	Duty of disclosure with respect to impartiality and independence by the emergency arbitrator	✓	<input checked="" type="checkbox"/>		✓	✓	✓	<input checked="" type="checkbox"/>
5	No strict requirement to hold a formal hearing	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓	✓	✓	✓	✓
6	Availability of parallel domestic court remedies	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓
7	Power of the emergency arbitrator to make any order that an arbitral tribunal could have made under the arbitration agreement and interpret EA rules	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓	✓	✓	✓	✓
8	Authority of the emergency arbitrator to make a 'necessary' decision	✓	<input checked="" type="checkbox"/>	✓	✓	✓	✓	<input checked="" type="checkbox"/>

S. No.	Identified Common Features	NDIAC	ICA	MHCAC	MCIA	NPAC	BIMACC	IIAM
9	Permission to state only brief reasons for the EA order	✓	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓
10	No right to appeal the EA order in a domestic court	<input checked="" type="checkbox"/>	✓	✓	✓	✓	✓	✓
11	Emergency arbitrator to not act as arbitrator in future arbitral proceedings relating to the dispute	✓	<input checked="" type="checkbox"/>	✓	✓	✓	✓	✓
12	Arbitral tribunal can do vary, confirm, discharge, revoke, or suspend the EA order	✓	✓	✓	✓	✓	✓	✓
13	EA order can be amended by the emergency arbitrator before the formation of the arbitral tribunal to correct errors, if any	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓	✓	✓	✓	✓
14	EA order ceases to be binding after a certain period	✓	<input checked="" type="checkbox"/>	✓	<input checked="" type="checkbox"/>	✓	✓	<input checked="" type="checkbox"/>
15	Emergency arbitrator has the authority to apportion costs, subject to the final determination by the arbitral tribunal	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓	✓	✓	✓	✓
16	Emergency arbitrator has the power to obtain security from the applicant	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓	✓	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	✓
17	Provision for an opt-out mechanism for the parties	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

VI. RECOMMENDATIONS: TOWARDS A ROBUST EMERGENCY ARBITRATION PROCEDURE UNDER THE DOMESTIC RULES

The EA mechanism, despite its many advantages over court-ordered interim measures, is largely under utilised in India. Though the lack of finality on the recognition of the mechanism can be attributed to such a scenario, the establishment of a robust EA mechanism under the various domestic rules can certainly motivate parties to utilise the EA process. This is also in light of the fact that the Indian courts, as well as the government, have been continuously adopting a pro-arbitration approach,²⁵⁷ and the likelihood of the complete recognition of EA mechanism in the future is therefore high.

Further, provided that the interim orders made by courts under §9 and by the tribunal under §17 of the 1996 Act provide for the same enforcement procedure, upon a definitive recognition of the concept of EA, parties will be greatly tempted to utilise the mechanism due to its numerous advantages highlighted before.²⁵⁸ Therefore, it becomes imperative to formulate a robust procedure for EA under the domestic rules in order to provide the parties with an efficient resolution to their claims. Accordingly, this part focuses on providing suitable recommendations that can operate as minimum thresholds in order to achieve such robustness under the domestic framework.

²⁵⁷ For an assessment of the pro-arbitration approach adopted by the Indian courts, see H. Jayesh et al., *Indian Supreme Courts Adopts a Pro-Arbitration Approach*, THOMAS REUTERS, June 30, 2011, available at [https://uk.practicallaw.thomsonreuters.com/4-506-6791?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-506-6791?transitionType=Default&contextData=(sc.Default)&firstPage=true) (Last visited on November 2, 2021); Nicholas Peacock, *Arbitration in India: A Pro-Arbitration Approach?*, HERBERT SMITH FREEHILLS, December 16, 2016, available at <https://www.herbertsmithfreehills.com/latest-thinking/arbitration-in-india-a-pro-arbitration-approach> (Last visited on November 2, 2021); Aditya Mehta & Tanya Singh, *Can Two Indian Parties Choose Foreign Law to Govern their Arbitration Agreement? The Delhi High Court Answers in the Affirmative*, CYRIL AMARCHAND MANGALDAS BLOG, December 2, 2020, available at <https://corporate.cyrilamarchandblogs.com/2020/12/can-two-indian-parties-choose-foreign-law-to-govern-their-arbitration-agreement-the-delhi-high-court-answers-in-the-affirmative/> (Last visited on November 2, 2021); Adimesh Lochan et al., *International Commercial Arbitration—Laws and Recent Developments in India*, NISHITH DESAI, April 2021, available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/2021-04_International_Commercial_Arbitration.pdf (Last visited on November 2, 2021); Abhinav Gupta, *Indian Parties Permitted to Choose Foreign Seat for Arbitration: An Anomalous Decision?*, ARBITRATION & CORPORATE LAW REVIEW, December 8, 2020, available at <https://www.arbitrationcorporatelawreview.com/post/indian-parties-permitted-to-choose-foreign-seat-for-arbitration-an-anomalous-decision?postId=5fe9c86ff9158900340ab30d> (Last visited on November 2, 2021); Suadat Ahmad Kirmani, *Role of Judiciary in Making Indian an Arbitration Friendly Jurisdiction*, MONDAQ, December 9, 2020, available at <https://www.mondaq.com/india/trials-appeals-compensation/1013892/role-of-judiciary-in-making-india-an-arbitration-friendly-jurisdiction> (Last visited on November 2, 2021); Divya Kesaaar & Mannmohit K. Puri, *Pro-Arbitration Trend Continues in India?*, PSA LEGAL, March 2014, available at <https://psalegal.com/wp-content/uploads/2017/01/ENewlineMarch2014.pdf> (Last visited on November 2, 2021).

²⁵⁸ For assessing the advantages of EA over court-ordered interim measures, see *supra* Part II.B on “Benefits of Emergency Arbitration Over Court-Ordered Interim Measures”.

A. EXPEDITED PROCESS

An expedited process can be considered as the heart and soul of an EA mechanism. Various provisions under an EA process enable the express determinations of the claims and fast-track the procedure. Parties often solely proceed with the EA process in order to obtain an expedited order and prevent irreparable harm.²⁵⁹ For instance, in a case before the LCIA, the dispute arose due to the alleged unlawful termination of an agreement for the distribution of TV rights.²⁶⁰ The claimant applied for EA explaining that the service under the said agreement shall cease in twenty-seven days which will result in millions of customers of the claimant no longer receiving the live programming. This would ultimately impact the claimant's reputation and customer relations in an adverse manner. Further, the claimant also alleged that the exclusive rights granted to it under the agreement would no longer be applicable and shall be transferred to its competitors. The LCIA Court, considering such an urgency, granted the emergency application that ultimately resulted in a quick settlement.²⁶¹

Thus, the purpose that EA intends to serve is to protect assets and information that might otherwise be altered, lost, rendered useless, or of less value by one party in order to make arbitration meaningless.²⁶² Further, applications for EA are only accepted by the arbitral institution in case there exists an emergency that cannot await the formation of the arbitral tribunal.²⁶³ Therefore, it becomes imperative to establish an expedited process under an EA mechanism. In this sub-part, we will focus on the features that expedite the EA process and suggest suitable amendments to the domestic rules that fail to abide by the said features.

Quick Determination of Claims, Applications, Appointment, Challenges, and Establishment of the Schedule

The recommendations with respect to the deadlines for the determination of the application and the appointment of the emergency arbitrator, challenges to such an appointment, determination of claims, and the establishment of schedule are discussed below.

²⁵⁹ James Dough & Robin Wood, *Emergency Arbitrators and Expedited Tribunals*, HERBERT SMITH FREEHILLS, May 25, 2017, available at <https://www.herbertsmithfreehills.com/latest-thinking/emergency-arbitrators-and-expedited-tribunals-in-construction-disputes-some-recent> (Last visited on November 2, 2021).

²⁶⁰ London Court of International Arbitration, *LCIA Notes on Emergency Arbitration*, available at <https://www.lcia.org/adr-services/lcia-notes-on-emergency-procedures.aspx> (Last visited on November 2, 2021).

²⁶¹ *Id.*

²⁶² Karl Falk, *Emergency Arbitration—An Examination of the SCC Solution*, Vol. 30, GÖTEBORG, 7 (2010).

²⁶³ For an assessment of this standard of admissibility, see *supra* Part IV on “International Rules and the Key Features of Emergency Arbitration”.

a. Determination of Application and Appointment of Emergency Arbitrator

The application for the EA request and the subsequent appointment of the emergency arbitrator under the international EA rules is conducted within one to three days of the receipt of the application. Under the domestic rules, however, only IIAM appears to adhere to such a timeline by providing three days to determine the application and appoint the emergency arbitrator.²⁶⁴ On the other hand, compliance under NDIAC, MHCAC, NPAC, and MCIA, can be found to be highly situational and based on the specific case. The reasons for such an assertion are stipulated hereinafter. While MHCAC, NPAC, and MCIA stipulate that the determination of the application and appointment of an EA in one ‘business’ day,²⁶⁵ NDIAC stipulates a time period of two ‘business’ days.²⁶⁶

Business days generally include the period from Monday to Friday and exclude Saturday, Sunday, and any other legal holiday.²⁶⁷ Moreover, under MCIA and NDIAC, the calculation of any given period under the rules is also done through a specific process. If the date on which the application is received precedes a non-business day, the period commences from the first following business day.²⁶⁸ Therefore, if an application is received on a Friday, the period shall begin from Monday, which is the first following business day. Further, if the last date of a given period is a non-business day, the period shall extend to the first following business day.²⁶⁹ Thus, if a given period is ending on a Saturday, the period that ought to have been utilised on the given Saturday shall be utilised on the next Monday instead.

This essentially raises conundrums for an EA application. For instance, if the application is made on a Friday and the period for determination is one business day, the application fulfils both criteria, i.e. the application was submitted before a non-business day, and the period for determining the application shall also end on a non-business day – Saturday. Therefore, the problem arises as to whether the one business day period would ‘commence’ from the next business

²⁶⁴ The IIAM Arbitration Rules, 2021, Schedule-2, §3(a).

²⁶⁵ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.2; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(b); Rule of Arbitration for NPAC, 2005, Rule 20(A)(ii).

²⁶⁶ The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.4.

²⁶⁷ BRYAN A. GARNER, BLACK’S LAW DICTIONARY, 424 (Thomas Reuters, 8th ed., 2009); Bilzin Sumberg Baena Price & Axelrod LLP, *Taking Care of Business (Day)–Defining “Business Day” in Agreements*, NATIONAL LAW REVIEW, February 6, 2020, available at <https://www.natlawreview.com/article/taking-care-business-day-defining-business-day-agreements> (Last visited on November 2, 2021); Jon Tavares, *It Was a Good (Business) Day*, TEMENOS, October 17, 2018, available at <https://www.temenos.com/news/2018/10/17/how-regulations-define-business-days/> (Last visited on November 2, 2021).

²⁶⁸ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 2.3; The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 3.4.

²⁶⁹ *Id.*

day, i.e. Monday, or would the remaining period that ought to have been covered on Saturday get 'extended' till Monday. Regardless of this vagueness, even if the period terminates on Monday or Tuesday, it can be viewed that the deadline would largely conform to the general three day limit for determining the application and appointment of the arbitrator.

However, this opinion is also situational and depends on the legal holidays and the timing of the application. For instance, NDIAC provides for a period of two business days for appointment, and therefore, applications submitted on a Friday can be expected to take over four to five days to determine. Further, if other legal holidays emerge near the weekends, such as on Monday or Friday, such periods can be further increased. The appointment process can also become lengthier if week-long holidays are placed during festivals.

Facing this problem, the international rules have since omitted the exclusion of non-business days under their respective EA mechanisms. It can be found that the international EA rules plainly mention the phrase 'day' or 'days' and do not make reference to only business days. For instance, SIAC in 2016, realising such problems caused by the phrase 'business' days, amended its provisions and removed the phrase from its EA mechanism.²⁷⁰ Thus, whereas under the 2010 and 2013 SIAC Rules the appointment had to be done in one 'business' day, the 2016 SIAC Rules only provides for "one day". Such amendment was also performed for other deadlines provided under the EA mechanism, such as the period for challenging the appointment of the emergency arbitrator and the formation of the schedule for the EA proceedings. This was primarily done in order to design an EA procedure that enables a party to quickly obtain a decision.²⁷¹

In light of the aforementioned issues, there is a need to amend the domestic EA rules and omit the usage of the phrase 'business' while delineating the deadlines under the EA mechanism. Accordingly, under the EA rules of NDIAC, MHCAC, NPAC, and MCIA, the appointment process should be done under a three day period which includes non-business days.

With respect to the determination of application and appointment under BIMACC, the period specified is seven 'business' days.²⁷² On the other hand, ICA provides a seven day period to the claimant after the EA application is made to submit the fees.²⁷³ Following such a period, the determination and appointment of the emergency arbitrator takes place within seven days.²⁷⁴ This is in contrast to the general practice where the claimant is required to submit the fees along with the application. However, even if the claimant, for its own benefit, submits the

²⁷⁰ CHOONG, *supra* note 178, at 241.

²⁷¹ *Id.*

²⁷² The BIMACC Institutional Arbitration Rules, 2013, Rule 35.02.

²⁷³ The Rules of Domestic Commercial Arbitration, 2016, Rule 57(b)(c).

²⁷⁴ *Id.*, Rule 57(b)(d).

fees in an expedited manner, the ICA Rules still provide a seven day period to determine the application and appoint the emergency arbitrator. The same is well beyond the general deadline of three days.

Therefore, the BIMACC and ICA Rules for EA are also suggested to incorporate a mechanism that determines the application and appoints an emergency arbitrator at least within three days, which should include non-business days. The same shall help motivate the institution to review the application in an extremely urgent manner, ultimately resulting in a quicker EA process under the relevant rules.

This is also complemented by the fact that with an almost two-year pandemic break from physical hearings, the area of arbitration has witnessed an increasingly virtual mode of dispute resolution, with hearings, document sharing, case management, and even applications being submitted online.²⁷⁵ Resultantly, it has lessened the logistical divide between business and non-business days due to the augmented pervasiveness of technology in the arbitration sphere, thereby rendering the said distinction impracticable.

b. Challenges to the Appointment of Emergency Arbitrator

The challenges to the appointment of an emergency arbitrator under the international EA rules is generally done within one to three days of the appointment or the disclosure of facts and circumstances concerning their impartiality or independence. Under the domestic rules, while IIAM provides for a three-day period,²⁷⁶ other rules such as NDIAC, MHCAC, MCIA, NPAC, and BIMACC, provide for a period of one business day to challenge such an appointment.²⁷⁷ In such a situation as well, the exclusion of non-business days can greatly affect and increase the time period that is delineated under the said provision.

It is important to note that while the challenge to the appointment of an emergency arbitrator is pending, the EA proceedings still continue.²⁷⁸ Therefore, it is important to raise such challenges in a time-bound manner in order to render a decision before the EA order is passed.²⁷⁹ Further, it also prevents the respondent from delaying the EA proceedings by raising trivial challenges to the appointment

²⁷⁵ Emre Koluman, *Effects of COVID-19 on Arbitral Proceedings: Is the Virus Reshaping the Future of Arbitration?*, MONDAQ, December 2, 2020, available at <https://www.mondaq.com/turkey/arbitration-dispute-resolution/1011780/effects-of-covid-19-on-arbitral-proceedings-is-the-virus-reshaping-the-future-of-arbitration> (Last visited on November 2, 2021).

²⁷⁶ The IIAM Arbitration Rules, 2021, Schedule-2, §4(a).

²⁷⁷ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.3; The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.5; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(d); Rule of Arbitration for NPAC, 2005, Rule 20(A)(iii); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.03.

²⁷⁸ Bieri & Schnyder, *supra* note 170, at 464.

²⁷⁹ RAGN WALDH, *supra* note 177, at 190.

at any subsequent stage of the proceedings.²⁸⁰ Therefore, a short period for raising challenges to the appointment of the emergency arbitrator is imperative for delivering a time-bound EA order.

Accordingly, the time period for challenging the appointment of an emergency arbitrator provided under NDIAC, MHCAC, MCIA, NPAC, and BIMACC should be amended to ensure a three-day deadline that includes non-business days. Lastly, ICA does not provide any mechanism to challenge the appointment of an emergency arbitrator. Even if the general rules under ICA for challenging the appointment of an arbitrator are applied,²⁸¹ the same is unsuitable for an EA proceeding. They do not specify any time period within which such a challenge has been made, and further mandate a halt on the arbitral proceedings till the challenge is determined.²⁸² Evidently, this may grant the respondent significant liberty to delay the adjudication of the claims in an EA proceeding. Therefore, we recommend the ICA to devise a specific process for challenging the appointment of the emergency arbitrator, limit the period for challenging to three days, and allow the continuation of the EA proceedings while such a challenge is subsisting.

c. Establishment of a Schedule

The international EA rules generally stipulate the establishment of a schedule by the emergency arbitrator for the EA proceedings within one to three days from their appointment. In contrast, the domestic EA rules consisting of NDIAC, MHCAC, NPAC, and BIMACC, provide for the establishment of the schedule within two 'business' days.²⁸³ Here again, the exclusion of non-business days can result in great delays in the actual deadlines for the establishment of the schedule. Thus, we recommend that the said rules provide a time-bound period of three days that include the non-business days under their deadlines.

On the other hand, ICA, MCIA, and IIAM do not provide any such deadline or obligation on the emergency arbitrator to formulate a schedule within a certain period. The establishment of the schedule at the initial stage of EA proceedings assists in streamlining the EA process, which the parties will have to abide by for a given case.²⁸⁴ Its establishment soon after the appointment of the emergency arbitrator helps the parties in attaining a lucid idea of the deadlines for submissions and hearing and prepare accordingly.²⁸⁵ It essentially provides parties

²⁸⁰ *Id.*

²⁸¹ The ICA's Rules of Domestic Commercial Arbitration, 2016, Rule 26.

²⁸² The Rules of Domestic Commercial Arbitration, 2016, Rule 63(vi).

²⁸³ The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.7; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(f); Rule of Arbitration for NPAC, 2005, Rule 20(A)(v); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.05.

²⁸⁴ YU & CAO, *supra* note 88, at 150-151, 265.

²⁸⁵ RAGN WALDH, *supra* note 177, at 193-194.

with more time to prepare for the submissions and hearings, if any.²⁸⁶ Therefore, we recommend that the EA rules under ICA, MCIA, and IIAM provide for a period of maximum of three days, including non-business days, within which the emergency arbitrator is bound to establish a schedule for the EA proceedings.

d. Determination of the Claims

The deadlines for the determination of the claims and the delivery of the EA order by the emergency arbitrator generally ranges from fourteen to fifteen days from the date of appointment under the international EA rules. The SCC Rules provide a highly expedited five-day procedure for the delivery of the EA order.

Only MCIA and IIAM Rules, under the domestic EA Rules, provide a proper time period of fourteen²⁸⁷ and seven days,²⁸⁸ respectively, for the delivery of the EA order from the date of appointment. Though NDIAC also provides for a seven day period for the determination of the EA order,²⁸⁹ the same is opined to be unsuited for the current mechanism due to two reasons. *First*, the NDIAC Rules contain a strict requirement for hearing with no recourse to document only proceedings.²⁹⁰ On the other hand, SCC and IIAM, which provide a similar timeline, allow the emergency arbitrator to hold a document only proceeding.²⁹¹ Even after such provisions, EA orders under SCC, made frequently through document only proceedings, are majorly delivered within eight days with a median of six and a half days.²⁹²

Therefore, the SCC Secretariat grants extensions in necessary situations upon reasoned requests or wherever necessary.²⁹³ The reasoned request is made by the emergency arbitrator to the Secretariat, explaining as to why an extension is necessary.²⁹⁴ Further, the Secretariat can grant extensions out of its own motion without any request from the emergency arbitrator. Thus, this flexibility granted to the extension of such a short time period enables the delivery of an enforceable EA order.

This raises the second concern. The NDIAC Rules do not provide any power to the emergency arbitrator or the arbitral institution to extend the time limit specified for the delivery of an EA order.²⁹⁵ This can make the decisions ren-

²⁸⁶ *Id.*

²⁸⁷ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.6.

²⁸⁸ The IIAM Arbitration Rules, 2021, Schedule-2, §7(a).

²⁸⁹ The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.9.

²⁹⁰ *Id.*, Rule 14.7.

²⁹¹ The SCC Arbitration Rules, 2017, Appendix II, Art. 7 read with Art. 23(1); The IIAM Arbitration Rules, 2021, Schedule-2, §6(a).

²⁹² RAGN WALDH, *supra* note 177, at195.

²⁹³ The SCC Arbitration Rules, 2017, Appendix II, Art. 8(1).

²⁹⁴ RAGN WALDH, *supra* note 177, at195.

²⁹⁵ *See* The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.9.

dered after the expiry of seven days vulnerable to attacks by the losing party. The party can argue that the failure to meet the seven-day limit implies that the decision was not rendered in accordance with the parties' arbitration agreement and is not binding because the emergency arbitrator has essentially become *functus officio* after the expiry of the period.²⁹⁶ Therefore, such challenges may render the EA order, delivered after seven days, ultimately unenforceable.²⁹⁷

Accordingly, it would be suitable that either the time limit under the NDIAC Rules is extended for the delivery of the EA order, or the strict requirement for hearing is removed, and the emergency arbitrator, as well as the arbitral institution, are granted powers to extend the current seven day period whenever appropriate and necessary. In our opinion, the latter option of increasing the time limit on a case to case basis is preferable since a former option would contradict the general trend towards an expedited EA process. Essentially, increasing the time limit for rendering an EA decision is contrary to the current approach of reducing such deadlines. Further, the option of extension by the arbitrator would provide flexibility in a proceeding that may be required in an EA based on the magnitude and circumstances of the case at hand.

However, ICA provides for a period of thirty 'business' days from the date of appointment to deliver the EA order.²⁹⁸ The same carries two concerns. *First*, the exclusion of non-business days for a period as long as thirty days can result in a significant increase in the actual deadline. This is due to the fact that with a longer period, more weekends and legal vacations will tend to be included in the given timeline. *Second*, the limit of thirty days itself reflects the old approach of the arbitral institutions and is not in consonance with the current best practices of a fourteen or fifteen-day deadline.

Moreover, MHCAC, NPAC, and BIMACC do not provide any time period within which the EA order has to be delivered. Further, they do not impose the duty on the emergency arbitrator to render the order as soon as possible. This reflects the old approach that was present under the 2013 SIAC Rules.²⁹⁹ Such an approach can be dangerous as it may permit a party to delay the EA proceedings in order to frustrate the effect of arbitration. Without any obligation to adhere to a deadline, the emergency arbitrator may also find it difficult to not entertain such dilatory tactics.³⁰⁰ Therefore, a short deadline provides support to the emergency arbitrator in balancing the concerns of due process with the requirement for an expedited decision.

²⁹⁶ MOSER & BAO, *supra* note 172, at 141; RAGN WALDH, *supra* note 177, at 196.

²⁹⁷ *Id.*

²⁹⁸ The Rules of Domestic Commercial Arbitration, 2016, Rule 57(b)(f).

²⁹⁹ For a reference to the old approach, *see* The SIAC Rules, 2013, Schedule 1.

³⁰⁰ Bieri & Schnyder, *supra* note 170, at 467.

In some cases, it may even motivate the emergency arbitrator to balance such consideration. An emergency arbitrator, due to a conventional mindset, may choose to focus more on the concerns of due process than the requirement of an expedited process.³⁰¹ This may result in the ultimate frustration of the relief. Further, a definitive timeline may also provide the applicant with an assurance regarding the delivery of an order within a particular period and incentivise them to utilise the EA mechanism. Therefore, we recommend that the EA rules under MHCAC, NPAC, and BIMACC, stipulate a specific time period of maximum of fifteen days, including non-business days, for the delivery of an EA order by the emergency arbitrator.

However, it is important to remember that such time limits for rendering the EA order should be extendable in necessary circumstances by the emergency arbitrator or the arbitral institution in order to provide flexibility to render an enforceable order. Such necessary circumstances can arise in complex cases that require more detailed analysis by the parties as well as the emergency arbitrator.³⁰² Additional time may also be required where the respondent is a State or has been unable to retain a counsel.³⁰³

1. No Strict Requirement for a Formal Hearing

The international EA rules provide the emergency arbitrator with the liberty to conduct the proceedings in any suitable manner, which includes the ability to conduct a virtual hearing through video or teleconference or document-only proceedings. Therefore, they do not require a strict formal hearing in an EA proceeding.

Under the domestic EA rules, the NDIAC and ICA Rules do not provide such wide discretion to the emergency arbitrator. Such an express delineation permits the emergency arbitrator to attain flexibility in the conduct of the EA proceedings.³⁰⁴ The alternative option of virtual hearings through tele or video conferencing may especially be required in unforeseen circumstances such as the ongoing COVID-19 pandemic. Further, an emergency arbitrator may be required to deliver the EA order only based on the documents in certain complex cases or where a hearing cannot be scheduled due to the dilatory tactics of a party.³⁰⁵ In the absence of a clear provision on the same, it may be difficult for the emergency arbitrator to resort to such alternatives, especially documents-only proceedings, due to the risks regarding enforceability over issues concerning due process. Therefore, the express reference to such a wide discretion provides support to the emergency arbitrator to adopt flexible approaches for an EA proceeding.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ RAGNWARDH, *supra* note 177, at 194.

³⁰⁴ YU & CAO, *supra* note 88, at 265.

³⁰⁵ Scherer, *supra* note 39, at 13.

However, it is important to note that the emergency arbitrator must provide a reasonable opportunity to be heard to the parties.³⁰⁶ This norm is also present under §18 of the 1996 Act³⁰⁷ and Article 18 of the UNCITRAL Model Law³⁰⁸ and therefore is a cardinal principle under arbitration law. In other words, document-only proceedings must only be made in exceptional cases and keeping in mind the time constraint in a case. The EA proceedings must be conducted in a highly efficient manner and in accordance with due process.³⁰⁹ Non-adherence to the requirement of due process can raise enforceability challenges to the final EA decision. For instance, Article V(1)(b) of the New York Convention contains the ground for refusing enforcement when the due process requirements have not been adhered to. Courts have interpreted that the same extends to providing a meaningful opportunity to the parties to present their case.³¹⁰

Thus, the emergency arbitrator ought to balance the urgency of the EA proceedings and the parties' due process rights.³¹¹ Further, the EA order is always subject to review by the arbitral tribunal. Therefore, if an opportunity for a hearing is not granted by the emergency arbitrator, the same may act as a consideration by the arbitral tribunal while reviewing the EA order.³¹²

Accordingly, we recommend that the EA rules under NDIAC and ICA are amended in order to provide alternatives to the emergency arbitrator to conduct the proceedings through virtual or document only mode, as opposed to the requirement of a formal in-person hearing.

2. Permission to State Only Summary Reasons for the Emergency Order

The international EA rules provide an option to the emergency arbitrator to state only brief or summary reasons for the final EA order. In contrast, in India three institutional rules, namely the NDIAC, MCIA, and the IIAM Rules, provide a similar provision.³¹³ The ICA, MHCAC, NPAC, and BIMACC Rules, do not provide for any such option to the emergency arbitrator while rendering the EA order.

³⁰⁶ MARTIN F. GUSY & JAMES M. HOSKING, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES, 77 (Oxford University Press, 2nd ed., 2019).

³⁰⁷ The Arbitration and Conciliation Act, 1996, §18.

³⁰⁸ UNCITRAL Model Law, *supra* note 52, at Art. 18.

³⁰⁹ MOSER & BAO, *supra* note 172, at 140; Scherer, *supra* note 39, at 13.

³¹⁰ Iran Aircraft Indus v. Avco Corp., 980 F.2d 141, 146 (2nd Cir. 1992); Karaha Bodas v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 02-20042 (5th Cir. 23 March 2004).

³¹¹ RAGN WALDH, *supra* note 177, at 194.

³¹² Scherer, *supra* note 39, at 13.

³¹³ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.7; The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.8; The IIAM Arbitration Rules, 2021, Schedule-2, §7(b)(ii).

Such an option enables the emergency arbitrator to issue a quick EA order in light of the limited time that may be available in an EA process. Writing a detailed order, especially in complex issues, can range to various pages and may consume precious time.³¹⁴ This may ultimately result in a delay even when the entire procedure for submissions and hearing was expedited. Further, the express delineation of the powers of the emergency arbitrator to state only summary reasons is important in order to avoid challenges by the losing party regarding the lack of detailed rationales in an order, which may threaten its enforceability.³¹⁵ In the absence of an express permission, the claimant may find it difficult to justify the measures taken by the emergency arbitrator to state only summary reasons.

Moreover, given that the EA order is not final and subject to review by the arbitral tribunal and security can be obtained for it, providing only brief summary reasons are unlikely to have any adverse effects on the rights and obligations of the parties.³¹⁶ Accordingly, we recommend that ICA, MHCAC, NPAC, and BIMACC, explicitly permit their emergency arbitrators to state only summary reasons for the EA order.

3. No Right to Appeal an Emergency Order

The international EA rules uniformly delineate the EA order to be binding on the parties for the relevant time period. The term ‘binding’ is interpreted to mean that the decision is no longer open to ordinary means of recourse, such as an appeal before a judicial authority.³¹⁷ Therefore, the parties are presumed to have contractually agreed to waive their right to appeal such an order. Such a mandate prevents the losing party from utilising the typically lengthy and slow process of appeal and avoiding enforcement of an EA order.³¹⁸

The domestic rules also largely conform to this core feature. However, a particular set of rules, namely the NDIAC Rules, do not provide for the EA order to be binding on the parties. Thereby this leaves the option to the losing party to appeal the resulting EA order. EA orders, as explained earlier,³¹⁹ are recognised in India under §17 of the 1996 Act as interim measures ordered by an arbitral tribunal. As per §37(2)(b) of the 1996 Act, such orders under §17 can be appealed before the court that is authorised to hear the appeal from the original decrees, i.e. the court of first appeal.³²⁰ Hence, this brings into play the CPC. §96 read with Order XLI largely provides for the mechanism for first appeal under the

³¹⁴ YU & CAO, *supra* note 88, at 268.

³¹⁵ *Id.*

³¹⁶ CHOONG, *supra* note 178, at 248.

³¹⁷ YU & CAO, *supra* note 88, at 254-255.

³¹⁸ CHOONG, *supra* note 178, at 240.

³¹⁹ For the conclusion regarding EA falling under §17 of the 1996 Act, see *supra* Part III.B on “Rulings of the Indian Courts”.

³²⁰ The Arbitration and Conciliation Act, 1996, §37(2)(b).

CPC.³²¹ While §96 generally states that an appeal shall lie from an original decree, Order XLI provides for the procedure implemented for such an appeal.

The party challenging the order has to present a memorandum comprising the grounds of objections along with a copy of the order.³²² The limitation period for filing such a challenge before a civil court is thirty days, and for a High Court is ninety days from the delivery of the order as per the Limitation Act, 1963.³²³ However, a delay can also be condoned by the court in appropriate circumstances.³²⁴ For an order appealed as per §37 of the 1996 Act, the Indian courts generally grant a grace period of thirty more days.³²⁵ Further, the appellate court is also competent to provide a stay to the execution of the order in case sufficient cause is shown.³²⁶ The losing party can thus obtain a stay on the execution of the EA order while the proceedings for the appeal continue.

A formal hearing has to be conducted by the appellate court in order to adjudicate the appeal.³²⁷ The said court is provided with a sixty-day period to conclude the hearings.³²⁸ This is significantly larger from the overall period of fourteen to fifteen days provided for the delivery of the EA order itself. Moreover, summons for proceedings are issued to the respondent, following which the respondent has to furnish a memorandum stating the counterclaims.³²⁹ The appellate court also has the power to take additional evidence from the parties for determining the claims.³³⁰ It has to place its findings and evidence it has considered on record.³³¹ The parties here have the opportunity to file objections through a memorandum to any finding or evidence placed on record.³³² The appellate court fixes a period for presenting such a memorandum, and after the objections are resolved the court proceeds to determine the appeal.³³³ Therefore, the appellate, who may wish to further delay the execution of the EA order, can file objections merely to extend the pronouncement of the judgment by the appellate court.

The judgment can be pronounced after all hearings are completed either at once or at any future date which the court may determine.³³⁴ The appellate court has wide powers to confirm, vary, or reverse the order that was appealed³³⁵

³²¹ The Code of Civil Procedure, 1908, §9, Order XLI.

³²² *Id.*, Order XLI, Rule 1.

³²³ The Limitation Act, 1963, Art. 116.

³²⁴ The Code of Civil Procedure, 1908, Order XLI, Rule 3A; The Limitation Act, 1963, §5.

³²⁵ *N. V. International v. State of Assam*, (2020) 2 SCC 109; *Union of India v. Varindera Constructions*, (2020) 2 SCC 111.

³²⁶ The Code of Civil Procedure, 1908, Order XLI, Rule 5.

³²⁷ *Id.*, Order XLI, Rule 11.

³²⁸ *Id.*, Order XLI, Rule 11A.

³²⁹ *Id.*, Order XLI, Rule 14.

³³⁰ *Id.*, Order XLI, Rules 27-28.

³³¹ *Id.*, Order XLI, Rule 26(1).

³³² *Id.*

³³³ *Id.*, Order XLI, Rule 26(2).

³³⁴ *Id.*, Order XLI, Rule 30.

³³⁵ *Id.*, Order XLI, Rules 32-33.

with appropriate reasons.³³⁶ Moreover, the appellate courts are also required to provide a thorough examination in their judgment. The appellate court must properly appreciate all the facts and evidence presented before it.³³⁷ It has to formulate an independent assessment of the relevant evidence, consider the relevant points that arise during the adjudication, and analyse the effect of the evidence on such points.³³⁸ The appellate court cannot provide a general expression of concurrence with the previous order, and the relevant considerations are ought to be discussed in detail.³³⁹ Therefore, the judgment of the appellate court must be as detailed as possible and cannot be in a summary form.

It can be concluded that the whole appeal process provided under the 1996 Act and the CPC is laxative in nature. The losing party that may wish to delay the enforcement of an order can easily file an appeal, obtain a stay, and delay the proceedings through numerous objections during the proceedings. Further, the procedure also does not mandate the appellate court to act in an expeditious manner suitable for emergency relief. The said court is granted a sixty-day period for hearing itself, mandated to place all evidence and facts on record and invite objections to the same, and also required to state detailed reasons and analysis of the evidence and facts in its judgment.

Thus, the appeal process under the 1996 Act and the CPC is highly unsuitable for urgent relief where time is of great essence. The resort to such a slow mechanism would, in all likelihood, result in the delay of the ultimate execution of the order and frustrate the purpose of an expedited EA proceeding. Accordingly, we recommend that the NDIAC Rules explicitly provide the EA order to be binding to the parties with no resort to an appellate mechanism before a judicial authority.

4. Special Procedure for the Determination of the Seat of Arbitration

The international EA rules, as highlighted before, provide for a specific process for determining the seat of the arbitration during an EA proceeding. In the absence of an express agreement, the rules either provide the domicile of the institution as the automatic seat, or require the Secretariat or President of the institution to determine the seat, who also often determine the domicile as the seat. This ultimately prevents the utilisation of the crucial time of the emergency arbitrator in determining such complex challenges.³⁴⁰

³³⁶ *Id.*, Order XLI, Rule 31.

³³⁷ *United Engineers & Contractors v. Govt. of A.P.*, (2014) 16 SCC 109, ¶9.

³³⁸ *H. Siddiqui v. A. Ramalingam*, (2011) 4 SCC 240, ¶18; *Leela Krishnarao Pansare v. Babasaheb Bhanudas Ithape*, (2014) 15 SCC 821, ¶¶5-6.

³³⁹ *Id.*

³⁴⁰ CHOONG, *supra* note 178, at 245.

In contrast, under the domestic EA rules, only IIAM provides for such a special procedure for the determination of the seat of arbitration. Under the said rules, in the absence of an express agreement, the seat of arbitration shall automatically be the place where the concerned arbitration agreement was executed.³⁴¹ The non-availability of a similar procedure under the EA rules can have ramifications on the expedited nature of the EA proceedings, especially in India. The test to determine the seat of arbitration in the absence of an ascertainable express agreement is famously unclear in India.³⁴²

In *Union of India v. Hardy Exploration and Production (India) Inc.*,³⁴³ ('Hardy') a three-judge bench of the Supreme Court opined that the choice of Kuala Lumpur as the venue for the arbitration proceedings did not imply that the place would automatically become the seat of arbitration.³⁴⁴ It held that the venue by itself cannot become the seat of the arbitration and would require some additional factors in order to delineate it as the seat.³⁴⁵ However, it did not engage in explaining or delineating such factors.

Subsequently, in *BGS SGS Soma JV v. NHPC Ltd.*,³⁴⁶ ('BGS Soma') another three-judge bench of the Supreme Court provided a test contrary to the principles laid down in *Hardy*. The Court delivered a 'bright-line' test containing five considerations for determining when a chosen venue can be treated as a seat of arbitration. These considerations include the usage of phrases such as 'arbitration proceedings' and 'proceedings shall be held' to transform a venue into a seat of arbitration. However, the above considerations are subject to the absence of a "significant contrary *indicia*" which suggests that the given place would merely remain the venue and not the seat of arbitration.³⁴⁷

The aforesaid bright-line test laid down in *BGS Soma* is diametrically opposed to the principle identified in *Hardy*. If this test were to be applied to the facts of *Hardy*, Kuala Lumpur would unequivocally be regarded as the seat of arbitration chosen by the parties. This is because it stipulated Kuala Lumpur as the venue for 'arbitration proceedings', which would fit the first prong of the

³⁴¹ The IIAM Arbitration Rules, 2021, Schedule-2, §5(a).

³⁴² For a discussion on the vagueness surrounding the test to determine the seat of arbitration in India, see Aman Deep Borthakur, *A Tale of Two Seats: The Indian Supreme Court on the Seat/Venue Distinction*, Vol. 6, J. DISP. RESOL., 216 (2020); Adarsh Ramanujan, *The Pragmatics Behind Seat – Place and Venue in Arbitration Clause: Is Hardy a Discordant Note*, Vol. 1, NLUJ.LEG. STUD., 60 (2019); Alok Vajpeyi, *Determination of Seat Law by the Indian Courts*, SCC ONLINE, July 29, 2019, available at sconline.com/blog/post/2019/07/29/determination-of-seat-law-by-the-indian-courts/ (Last visited on November 2, 2021); Roopadaksha Basu, *The Seat v/s. Venue Debate – A Continuing Saga*, MONDAQ, June 24, 2020, available at <https://www.mondaq.com/india/arbitration-dispute-resolution/957918/the-seat-vsvenue-debate-a-continuing-saga> (Last visited on November 2, 2021).

³⁴³ (2019) 13 SCC 472 ('Hardy').

³⁴⁴ *Id.*, ¶33-35.

³⁴⁵ *Id.*, ¶35.

³⁴⁶ (2020) 4 SCC 234 ('BGS Soma').

³⁴⁷ *Id.*

bright-line test in BGS Soma. Subsequently, different High Courts and smaller Supreme Court benches have relied on both Hardy³⁴⁸ and BGS Soma³⁴⁹ raising doubts regarding the correct position of law.

It can be noticed that the proper tests and factors that ought to be applied to determine the seat of arbitration remain highly debatable and unclear. The practice of the courts is inconsistent and unreliable in this regard. Therefore, determining the issue regarding the choice of the seat by the parties can be both extremely time consuming and expensive.³⁵⁰

Accordingly, in order to avoid such a hassle in EA proceedings where time is of the utmost essence, there is a requirement for a special procedure to determine the seat of arbitration. Thus, the EA rules of NDIAC, MCIA, MHCAC, ICA, BIMACC, and NPAC, should incorporate a default process to expressly determine the seat of arbitration in EA proceedings. The rules can, in the absence of an express agreement, either provide the respective institution's domicile as the automatic seat or require their respective Secretariat or President to determine the same.

It is, however, important to note that the Secretariat or President, while making such determination can instead of applying the general law, take into consideration factors more suitable for an EA proceedings.³⁵¹ Such factors may include whether the law of the seat permits EA and allows enforcement of EA orders.³⁵² This default rule may now become more important since Indian parties, to which the domestic rules primarily serve, are now permitted to choose a foreign seat of arbitration.³⁵³ Therefore, Indian parties, even in domestic commercial arbitration where there is an absence of foreign parties, have the freedom to choose other international legal frameworks as the seat of arbitration. Thus, this can result in the interplay of different legal systems in a single arbitration and raise more complexities as to the choice of the seat.

Hence, it is necessary to provide a quick procedure to determine the seat of arbitration under the domestic EA rules. Further, given that the arbitral tribunal is not bound by such a determination if the seat of arbitration is found to

³⁴⁸ For judgments that rely on Hardy, *see* Mankastu Impex (P) Ltd. v. Airvisual Ltd., (2020) 5 SCC 399; Aniket SA Investments LLC v. Janapriya Engineers Syndicate (P) Ltd., 2019 SCC OnLine Bom 3187.

³⁴⁹ For judgments that rely on BGS Soma, *see* Inox Renewables v. Jayesh Electricals, (2023) 3 SCC 733; Omprakash v. Vijay Dwarkada Varma, 2020 SCC OnLine Bom 796; GE Power Conversion India (P) Ltd. v. PASL Wind Solutions, 2020 SCC OnLine Guj 2432.

³⁵⁰ Anjali Anchayil & Ashutosh Kumar, *Choice of Seat or Venue: Supreme Court of India Dithers*, KLUWER ARBITRATION BLOG, May 13, 2020, available at <http://arbitrationblog.kluwerarbitration.com/2020/05/13/choice-of-seat-or-venue-supreme-court-of-india-dithers/> (Last visited on November 2, 2021).

³⁵¹ Bieri & Schnyder, *supra* note 170, at 465.

³⁵² *Id.*

³⁵³ *See* PASL Wind Solutions v. GE Power Conversion India (P) Ltd., (2021) 7 SCC 1.

be a different place as ascertained by the emergency arbitrator and the same affect the appropriateness of the EA order, the arbitral tribunal is at liberty to suitably amend or revoke the said order.³⁵⁴

B. PROPER DELINEATION OF POWERS AND DUTIES OF THE EMERGENCY ARBITRATOR

The delineation of the proper powers and duties of the emergency arbitrator is important to conduct the EA process in a fair manner, deter dilatory tactics by the respondent, and also prevent the claimant from misusing the EA mechanism. In the absence of an express delineation of such powers and duties, it may be difficult for the emergency arbitrator to justify their actions, and also for the parties to ensure that the said arbitrator acts in a fair and just manner.

1. Power to Adjudicate on Disputes Arising out of the Arbitration Agreement

The international EA rules specify the powers of the emergency arbitrator to adjudicate on disputes arising out of the arbitration agreement. Under the domestic EA rules, MHCAC, MCIA, NPAC, BIMACC, and IIAM Rules, also provide for such powers.³⁵⁵ However, the NDIAC and ICA Rules remain silent in this regard.

Various issues, largely consisting of jurisdictional disputes, can arise out of the arbitration agreement such as third-party rights, arbitrability of a dispute, validity or existence of the arbitration agreement, and the applicability of the EA procedure.³⁵⁶ The express delineation of the powers to adjudicate such disputes are intended to avoid any attempt by a respondent to adopt dilatory tactics and initiate court challenges regarding the jurisdiction of the emergency arbitrator.³⁵⁷ This is in light of the fact that the EA process does not act as a substitute to court measures, and parallel court relief is permitted under the EA rules, as highlighted earlier. Such challenges by the respondent may instead result in the delay of the proceedings, disclosure of confidential information, which would undermine the authority of the emergency arbitrator and the principle of *kompetenz-kompetenz*.³⁵⁸

It is also feared that a claimant may take advantage of the short time available for assessing the application and include a party without proper basis for

³⁵⁴ CHOONG, *supra* note 178, at 245.

³⁵⁵ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.5; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(f); Rule of Arbitration for NPAC, 2005, Rule 20(A)(v); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.05; The IIAM Arbitration Rules, 2021, Schedule-2, §6(c).

³⁵⁶ MOSER & BAO, *supra* note 172, at 140.

³⁵⁷ GUSY & HOSKING, *supra* note 306, at 78.

³⁵⁸ *Id.*

jurisdiction with the intention to make it a party during the merits proceedings.³⁵⁹ Thus, it is important for the emergency arbitrator to affirm their jurisdiction to stop such attempts at an early stage.

Therefore, it becomes imperative to delineate such powers of the emergency arbitrator to determine issues that arise out of the arbitration agreement. Thus, we recommend that the NDIAC and ICA EA rules adopt a similar approach and explicitly grant powers to the emergency arbitrator to determine jurisdictional issues. However, it is important to remember that such decisions on jurisdictions do not bind the arbitral tribunal, which can vary the EA order accordingly.

2. Duty of Disclosure Regarding Impartiality or Independence

The duty of disclosure of facts and circumstances before appointment that may affect the impartiality or independence of the emergency arbitrator is universally present across the international EA rules. In contrast, two domestic rules, namely IIAM and ICA Rules, do not provide for such an obligation on the emergency arbitrator.

Arbitration acts as an alternative dispute resolution mechanism and is governed by the prevailing principles of due process that ensures a certain level of justice and fair and equal treatment of the parties.³⁶⁰ Undeniably, disclosures regarding impartiality and independence from one of the basic features of any arbitration in order to adhere to these principles of natural justice.³⁶¹ Such disclosures generally include any direct or indirect, past or present relationship with any party, counsel, subject-matter and outcome of arbitration, whether financial, professional or any other kind, that raises any actual or potential conflicts of interests.³⁶²

Thus, there is a clear need to implement specific provisions under the IIAM and ICA Rules in order to impose a duty of disclosure on the emergency arbitrator. Though it may be argued that the general rules under IIAM and ICA, which provide for such a disclosure, can be applied in the interest of justice to cover such a gap, it is always beneficial to provide an express provision regarding the same. This will, in turn, avoid redundant disputes regarding the existence of

³⁵⁹ Bieri & Schnyder, *supra* note 170, at 461.

³⁶⁰ James Ng, *When the Arbitrator Creates the Conflict: Understanding Arbitrator Ethics through the IBA Guidelines on Conflict of Interest and Publishes Challenges*, Vol.2(1), MCGILL J. DISP. RESOL., 23-24 (2016); CIArb, *Independence and Impartiality of Arbitrators*, August 8, 2018, available at <https://www.ciarb.org/resources/features/independence-and-impartiality-of-arbitrators/> (Last visited on November 2, 2021).

³⁶¹ Shashi Gupta, *Independence & Impartiality of Arbitrator-Scheme Under the Arbitration and Conciliation Act, 1996*, MONDAQ, July 1, 2020, available at <https://www.mondaq.com/india/arbitration-dispute-resolution/959426/independence-impartiality-of-arbitrator-scheme-under-the-arbitration-conciliation-act-1996> (Last visited on November 2, 2021).

³⁶² The Arbitration and Conciliation Act, 1996, §12(1)(a).

such obligations and save crucial time in an EA proceeding. Moreover, given that ICA currently does not provide a suitable mechanism to challenge the appointment of an emergency arbitrator, as showcased earlier, it becomes even more important to impose such an obligation on the said arbitrator.

Though the 1996 Act provides statutory backing with respect to this disclosure regarding impartiality and independence, a specific reference to the same under the EA rules would augment the support for the claims. The statutory requirement acts as a general guideline and would require different stages, such as interpreting the phrase arbitrator wide enough to incorporate emergency arbitrators. The same could again mount challenges from the opposing party and further delay the process. Thus, a specific reference under the EA rules with respect to the duty to disclose would act more efficiently to challenge the appointment. Accordingly, both IIAM and ICA should specify, under their respective EA rules, a duty on the emergency arbitrator to disclose any facts or circumstances that may affect their impartiality or independence and create any conflict of interest with any party.

3. Authority to Make ‘Necessary’ Decisions

The authority of the emergency arbitrator to make any ‘necessary’ decision under an EA order is a key feature present under international EA rules. The domestic EA rules such as NDIAC, MHCAC, MCIA, NPAC, and BIMACC Rules also provide such authority to the emergency arbitrator.³⁶³ The ICA and IIAM EA rules, however, do not grant the emergency arbitrator such an authority.

Such an express determination to grant any ‘necessary’ relief does not constrain the emergency arbitrator to a specific national legal system that may ordinarily be utilised by a judicial authority while considering interim relief applications.³⁶⁴ Thus, it allows and enables the emergency arbitrator to render any decision that it may deem necessary and be guided by the general principles of arbitration.³⁶⁵ In practice, this implies that the emergency arbitrator will be able to factor more considerations than a domestic court while delivering the interim relief.³⁶⁶ In the absence of such an express delineation, it will be difficult for the emergency arbitrator to render any necessary relief, and the EA order is likely to face enforcement concerns on account of the said arbitrator exceeding its mandate and going beyond the agreement between the parties.

³⁶³ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.7; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(g); Rule of Arbitration for NPAC, 2005, Rule 20(A)(vi); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.07; The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.8.

³⁶⁴ CHOONG, *supra* note 178, at 247.

³⁶⁵ *Id.*

³⁶⁶ *Id.*, 248.

Therefore, in order to make EA more attractive than judicial measures and grant emergency arbitrators the required powers, we recommend that the EA rules of IIAM and ICA be amended and grant explicit powers to the emergency arbitrator to order any ‘necessary’ relief.

4. Emergency Arbitrator to Not Act as an Arbitrator in Future Proceedings

The international EA rules prevent the emergency arbitrator from becoming a member of a tribunal in any future arbitration regarding the dispute. The domestic EA rules largely abide by this key feature except for the ICA Rules. Though the ICA Rules stipulate that powers of the emergency arbitrator shall cease after the order is made,³⁶⁷ they do not impose any bar on such a person to act as an arbitrator in a future arbitration relating to the disputes.

The policy of preventing the emergency arbitrator from participating in future arbitration regarding the dispute is largely meant to ensure the impartiality of the members of the arbitral tribunal. As discussed before, the arbitral tribunal has the authority to review the determinations made by the emergency arbitrator with respect to the seat, jurisdiction, as well as the relief. Herein, the tribunal can vary, confirm, discharge, or suspend the operation of the EA order. Thus, in case the emergency arbitrator was to be appointed to review their own decision, there will be evident and valid concerns regarding their impartiality.³⁶⁸ The emergency arbitrator may be inclined to uphold the earlier order, which otherwise may be considered to be amended by other arbitrators.³⁶⁹

Therefore, in order to enable the tribunal to reach an impartial decision, such a prohibition on the appointment is generally provided. This policy keeps in check the institution itself from making such an appointment, in the absence of an agreement between the parties. Such an agreement may be reached in case the parties consider it useful to have the same person as an arbitrator since they would already be familiar with the facts and circumstances surrounding the case.³⁷⁰

Thus, we recommend that the ICA Rules adopt a similar approach and explicitly bar the emergency arbitrator from being a member of the tribunal relating to the concerned dispute between the parties. This should, however, be subject to an agreement to the contrary by the parties.

³⁶⁷ The Rules of Domestic Commercial Arbitration, 2016, Rule 57(b)(g).

³⁶⁸ MOSER & BAO, *supra* note 172, at 146.

³⁶⁹ CHOONG, *supra* note 178, at 246.

³⁷⁰ Bieri & Schnyder, *supra* note 170, at 474; YU & CAO, *supra* note 88, at 263.

5. Emergency Arbitrator can Obtain Security from the Applicant

A key feature of the international EA rules is to provide the ability and authority to the emergency arbitrator to obtain security from the applicant, i.e. the claimant, for passing the EA order. In contrast, only three domestic EA rules, namely MHCAC, MCIA, and IIAM, contain such a provision.³⁷¹ The EA rules of NDIAC, ICA, NPAC, and BIMACC do not provide for such powers.

Emergency relief can have a significant impact on the business and operations of a party.³⁷² For instance, an EA order restraining a company from closing a high value mergers and acquisition transaction can have a huge effect on the commercial interest of the company. Therefore, the mechanism to obtain security allows the emergency arbitrator to obtain security from the claimant to compensate for any damages that the respondent may suffer.³⁷³ Such a mechanism acts to compensate the party against whom relief is granted in case the order is ultimately found to be unjustified by the emergency arbitrator or the arbitral tribunal.³⁷⁴

Thus, such powers are important to prevent the misuse of the EA mechanism by the claimant to obtain unjustified relief. Accordingly, we recommend that the EA rules of NDIAC, ICA, NPAC, and BIMACC, explicitly provide such powers to the emergency arbitrator to obtain security from the applicant for an EA order.

6. Emergency Arbitrator Shall Apportion Costs

The authority to apportion costs for the EA proceedings primarily rests with the emergency arbitrator under the international EA rules. In India, the domestic EA rules comprising the MHCAC, MCIA, NPAC, BIMACC and IIAM Rules provide for a similar mechanism.³⁷⁵ However, NDIAC and ICA Rules are silent on this aspect.

The arbitrators have increasingly showcased a tendency to apportion costs of an arbitral proceeding as a method to allocate the costs.³⁷⁶ As per

³⁷¹ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.10; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(i); The IIAM Arbitration Rules, 2021, Schedule-2, §7(d).

³⁷² CHOONG, *supra* note 178, at 238.

³⁷³ MOSER & BAO, *supra* note 172, at 144.

³⁷⁴ YU & CAO, *supra* note 88, at 265.

³⁷⁵ The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.11; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(k); Rule of Arbitration for NPAC, 2005, Rule 20(A)(ix); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.09; The IIAM Arbitration Rules, 2021, Schedule-2, §8(a).

³⁷⁶ Tilbe Birengel, *Cost Allocation in International Arbitration*, MONDAQ, March 6, 2018, available at <https://www.mondaq.com/turkey/arbitration-dispute-resolution/679932/cost-allocation-in-international-arbitration> (Last visited on November 2, 2021).

this method, the parties bear the costs in lieu of their success on the merits of the case, and therefore, it ensures a more equitable distribution.³⁷⁷ The provision for the costs to be apportioned by the emergency arbitrator at the end of the EA proceedings ensures that the costs are dealt with during the proceedings, in case the arbitral tribunal is not formed subsequently.³⁷⁸ For instance, after an EA proceeding, the claimant may not wish to proceed with the formation of an arbitral tribunal to determine substantive issues, in which case there would not be any subsequent decision on the costs. Herein, if there is a successful respondent in the emergency proceedings, they would need to consider a separate arbitration to recover such costs.³⁷⁹ Therefore, it is always preferred that the emergency arbitrator first ascertains the costs of the EA proceedings, subject to the formation and review by the arbitral tribunal. The explicit statement of such powers enables the emergency arbitrator to establish jurisdiction over the determination of the costs.³⁸⁰

Moreover, apart from the fixed fees of the emergency arbitrator and the institution, parties may be required to incur certain reasonable costs which are apportioned by the emergency arbitrator between the parties. The question of whether the costs were reasonably incurred is decided based on the conduct of the party's counsel and the complexity of the case.³⁸¹ Therefore, the emergency arbitrator, who has first-hand knowledge about such factors, is more suitable than an arbitral tribunal to ascertain the reasonable costs incurred by the parties.

Accordingly, we recommend that both the NDIAC and the ICA Rules impose a duty on the emergency arbitrator to apportion the costs for the EA proceedings, subject to the formation and review by the arbitral tribunal.

C. INTERIM NATURE OF THE EMERGENCY ORDER

The EA orders, though binding on the parties, can always be varied by the emergency arbitrator, the arbitral tribunal, or cease to operate after the passage of a certain period in case the arbitral tribunal is not constituted. Such an approach prevents the winning party from misusing the benefits granted in an EA order and also provides an opportunity to consider factors that may have been missed due to the expedited EA process. Therefore, they become important elements of an EA mechanism.

Certain domestic EA rules fall short on providing a specific period for the operation of the EA order without the formation of the arbitral tribunal and granting emergency arbitrators the powers to modify their orders. Without an express delineation of such a power and the period of operation of the EA order, there

³⁷⁷ *Id.*

³⁷⁸ MOSER & BAO, *supra* note 172, at 142-143; YU & CAO, *supra* note 88, at 272.

³⁷⁹ RAGN WALDH, *supra* note 177, at 200.

³⁸⁰ *Id.*

³⁸¹ MOSER & BAO, *supra* note 172, at 142-143.

is a narrow scope for the emergency arbitrator to legitimately amend the order and cease its operation. The detailed rationales behind such provisions and the amendments required under the various domestic rules are discussed below.

1. Emergency Order can be Amended by the Emergency Arbitrator

The power of the emergency arbitrator to vary or vacate the EA order upon any party showing a good cause is a key feature of the international EA rules. The domestic EA rules, namely MHCAC, MCIA, NPAC, BIMACC, and IIAM Rules, also provide for such powers.³⁸² The NDIAC and ICA Rules, however, do not provide emergency arbitrators with the power to amend the EA order.

The rationales for granting the power to the emergency arbitrator to vary the EA order are similar to the reasons for granting such power to the arbitral tribunal. Due to the time pressure under which the EA order is granted without comprehensive submissions from the parties, a valid cause may be shown by a party to alter the said order.³⁸³ Further, new facts or legal elements may arise after the EA order is passed, which may validate the reconsideration of the order. Therefore, though the arbitral tribunal is also granted such powers, its formation can take time, and within that period, a party may face commercial harm. Thus, in order to fill this gap, emergency arbitrators are also granted the powers to amend their EA orders.

Accordingly, it is essential that the NDIAC and ICA Rules also provide the emergency arbitrators to vary or vacate the order upon a party showing good cause. However, it is important to remember that such powers only last till the formation of the arbitral tribunal, after which the tribunal itself considers such requests of amendment.

2. Emergency Order Ceases to Operate After a Certain Period

The international EA rules generally provide for a specific period, ranging from sixty to ninety days, after which the EA order shall automatically cease to be binding if the arbitral tribunal has not been constituted. On the other hand, under the domestic EA rules, the MHCAC, NPAC, and BIMACC Rules also provide for a ninety-day period³⁸⁴ to constitute the tribunal, while NDIAC

³⁸² The Arbitration Rules of the Mumbai Centre for International Arbitration, 2016, Rule 14.7; The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(g); Rule of Arbitration for NPAC, 2005, Rule 20(A)(vi); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.07; The IIAM Arbitration Rules, 2021, Schedule-2, §7(e).

³⁸³ JASON FRY ET AL., *THE SECRETARIAT'S GUIDE TO ICC ARBITRATION*, 1091, ¶3 (ICC Publication, 2012); MOSER & BAO, *supra* note 172, at 145.

³⁸⁴ The MHCAC (Internal Management) Rules, 2017, Rule 19(1)(h); Rule of Arbitration for NPAC, 2005, Rule 20(A)(vii); The BIMACC Institutional Arbitration Rules, 2013, Rule 35.07.

provides a period of sixty days.³⁸⁵ ICA, MCIA and IIAM, however, do not stipulate such a provision.

The provision to cease the binding effect of the EA order after a period of time is inserted in order to prevent the winning party from abusing the benefits of the order. A successful applicant may tactically delay the initiation of the arbitral proceedings in order to obtain the relief for an indefinite period, exert pressure on the opposing party and also hinder the arbitral tribunal from reviewing the EA order.³⁸⁶ Thus, such a provision is designed to prevent the dilatory tactics of the successful party employed to extract unfair advantages from a favourable order.³⁸⁷ Similar principles are also reflected under the 1996 Act wherein under §9(2) the arbitral proceedings have to be necessarily commenced within ninety days from the date the order for interim measures as granted by the court.³⁸⁸

Therefore, we recommend that the ICA, MCIA, and IIAM Rules provide a similar period of either sixty or ninety days for the operation of the EA order without the formation of the arbitral tribunal.

D. RIGHTS OF THE PARTIES

The key features regarding the rights of the parties include the right to approach the domestic court parallelly and the right to opt-out of the EA mechanism. The recommendations regarding the same are discussed hereunder.

1. Availability of Parallel Domestic Court Measures

The EA rules under the international institutions explicitly provide a parallel option to the parties to approach a judicial authority for any interim measures. Under the domestic EA rules, only the IIAM Rules contain a similar provision.³⁸⁹

The provision for parallel relief reinforces the function of the EA mechanism as only an alternative to the remedies available before a domestic court for urgent interim relief. A party may prefer to approach a court due to benefits such as the ability to grant *ex parte* relief, bind third parties, and sanction any breach of its orders.³⁹⁰ Hence, though parties may have agreed to be bound by the EA rules, such a provision ensures that they preserve their statutory rights to approach the domestic courts.³⁹¹ This was evident in the case of Raffles Design,

³⁸⁵ The NDIAC (Arbitration Proceedings) Rules, 2018, Rule 14.12.

³⁸⁶ YU & CAO, *supra* note 88, at 270.

³⁸⁷ *Id.*

³⁸⁸ The Arbitration and Conciliation Act, 1996, §9(2).

³⁸⁹ The IIAM Arbitration Rules, 2021, Schedule 2, §11(b).

³⁹⁰ MOSER & BAO, *supra* note 172, at 146.

³⁹¹ Scherer, *supra* note 39, at 16.

wherein the §9 petition by the Indian party was permitted due to the express delineation of a parallel domestic court mechanism under the SIAC Rules.³⁹² Moreover, it implies that the choice of a party to approach a judicial authority does not act as a waiver to the right to arbitrate under the arbitration agreement.³⁹³

It also prevents the discontinuance or a halt on the EA proceedings merely due to a party approaching a domestic court during the said proceedings. This can be utilised by a party as a tactic to delay the EA proceedings. Therefore, it becomes imperative to stipulate that the parties can resort to the judicial courts without it affecting the operation of the EA proceedings before the emergency arbitrator.

Accordingly, it is essential that the domestic EA rules, namely the NDIAC, ICA, MHCAC, NPAC, MCIA, and BIMACC Rules, also provide an explicit parallel right to the parties to access the judicial courts.

2. Availability of an Opt-Out Mechanism

The international EA rules generally provide an opt-out mechanism to the parties, which implies that the parties can, through agreement, choose not to be bound by the EA rules of the relevant institution. Such an approach may especially be taken by parties when the place of enforcement, for either of the parties, does not legally recognise the concept of EA. However, none of the domestic EA rules provides for such an opt-out solution.

The inclusion of an opt-out mechanism implies that unless the parties have agreed to not be bound by the EA rules, the said rules shall apply to the parties.³⁹⁴ Thereby, when parties agree to incorporate a particular institutional rule, they are automatically bound by its EA provisions. Though it is important to state that parties may, even without such a provision, validly opt-out of such rules.³⁹⁵ The provision functions to instead prevent frivolous challenges by a party merely as a dilatory tactic. A party may raise a challenge based on the premise that since the EA mechanism is a distinct part of the institutional rules, the same cannot be binding unless the parties through agreement opt-in for such a provision.³⁹⁶

Further, since EA is a relatively novel concept, some EA rules were added in the regulatory framework via amendments, such as in the case of ICA, NDIAC, NPAC, and IIAM Rules. Hence, there are bound to be situations where the parties agreed to be bound by the rules before the insertion of the EA mechanism. The opt-out provision here acts as a support to the proposition that the parties

³⁹² For this determination, see *supra* Part III.B on “Rulings of the Indian Courts”.

³⁹³ GUSY & HOSKING, *supra* note 306, at 81-82.

³⁹⁴ Bieri & Schnyder, *supra* note 170, at 457.

³⁹⁵ GUSY & HOSKING, *supra* note 306, at 74.

³⁹⁶ Scherer, *supra* note 39, at 8.

have also prospectively agreed to be bound by the newly inserted EA rules.³⁹⁷ This is based on the general dictum that the parties in arbitration prefer to be bound by the updated and latest provisions of the institutional rules.³⁹⁸ In general, it also provides parties, which may be unsure as to what extent they can agree to not be bound by a rule, with the necessary assurances regarding their ability to opt-out of the EA mechanism.³⁹⁹

Therefore, it is necessary that the domestic EA rules be amended and provide the parties with an opt-out mechanism for EA.

VII. ENFORCEMENT OF EMERGENCY ARBITRATION ORDERS IN INDIA

In this part, we attempt to highlight the major looming issues with the enforcement of the interim orders – and thereby EA orders – under the Indian legal framework. The part will focus on the enforcement mechanism for both domestic as well as foreign seated arbitrations. It is opined that without any progress in these issues regarding enforcement, an effective framework for EA, even with the implementation of the recommendations as provided under Part VI, cannot be established. Hence, there is an imminent requirement to address the issues regarding enforcement.

A. ENFORCEMENT FOR A DOMESTIC SEATED ARBITRATION

The sub-part first highlights the legislative amendment, which enabled the arbitral tribunals to enforce their orders and thereafter proceeds to examine the process of enforcement before a civil court.

1. Power of Enforcement

While §9 and §17 of the 1996 Act confer the authority upon the courts and tribunals to grant interim relief, it fails to address the enforcement of the same. Under §9, a court is conferred with the power to issue and enforce an interim order, as per the procedure established by the CPC.⁴⁰⁰ Before the 2015 Amendment, such a provision was absent from §17, rendering the interim order granted by tribunals ineffective. The contempt of such an order was also left out of the purview of the Contempt Act since an arbitrator was distinct from a court and could not attract provisions of either the Contempt Act or the CPC. Furthermore, §3 of the Evidence Act, 1872, expressly excluded an arbitrator from the definition of ‘court’.⁴⁰¹

³⁹⁷ Bieri & Schnyder, *supra* note 170, at 456-457.

³⁹⁸ *Id.*

³⁹⁹ GUSY & HOSKING, *supra* note 306, at 74.

⁴⁰⁰ The Arbitration and Conciliation Act, 1996, §9(1).

⁴⁰¹ See also The Evidence Act, 1872, §3 (“Court” includes all judges and magistrates and all persons, except arbitrators, legally authorised to take evidence).

Nevertheless, the 2015 Amendment added clause (2) to §17 and brought the tribunal at par with the court *vis-à-vis* interim orders. The amendment deemed that all interim orders passed under §17 would be enforceable under the CPC in the same manner as if it were an order of the court.⁴⁰² However, the Kerala High Court held that the amendment does not adequately address the question of enforcement.⁴⁰³ The High Court expressed that conferring the power of the civil court upon the tribunal to pass interim orders does not mean that it is conferred with the power of enforcement.⁴⁰⁴ The Court held that the nature of the arbitral tribunal's composition arises from a contract, although its power is derived from a statute. Therefore, owing to its creation through a contract, it inherently lacks the authority to exercise any power related to any sovereign function or public law, which is vested in the courts.⁴⁰⁵ In effect, the judgement of the High Court held that the applicant would have to necessarily approach a civil court for enforcement of an interim order granted by the tribunal. This would run counter to the amendment's objective of non-interference of courts in arbitral proceedings.

Varied inferences made by High Courts led the Supreme Court to clarify the position on enforcement of interim orders.⁴⁰⁶ With the help of the Report,⁴⁰⁷ the Supreme Court held that the addition of clause (2) to §17, was brought as a 'complete solution' to the problem of enforcement of interim orders granted by tribunals under §17(2).⁴⁰⁸ The Court also clarified that the tribunal would not have to apply to a High Court for contempt of its orders since the amendment clarified that such orders would be enforceable in the same manner as a civil court.⁴⁰⁹

Although the Supreme Court has attempted to clarify the position of law with respect to tribunals seeking the court's assistance for enforcement, the mechanism for direct enforcement by tribunals still remains unclear and ambiguous under the 1996 Act. The 1996 Act does not explicitly provide for any specific provision in case of violation of orders passed under §17.

2. Enforcement of Interim Orders

Whether an interim order is passed under §9 or §17, it may be enforced either under §94 or §151 or Order XXXIX of the CPC.⁴¹⁰ However, the statute fails to provide for a mechanism in cases where orders passed under §17 are violated.

⁴⁰² The Arbitration and Conciliation Act, 1996, §17(2).

⁴⁰³ Pradeep K.N. v. Station House Officer, 2016 SCC OnLine Ker 8995.

⁴⁰⁴ *Id.*, ¶13.

⁴⁰⁵ *Id.*

⁴⁰⁶ Alka Chandewar, *supra* note 72.

⁴⁰⁷ 246th Law Commission Report, *supra* note 57.

⁴⁰⁸ Alka Chandewar, *supra* note 72, at ¶9.

⁴⁰⁹ *Id.*

⁴¹⁰ SUDIPTO SARKAR & V. R. MANOHAR, SARKAR'S CODE OF CIVIL PROCEDURE, 2062 (Wadhwa & Co., 10th ed., 2002); Rattu v. Mala, 1968 SCC OnLine Raj 3 ; ¶6.

Nevertheless, the Supreme Court of India in *Alka Chandewar v. Shamshul Ishrar Khan* held that a defaulting party could be penalised under §27(5) of the 1996 Act for violating an interim order granted by an arbitral tribunal.⁴¹¹ While this section provides that the tribunal must seek the assistance of the Court in taking evidence, the Supreme Court held that the scope of the provision extended to the Court punishing a party for contempt of the tribunal, as if it were an order of the Court itself.⁴¹² However, §27(5) only provides for the tribunal to seek assistance from the court in enforcing the order instead of punishing the defaulting party for contempt.⁴¹³ The 1996 Act does not specifically provide for direct enforcement of the tribunal's orders, though it deems that an interim order passed by a tribunal be enforced as an order of a civil court under the CPC.⁴¹⁴ Therefore, we must analyse the procedure followed by courts to understand the enforcement of interim orders and the procedure for penalising a party for contempt of the tribunal's orders.

a. *Enforcement of Interim Orders by Civil Courts*

A party seeking interim relief must first approach a civil court and file an application for injunction under Order XXXIX Rule 1 or 2 or under §94 of the CPC.⁴¹⁵ The court may then grant an injunction without hearing the other party, i.e. an *ad interim* injunction or may notify the other party to present their case before granting a temporary injunction.⁴¹⁶

In case the court does not grant an *ad interim* injunction, it will issue a summons to the other party. Naturally, the other party tends to avoid the service of such summons.⁴¹⁷ Once the summons has been served, the opposing party will be granted an opportunity to file objections against the application and will attempt to delay the process as much as possible. Thus, frustrating the applicant party's objective to seek urgent interim relief. Another procedure that could be adopted by the opposing party would be to file a caveat⁴¹⁸ before the court and then seek time for objections against the application for interim relief. This may be followed by adjournments on some ground or another, delaying the grant in interim relief and rendering its objective completely ineffectual.⁴¹⁹

⁴¹¹ *Alka Chandewar*, *supra* note 72, at ¶6, ¶8; 246th Law Commission Report, *supra* note 57, at 48; *Sri Kishan v. Anand*, 2009 SCC OnLine Del 2472, ¶11.

⁴¹² *Alka Chandewar*, *supra* note 72, at ¶8; 246th Law Commission Report, *supra* note 57, at 48.

⁴¹³ The Arbitration and Conciliation Act, §27(5).

⁴¹⁴ *Id.*, §17(2).

⁴¹⁵ Rab, *supra* note 63, at 97; Nishith Desai Associates, *Interim Reliefs in Arbitral Proceedings: Powerplay between Courts and Tribunals*, January 2020, available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Interim_Reliefs_in_Arbitral_Proceedings.pdf (Last visited on November 2, 2021).

⁴¹⁶ The Code of Civil Procedure, 1908, Order XXXIX, Rule 3.

⁴¹⁷ Rab, *supra* note 63.

⁴¹⁸ The Code of Civil Procedure, 1908, §148A(1).

⁴¹⁹ Rab, *supra* note 63.

Whether the court grants an *ad interim* injunction or grants an interim order through any other aforementioned procedures, the opposing party may easily frustrate the objective of interim relief through its non-compliance. On violation of the order by the defaulting party, the applicant party would have to approach the same court, file a petition and prove how the defaulting party violated the said interim order. The defaulting party would then again be given the opportunity to provide a defence.⁴²⁰ It is only after such an opportunity that the court would pass an order under Order XXXIX Rule 2A or §94 of the CPC.⁴²¹

All aforementioned mechanisms allow the opposing party to delay the proceedings in order to frustrate the practical effect of any enforcement orders rendered by the civil court.

b. Penalising Non-Compliance of Interim Order

While the CPC does not provide for the mechanism of enforcement of the orders passed under §94 or Order XXXIX Rule 2A,⁴²² the penal consequences for non-compliance of an order are also rendered ineffectual. While Order XXXIX Rule 2A expressly provides for penalty through the attachment of property or detention in civil prison, the appendix to the CPC does not contain any proforma for detaining a person at a civil prison for disobedience under this provision.⁴²³ Courts have also noted that orders delivered under §94 and Order XXXIX Rule 2A must be invoked carefully and frugally in such circumstances.⁴²⁴

This leaves us with §151 of the CPC to successfully enforce an order.⁴²⁵ However, an application brought under §151 is heavily dependent upon the subjective satisfaction of the presiding judge.⁴²⁶ The procedure stipulated under §151 directs the applicant party to first prove the case for grant of interim relief and then requires the applicant party to prove violation of the interim order by the defaulting party. Subject to the satisfaction of the court, it may pass an order for disobedience or contempt. Since it is unclear how the court seeks to enforce the same under Order XXXIX Rule 2A, the order can only effectively be enforced under §151 of the CPC.

On an assessment of all the mechanisms for enforcement, the present structure for enforcement of interim orders granted by tribunals is essentially dependent upon the voluntary compliance of the parties rather than penal consequences.

⁴²⁰ Provided respectively in the general civil rules of each State.

⁴²¹ Rab, *supra* note 63.

⁴²² Rayapati Audemma v. Pothineni Narasimham, 1969 SCC OnLine AP 204, ¶10; Manohar Lal Chopra v. Seth Hiralal, AIR 1962 SC 527, ¶532.

⁴²³ Rab, *supra* note 63, at 98.

⁴²⁴ SARKAR & MANOHAR, *supra* note 410, at 2063; Rab, *supra* note 63, at 98.

⁴²⁵ The Code of Civil Procedure, 1908, §151.

⁴²⁶ *Id.*

3. Other Issues with the Enforcement of Interim Orders

While the question of enforcement of an interim order and its contempt remains unanswered, many other shortcomings are present. Presently, the structure of enforcement also stipulates that an order may be enforced under Order XXI of the CPC.⁴²⁷ On a collective reading of §36 and §2(14) of the CPC, unless “there is a formal expression of an order of the Civil Court”, resort is to be had under Order XXXIX Rule 2A or §94 of the CPC.⁴²⁸ An application may only be filed under Order XXI once the final decree has been rendered after adjudication of the dispute.⁴²⁹ Since Order XXI only applies to the execution of final decrees, interim orders will not fall under its ambit.⁴³⁰

Furthermore, it is noted that once an interim order has been granted under either §9 or §17 of the 1996 Act, it could only be effectively enforced by the court under §94, §151 or Order XXXIX Rule 2A of the CPC or the Contempt Act. The procedure entails that only an order for injunction may be granted under Order XXXIX Rule 1 or 2 or §94 or §151 of the CPC.⁴³¹ Disobedience of such an order of injunction is then punishable under Order XXXIX Rule 2A of the CPC.⁴³² However, these provisions are only applicable to cases where an injunction is granted. This procedure is outrightly limited in its scope since it is generally observed that not all interim orders are restricted to injunctions.

Although, on paper, the 2015 Amendment to §17 was intended to confer power of enforcement upon the tribunal, it failed to do so in actuality. On practical application of enforcement procedure for enforcement of interim orders, it is realised that instead of the threat of penal consequences, the enforcement relies heavily on the voluntary compliance of the parties. Furthermore, the current structure of enforcement allows the opposing party to easily delay the process and, therefore, frustrate the objective of seeking quick interim relief by the aggrieved party.

B. ENFORCEMENT FOR A FOREIGN SEATED ARBITRATION

As highlighted in the prior discussion surrounding the Raffles Design case,⁴³³ an EA order rendered in a foreign seated arbitration is not recognised as an interim order under §17 of the 1996 Act. Thus, a party cannot directly enforce an EA order in such circumstances. An option, as provided by Raffles Design, is to approach the Court under §9 and then enforce the consequent Court order. Herein,

⁴²⁷ Rab, *supra* note 63, at 96.

⁴²⁸ Pradeep K.N. v. Station House Officer, 2016 SCC OnLine Ker 8995 :, ¶10.

⁴²⁹ Kanwar Singh Saini v. High Court of Delhi, (2012) 4 SCC 307.

⁴³⁰ Thummu Koti Nagaiah v. D. Sambaiiah, 1962 SCC OnLine AP 107 :, ¶11.

⁴³¹ Rattu v. Mala, 1968 SCC OnLine Raj 3, ¶6.

⁴³² Adaikkala v. Imperial Bank, 1925 SCC OnLine Mad 466 :, ¶¶2-3.

⁴³³ For understanding this discussion, see *supra* Part III.B on “Rulings of the Indian Courts”.

the process of enforcement is the same as that of an order under §17.⁴³⁴ Thus, the parties will again face similar problems associated with the inefficient and slow process of enforcement, as discussed in the previous sub-part. However, in case the parties have, through an agreement, chosen to exclude the applicability of §9, a party only has the option to file a fresh suit under the CPC, rendering the EA order meaningless.⁴³⁵

Hence, due to this dichotomy, it is more practical for parties who seek an urgent interim relief to approach the Indian courts instead of resorting to the EA mechanism.⁴³⁶ Resultantly, the lack of enforceability of an EA order in a foreign seated tribunal negates the advantages of the availability of the EA mechanism under the institutional rules.⁴³⁷

VIII. CONCLUSION

The pro-arbitration approach under the Indian jurisdiction has been carefully manoeuvred and furthered over the past few years in order to formulate an efficient dispute resolution mechanism that ultimately improves the ease of doing business in the country. EA undoubtedly, due to its object and purpose, forms a core element of an effective arbitration regime.

Through this paper, we have attempted to trace the numerous issues and concerns which surround EA in India with respect to recognition, enforcement, and the institutional mechanism governing the EA proceedings. The paper specifically focuses on a critical examination of the institutional framework through a comparative approach – by juxtaposing the international EA rules with their domestic counterparts. The basis of the critique of the domestic EA rules is the seventeen identifiable key features under the international EA rules. These features include an expedited process, special procedure for determining the seat of arbitration, availability of parallel domestic court relief, no strict requirement of a formal hearing, the power of the tribunal as well as the emergency arbitrator to review the EA order, to name a few. The domestic EA rules, however, are observed to fall short of meeting these basic standards on several fronts.

It is important to emphasise here that the paper does not attempt to argue for a hyper-technical approach to enforce a hegemonised and rigid version

⁴³⁴ See also the Arbitration and Conciliation Act, 1996, §17(2) (“any order issued by the arbitral tribunal under this section shall be deemed to be an order of the court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the court”).

⁴³⁵ Raffles Design, *supra* note 103.

⁴³⁶ Amit Vyas et al., *Enforceability of Emergency Award in India, Passed in Foreign Seated Arbitration*, April 15, 2021, available at <https://www.barandbench.com/view-point/enforceability-emergency-award-india-passed-foreign-seated-arbitration> (Last visited on November 2, 2021).

⁴³⁷ For an assessment of the advantages that an EA mechanism has over a court-ordered interim measures, see *supra* Part II.B on “Benefits of Emergency Arbitration over Court-Ordered Interim Measures”.

of the EA rules. The EA rules naturally vary in certain aspects due to the jurisdictional or institutional approaches that are bound to defer at some level. Instead, as is shown through the paper, the focus is on demarcating core features that are fundamental for the efficient functioning of the EA process. The said features address various issues surrounding enforcement, the expedited nature of the EA proceedings, the proper duties and the powers of the emergency arbitrator and the tribunal, the rights of the parties, and the interim nature of the EA order. It is in this context and background that we call for a basic level of uniformity in the domestic EA institutional framework. We hope that the paper helps initiate a discussion regarding the said framework and contributes to the development and the rising call for a holistic institutionalised arbitration regime in the country.