

# Kluwer Arbitration Blog

## Uncertainty of enforcement of emergency awards in India

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India took a big leap in reforming its arbitration law by amending the Arbitration & Conciliation Act, 1996 (“Act”) in December 2015 (“**2015 Amendments**”). The 2015 Amendments coupled with setting up of the Mumbai Centre for International Arbitration (“**MCIAC**”) within a year of the amendments and the increased emphasis by the Government on arbitration bode well for promoting institutional arbitration in India.

One of the obvious advantages of institutional arbitration is the emergency arbitrator provisions – a procedure which has been resorted to quite frequently by the Indian parties under the SIAC rules. Enforceability issues, however, loom large over such emergency awards in a foreign seated arbitration in light of the recent decision of the Delhi High Court (“**Court**”) in *Raffles Design International India Pvt. Ltd. & Anr. v. Educomp Professional Education Ltd. & Ors.* (MANU/DE/2754/2016) (“**Raffles Design**”). The Court ruled that an emergency award in a foreign seated arbitration cannot be enforced in India under the Act. However, it appears that parties can seek indirect enforcement of emergency awards by applying for interim measures under section 9 of the Act before Indian courts. We analyse the judgment and its implications below.

### Indian position pre-2015 Amendments

Due to the *Bhatia-BALCO* dichotomy in Indian arbitral jurisprudence, arbitration agreements executed prior to 6 September 2012 with a foreign seat may still be bound by the provisions of Part I of the Act (applicable to India seated arbitrations) unless expressly or impliedly excluded. (one of the authors has discussed this previously [here](#)).

There are two important provisions for the grant of interim relief under the Act. Section 17 provides for interim measures by the arbitral tribunal and section 9 provides for interim measures by courts. Since both these provisions are contained in Part I of the Act, the authors presume that these provisions are not applicable to foreign seated arbitrations *per se* without going into the exceptions that may arise due to the *Bhatia-BALCO* dichotomy.

### 2015 Amendments – Job half done

To ensure that parties involved in a foreign seated arbitration have recourse to interim relief from

Indian courts, the 2015 Amendments made section 9 of the Act applicable to foreign seated arbitrations (subject to an agreement to the contrary). Another significant amendment was insertion of section 17(2) under which any order issued by the arbitral tribunal is now deemed to be an order of the court and enforceable in the same manner. The addition of section 17(2) should aid the enforcement of emergency awards for domestic seated arbitration in India. However, there was no similar amendment made in Part II of the Act dealing with foreign seated arbitrations, leaving any interim orders passed by a foreign seated arbitral tribunal as non-enforceable in India.

In August 2014, the Law Commission of India in its 246<sup>th</sup> Report, sought to offer statutory recognition to emergency awards by broadening the definition of “arbitral tribunal” under section 2(1)(d) of the Act (similar to the position in Singapore as described below) to include an emergency arbitrator. Nonetheless, such statutory recognition is not reflected in 2015 Amendments and this, along with the absence of a provision similar to section 17(2) in Part II of the Act, has caused uncertainty in India for both domestic and foreign seated emergency awards.

### ***Raffles Design: The Judgment and Improper reliance***

In *Raffles Design*, the dispute resolution clause provided for arbitration under SIAC Rules. In September 2015, the petitioners invoked emergency arbitration provisions and an emergency award was rendered on 6 October 2016. The petitioners were successful in enforcing emergency award against one of the respondents before the High Court of Singapore under section 12 of the Singapore International Arbitration Act in February 2016. The Court was concerned with the question, among others, of maintainability of an application for interim measures under section 9 of the Act after a foreign seated emergency award was already obtained by the petitioner, which it answered in the affirmative. The reasoning raises some interesting propositions worth analysing.

#### 1. a) Enforcement of Emergency Awards in India

The Court reasoned that section 17(2) of the Act is not applicable to foreign seated arbitrations, as it is contained in Part I of the Act. The Court then went on to rely on Article 17H of the UNCITRAL Model Law (“**Model Law**”) which provides for recognition and enforcement of interim measures granted by the arbitral tribunal to be binding, except the grounds mentioned in Article 17I. In the absence of a similar provision for foreign seated arbitrations, the Court held that the emergency award cannot be enforced under the Act and the only method available for enforcing the same would be to file a suit. (¶ 98-99)

The Act is silent on the enforcement of foreign seated emergency awards/orders of the arbitral tribunal and the Court’s observations in this regard that emergency awards cannot be enforced under the Act appear to be consistent.

#### 1. b) Non-reliance on HSBC

The Court reasoned that section 9 of the Act cannot be used to enforce emergency awards but the parties are free to approach the court for interim relief under section 9 (¶100). *Raffles Design* is not the first Indian case which provided an avenue to the parties to approach Indian courts under section 9 for interim measures after obtaining an emergency award in a foreign seated arbitration.

The judgment of *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studios Ltd. & Ors.* (MANU/MH/0050/2014) (“*HSBC*”) holds particular importance for the acknowledgement of the concept of emergency arbitration in India. It is unfortunate that *HSBC* has not received much attention in the Indian arbitration scene and was not even mentioned by the Court in *Raffles Design*.

#### 1. c) Improper reliance on Article 17I(2) of the Model Law

In *HSBC*, the Bombay High Court granted interim measures in a similar vein as that of the emergency arbitrator. On the other hand, in *Raffles Design* it was held that it is open to a court to independently determine the grant of interim relief.

In arriving at this conclusion, the Court incorrectly sought to rely on Article 17I(2) of the Model Law to state that the “*court enforcing an interim order passed by the Arbitral Tribunal in prescribed form undertakes a review of the substance of interim measure.*” (¶101) In fact, a bare reading of Article 17I(2) of the Model Law demonstrates that such a review on merits of the interim measure is not available – “.... *The court where recognition or enforcement is sought shall not.. undertake a review of the substance of the interim measure.*” (emphasis added)

### **Analysing international trends**

The legislative and judicial trend worldwide is to bring municipal arbitration laws to recognize and enforce emergency awards. Some jurisdictions who have brought such legislative changes include Singapore (amendment to the definition of ‘*arbitral tribunal*’ to include emergency arbitrator in section 2(1)), and Hong Kong (amendment to include Part 3A, section 22B to make *emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules enforceable*).

Recognition of the importance of emergency arbitration can be observed from the recent decision of *Gerald Metal S.A. v. Timis & Ors.* (2016 EWHC 2327 (Ch)) where it was held that the Court may not grant interim measures in the case of “urgency” if, emergency arbitration provisions are available under the procedural rules (in that case, LCIA). One of the factors considered by the court was that the test for ‘urgency’ was same under both the English Arbitration Act, 1996 and the LCIA Rules. Therefore, limitation on the powers of the court was placed to grant interim measures and it could only be exercised if there was a lack of “practical ability” of the emergency arbitrator to provide interim relief or when its powers are inadequate. As the emergency arbitrator awards are themselves surrounded by a cloud of uncertainty in terms of enforcement in India, it is difficult to foresee any Indian court exercising restraint in favour of an emergency arbitrator’s powers to grant interim relief.

### **The way forward**

*Raffles Design* highlights the lacunae under Indian law in relation to enforcement of foreign seated emergency arbitrator awards. It is noted that the amendment to section 2(1)(d) of Act recommended by the Law Commission of India would have brought Indian law in line with the global trend to enforce emergency awards by way of legislative provision. However, such an

attempt would only be applicable for domestic seated emergency awards which can still possibly be enforced resorting to section 17(2) of the Act. In order to expressly recognise the emergency awards in foreign seated arbitrations, a provision similar to section 17(2) of the Act needs to be inserted in Part II of the Act.

The timing of amendments of the Singapore and Hong Kong legislations to include favourable provisions relating to emergency awards coincided with the inclusion of emergency arbitration provisions in the SIAC Rules and HKIAC Rules. It is hoped that with the launch of the MCIA providing for emergency arbitration and the Government's push towards institutional arbitration, such provisions will be incorporated in the Indian legislation in near future.

For the time being, in the absence of a conclusive judgment of the Supreme Court, the only remedy available for indirect enforcement of emergency awards appears to be for the parties to apply for interim measures under section 9 of the Act. As held in *Raffles Design*, the Court will review the merits independently of the interim relief already granted by the Tribunal. But the authors are hopeful that a court dealing with such a section 9 application may be more inclined to grant interim relief where it has already been ordered by the emergency arbitrator as was done in the case of *HSBC*.

*Raffles Design* decides only the maintainability of the section 9 application and the Court is yet to decide on the merits. It is only after analysing the judgment on merits and as well future decisions from other High Courts of the country, we can firmly establish that the Indian courts might be looking to award the same relief in an application under section 9 of the Act as that awarded by the emergency arbitrator.

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This entry was posted on Wednesday, December 7th, 2016 at 12:01 pm and is filed under [Emergency Arbitrator, Enforcement, India](#)

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