

TRIBUNAL-ORDERED INTERIM MEASURES AND EMERGENCY ARBITRATORS: RECENT DEVELOPMENTS ACROSS THE WORLD AND IN INDIA

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Abstract

*This note examines the nature of interim measures granted by arbitral tribunals internationally. Thereafter, it directs the same question to the narrower Indian context. The note explores in detail the minimum international standards to be met by a party seeking interim measures before an arbitral tribunal, that of possible irreparable harm and a reasonable chance of success. These requirements ensure that the claim is not merely vexatious. This note also delves into the world of emergency arbitrators and the enforcement by national courts across the world of their awards. India is yet to see an important case dealing with emergency arbitration, except for the Bombay High Court judgment in *HSBC v. Avitel*, which has been discussed at length in this note.*

The author also critically analyses the various deficiencies of the Arbitration and Conciliation Act, 1996 (“the Act”), in providing for tribunal-ordered interim measures. The wording of Section 17 does not provide for enforcement of orders of arbitral tribunals, but merely allows tribunals to order them. The note also addresses two amendments suggested by the 246th Law Commission Report, for Sections 2(d) and 17 of the Act, analysing how they could improve the arbitration scene in India, while also recommending possible changes.

1. Introduction

Arbitration, by nature, is a creature of consent. It cannot operate in the absence of a validly concluded agreement to arbitrate.¹ It remains, as it always has been, a mechanism for dispute resolution agreed on between the parties, without recourse to courts of law.² This includes mechanisms by which the Parties may submit themselves to various arbitral institutions like the ICC International Court of Arbitration, The Singapore International Arbitration Centre (“SIAC”) and Indian Institutes like the Nani Palkhivala Arbitration Centre.³ During an arbitration, certain circumstances require the tribunal or national courts to issue interim measures to maintain the *status quo* or to enforce performance of the contract, on the basis of the probability of irreparable harm, among several other possible situations.⁴ Several arbitral institutions within their institutional rules, have allowed tribunals to grant interim measures as early as 1915.⁵ This triggered the amendments to the UNCITRAL Model Law in 2006, which brought in several provisions to accommodate emerging trends in international commercial arbitration.⁶ One of these amendments was to Article 17 which empowered tribunals to grant interim measures when the situation demanded. Several nations have since then amended their own national arbitration laws. In India, the 246th Law Commission Report 2014 has sought to

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¹ ALAN REDFERN & MARTIN J. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* (4th ed., 2004) [hereinafter “Redfern & Hunter”].

² *Id.* at 1.

³ *Id.* at 11.

⁴ Fouchard, Gaillard & Goldman, *Part 4: Chapter III - Provisional and Conservatory Measures in the Course of the Arbitration Proceedings*, in *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION*, 721 (1999).

⁵ ALI YESILIRMAK, *PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION* ¶¶ 2-11 (2005); (For current provisions of arbitral institutions providing for interim measures, see Art. 28, Arbitration Rules of the International Chamber of Commerce, 2012; Rule 26, Arbitration Rules of the Singapore International Arbitration Centre, 2013).

⁶ Markus S. Reider, *UNCITRAL Arbitration Rules- Institutional Reform*, 16.6 INT’L A.L.R. 179, 179-184 (2013) [hereinafter *Reider*].

address all areas of arbitral law that they saw as conforming to the scene of arbitration in India.⁷ This issue has been dealt with towards the later parts of the note.

2. General Principles governing the grant of Interim Measures

Interim measures are grants of temporary relief protecting parties' rights, pending final resolution of the dispute.⁸ They often complement the enforcement of the final award and such measures are essential to the process of arbitration. Provisional measures play a crucial role in all kinds of arbitration.⁹ Arbitral tribunals have granted interim measures on a regular basis, based on several principles which have been discussed below. Such interim measures are usually initiated by the parties to protect their own rights.¹⁰ However, in the event that a tribunal feels that its order would be frustrated by its inaction or that one of the parties would face substantial prejudice as a result of such inaction, the tribunal is free, under several laws and procedural rules, to take up the *suo moto* responsibility to issue interim measures.¹¹

Although arbitrators are given discretion as well as wide leeway in the minimum requirements for the granting of an interim measure, judicial precedents, awards and juristic opinions have prescribed a minimum threshold that parties have to satisfy in order to obtain favourable interim measures.¹² Further, these minimum requirements should be interpreted in a manner to suit the specific needs every case before the tribunal demands.¹³

Two principles are to be taken into consideration in an application for interim relief:

1. Irreparable harm; and
2. A reasonable chance of success before the final tribunal.¹⁴

The requirement of *urgency*, which has been developed out of the necessity experienced by the parties, is also generally considered paramount in a plea for interim relief. The International Centre for Settlement of Investment Disputes ("ICSID") in *Occidental Petroleum Corporation v. Republic of Ecuador*,¹⁵ has held that when a party starts negotiating with third parties for the same contract, the situation was not only urgent, but one which compulsorily required an interim measure to ensure that the award of the tribunal would not be frustrated.

The next requirement is that of *irreparable harm*, or the requirement that the harm caused cannot be adequately compensated by damages which the party seeking the interim measures could suffer. There has to exist an imminent danger to the rights of a party which would affect the nature of the dispute and the arbitration at a very basic level.¹⁶ The most common situation is where a corporate entity's existence is itself at stake i.e. where the entity would become insolvent

⁷ Law Commission of India, *The 246th Report on the Amendments to the Arbitration and Conciliation Act, 1996*, 37-50 available at <http://lawcommissionofindia.nic.in/reports/Report246.pdf> [hereinafter *246th Report*].

⁸ Lee Anna Tucker, *Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty*, 1.2 INT'L COMM. ARB. BRIEF 15, 15-23 (2011) [hereinafter *Tucker*].

⁹ *Reider*, *supra* note 6, at ¶¶ 1-10.

¹⁰ *Reider*, *supra* note 6, at ¶¶ 3-5.

¹¹ *Reider*, *supra* note 6, at ¶¶ 5-19.

¹² *Tucker*, *supra* note 8.

¹³ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 920 (2nd ed., 2001).

¹⁴ Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 40/72, U.N. Doc. A/RES/40/72, Art. 17A (Dec. 11, 1985) [hereinafter *UNCITRAL Model Law*].

¹⁵ *Occidental Petroleum Corporation v. Republic of Ecuador*, ICSID Case No. ARB/06011, ¶ 61, (Provisional Measures) (Oct. 5, 2012).

¹⁶ *Reider*, *supra* note 6, at ¶¶ 5-33.

in the absence of these measures.¹⁷ The most important situation, in the author's opinion, is where irreparable harm can occur is in the destruction of evidence. However, due to the high burden of proof required to acquire such evidence, there have been no recorded situations in the recent past.

The last requirement to grant an interim measure is for the parties to prove that they have a reasonable chance of success before the tribunal i.e. the establishment of a *prima facie* case.¹⁸ However, in the author's opinion, the tribunal must not pre-judge the case on the basis of the merits in order to grant such provisional measures, as this would create a bias in the tribunal, without the complete investigation of the facts. A prominent case on the subject is United States' Ninth Circuit Court decision of *Toyo Tires v. Continental Tire*,¹⁹ where the *prima facie* establishment of the contract and completion of duties on the plaintiff's side had been made. The Court granted injunctive relief, even though the defendant eventually won the case, as the *prima facie* case does not contain an examination on the merits.²⁰

3. Tribunal ordered Interim Measures in India

Section 17 of the Act provides that an arbitral tribunal can order interim measures as it deems fit, unless parties expressly agree otherwise. The Act is essentially an adoption of the UNCITRAL Model Law, modified to suit the Indian environment. The Act allows a tribunal to grant measures, based on two conditions – first, a tribunal must regard the interim measure as necessary; and second, the relief has to be in respect of the subject matter of the dispute.

A tribunal is empowered by Section 17 to order a party to take any interim measures of protection in respect of the subject matter of the dispute, and also direct the party in whose favour the order has been passed to provide appropriate security as provided in Section 17(2) of the Act.

Section 17, however, in the opinion of the author, has been poorly drafted as it merely states that the tribunal may pass an interim measure. It neither confers the tribunal the power to enforce its order nor provides for judicial enforcement of such order. The only consequence of a party not taking the interim measure of protection is of such failure being taken into account in the final decision by the tribunal, particularly in any assessment of damages.²¹

In *M.D Army Welfare Housing v. Sumangal Services Pvt. Ltd.*,²² the Supreme Court of India, while dealing primarily with a matter under the Arbitration Act of 1940, also sought to observe:

“...A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the arbitrator is a limited one... even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned Arbitrator, therefore, being coram non iudice was wholly without jurisdiction and thus, a nullity.”

¹⁷ *Plama Consortium v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Feb. 8, 2005).

¹⁸ UNCITRAL Model Law, *supra* note 14; See also 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1988 (3rd ed., 2009).

¹⁹ *Toyo Tire Holdings v. Continental Tire North America*, 609 F.3d 975 (9th Cir. 2010) (U.S.).

²⁰ See also *Société Nationale des Pétroles du Congo and République du Congo v. TEP Congo, Court of Appeals, Paris, in Emmanuel Gaillard & Philippe Pinsolle, The ICC Pre-Arbitral Referee: First Practical Experiences*, 20.1 ARB. INT'L 13, 34 (2004).

²¹ B.P. SARAF, LAW OF ARBITRATION AND CONCILIATION 312 (6th ed., 2012).

²² *M.D. Army Welfare Housing v. Sumangal Services Pvt. Ltd.*, A.I.R. 2004 S.C. 1344 (India).

This view is clearly detrimental to the jurisprudence of Section 17 of the Act, stating that an order of an arbitrator would be unenforceable by the court, as the Act does not provide for it. Relevant to this is yet another regressive ruling by the Supreme Court, in *Sundaram Finance v. NEPC*,²³ where the Supreme Court observed, "... though Section 17 gives the arbitral tribunal the power to pass orders the same cannot be enforced as orders of a Court."

The *Sundaram* ruling, coupled with the clear statement from the *M.D. Army Welfare Association* case is unfortunate outcome of the drafting of the Act, which then went on to be interpreted differently by the Delhi High Court. In *Sri Krishan v. Anand*.²⁴ The Delhi High Court looked into a case where the petitioner sought to enforce an order of a tribunal it had received under Section 17. It availed of Section 9 for the purpose of this petition. In his ruling, Justice Rajiv Sahai Endlaw constructively interpreted the legislative intent behind Section 17, stating that-

"At the outset I may state that if able to find an answer to the grievance raised by the petitioner of the order under Section 17 being unenforceable and toothless, I am reluctant to hold that such repetition of orders can be sought from the court. Such an interpretation would make Section 17 otiose and redundant... The legislative intent in Section 17 of the Act appears to be to make the arbitral tribunal a complete fora not only for finally adjudicating the disputes between the parties but to also order interim measures."

The author unequivocally supports this decision of the Delhi High Court where, in contravention of previous obiters of the Supreme Court, Section 17 was interpreted so as to provide teeth to a tribunal. Law Commission of India, in its 246th Report, has suggested amendments to Section 17, such that a tribunal would have powers similar to that of that of a civil court. The Report suggests removal of the consent requirement which is present in the Act. It also permits arbitral tribunals to pass interim awards and orders similar to Section 9, which, in the opinion of the author, fulfils the intention of the UNCITRAL Model Law amendments of 2006.

However, Section 17 has a limitation of not being applicable until the formation of the arbitral tribunal. This forces parties to approach courts under Section 9, which is where the need for emergency arbitrators comes in.

4. Emergency Arbitrators

An emergency arbitrator is a person, usually appointed by the arbitral institution involved, who awards or orders interim measures which have effect until the formation of a tribunal.

As per the ICC Rules, "*A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal... may make an application for such measures... to the Emergency Arbitrator.*"²⁵ Thus, an emergency arbitrator is one who can grant interim measures.

The need for such emergency arbitrators arise in situations when the tribunal is yet to be constituted and parties have no alternative but to turn to the state courts. Further, where parties have *expressly* and *validly* excluded the jurisdiction of state courts, even for interim measures, such an option of pre - arbitral interim measures from the state courts is practically impossible. In any case, approaching a state court for the purpose of pre-arbitral interim measures is inconvenient, as in many cases, the legal teams of the parties may not be well versed with the law of the country where the interim measures are to be sought and enforced.

²³ *Sundaram Finance v. NEPC India*, (2004) 9 S.C.C. 619 (India).

²⁴ *Sri Krishan v. Anand*, (2009) 3 Arb. L.R. 447 (Del) (India).

²⁵ Art. 29(1), ICC Arbitration Rules, 2012, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> [hereinafter *ICC Rules*].

For example, if a dispute arises between a German firm A, and an Indian company B, then the interim measure sought by A against B would have to be sought in India, which creates a language and legal barrier for the lawyers of firm A. This is only aggravated by the differences in the common law and civil law systems of India and Germany respectively. Such situations are common in the new, globalised world and have to be taken into consideration. This is why pre – arbitral interim measures became part of several legal systems and arbitral institutional rules.

There have been criticisms that the inapplicability of emergency mechanisms of the ICC and the International Centre for Dispute Resolution (“ICDR”) to third parties (non-signatories) to the contract forms a half measure on part of the drafters of the rules.²⁶ However, on deeper inspection, it becomes apparent that emergency arbitration can be only used to bind parties who are privy to the arbitration agreement, as arbitration is fundamentally contractual. Joinder of additional parties is done with the sole purpose of making sure that enforcement of the final award of the tribunal is ensured,²⁷ as third parties cannot be expected to be privy to the details of every contract that it may be remotely related to. Further, with specific reference to the ICC Arbitration Rules of 2012, the emergency arbitrator is required to pass an order within 15 days of hearing the case, which is as early as 18 days from the initial submission of the case to the ICC Secretariat.²⁸ Thus, emergency arbitrators are more expeditious than state mechanisms.

A curious case is that of the ICC’s pre-arbitral Referee provisions, which were adopted in their ICC Arbitration Rules of 1998. Unlike the emergency arbitrator, the Referee was a provision that had to be expressly opted into and did not provide for any judicial authority to be granted to the Referee, but merely provided for a contractual obligation to follow the decision (much unlike the case of emergency arbitrators, who are judicial bodies).

Thus, the increasing demand for a quick and effective process to apply for urgent and conservatory measures within the framework of the underlying arbitration and without redress to the national courts led to the formation of rules providing for emergency arbitrators.

5. Emergency Arbitrators in India

Indian arbitral jurisprudence on the usage and application of emergency arbitrators is not fully developed and is still at a nascent stage.

A recent Bombay High Court decision in *HSBC Pl Holdings v. Avitel Post*,²⁹ is the only Indian decision dealing with emergency arbitrators. An interim injunction seeking the enforcement of an order by a SIAC emergency arbitrator was sought. The Court ruled that the emergency arbitrator did fall under Section 17 of the Act, so as to form an order by an arbitral tribunal.

Interestingly enough, Section 17 of the Act only refers to interim measures or provisional measures. There is no clear distinction on whether the measures are to be made in the form of orders, awards or otherwise. Thus, as a result, it is possible that any future jurisprudence developed by courts would include within its purview ‘orders’ or ‘awards’ granted by emergency arbitrators.

²⁶ Akhil Raina, *Emergency Arbitrator proceedings under the 2012 ICC Rules*, at <https://arbitrictum.wordpress.com/2014/04/21/emergency-arbitrator-proceedings-under-the-2012-icc-rules/> (last visited Feb. 14, 2015).

²⁷ BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTI CONTRACT, MULTI-ISSUE AND CLASS ACTIONS* 343-344 (2006).

²⁸ *ICC Rules*, *supra* note 25, at Appendix V.

²⁹ *HSBC Pl. Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd.*, 2014 Indlaw Mum 29 (India).

This interpretation, however, will most likely not be required. In its 246th Report, the Law Commission has stated that it intends to bring within the purview of the Act, provisions which would validate the application of emergency arbitrator provisions of arbitral institutions.³⁰

The Law Commission has also recommended that Section 2(1)(d) of the Act be amended so as to include the clause:³¹

“...and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator”, such that the new Section 2(1)(d) would read:

“‘arbitral tribunal’ means a sole arbitrator or a panel of arbitrators and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator.”

This amendment to the Act would provide an automatic assent to the duties carried out by an emergency arbitrator and would recognise them as arbitrators, which automatically solves the first question posed by the author in the previous section. The suggestion to include emergency arbitrator within the definition of arbitrator, for the purposes of the entire Act, is a bold move which could make India a centre for international arbitration, as India would become the only country to specifically extend the definition of an arbitral tribunal to include emergency arbitrators.

However, a valid doubt on the recommendations of the 246th Report of the Law Commission of India is the fact that most of India’s arbitrations are held *ad hoc* and have not been institutionalised. Taking into consideration that emergency arbitrators are usually appointed by the institution itself, the Law Commission should have, perhaps, suggested including a clause which would allow for appointment of an emergency arbitrator by the court of jurisdiction, instead of having the court deal with the matter in detail.

6. Enforceability of an Emergency Arbitrator’s Measures

The last part of the note deals with the question that arises with the enforcement of the order of an emergency arbitrator. For this, one must consider at a fundamental level, if emergency arbitrators can be considered as arbitrators in their own right.

The British High Court in the case of *Walkinshaw v. Diniz*,³² held that mere reference to a dispute resolver as an arbitrator does not amount to that body being an arbitrator. The procedure followed by the body, if of an arbitral form and nature, would be a valid consideration in deciding the type of dispute resolution provided by the body or provision, whichever the case may have been.

The emergency arbitrator, thus, cannot be held to be an arbitrator simply because of the naming. While it is a relevant consideration, it cannot be the only basis for this conclusion.³³ Furthermore, the emergency arbitrator is usually appointed by the institution providing the rules which govern the arbitration agreement.³⁴ Arbitral rules providing for emergency arbitration do not provide the parties with the right to choose their emergency arbitrator or even to provide

³⁰ 246th Report, *supra* note 7, at 10.

³¹ *Id.* at 37.

³² *Walkinshaw v. Diniz*, 2000 2 All ER (Comm.) 237 (U.K.).

³³ Baruch Baigel, *The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis*, 31.1 J. OF INT’L ARB. 1, 14-15 (2014).

³⁴ *Id.*

nominees for the President to consider.³⁵ This provision is likely to have been principally motivated by procedural expedience, because potential disputes between the parties concerning the appointment of an emergency arbitrator could defeat the purpose of the whole scheme. However, the fact that the emergency arbitrator is never party-appointed or nominated reinforces the idea that the emergency arbitrator is not to be treated as an arbitrator.³⁶

Ultimately, the answers to these questions are likely to turn upon whether emergency arbitrators are deemed arbitrators granting relief in the course of proceedings. A strict reading of the Act seems to indicate that its provisions do not apply to emergency arbitrators. However, the author respectfully submits that the Indian courts, if asked to consider the issue, might adopt a constructive, purposive approach and establish a welcome precedent by finding that the provisions of the Act are applicable to emergency arbitrators, where relevant. This may, however, not even be required, as a result of the recommendations of the 246th Report of the Law Commission of India, which has been discussed in the previous section of the note.

The next question that arises as a result of these measures is whether an emergency arbitrator's decision is in the form of an 'award' or an 'order'. This distinction is crucial in deciding the enforceability of the decision of the emergency arbitrator under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention").

Article 29(2) of the ICC Rules of Arbitration 2012 state that the decision of the emergency arbitrator will take place in the form of an order. However, in contrast, the SIAC, Stockholm Chamber of Commerce ("SCC") and ICDR have simply stated in their rules that the emergency arbitrator will have the powers to order or award interim and conservatory relief.³⁷ The question of whether such power vested in the emergency arbitrator is that of granting an award or an order, is specific to the rules and must be handled on a case - by - case basis. This ambiguity in the form of the decision of the emergency arbitrator has resulted in a great deal of vagueness, which has to be interpreted constructively to give effect to the intent of the tribunal.

In the French case of *Braspetro Oil Services Company v. The Management and Implementation Authority of the Great Man-Made River Project*,³⁸ an ICC Tribunal passed an interim 'order', refusing to relook into a certain aspect of the case, even after new documents had appeared. The *Cour d'Appel* at Paris, on reviewing the appeal from this order, held that the qualification of a term as an award is not dependant on the terms used by the arbitrators and the parties. On further inspection into the facts, the Court said that the tribunal had "*handed down a reasoned decision in which they had considered, in detail, the arguments of the parties and had solved, in a final manner, the dispute between the parties concerning the admissibility of [the] request for a review.*" In doing so, and although the tribunal

³⁵ Guillaume Lemenez & Paul Quigley, *The ICDR's Emergency Arbitrator: Procedure in Action*, available at https://www.adr.org/aaa/ShowPDF%3Fdoc%3DADRSTG_004355.

³⁶ See generally, *ICC Rules*, *supra* note 25; American Arbitration Association, Rules of Arbitration, available at https://www.adr.org/aaa/faces/rules/searchrules?_afLoop=88902031100465&_afWindowMode=0&_afWindowId=v4ar32r1m_1#%40%3F_afWindowId%3Dv4ar32r1m_1%26_afLoop%3D88902031100465%26_afWindowMode%3D0%26_adf.ctrl-state%3Dv4ar32r1m_83.

³⁷ Schedule 1(6), Singapore International Arbitration Centre (SIAC) Rules, available at http://www.siac.org.sg/our-rules/rules/siac-rules-2013#siac_schedule1; Article 32(3), Stockholm Chamber of Commerce (SCC) Rules, available at <http://www.sccinstitute.com/dispute-resolution/rules/>.

³⁸ *Braspetro Oil Services Company v. The Management and Implementation Authority of the Great Man-Made River Project*, Cour d'appel [Court of Appeal], Paris, Jul. 1, 1999 MEALEY'S INT'L. ARB. REP., No. 8 (Fr.).

had itself designated its decision as an ‘order’, the Court approached the issue by looking at the content of the tribunal's decision and not its actual designation.³⁹

Similarly, in the case of the US Seventh Circuit Court of Appeals, *Publicis Communications and Publicis SA v. True North Communications*,⁴⁰ the Court was asked to enforce an order of a London Court of International Arbitration (“LCIA”) tribunal requiring one of the parties to produce certain documents essential to the case. The Court disagreed on the contention that this was unenforceable. It held that refusing the enforcement of an award on such ‘extreme formality’ of a term applied is untenable.

Several courts have adopted this ‘substance over form’ principle in enforcing the will of arbitral tribunals. However, while this may be true, this requires constructive interpretation on part of the court, which could be avoided by merely amending the various rules in order to eliminate the possibility of misinterpretation in itself.

Lastly, the question of enforceability of an emergency arbitrator (in specific), under the New York Convention comes up. The underlying question is whether interim measures ordered by an emergency arbitrator may be enforced if they are not in fact ‘final’? To answer this question, one needs to pose another question: can only ‘final’ awards be confirmed (or vacated) under the applicable national regime?

There are no straightforward answers to these questions, not least of all because different national courts have approached the broader issue of whether a tribunal's interim decision lacks finality for the purposes of enforcement in different ways. However, while there is a scarcity of case law with specific reference to emergency arbitrators, the adoption of the ‘substance over form’ principle has paved the way for similar interpretation of decisions of emergency arbitrators, as they essentially arise out of a contract between the parties involved.

In some jurisdictions, the position is relatively clearer. In Sweden, for example, a tribunal's interim measures, whether in the form of an order or award, are not enforceable through the Swedish courts and the party seeking the interim measures would need to approach the court for an enforceable decision.⁴¹ It follows that an emergency arbitrator's interim decision would also not be enforceable through the national courts. In contrast, in other jurisdictions such as Switzerland⁴² and Hong Kong⁴³ the relevant national legislation allows national courts to enforce interim measures ordered by a tribunal (although there is yet to be any definitive guidance from either jurisdiction as to whether the same would apply to an emergency arbitrator's decision).

India, on the enactment of the recommended amendments, would be one of the first countries to legislatively recognise emergency arbitrators.

7. Conclusion

The Indian scenario in relation to interim measures ordered by emergency arbitrators, and to complete enforcement of interim measures ordered by arbitral tribunals, in contrast to international scenario, is not very favourable. This has been sought to be reformed by the amendments recommended by the 246th Law Commission Report, which while being a leap in

³⁹ Amir Gaffari & Emmy Lou Walters, *The Emergency Arbitrator: The Dawn of a New Age?* 30.1 ARB. INT'L. 153, 153-163 (2014).

⁴⁰ *Publicis Communication, et al v. True North Communications Inc.*, 206 F. 3d 725 (Mar. 14, 2000) (U.S.).

⁴¹ Sec. 27, Swedish Arbitration Act (SFS 1999:116) (Swed.).

⁴² Art. 183(2), Chapter 12, Federal Statute on Private International Law Act, 1987 (Switz.).

⁴³ Sec. 35, Hong Kong Arbitration Ordinance, 2011 (Cap 609) L.N. 38 of 2011 (H.K.).

the correct direction, has several flaws which have to be corrected in order to become completely effective.

Emergency arbitration is a very useful pre-arbitral mechanism, and with the inclusion of an emergency arbitrator within the definition of an arbitrator under Section 2(d) of the Act is imported into the Indian arbitration regime. In the opinion of the author, emergency arbitrators ensure that the purpose of the final arbitral award is not frustrated and in this end, should be adopted as the preferred form of pre-arbitral interim measures, over Section 9 of the Act. The Law Commission's recommendations, in the opinion of the author, should be adopted, after considering the changes proposed by various jurists, as they make India an arbitration-friendly country, with costs much lower than Singapore and France, *inter alia*. These recommendations and the efforts behind the 246th Report should be applauded.