EMERGENCY ARBITRATION AND INDIA—A LONG OVERDUE FRIENDSHIP

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Abstract

Recent years have seen the rise of international arbitration as a robust tool for dispute resolution. Emergency arbitration was introduced to combat one of its few weaknesses—the inability to provide interim relief prior to the constitution of the arbitral tribunal. However, despite its extensive utilisation and many advantages, issues with regard to enforcement of the emergency arbitrator's decisions have thwarted emergency arbitration from being enthroned as the preferred forum for parties seeking interim relief prior to the tribunal's constitution; this is the case in India as well. In view of this, the purpose of this article is two-fold. First, to examine the status of an emergency arbitrator and enforceability of its decisions. Second, to make a case for providing statutory recognition to the procedure and its resulting decisions in India.

I. Introduction

The significance of provisional measures,[1] especially prior to the constitution of the arbitral tribunal,[2] cannot be overstated. That said, in the past, there was a lack of availability of arbitral provisional measures at this pre-formation stage.[3] This compromised parties' rights, including those of seeking to prevent an opposing party from destroying evidence, dissipating assets, damaging market value of the property or releasing confidential information,[4] prior to a final decision being rendered.[5] When urgent arbitral relief was not possible, parties would be forced to approach national courts, which has been widely regarded as the "*Achilles' heel*" of arbitration,[6] and thereby defeat the precise reason they chose arbitration in the first place. Alternatively, they would

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1 Note that different jurisdictions use these terms (provisional measures, interim relief, provisional relief, urgent relief, interim measures) in different contexts. For the purposes of this article, such terms are used interchangeably.

2 JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 622 (2012) ("[…] concerns as to treatment of assets or evidence typically arise immediately upon a dispute arising.").

3 ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 114 (2005) [*hereinafter* "YESILIRMAK"].

4 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2604–05 (3d ed. 2021) [*hereinafter* "BORN"].

5 *See* Louis Yves Fortier, *Interim Measures: An Arbitrator's Provisional Views, in* 2 CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2008 47, 53 (Arthur W. Rovine ed., 2009); *see also* Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Provisional Measures, ¶ 60 (Aug. 17, 2007); REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 313 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "REDFERN & HUNTER"]; FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 721–34 (Emmanuel Gaillard et al. eds., 1999); JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 586 (2003) [*hereinafter* "LEW ET AL."]; V. V. Veeder, *Provisional and Conservatory Measures*, *in* ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 21, 21 (1999).

6 David E. Wagoner, *Managing International Arbitration: A Shared Responsibility of the Parties, the tribunal, and the Arbitral Institution*, 54(2) DISP. RESOL. J. 15, 19 (1999); *see also* Martin Davies, *Court-Ordered Interim Measures in Aid of International Commercial Arbitration*, 17(3) AMERICAN REV. INT'L ARB. 299, 332 (2008); Jason Fry, *The Emergency Arbitrator – Flawed Fashion or Sensible Solution?*, 7(2) DISP. RESOL. INT'L 179, 180 (2013) [*hereinafter* "Fry"]; Erin Collins, *Pre-Tribunal Emergency Relief in International Commercial Arbitration*, 10(1) LOY. UNIV. CHI. INT'L L. REV. 105, 116 (2012).

be required to wait for the constitution of the tribunal, which would jeopardize the efficacy of the final decision.[7] Accordingly, introducing a reform was imperative.[8]

In order to fill this gap, the International Chamber of Commerce ["**ICC**"] introduced the Pre-Arbitral Referee Procedure in 1990 as an alternative recourse to national courts for emergency relief at the pre-formation stage. Under this procedure, the parties would agree to the appointment of a "*referee*" who would decide on issues of provisional measures prior to the referral of the dispute to arbitration or the courts.[9] This was the first procedure of its kind, and was not seen in the rules of any other arbitral institution.[10] Unfortunately, this procedure lacked in combat because, amongst other things, parties were often unaware of its existence and were required to expressly opt into it through a separate agreement at the time of contracting.[11]

With time, however, an increasing number of arbitral institutions began to adopt similar provisions. The 1997 Netherlands Arbitration Institute ["**NAI**"] Rules provided for self-standing summary arbitral proceedings[12] (*arbitraal kort geding*) exclusively for arbitrations seated[13] in the Netherlands,[14] to resolve preliminary interim issues prior to the constitution of the tribunal.[15] A different approach was provided for by Article 9 of the 1998 London Court of International Arbitration ["**LCIA**"] Rules, which allowed parties to apply for an expedited constitution of the tribunal in cases of "*exceptional urgency.*"[16] Yet another approach was adopted under Article 12(1) of the 2002 Arbitration Court of the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic Arbitration Rules,[17] Article 8 of the 1994 Italian Association for

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7 Charlie Caher & John MacMillan, *Emergency Arbitration: The Default Option for Pre-Arbitral Relief? in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: INTERNATIONAL ARBITRATION 2015 1, 1 (Steven Finizio & Charlie Caher eds., 12th ed. 2015) [*hereinafter* "Caher & MacMillan"].

8 Koh Swee Yen, *The Use of Emergency Arbitrators in Investment Treaty Arbitration*, 31(3) ICSID REV. 534, 535 (2016).

9 *Pre-Arbitral Referee*, INTERNATIONAL CHAMBER OF COMMERCE, *available at* https://iccwbo.org/dispute-resolution-services/pre-arbitral-referee.

10 Charles N. Brower, Ariel Meyerstein & Stephan W. Schill, *The Power and Effectiveness of Pre-arbitral Provisional Relief: The SCC Emergency Arbitrator in Investor-State Disputes*, *in* BETWEEN EAST AND WEST: ESSAYS IN HONOUR OF ULF FRANKE 61, 61 (Kaj Hobér, Annette Magnusson, Marie Öhrsrtöm & Christopher Goddard eds., 2010) [*hereinafter* "Brower et al."].

11 *See* HERMAN VERBIST, ERIK SCHÄFER & CHRISTOPHE IMHOOS, ICC ARBITRATION IN PRACTICE 162–163 (2d ed. 2015); Chiann Bao, *Developing the Emergency Arbitrator Procedure: The Approach of the Hong Kong International Arbitration Centre*, *in* INTERIM AND EMERGENCY RELIEF IN INTERNATIONAL ARBITRATION – INTERNATIONAL LAW INSTITUTE SERIES ON INTERNATIONAL LAW, ARBITRATION AND PRACTICE 265, 269 (Anne Marie Whitesell, Diora Ziyaeva, Ian A. Laird & Borzu Sabahi eds., 2015) [*hereinafter* "Bao"].

12 Robert van Agteren & Mathieu Raas, *The Netherlands*, *in* THE BAKER MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK 315 (2017), *available at* https://globalarbitrationnews.com/wp-content/uploads/2017/06/The-Netherlands.pdf; Netherlands Arbitration Institute (NAI), Arbitration Rules 1997, arts. 37, 38 [*hereinafter* "NAI Rules"].

13 The seat (juridical place) of arbitration provides the supporting legal framework to arbitration. Courts at the seat will have jurisdiction in case assistance is required during or after proceedings and exclusive jurisdiction as regards setting aside the award. *See* SIMON GREENBERG, CHRISTOPHER KEE & ROMESH WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE ¶ 1.76 (2011).

14 *Id.*; Rogier Schellaars & Albert Marsman, *The Netherlands, in* ARB. GUIDE 10 (Pascal Hollander & Sofia Martins eds., 2018), *available at* https://www.ibanet.org/MediaHandler?id=771279FD-6BA6-4A4B-8A5B-7A0A3D9FC62C.

15 Amir Ghaffari & Emmylou Walters, *The Emergency Arbitrator: The Dawn of a New Age?*, 30(1) ARB. INT'L 153, 155 (2014) [*hereinafter* "Ghaffari & Walters"].

16 MAXI SCHERER, LISA RICHMAN & REMY GERBAY, ARBITRATING UNDER THE 2014 LCIA RULES: A USER'S GUIDE 133–37 (2015); London Court of International Arbitration (LCIA), Arbitration Rules 1998, art. 9.

17 YESILIRMAK, *supra* note 3, at 118–19.

Arbitration Rules, and Rule 37 of the 2004 Rules of the Court of Arbitration for Sport, which provided that the arbitral institution, instead of the tribunal, may grant provisional measures before the constitution of the tribunal.[18]

The concept of 'emergency arbitration' as we know it today first appeared in 2006, in the international arbitration rules of the International Center for Dispute Resolution ["**ICDR**"]. It would apply to all disputes arbitrated under the ICDR Arbitration Rules, with parties being able to opt-out if they so wished.[19] Pursuant to the procedure, parties could apply for interim relief prior to the constitution of the tribunal, after which the ICDR would appoint an emergency arbitrator to render an emergency decision,[20] typically within a period of two to fifteen days. Such an emergency arbitrator would need to have "*the ability to quickly organize the procedure under tight time constraints, ensure fairness and efficiency, understand the issues, and wisely make snap decisions that may have significant consequences.*"[21]

The introduction of emergency arbitration has received widespread recognition and acceptance.[22] It has become a common element of arbitral rules, for example, it was incorporated in the Stockholm Chamber of Commerce Arbitration ["**SCC**"] Rules in 2010, orchestrated by its Secretary General, Ulf Franke, who significantly contributed to the development of this mechanism.[23] Subsequently, this procedure was formally introduced under various leading institutional arbitration rules.[24] Redfern & Hunter commented in 2015, "*it is hoped that these new rules*

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18 BORN, *supra* note 4, at 2635.

19 Ben Sheppard Jr. & John Townsend, *Holding the Fort until the Arbitrators are Appointed: The New ICDR International Emergency Rule*, 61(2) DISP. RESOL. J. 74, 78 (2006); International Centre for Dispute Resolution (ICDR), Arbitration Rules 2006, art. 37.

20 Note that for the purpose of this article, decisions of an emergency arbitrator are referred to as "emergency decisions."

21 Patricia Shaughnessy, *The Emergency Arbitrator*, *in* THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 339, 339 (Patricia Shaughnessy & Sherlin Tung eds., 2017) [*hereinafter* "Shaughnessy"].

22 Lars Markert & Raeesa Rawal, *Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?*, 37(1) J. INT'L ARB. 131, 131 (2020) [*hereinafter* "Markert & Rawal"]; *see also* Michael Dunmore, *The Use of Emergency Arbitration Provisions*, 17(3) ASIAN DISP. REV. 130, 130 (2015); Diana Paraguacuto-Maheo & Christine Lecuyer-Thieffry, *Emergency Arbitrator: A New Player in the Field - The French Perspective*, 40(3) FORDHAM INT'L L. J. 748, 751 (2017) [*hereinafter* "Paraguacuto-Maheo & Lecuyer-Thieffry"]; BORN, *supra* note 4, at 2634.

23 Brower et al., *supra* note 10, at 63.

24 *See, e.g.,* Singapore International Arbitration Centre Arbitration (SIAC), Arbitration Rules 2010, r. 26 & sched. 1; NAI Rules; Bahrain Chamber for Dispute Resolution (BCDR), Arbitration Rules 2010, art. 37; International Chamber of Commerce (ICC), Rules of Arbitration 2012, art. 29 & sched. V [*hereinafter* "ICC Rules 2012"]; Swiss Chambers' Arbitration Institution (SCAI), Rules of International Arbitration 2012, art. 43; International Institute for Conflict Prevention & Resolution (CPR), Administered Arbitration Rules 2013, r. 14; Hong Kong International Arbitration Centre (HKIAC), Arbitration Rules 2013, art. 23 & sched. 4; Kuala Lumpur Regional Centre for Arbitration (KLRCA), Arbitration Rules 2013, sched. 2 & r. 7 (later renamed as the Asian International Arbitration Centre (AIAC)); London Court of International Arbitration (LCIA), Arbitration Rules 2014, art. 9B; Japan Commercial Arbitration Association (JCAA), Arbitration Rules 2014, ch. V; China International Economic and Trade Arbitration Commission (CIETAC), Arbitration Rules 2015, art. 23 & app. III; Mumbai Centre for International Arbitration (MCIA), Arbitration Rules 2017, r. 14 [*hereinafter* "MCIA Rules"]; Indian Council of Arbitration (ICA), Rules of Domestic Commercial Arbitration and Conciliation 2016, r. 57; Korean Commercial Arbitration Board (KCAB), International Arbitration Rules 2016, app. 3; Delhi International Arbitration Centre (DIAC), Arbitration Proceedings Rules 2018, art. 14 [*hereinafter* "DIAC Rules"].

will be more effective and useful to parties than their precursors, which required parties expressly to opt in."[25] The increased utilisation of this procedure[26] is indicative of the accuracy of that comment.

Nevertheless, the availability of this mechanism has led to different consequences. For example, in England and Wales, Singapore, and France, courts can only hear applications for interim relief in situations where the tribunal or arbitral institution are unable or unavailable to do so.[27] In other jurisdictions, such as Hong Kong and the United States, where there is no explicit legislative provision on this issue, courts have been reluctant to grant interim relief where a tribunal has been constituted.[28] This reluctance, or the existence of such legislative provisions, may limit a party's options when seeking interim relief to the procedure of emergency arbitration. It is therefore crucial that the emergency decisions are enforceable.

This article examines the status of an emergency arbitrator and the enforceability of its decisions under international regimes and various national legislations **[Part II]**. It then focuses specifically on these issues under the Indian arbitration regime by analysing the approach adopted by the Indian courts in various judgments of the past decade and more recently, in several rulings arising out of an ongoing high-profile dispute between two commercial giants **[Part III]**. Finally, it concludes by recommending the way forward for India **[Part IV]**.

II. Anatomising the emergency arbitration procedure and its enforceability issues

The recognition and enforcement of arbitral decisions is not only crucial to the success of arbitration, but is also one of the key reasons the reason for its popularity.[29] It has been stated that the issue of enforcement is of such importance that while drafting contracts, practitioners usually "*strategize backward*" from the enforcement angle.[30] That said, even though arbitration is a private agreement, the process is somewhat state-controlled because the enforcement of a decision is dependent upon international conventions and national laws.[31] This was foretold—over two

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25 REDFERN & HUNTER, *supra* note 5, at 235.

26 The total number of emergency arbitration applications received by major arbitral institutions:
ICC – 154 applications for 'Emergency measures' as on March 01, 2021.
ICDR – 119 Emergency Arbitrator applications as on January 01, 2021.
SIAC – 116 Emergency Arbitrator applications as on Feb 26, 2021.
SCC – 47 Emergency arbitration applications as on 01 Jan 2021.
HKIAC – 28 Emergency Arbitration applications as on March 08, 2021.
SCAI – 13 applications for the Emergency relief procedure as on March 2, 2021.
LCIA – 11 Emergency arbitration applications as on May 17, 2021.
MCIA – 1 Emergency Arbitrator application as on March 09, 2021.
AIAC – 1 Emergency Arbitrator application as on March 09, 2021.

27 Caher & MacMillan, *supra* note 7, at 3. *See also* Arbitration Act 1996, c. 23, § 44(5) (Eng.); International Arbitration Act, Chapter 143A (as revised in 2002) No. 23 of 1994, § 12(A)(6) (Sing.) ["*hereinafter* "Singapore IAA"]; CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1449(1) (Fr.) ("This provision applies to international arbitration by means of art. 1506(1).").

28 *See* sourced cited *supra* note 27. *See also* Leviathan Shipping Co. Ltd. v. Sky Sailing Overseas Co. Ltd., [1998] 4 HKC 347 (H.K.); Next Step Med. Co. v. Johnson & Johnson Int'l, 619 F.3d 67, 70 (5th Cir. 2010) (U.S.); Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999) (U.S.).

29 LEW ET AL., *supra* note 5, at 688.

30 Lucy Reed, *Experience of Practical Problems of Enforcement*, *in* 9 IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 557, 561 (Albert Jan Van den Berg ed., 1999) [*hereinafter* "Reed"].

31 Bernard Hanotiau, *International Arbitration in a Global Economy: The Challenges of the Future*, 28(2) J. INT'L ARB. 89, 91 (2011).

decades ago—by Mr. Fali S. Nariman, who paid tribute to the framers of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"][32] for recognising the "*genetic heritage*" of national courts and said "*without the aid and assistance of local municipal courts transnational arbitral awards could not be effectively enforced.*"[33]

Similarly, as it stands, national courts play a major role in the enforcement of emergency decisions. Even though national legislators have "*abandoned their historical animosity towards, or distrust of, international arbitration,*"[34] the same cannot be said for emergency arbitration, and there is still the possibility of a mere pyrrhic victory.[35] There is a long way to go in dealing with the enforcement issues of emergency arbitration, especially where enforcement is sought in a foreign jurisdiction. The Honourable William G. Bassler questions the existence of this problem, by stating that, "*[r]efusing to enforce an emergency award when the parties have granted the emergency arbitrator the power to issue emergency awards depreciates the principle of freedom of contract. Of what value is a contractual provision as important as emergency relief if it is unenforceable?*"[36]

This is especially important when looking at the reasons based on which parties opt to specifically seek emergency relief through emergency arbitration, and not from courts. A survey conducted in 2015 found that 79% of the respondents considered enforceability of emergency decisions to be one of the most important factors.[37] Unfortunately, the importance has seemingly been placed due to the concerns regarding enforceability, as opposed to enforceability being a reason for utilizing emergency arbitration. As some interviewees have noted, *"the prospect of successfully enforcing emergency arbitrator decisions varies between jurisdictions. In certain jurisdictions, enforcement is seen as time-consuming and unpredictable. The use of emergency arbitrators was seen as an unnecessary extra in other jurisdictions because of the perceived effectiveness of the national courts compared to the uncertainty of enforcing an emergency arbitrator's decision.*"[38] Thus, enforceability of emergency decisions has faced many practical challenges and uncertainties.

These problems stem from the fact that tribunals generally lack the coercive power to enforce provisional relief, and thus the responsibility falls onto national courts.[39] In general arbitral proceedings, most parties voluntarily comply with provisional measures, as they fear that non-compliance could prompt a tribunal to draw a negative inference.[40] However, this voluntary

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32 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"].

33 Fali S. Nariman, *The Convention's contribution to the globalization of international commercial arbitration*, *in* ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 11, 13 (1999).

34 Emmanuel Gaillard, *Interim and Emergency Measures of Protection (BCDR Rules 2017, Arts 26 & 14)*, *in* 4(2) BCDR INT'L ARB. REV. 297, 299 (Nassib Ziadé ed., 2017).

35 ALBERT JAN VAN DEN BERG, NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 143 (1981); *see also* LEW ET AL., *supra* note 5, at 688.

36 William G. Bassler, *The enforceability of emergency awards in the United States: or when interim means final*, 32(4) ARB. INT'L 559, 572 (2016) [*hereinafter* "Bassler"].

37 White & Case & School of International Arbitration, Queen Mary Univ. of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration (2015), at 28, *available at* http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

38 *Id.*

39 BORN, *supra* note 4, at 2627; YESILIRMAK, *supra* note 3, at 246.

40 Gregoire Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA & UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 133 (1999).

compliance is not always the case,[41] and since damages are often an inadequate substitute,[42] it is imperative that parties are able to enforce these interim orders.[43] The same applies to the enforcement of emergency decisions.[44] Even though the voluntary compliance of an emergency decision is expected,[45] it is not a guarantee, and therefore, ensuring a clear-cut enforcement procedure is paramount.[46]

These unclear repercussions of non-compliance, along with the preservation of arguments on jurisdiction and questions regarding enforceability in local courts, increase the likelihood of parties refusing to comply with emergency decisions.[47] In the opinion of Jason Fry, emergency arbitration needs to be "*properly welcomed into a legal framework*" to ensure that it is as effective as it is popular.[48]

In order to do this, and to ensure the clear-cut enforcement of emergency decisions, two issues need to be addressed:

(a) The status of emergency arbitrators and emergency decisions; and

(b) The enforceability of emergency decisions under the New York Convention, as arbitral decisions on interim relief under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ["**UNCITRAL Model Law**"]; and under national legislation.

A. Status of emergency arbitrators and emergency decisions

When the ICC introduced the pre-arbitral referee procedure in 1990, commentators started to question the status of the referees' decisions.[49] However, criticisms were not limited to

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41 David L. Zicherman, *The Use of Pre-Judgment Attachments & Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British & American Approaches*, 50(2) UNIV. PITT. L. REV. 667, 690 (1989) ("eighty-five percent of all awards are paid without controversy. Turning this argument around, the statistics point out exactly why pre-judgment attachment is necessary: fifteen percent of all awards are not paid voluntarily."); *see also* Tijana Kojovic, *Court Enforcement of Arbitral Decisions on Provisional Relief - How Final is Provisional?*, 18(5) J. INT'L ARB. 511, 512 (2001) ("placing too much faith in the parties' cooperative spirit seems to be a romantic echo of the 'good old times' when arbitration was a friendly forum where the parties looked to their business peers for an answer to their differences.").

42 Zia Mody & T.T. Arvind, *Redeeming Sisyphus: The Need to Invigorate Interim Relief in International Commercial Arbitration*, *in* 10 INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY, ICCA CONGRESS SERIES 126, 132 (Albert Jan Van den Berg ed., 2001).

43 Peter Sherwin & Douglas C Rennie, *Interim Relief under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20(3) AMERICAN REV. INT'L ARB. 317, 324 (2010) [*hereinafter* "Sherwin & Rennie"].

44 Philippe Cavalieros & Janet (Hyun Jeong) Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35(3) J. INT'L ARB. 275, 287 (2018).

45 Report of The ICC Commission on Arbitration and ADR Task Force on Emergency Arbitrator Proceedings, ¶ 35 (Apr. 2019), *available at* https://iccwbo.org/content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf [*hereinafter* "ICC REPORT"] ("in the vast majority of cases, parties comply voluntarily with EA decisions"); *see also* Fry, *supra* note 6, at 196–97; Paraguacuto-Maheo & Lecuyer-Thieffry, *supra* note 22, at 777; Bao, *supra* note 11, at 282; Markert & Rawal, *supra* note 22, at 133.

46 Rania Alnaber, *Emergency Arbitration: Mere Innovation or Vast Improvement*, 35(4) ARB. INT'L 441, 457 (2019) [*hereinafter* "Alnaber"].

47 Hamish Lal & Brendan Casey, *Ten Years Later: Why the 'Renaissance of Expedited Arbitration' Should Be the 'Emergency Arbitration' of 2020*, 37(3) J. INT'L ARB. 325, 330 (2020).

48 Fry, *supra* note 6, at 181.

49 Ank A. Santens & Jaroslav Kudrna, *The State of Play of Enforcement of Emergency Arbitrator Decisions*, 34(1) J. INT'L ARB. 1, 2 (2017).

commentators, and in *Société Nationale des Pétroles du Congo and République du Congo* v. *Total E & P Congo* ["**Congo**"], the *Paris Cour d'appel* expressly ruled that the referee was not an "*arbitrator*" with jurisdictional features, and the resulting decisions were not "*arbitral awards.*"[50] This was perhaps part of the reason why the ICC's mechanism never really took off. Other reasons included its scarce usage,[51] its opt-in design, its need for a separate written agreement, and its lack of general recognition.

In the aftermath of its failure to take off, the ICC jumped on the bandwagon in 2012, and included a provision for emergency arbitration in its 2012 arbitral rules.[52] This new provision has built on the old one, resulting in a more refined, readily available, and well-structured mechanism as compared to the referee procedure. For instance, ICC emergency arbitration is opt-out, removing the requirement of a separate written agreement. This arguably gave the mechanism a more authoritative standing and greater recognition. The success of this mechanism is evident, as the ICC has received over 150 emergency arbitration applications in the span of nine years.[53]

One may question whether the *Paris Cour d'appel's* decision in *Congo* would also apply to emergency arbitrators. In this regard, the Report of the ICC Task Force on Emergency Arbitrator Proceedings ["**ICC Report**"] noted that the reasoning in *Congo*—as regards the "*non-jurisdictional character*" of the ICC referee—is widely criticised[54] and is not likely to apply to the ICC's emergency proceedings.[55] In fact, through its widespread use,[56] emergency arbitration has essentially reached universal recognition, making it further unlikely to be affected by *Congo*'s decision.

Nevertheless, there are other issues that could give rise to the uncertainty regarding the status of an emergency arbitrator, for instance, the continual lack of universal statutory recognition. A number of States have attempted to address this issue, including Singapore,[57] New Zealand,[58]

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50 Société Nationale des Pétroles du Congo and République du Congo v. TEP Congo, Court of Appeals, Paris, Cour d'appel [CA] Regional court of appeal, Paris 1'ch, Apr. 29, 2003 (Fr.), *in* Emmanuel Gaillard & Philippe Pinsolle, *The ICC Pre-Arbitral Referee: First Practical Experiences*, 20(1) ARB. INT'L 13, 22 (2004) [*hereinafter* "Gaillard & Pinsolle"].

51 BORN, *supra* note 4, at 2632; *see also* Toulson, *Van Houtte acts as emergency referee*, GLOB. ARB. REV. (Dec. 9, 2010), *available at* https://globalarbitrationreview.com/van-houtte-acts-emergency-referee ("The ICC's Pre-Arbitral Referee Procedure Rules have been in force since 1990 but have been used only very rarely (less than a dozen instances).").

52 ICC Rules 2012, art. 29.

53 *See supra* text accompanying notes 21–24.

54 Gaillard & Pinsolle, *supra* note 50, at 22 ("Overall, we do not necessarily disagree with the result reached by the Paris Court of Appeal, which denies the characterization as an award, even though we would have welcomed more detailed reasons supporting it.").

55 ICC REPORT, *supra* note 45, ¶ 197.

56 *See supra* text accompanying notes 12–24.

57 International Arbitration (Amendment) Act, No. 12 of 2012, § 2 (Sing.) (amending the Singapore IAA, § 2(1)) (""arbitral tribunal" means a sole arbitrator or a panel of arbitrators or a permanent arbitral institution, and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation.").

58 Arbitration Amendment Act 2016, § 4 (N.Z.) (amending the Arbitration Act 1996, § 2(1) (N.Z.)) ("arbitral tribunal includes any emergency arbitrator appointed under (i) the arbitration agreement that the parties have entered into; or (ii) the arbitration rules of any institution or organisation that the parties have adopted.").

Malaysia,[59] and Fiji.[60] These States have included "*emergency arbitrator*" within the statutory definition of an "*arbitrator*." On the other hand, Hong Kong,[61] South Korea,[62] and Bolivia[63] have amended their national legislations to construct specialised mechanisms for the enforcement of emergency decisions.[64] Further, as per the ICC Report, National Committees of many countries such as Belgium, Brazil, Spain, and Ukraine recognise the powers of an arbitral tribunal to grant interim relief extend to emergency arbitrators.[65]

Even though states have adopted a pro-emergency arbitration approach, the mechanism itself has not been free of criticism. Baruch Baigel,[66] for example, has observed that an ICC emergency arbitrator is not an arbitrator for a number of reasons. Some of the reasons he puts forth are that (i) the ICC emergency arbitration procedure is "*contractual*", and not "*jurisdictional*";[67] (ii) if an ICC tribunal and an emergency arbitrator have similar jurisdiction, there is no "*clear basis on which an ICC tribunal should be able to modify decisions made by another properly appointed arbitrator*" without some reasonable justification on the basis of "*error or new circumstances*";[68] and (iii) unlike a traditional arbitrator, an ICC emergency arbitrator is not appointed by the parties but instead by the President of the ICC court.[69] The author respectfully argues that Baigel's views are not necessarily accurate, and each of these arguments is addressed below.

First, an emergency arbitrator possesses both "*contractual*" and "*jurisdictional*" features. With regard to the former, it is clear that emergency arbitration has contractual features—just like traditional arbitration—by virtue of the contracted arbitration agreement.[70] As regards the latter, the Honourable Charles N. Brower has opined:

> "*[A]s the emergency arbitrator has the same role and powers, limited by duration of the appointment, as an already constituted arbitral tribunal (Article 1(2)), the same jurisdictional standard should apply to the*

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59 Arbitration (Amendment) Act, No. 2 of 2018, § 2 (Malay.) (amending the Arbitration Act, No. 646 of 2005, § 2(1) (Malay.)) (""arbitral tribunal" means an emergency arbitrator, a sole arbitrator or a panel of arbitrators.").

60 International Arbitration Act, No. 44 of 2017, § 2 (Fiji) (""arbitral tribunal" means a sole arbitrator, a panel of arbitrators or an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties.").

61 Arbitration (Amendment) Ordinance, (2013) Ord. No. 7, § 5 (H.K.) (amending the Arbitration Ordinance, (2011) Cap. 609, §§ 22A, 22B (H.K.)) [*hereinafter* "HK Arbitration (Amendment) Ordinance"].

62 Eun Jeong Park & Joel Richardson, *Rush to Judgment: Speed v Fairness in International Arbitration*, 18(4) ASIAN DISP. REV. 174, 175 (2016) ("In July 2016, Korea followed this trend by enacting amendments to its Arbitration Act to permit the enforcement of interim measures ordered by an arbitral tribunal seated in Korea, which is understood to apply to orders rendered by emergency arbitrators.").

63 Conciliation and Arbitration Law, No. 708 of 2015, §§ 67–71 (Bol.).

64 BORN, *supra* note 4, at 2709.

65 ICC REPORT, *supra* note 45, ¶ 187.

66 Note that Baigel, *infra* note 67, in his article, specifically talks about the ICC emergency arbitration process. One of the major differences between ICC and most other arbitral institutions (like LCIA, SIAC, SCC, HKIAC) is that the emergency decisions under ICC rules are only termed as "orders," whereas the institutions generally allow emergency decisions to be termed as both orders or awards.

67 Baruch Baigel, *The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis*, 31(1) J. INT'L ARB. 1, 11 (2014) [*hereinafter* "Baigel"].

68 *Id.* at 12.

69 *Id.* at 15.

70 *See* Shaughnessy, *supra* note 21, at 341–42.

> *emergency arbitrator as applies to a fully constituted tribunal, which is faced with a request for provisional measures by a claimant and objections to jurisdiction by the respondent.*"[71]

The overlapping powers that a regular tribunal and an emergency arbitrator have include that of being able to rule on their own jurisdiction[72] under the doctrine of *kompetenz-kompetenz*,[73] and to issue interim relief by "*independent*" and "*impartial*" adjudication[74] at the seat of the proceedings.[75]

This position has also been espoused by Yesilirmak, who has stated that an emergency arbitrator "*resolves the request for an interim remedy in a judicial manner,*"[76] and by the likes of Gaillard and Pinsolle.[77] It is thus clear that emergency arbitration is not just a contractual mechanism, but also has jurisdictional features, like traditional arbitration.[78]

Second, an emergency decision being subject to modification by the fully constituted tribunal should not affect the way in which an emergency arbitration is viewed. An analogy can be drawn with the way in which court X modifying court Y's interim relief decision does not take away the status or recognition of court Y.[79] Furthermore, as per the ICC Report, even though the fully constituted tribunal is not bound by the emergency decision, it may have an indirect effect on the tribunal

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71 Brower et al., *supra* note 10, at 64–65.

72 International Chamber of Commerce (ICC), Arbitration Rules 2021, art. 6(2), app. V [*hereinafter* "ICC Rules 2021"]; ICDR International Arbitration Rules 2021, art. 7(3) [*hereinafter* "ICDR Rules 2021"]; Singapore International Arbitration Centre (SIAC), Arbitration Rules 2016, sched. 1(7) [*hereinafter* "SIAC Rules 2016"]; Hong Kong International Arbitration Centre (HKIAC), Administered Arbitration Rules 2018, sched. 4(10) [*hereinafter* "HKIAC Rules 2018"]. *See also* Fry, *supra* note 6, at 187 ("One might argue that similarities between the duties of emergency arbitrators, as defined in most arbitration rules (mostly relating to independence and impartiality) and those of arbitral tribunals (which also relate to independence, fairness and impartiality) tend to show that an emergency arbitrator is an arbitral tribunal, without the need for further definition.").

73 The doctrine of *kompetenz-kompetenz* (also known as "competence-competence"), empowers an arbitral tribunal to rule on its own jurisdiction. This is the "positive effect" of this principle, which also entails that a challenge to the validity or existence of the arbitration agreement will not limit the powers of the arbitrator to decide on their own jurisdiction and eventually render a decision on merits. This doctrine also purports that during the time the arbitrator has a jurisdictional challenge before him, "courts should limit, at that stage, their review to a prima facie determination that the agreement is not 'null and void, inoperative or incapable of being performed'. This principle is known as the 'negative effect' of the doctrine". *See* Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-competence: The Rule of Priority in Favour of the Arbitrators*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 257, 257–73 (Emmanuel Gaillard & Domenico di Pietro eds., 2008).

74 Christopher Boog & Bertrand Stoffel, *Preliminary Orders and the Emergency Arbitrator: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances*, *in* TEN YEARS OF SWISS RULES OF INTERNATIONAL ARBITRATION - ASA SPECIAL SERIES NO. 44, 71, 78 (Nathalie Voser ed., 2014) [*hereinafter* "Boog & Stoffel"]; *see also* Andrea Meier, *Article 43 Swiss Rules*, *in* SWISS RULES OF INTERNATIONAL ARBITRATION: COMMENTARY 453, ¶ 33 (Tobias Zuberbühler, Christoph Müller & Philipp Habegger eds., 2d ed. 2013); ICC Rules 2021, app. V, art. 2(4) ("Every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute."), app. V, art. 2(5) ("Before being appointed, a prospective emergency arbitrator shall sign a statement of acceptance, availability, impartiality & independence.").

75 ICC Rules 2021, art. 4, app. V; SIAC Rules 2016, sched. 1(4); HKIAC Rules 2018, sched. 4(9); Arbitration Institute of The Stockholm Chamber of Commerce Arbitration (SCC), Arbitration Rules 2017, art. 5, app. II [*hereinafter* "SCC Rules 2017"].

76 YESILIRMAK, *supra* note 3, at 123.

77 Gaillard & Pinsolle, *supra* note 50, at 22 ("Arbitration is also contractual in nature, but nevertheless undoubtedly leads to a jurisdictional decision. In our view, the referee does render a jurisdictional decision […].").

78 Fabio G. Santacroce, *The emergency arbitrator: a full-fledged arbitrator rendering an enforceable decision?*, 31(2) ARB. INT'L 283, 293–96 (2015) [*hereinafter* "Santacroce"]; Alnaber, *supra* note 46, at 458.

79 Alnaber, *supra* note 46, at 459.

when it comes to considering the same issues or evidence.[80] It is also pertinent to note that it is not only the tribunal that can modify the emergency decision. The emergency arbitrator can also modify its own decision where necessary.[81] This possibility of modification is a result of the "*emergency*" element of the emergency arbitration process and is not about the status of an emergency arbitrator. Put simply, emergency arbitrations take place in high stake situations, where facts may change overnight. Accordingly, it is crucial that emergency decisions be open to modifications in such situations.

Third, the parties do have a say in the appointment of the emergency arbitrator, even though they do not directly appoint him. This is put forth by Fabio Santacroce, who rightly notes that parties can confer the power of appointing emergency arbitrators on the arbitral institution.[82] As parties possess the "*ultimate control*" of their dispute resolution system,[83] by agreeing to arbitrate under the relevant rules, parties implicitly agree to the application of emergency arbitration provisions, and accordingly, the arbitral institution can appoint the emergency arbitrator. On a practical note, assigning this right is crucial considering the clear urgent circumstances in which emergency arbitration applications are made. The institutions are well-equipped, specialised and efficient in appointing a capable emergency arbitrator within the narrow time frame.

In view of the above, some commentators, such as Christopher Boog, note that an emergency arbitrator is in fact an arbitrator.[84] This view is supported by the argument that emergency decisions are similar to provisional measures provided by fully constituted tribunals, both of which implement a strict threshold requirement for granting interim relief. In emergency arbitration, the standard is usually of urgency that cannot wait for the constitution of the tribunal,[85] and in traditional arbitration, it has been upheld that "*extraordinary measures […] are not to be recommended lightly,*" but only after the conduct of meticulous analysis.[86]

Gary B. Born has aptly stated:

> "*[...] the better view is that emergency arbitrators should be treated like other arbitrators. The general definition of 'arbitration' should be satisfied by an 'emergency arbitration,' and an emergency arbitrator's award should be capable of recognition and enforcement in the same manner as other awards [...].*"[87]

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80 ICC REPORT, *supra* note 45, ¶ 93.

81 ICC Rules 2021, art. 6(8), app. V; ICC REPORT, *supra* note 45, ¶ 217.

82 Santacroce, *supra* note 78, at 301.

83 LEW ET AL., *supra* note 5, at 4.

84 Boog & Stoffel, *supra* note 74, at 78.

85 Shaughnessy, *supra* note 21, at 339 ("an emergency arbitrator is like a doctor who must operate in the emergency room." She borrowed this expression from Mark Kantor.); *see also* ICC REPORT, *supra* note 45, ¶ 8; ICC Rules 2021, art. 29(1) ("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 pursuant to the Emergency Arbitrator Rules in Appendix V.")

86 Brigitte Stern*, Interim/Provisional Measures*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 627, 628 (Meg Kinnear, Geraldine R. Fischer, Jara Minguez Almeida, Luisa Fernanda Torres & Mairée Uran Bidegain eds., 2015). *See also* Phoenix Action Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Decision on Provisional Measures, ¶ 33 (Apr. 6, 2007); Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2 (Decision on Request for Provisional Measures), ¶ 10 (Oct. 28, 1999).

87 BORN, *supra* note 4, at 2709.

B. Enforcement of emergency decisions under the New York Convention, UNCITRAL Model Law and national legislation

The nomenclature of an emergency decision varies across jurisdictions and arbitral institutions. For the former, barring a few jurisdictions such as Australia, Russia, and the United Arab Emirates, many others look to the substance of an emergency decision, as opposed to its terminology.[88] In doing so, the jurisdiction in which enforcement is sought will look to the agreement of parties, the *lex arbitri*,[89] and its own national arbitration framework.[90]

As for the latter, most arbitral institutions generally term emergency decisions as "*awards.*"[91] In contrast, the ICC labels these decisions as "*orders,*"[92] whereas the SCC terms them as "*emergency decisions.*"[93] Notwithstanding the differing terminologies, these decisions are binding on the parties under the rules of most arbitral institutions.[94] In this regard, the author agrees with Born, one of the commentators questioning why a reasoned emergency decision should not be considered enforceable under the New York Convention or national legislations.[95]

i. Under the New York Convention

The New York Convention is commonly regarded as the "*most important legal instrument in the history of international economic exchanges,*" with 168 States[96] having accepted to enforce arbitral awards in a similar manner as final judgments of their local courts.[97] In the context of emergency arbitration, some commentators have taken the view that the enforceability of emergency decisions under the New York Convention is questionable because of their temporary nature.[98] Nevertheless, there are many voices arguing for the opposing view. One such voice is Albert Jan Van den Berg's—widely considered an authority on the New York Convention—who has stated that "*arguably, an arbitral award in summary arbitral proceedings [also referred to as emergency arbitration] can be enforced outside the Netherlands under the 1958 New York Convention.*"[99] Building on this, it is certainly arguable that under

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88 ICC REPORT, *supra* note 45, ¶¶ 38, 194.

89 *Lex arbitri* is typically the law of the seat/place of arbitration and governs the arbitral proceedings. It is also referred to as the *curial law*. *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 73 (3d ed. 2017).

90 ICC REPORT, *supra* note 45, ¶¶ 89–90.

91 *See, e.g.,* London Court of International Arbitration (LCIA), Arbitration Rules 2020, art. 9.8 [*hereinafter* "LCIA Rules 2020"]; SIAC Rules 2016, sched. 1(8); HKIAC Rules 2018, sched. 4(12); ICDR Rules 2021, art. 7(4).

92 ICC Rules 2021, art. 29(2).

93 SCC Rules 2017, art. 8, app. II.

94 *See, e.g.,* SCC Rules 2017, app. II, art. 9(1) ("An emergency decision shall be binding on the parties when rendered."), app. II, art. 9(3) ("By agreeing to arbitration under the Arbitration Rules, the parties undertake to comply with any emergency decision without delay."); ICC Rules 2021, art. 29(2); SIAC Rules 2016, sched. 1(12); HKIAC Rules 2018, art. 35(3); ICDR Rules 2021, art. 7(4).

95 BORN, *supra* note 4, at 2703.

96 Contracting States to the New York Convention, *available at* http://www.newyorkconvention.org/countries.

97 Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25(2) ICSID REV. – FOREIGN INV. L. J. 339, 340 (2010).

98 Leonie Parkin & Shai Meir Wade, *Emergency Arbitrators and the State Courts: Will They Work Together?* 80(1) INT'L J. ARB. MED. & DISP. MAN. 48, 50 (2014) ("Much might depend on whether the EA decisions are regarded as temporary measures or as final awards. If the latter, then they may be enforceable under the New York Convention. Conversely, focus on the interim and temporary nature of the relief granted will cast doubts over the effectiveness of the process.").

99 Albert Jan Van den Berg, *National Report for the Netherlands (2020), in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 47–48 (Lise Bosman ed. Supp. 112, 2020).

the New York Convention, an emergency decision made in any jurisdiction would be enforceable outside that jurisdiction.

Even though the New York Convention does not explicitly require decisions on provisional measures to be "*final,*"[100] Yesilirmak has argued that two criteria must be met for a decision to be enforceable under the New York Convention: that a decision be both "*final*" and "*binding.*"[101] In this respect, it is argued that an emergency decision satisfies both the criteria.

With regard to the former criterion, certain national courts have stated that if an interim order granted by an arbitral tribunal addresses and determines a particular question to finality, then it should be enforceable.[102] This can be seen, for example, in *Braspetro Oil Services Company - Brasoil* v. *The Management and Implementation Authority of the Great Man-Made River Project*,[103] where the *Paris Cour d'appel* approached the issue by giving due regard, not to the form of the ICC arbitral tribunal's decision (terming their decision as an "*order*"), but to its "*content*" and "*finality,*" ruling that "*[t]he qualification of a decision as an award does not depend on the terms used by the arbitrators or by the parties*".[104]

Another example is *Publicis Communication* v. *Publicis S.A., True North Communications Inc.,*[105] where the U.S. Court of Appeals for the Seventh Circuit held that a tribunal's decision not being final or enforceable if it is not labelled as an award "*is extreme and untenable formalism. The New York Convention, the United Nations arbitration rules, and the commentators' consistent use of the label 'award' [...] as interchangeable with final does not necessarily mean that synonyms such as decision, opinion, order, or ruling could not also be final. The content of the decision – not its nomenclature – determines finality.*"[106] Various other American courts have supported this view holding that such decisions are to be treated as "*final*" and "*enforceable.*"[107]

Although the above cases are discussed in the context of interim decisions of traditional arbitrators, Ghaffari and Walters have questioned why the approach of the U.S. and France cannot also apply to emergency arbitrations.[108] Applying the broadly construed approach taken in the U.S., an interim award would be considered as "*final,*" even if it often only has temporary binding

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100 Brower et al., *supra* note 10, at 72.

101 YESILIRMAK, *supra* note 3, at 263–64.

102 Ghaffari & Walters, *supra* note 15, at 163.

103 *Braspetro Oil Services Company - Brasoil v. The Management and Implementation Authority of the Great Man-Made River Project, Cour d' Appel [Court of Appeal], July 1, 1999*, *in* 24a Y.B. COM. ARB. 296 (Albert Jan Van den Berg ed., 1999) (Fr.).

104 Ghaffari & Walters, *supra* note 15, at 163.

105 Publicis Communication v. True North Communications Inc., 206 F.3d 725, 728–30 (7th Cir. 2000) (U.S.).

106 *Id.*; *see also* Ghaffari & Walters, *supra* note 15, at 163–64.

107 Sherwin & Rennie, *supra* note 43, at 325–26; *see also* James M. Gaitis, *The Federal Arbitration Act: Risks & Incongruities Relating to the Issuance of Interim & Partial Awards in Domestic & International Arbitrations*, 16 AM. REV. INT'L ARB. 1, 67–68 (2005); *See, e.g.,* Yahoo! Inc. v. Microsoft Corp., 983 F.Supp.2d 310, 319 (S.D.N.Y. 2013) (U.S.); Metallgesellschaft A.G. v. MV Capitan Constante, 790 F.2d 280, 282-83 (2d Cir. 1986) (U.S.); Arrowhead Global Solutions, Inc. v. Datapath, Inc., 166 F.App'x 39, 41 (4th Cir. 2006) (U.S.); Yasuda Fire & Marine Ins. Co. of Europe v. Continental Casualty Co., 37 F.3d 345 (7th Cir. 1994) (U.S.); Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1023 (9th Cir. 1991) (U.S.); McVay v. Halliburton Energy Servs., Inc., 608 F. App'x 222 (5th Cir. 2015) (U.S.); Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046 (6th Cir. 1984) (U.S.); Ecopetrol SA v. Offshore Exploration and Prod. LLC, 46 F.Supp.3d 327 (S.D.N.Y. 2014) (U.S.) (cited in BORN, *supra* note 4, at 2699).

108 Ghaffari & Walters, *supra* note 15, at 163

effects,[109] because it resolves one of the issues put forth by the parties.[110] Any issue that parties raise can constitute a dispute, which relates to both the merits of the case and interim measures, as stated by Fry.[111] Accordingly, since an emergency arbitrator decides an issue that the parties have raised, namely the request for interim relief; then, even though his mandate is limited by time,[112] the resulting decision should also be considered as final and enforceable.

With regard to the latter criterion of the decision needing to be "*binding,*" by agreeing to arbitrate their disputes under the rules of the arbitral institution—which provide for an emergency arbitrator—the parties are "*deemed to have made the rules a part of their agreement*"[113] and have thus empowered the emergency arbitrator with the authority to issue a binding award.[114]

In view of the above, it can be safely said that an emergency decision is both final and binding and is arguably enforceable under the New York Convention. Yesilirmak believes that this "*approach should be taken because it is in line with the overall object and purpose of the Convention: enhancing effectiveness of arbitration through facilitating international enforcement of arbitral decisions.*"[115] Having demonstrated that emergency decisions can be considered as awards under the New York Convention, it is important to note that such decisions may nevertheless be refused enforcement in various states[116] that have made the "*reciprocity reservation.*"[117]

ii. *Under the UNCITRAL Model Law*

Taking note of the disparities between the various national arbitration regimes, as regards the enforcement of arbitral interim orders, the 2006 revisions of the UNCITRAL Model Law[118]

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109 Santacroce, *supra* note 78, at 304.

110 YESILIRMAK, *supra* note 3, at 265 ("As to the finality of an award on a provisional measure, an interim award or a partial award, in order to be final, needs to dispose of an issue in dispute. To this end, it is arguable that an interim award is final in respect of the issues it deals with.").

111 Fry, *supra* note 6, at 189.

112 Boog & Stoffel, *supra* note 74, at 78.

113 Bassler, *supra* note 36, at 572.

114 *See, e.g.,* Olga Hamama & Olga Sendetska, *Interim measures in support of arbitration in Ukraine: lessons from JKX Oil & Gas et al v Ukraine and the recent reform of Ukrainian legislation*, 34(2) ARB. INT'L 307, 311 (2018). *See also* Kyiv Pechersk District Court, JKX Oil & Gas et al. v. Ukraine, June 8, 2015 (Ukr.) ("[T]he emergency arbitrator procedure was in accordance with the agreement of the parties since the emergency arbitrator mechanism was foreseen in the SCC Arbitration Rules that were in force at the time of the request for the appointment of an emergency arbitrator. The court also ruled that Ukraine was properly notified about the appointment of the emergency arbitrator.").

115 YESILIRMAK, *supra* note 3, at 265.

116 *See supra* note 92 and accompanying text. *See also* August Reinisch, *Chapter 1: The New York Convention as an Instrument of International Law, in* 61 AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 1, 6, n. 25 (Franco Ferrari & Friedrich Rosenfeld eds., 2020) ("Seventy-two state parties have opted for the reciprocity reservation.") [*hereinafter* "Reinisch"].

117 The "Reciprocity reservation" allows a State to apply the New York Convention only to awards made in the territory of another Contracting State. *See* Article 1, 1958 N.Y. CONVENTION GUIDE, *available at* https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1. ("There is a *"commercial reservation"* provision as well, that allows States to apply the Convention only to commercial issues, but in recent times it has not been an issue, since most courts consider "commercial" in broad terms"); *see* Reinisch, *supra* note 116.

118 United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "UNCITRAL Model Law"].

adopted a "*specialized enforcement regime,*"[119] based on an "*opt-out*" formula,[120] to foster uniformity[121] regarding enforcement. However, only a handful of states have adopted the 2006 revisions.[122]

Before delving into the substance of this regime, it is pertinent to understand the long-established gravity of the issue of enforcing interim relief by noting that this was an issue that was raised decades ago in the discussions leading up to the 1985 UNCITRAL Model Law.[123] At the time, the UNCITRAL Secretariat proposed the inclusion of the following text in Article 17 of the 1985 UNCITRAL Model Law: "*If enforcement of any such interim measure becomes necessary, the arbitral tribunal may request [a competent court] [...] to render executory assistance.*"[124] Even though this was eventually not adopted due to practical complications,[125] the Fourth Working Group stated that the national courts in which such enforcement was to be sought could decide the approach they wanted to take—to enforce or not to enforce,[126] and it would not be advisable to limit the courts' ability to enforce these decisions.

The version of Article 17 that was eventually adopted in the 1985 UNCITRAL Model Law allowed the tribunal to order interim measures, at the request of either party, where it deemed it necessary to do so. The 2006 revisions completely revamped Article 17, with the most crucial modification in terms of enforcement being the addition of Article 17H(1), which provides for tribunal-ordered interim relief to be binding and enforceable upon application to the competent court.[127] Article 17H(1), arguably, also extends to emergency arbitrators as they should be considered the same as traditional arbitrators.[128] In this regard, an emergency decision should be deemed to be of the same

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119 BORN, *supra* note 4, at 2705.

120 Luis Enrique Graham, *Interim Measures: Ongoing Regulation and Practices (A View from the UNCITRAL Arbitration Regime)*, *in* 14 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, ICCA CONGRESS SERIES 539, 547 (Albert Jan Van den Berg ed., 2009).

121 Dana Renée Bucy, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*, 25(3) AMERICAN U. INT'L L. REV. 579, 582 (2010).

122 According to Peter Binder, out of the 111 jurisdictions that he surveyed, merely 13 jurisdictions "*adopted*" the revised Article 17, 2 jurisdictions "mostly adopted" and 9 territories adopted provisions "similar in parts" to Article 17. *See* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 803–810 (4th ed. 2019).

123 UNCITRAL Model Law; YESILIRMAK, *supra* note 3, at 249.

124 UNCITRAL, Working Papers submitted to the Working Group on International Contract Practices at its fifth session – Note by the Secretariat: Model Law on International Commercial Arbitration: Revised Draft Articles I to XXVI, U.N. Doc. A/CN.9/WG.II/WP.40, art. XIV (Feb. 22, 1983 – Mar. 04, 1983) *available at* https://undocs.org/en/A/CN.9/WG.II/WP.40.

125 YESILIRMAK, *supra* note 3, at 249.

126 UNCITRAL, Report of the Working Group on International Contract Practices on the Work of its Sixth Session, U.N. Doc. A/CN.9/245, art. XIV ¶ 72 (Sept. 22, 1983), *available at* https://undocs.org/en/A/CN.9/245; *Id.*

127 UNCITRAL Model Law, art. 17 H(1) ("An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.").

128 *See supra* text accompanying notes 51–84.

standing as a tribunal-ordered interim relief. This view has been supported by various commentators,[129] including Nathalie Voser,[130] and has also been noted by the ICC Report.[131]

Adopting a contrary view, Baigel opines that "*Article 17H simply begs the question as to whether the ICC [emergency arbitrator] is an arbitral tribunal*" and even if it is covered, enforcement might still be refused under Article 17I, on the basis of the very short notice period (lack of proper notice) in an ICC emergency arbitration.[132] The author does not agree with Baigel in this regard, and has already addressed Baigel's first point regarding the status of an emergency arbitrator previously.[133] As for the relatively short notice period in an emergency arbitration, this will not result in the enforcement of an emergency decision being refused under Article 17I because it is in line with the parties' agreement. By agreeing to have the arbitral rules apply, the respondents have implicitly accepted the accelerated nature of the emergency arbitrator proceedings.

iii. Under national legislations

Enforcement in some jurisdictions does not require an emergency decision to be enforceable under any international instrument. Instead, these jurisdictions have implemented the "*optimal solution,*"[134] which is to have a specialised legislation that allows for the enforcement of emergency decisions, often with the assistance of national courts.

Jurisdictions such as Singapore, New Zealand, Malaysia, and Fiji have expanded their definition of an "*arbitrator*" to explicitly include "*emergency arbitrators,*" thus making emergency decisions enforceable in the same manner as arbitral decisions.[135]

Going one step further, some jurisdictions have completely clarified the issue of enforceability of an emergency decision. Hong Kong, for example, in an amendment to its Arbitration Ordinance, explicitly stated that emergency decisions are to be enforced in the same manner as a court order, irrespective of the jurisdiction in which the emergency arbitration was seated.[136] Another example is of Bolivia, whose national arbitration law provides that all emergency decisions are binding on parties, and where they do not comply, judicial assistance for enforcement can be sought.[137] Furthermore, France allows the courts to order—through a summary judgment—an emergency decision to be specifically performed.[138]

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129 Monika Feigerlová, *Emergency Measures of Protection in International Arbitration*, 18(1) INT'L COMP. L. REV. 155, 169–170 (2018); Alnaber, *supra* note 46, at 461; Santacroce, *supra* note 78, at 306.

130 Nathalie Voser, *Overview in the Most Important Changes in the Revised ICC Arbitration Rules,* 29(4) ASA BULLETIN 783, 818 (2011) ("In particular jurisdictions which have adopted or will adopt the revised UNCITRAL Model Law, including the Articles 17H and 17I, are likely to recognize and enforce orders issued by an ICC emergency arbitrator.").

131 ICC REPORT, *supra* note 45, ¶ 186 ("[…] most reports from countries that have incorporated the UNCITRAL Model Law (and in particular its provisions on enforceability of interim measures), tend to favour the enforceability of EA decisions considering that full effect should be given to the provisions of the arbitration rules as the expression of the parties' intent and that it is reasonable to assume that the EA has the same powers as an arbitrator.").

132 Baigel, *supra* note 67, at 6.

133 *See supra* text accompanying notes 64–84.

134 Bassler, *supra* note 36, at 574.

135 *See supra* notes 55–58 and accompanying text.

136 Arbitration (Amendment) Ordinance, § 5 (H.K.).

137 Conciliation and Arbitration Law, No. 708 of 2015, § 67(IV) (Bol.).

138 ICC REPORT, *supra* note 45, ¶ 205.

Despite the above developments, a majority of the jurisdictions do not have any specific provisions on emergency arbitrations in their national legislations. Nevertheless, where such jurisdictions have adopted the 2006 revisions of the UNCITRAL Model Law, enforcement of emergency decisions may still be sought indirectly, as explained above, pursuant to provisions under the national legislation allowing tribunal-ordered interim relief to be enforced.

Unfortunately, there may be situations where there is neither a specific provision in the national legislation, nor has the legislature adopted the 2006 revisions of the UNCITRAL Model Law. In such circumstances, the question arises as to how emergency decisions can be enforced? This is the case in India.

III. Emergency Arbitration under India's current arbitration regime

India, at least after 1996[139]—once the *nemesis* of the Indian arbitration regime, the 1940 Arbitration Act,[140] was repealed—has always demonstrated its intent of becoming arbitration-friendly. However, regarding the issue of interim measures, India has faced various setbacks in getting to the position it is at today.

A. The erratic history of the provision for interim relief in support of foreign-seated arbitrations under Indian law

In 1996, the Arbitration and Conciliation Act ["**Arbitration Act**"] was enacted.[141] The arbitration regime under this Act comprises of Part I, which applies to India-seated arbitrations[142] and is largely based on the UNCITRAL Model Law; and Part II, which deals with the enforcement of foreign awards.[143] Certain provisions, for example, those relating to the availability of court-ordered interim relief, are only mentioned in Part I of the Arbitration Act.[144] Where a foreign-seated arbitration needed the assistance of Indian courts in providing interim relief, they had no avenues of procuring such relief under Part II. Accordingly, this two-fold nature of the Arbitration Act raised questions as to whether the provisions of Part I could apply to Part II.

In 2002, the Indian Supreme Court in *Bhatia International* v. *Bulk Trading S.A.* ["**Bhatia International**"] held that the relevant provisions of Part I would be applicable to arbitral proceedings that fall under the aegis of Part II,[145] thus meaning that a court could now order

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139 Prior to the enactment of the Arbitration and Conciliation Act, No. 26 of 1996 (India) [*hereinafter* "Arbitration Act"] (adopted to ensure compatibility with the UNCITRAL Model Law) – domestic arbitrations were governed by the Arbitration Act, No. 10 of 1940 (India), and foreign awards were enforceable under Arbitration (Protocol and Convention) Act, No. 6 of 1937 (India) and the Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961 (India) for awards made under the Geneva Convention on the Execution of Foreign Arbitral Awards, July 24, 1923, 27 L.N.T.S. 157 and New York Convention respectively.

140 Sumeet Kachwaha, *The Arbitration Law of India: A Critical Analysis*, 1(2) ASIAN INT'L ARB. J. 105, 105 (2005). *See also* Guru Nanak Foundation v. Rattan Singh, (1981) 4 SCC 634 (India) ("This Act was largely premised on mistrust of the arbitral process and afforded multiple opportunities to litigants to approach the court for intervention") ("A telling comment on the working of the old Act can be found in a 1981 judgment of the Supreme Court where the judge (Justice DA Desai) in anguish remarked 'the way in which the proceedings under the (1940) Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep' […].").

141 Arbitration Act, No. 26 of 1996 (India).

142 *Id.* § 2(2).

143 *Id.* pt. II.

144 *Id.* § 9.

145 Bhatia Int'l v. Bulk Trading S.A., (2002) 4 SCC 105, ¶ 26 (India).

interim relief in support of foreign-seated arbitrations. However, this also meant that parties could apply to set aside foreign-seated awards,[146] as the provisions for setting aside of an award were set out in Part I.[147] This accordingly led to heavy criticism,[148] to which Fali S. Nariman noted that the Supreme Court would have to "*iron out the creases*" resulting from the judgment in *Bhatia International*.[149]

Bhatia International was eventually overturned, with the Supreme Court stating in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*, that Part I would not be applicable to foreign seated arbitral proceedings.[150] This judgment was received with open arms by the international arbitration community because Indian courts had essentially adopted a "*less interventionist approach.*"[151] However, this reignited the issue of what parties to foreign-seated arbitrations could do when they needed to seek interim relief in support of their arbitrations from the Indian courts.[152] This issue persisted until 2015, when the Arbitration Act was amended,[153] and it was clarified that interim relief could be sought in support of foreign-seated arbitrations through the assistance of courts. Although assistance in obtaining interim relief could now be sought prior to the constitution of an arbitral tribunal, the "*Achilles' Heel*" problem still remained.[154]

B. The current Indian approach to the emergency arbitration mechanism

Currently, India allows for emergency arbitration proceedings, with some arbitral rules providing that emergency decisions fall within the definition of an award,[155] whereas others, taking it a step further, provide that an emergency arbitrator is covered within the definition of an arbitral tribunal.[156] Despite this, there are issues regarding enforcement of emergency decisions in India, and the author believes that the same may only be resolved through statutory recognition of emergency arbitration in India.

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146 *See, e.g.,* Venture Global Engineering v. Satyam Computers Services Ltd., (2008) 4 SCC 190 (India).

147 Arbitration Act, § 34.

148 Lucy Reed addressed this so-called "Section 9(b) problem" (based on prior English law), prevalent in many jurisdictions, such as India, which entailed a risk that courts might treat foreign-seated arbitral awards as domestic awards, subjecting them to judicial review and eventually to setting-aside proceedings. *See* Reed, *supra* note 30, at 564.

149 Fali S. Nariman, *Application of the New York Convention in India*, 25(6) J. INT'L ARB. 893, 898 (2008).

150 Bharat Aluminum Co. v. Kaiser Aluminium Tech. Serv. Inc., (2012) 9 SCC 552, ¶ 194 (India).

151 Audley Sheppard & Jo Delaney, *A brighter future: moves towards a less interventionist approach by Indian courts*, 7535 NEW L. J. 1347, 1348 (2012).

152 *Id.*; *see also* Abhishek M. Singhvi, *Interim Relief: The Role of Arbitrators and the Courts in India, in* 10 INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY, ICCA CONGRESS SERIES 136, 136 (Albert Jan Van den Berg ed., 2001) (He noted that he could not see any reason why domestic courts in India could not grant interim relief in support of foreign-seated arbitrations.).

153 Arbitration and Conciliation (Amendment) Act, No. 3 of 2015 § 2(2) (India) (Section 9, 27 and 37 would also apply to foreign-seated international commercial arbitrations.).

154 *See supra* text accompanying note 6.

155 *See* MCIA Rules, r. 1.3; Indian Council of Arbitration (ICA), Rules of International Commercial Arbitration 2016, r. 2(b).

156 DIAC Rules, r. 2.1(c).

The Law Commission of India in 2014 had proposed the inclusion of an emergency arbitrator within the definition of an "*arbitral tribunal*" under Section 2(1)(d)[157] of the Arbitration Act.[158] This proposal was not accepted, and subsequently, the Srikrishna Committee—set up to "*review the institutionalisation of arbitration mechanism in India*"—recommended, *inter alia*, that the law be amended to allow the enforcement of emergency decisions, and that the Law Commission of India's proposal be adopted.[159] It was hoped that a majority of the Srikrishna Committee's recommendations would be adopted;[160] however this was not the case, and as of the date of this article, emergency arbitration is yet to find a home in India's statutory arbitration regime.

That said, notwithstanding the lack of express statutory recognition, it is possible to enforce emergency decisions in India. For India-seated arbitrations, Part I of the Arbitration Act provides for enforcement of orders and awards of arbitral tribunals to be conducted in the same manner as an order of the court.[161] Even though the definition of "*arbitral tribunal*" under the Arbitration Act does not include an emergency arbitrator, some commentators have argued that it is nevertheless "*broad enough to impliedly include emergency arbitrators within its scope.*"[162] This is further bolstered by Yesilirmak's comment that, "*if an emergency arbitrator is accepted as an arbitrator by a given legal system, his decision should be enforceable like a decision of an arbitrator.*"[163] Building on this, any "*order*" or "*interim award*"[164] granted by an emergency arbitrator should be enforceable like an order or interim award of the court as per Sections 17(2) and 36(1) of the Arbitration Act respectively.[165] In fact, in August 2021, the Supreme Court of India held that the emergency arbitration mechanism and its resulting decisions, come within the purview of the Indian arbitration legislation, and that the scope of an arbitral tribunal extended to emergency arbitrators.[166] This judgment is discussed later in this Part.

For foreign-seated arbitrations, an argument can be made for an emergency decision to be enforced under Part II of the Arbitration Act. This may be possible because an arbitral award can be enforced as per the New York Convention in India under the Arbitration Act.[167] Since it has been demonstrated previously that an emergency decision is enforceable under the New York

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157 The current definition is "*arbitral tribunal* means a sole arbitrator or a panel of arbitrators." *See* Arbitration Act, § 2(1)(d).

158 Law Comm'n of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996(2014), at 9–10, 37, *available at* http://lawcommissionofindia.nic.in/reports/Report246.pdf [*hereinafter* "246th Report"].

159 Ministry of Law & Justice, Government of India, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), at 76, *available at* https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf [*hereinafter* "HLC Report"].

160 Vyapak Desai, Kshama A. Loya & Ashish Kabra, *Arbitration in India: The Srikrishna Report – A Critique*, 20(1) ASIAN DISP. REV. 4, 10 (2018).

161 Arbitration Act, § 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."), § 36(1) ("[…] award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.").

162 Promod Nair & Shivani Singhal, *Interim Measures*, *in* ARBITRATION IN INDIA 145, 171 (Dushyant Dave, Martin Hunter, Fali Nariman & Marike Paulsson eds., 2021) [*hereinafter* "Nair & Singhal"].

163 YESILIRMAK, *supra* note 3, at 146.

164 The definition of an "arbitral award" under Arbitration Act, § 2(1)(c) includes an interim award.

165 Nair & Singhal, *supra* note 162.

166 Amazon.Com NV Inv. Holdings LLC v. Future Retail Ltd., Civil Appeal Nos. 4492-4493 of 2021 ¶¶ 19–22 (India) [*hereinafter* "Amazon (SC)"].

167 Arbitration Act, §§ 44–49 (These sections deal with enforcement of foreign awards under the New York Convention in India).

Convention by virtue of being both final and binding,[168] it is certainly arguable that an emergency decision can therefore be enforced under the Arbitration Act. However, emergency decision may nevertheless be refused enforcement in cases where India's commercial and reciprocity reservations become relevant.[169]

Since enforcement under the above methods is not guaranteed, parties have opted for an "*indirect method*" of enforcing their foreign-seated emergency decisions, i.e., to file a suit in the Indian courts after having procured an emergency decision. Although this method does not technically "*enforce*" an emergency decision, instead while seeking fresh interim relief from the Indian courts, it does not preclude the court from considering the merits, or the existence, of the emergency decision when coming to its own conclusions.

An example of this "*indirect method*" can be seen in *HSBC PI Holdings (Mauritius) Ltd.* v. *Avitel Post Studioz Ltd.* ["**Avitel Post**"].[170] In this case, the applicant had procured a favourable emergency decision in a Singapore-seated Singapore International Arbitration Centre ["**SIAC**"] arbitration, but did not seek its direct enforcement, instead opting to seek interim relief under Section 9 of the Arbitration Act.[171] The Bombay High Court held that, by directly applying for interim relief and not pursuing enforcement of the emergency decision, the applicant was "*entitled to invoke Section 9 for interim measures.*"[172] Section 9 was applicable to the case because, even though the parties had excluded the applicability of Part I of the Arbitration Act, Section 9 was specifically made to apply. In determining the interim relief application, the Court conducted its own analysis,[173] and eventually granted the relief sought.

In line with *Avitel Post*, for the purposes of our Section 9 discussion, the Delhi High Court in *Raffles Design International India Pvt. Ltd.* v. *Educomp Professional Education Ltd.* ["**Raffles Design**"][174] stated that although a party to a foreign-seated arbitration could not seek enforcement of an emergency decision under Section 17 of the Arbitration Act, it could bring a separate interim relief petition under Section 9 and a court could decide on such an application by conducting its own analysis – without being required to consider the emergency arbitrator's decision.[175]

In a recent case, *Ashwani Minda* v. *U-Shin Ltd.* ["**Ashwani Minda**"],[176] a slightly different factual matrix resulted in the Court finding that an application for interim relief under Section 9 was not

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168 *See supra* text accompanying notes 94–113.

169 Arbitration Act, § 44 ("foreign award means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 – (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."). *See also supra* notes 114–15 and accompanying text.

170 HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd., 2014 SCC Online Bom 102 (India) [*hereinafter* "Avitel"].

171 *Id.* ¶ 89.

172 *Id.*

173 *Id.* ¶ 99.

174 Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd., 2016 SCC OnLine Del 5521 (India) [*hereinafter* "Raffles"].

175 *Id.* ¶¶ 103–05.

176 Ashwani Minda v. U-Shin Ltd., 2020 SCC OnLine Del 1648 (India) [*hereinafter* "Ashwani (single-bench)"]; Ashwani Minda v. U-shin Ltd., 2020 SCC OnLine Del 721 (India) [*hereinafter* "Ashwani (division-bench)"].

possible. In this case, the parties had agreed to exclude the applicability of the Part I of the Arbitration Act by agreeing to being regulated by Japan Commercial Arbitration Association (Commercial Arbitration Rules), 2014 ["**JCAA Rules**"].

The case specifically involved an applicant attempting to seek interim relief from the single bench of the Delhi High Court, even though it had already received a detailed and reasoned unfavourable emergency decision in a Japan-seated emergency arbitration under the JCAA Rules. The single bench denied the interim relief application under Section 9, and this was upheld by a division bench of the Delhi High Court. The former denied the application, stating that a "*second bite at the cherry*" was not possible.[177] The latter, in upholding the decision, recognized the applicant's intention of approaching the forum as an "*appellate remedy*" against the order of the emergency arbitrator,[178] and provided that, "*[h]aving chosen the tribunal, the seat, the applicable rules and the forum from which to seek interim measures, the appellants cannot revise that choice at this juncture.*"[179] In saying this, the Court essentially recognized the emergency decision, taking into account the fact that the applicant had already been denied interim relief by an emergency arbitrator. The division bench's decision was thereafter upheld by the Supreme Court.[180]

The judgments in *Ashwani Minda* and *Raffles Design* presented contrasting approaches under Indian law as regards the availability of approaching a court under Section 9 of the Arbitration Act. It was provided in *Raffles Design* that an application could be assessed—independent of the tribunal's orders—by the court under Section 9. However, in *Ashwani Minda*, the court, considering the dismissal of an interim relief application by an emergency arbitrator, dismissed the Section 9 application.

The *Ashwani Minda* position is similar to the position in England, as per the *Gerald Metals S.A.* v. *Timis & Ors* ["**Gerald Metals**"][181] judgment in 2016.[182] In *Gerald Metals*, the applicants sought interim relief from the English High Court, despite receiving an unfavourable emergency decision from the LCIA Court. In refusing to hear the application, Leggatt J. stated that as per the legislation,[183] the court would only interfere if the powers of the tribunal were "*inadequate*" or ineffective in the case and noted that the LCIA's emergency arbitration provision was meant to "*reduce the need to invoke the assistance of the court in cases of urgency.*"[184]

The similarity between the judgments in *Ashwani Minda* and *Gerald Metals* with regard to giving due consideration to an emergency decision is indicative of the pro-arbitration approach of Indian

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177 Ashwani (single-bench), 2020 SCC OnLine Del 1648, ¶ 55.
178 Ashwani (division-bench), 2020 SCC OnLine Del 721, ¶ 43.
179 *Id.* ¶ 44.
180 Ashwani Minda v. U-shin Ltd., 2020 SCC OnLine SC 1123 (India).
181 Gerald Metals S.A. v. Timis, [2016] EWHC (Ch) 2327 (Eng.) [*hereinafter* "Gerald"].
182 Matthew Gearing QC, Sheila Ahuja & Arun Mal, *Ashwani Minda v U-Shin: The Delhi High Court's recent observations on emergency arbitrator relief and the availability of court-ordered interim measures*, ALLEN & OVERY PUBL'N (May 29, 2020), *available at* https://www.allenovery.com/en-gb/global/news-and-insights/publications/ashwani-minda-v-u-shin-the-delhi-high-court's-recent-observations [*hereinafter* "Gearing et al."].
183 *See* Arbitration Act 1996, c. 23, § 44(5) (Eng.) ("[…] court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.").
184 Gerald, [2016] EWHC (Ch) 2327, at 15–17. *See also* Gearing et al., *supra* note 182.

courts. Arguably, *Ashwani Minda* took an even stronger pro-arbitration approach by limiting its own jurisdiction with respect to a "*foreign-seated*" emergency decision. Despite the pro-arbitration stance adopted by *Ashwani Minda*, the Indian courts' decisions with regard to emergency arbitration are varied, and it is exactly due to this inconsistency that it is imperative for India to introduce statutory recognition to emergency arbitration, like in Hong Kong and Singapore. A legislative amendment should be adopted as soon as possible, especially in light of the fact that discussions on emergency arbitration and enforcement of emergency decisions are constantly taking place.

Case in point, in 2021, there were numerous hearings before the Indian Supreme Court on the specific issue of enforcing an emergency decision arising out of a dispute between Amazon.com NV Investment Holdings ["**Amazon**"] and the Future Group.[185]

As a brief introduction to the case, on October 5, 2020, Amazon initiated emergency arbitration proceedings against Future Group under the 2016 SIAC Rules in accordance with the dispute resolution clause in the parties' contract, alleging a violation of the Shareholders Agreement.[186] The violation alleged was that Future Group had entered into a sales transaction with a "*Restricted Person*" (Mukesh Dhirubhai Ambani Group/ Reliance) without first obtaining consent ["**Disputed Transaction**"].[187] On October 25, 2020, the emergency arbitrator, Mr. V.K. Rajah, Senior Counsel, granted the injunction, restricting Future Group from proceeding with the Disputed Transaction. In doing so, he dismissed Future Group's arguments that the definition of an "*arbitrator*" under Section 2(1)(d) does not include an emergency arbitrator, and that the resulting decision would not be enforceable under the Arbitration Act, by holding "*that the Emergency Arbitrator is an Arbitral Tribunal for all intents and purposes.*"[188] The emergency arbitrator further noted that "*emergency arbitrators are recognized under the Indian arbitration framework.*"[189]

Subsequently, Amazon sought to enforce the emergency decision in India, by filing a petition in the Delhi High Court under Section 17(2) of the Arbitration Act.[190] Future Group objected to the enforcement and raised concerns regarding the status of an emergency arbitrator and the enforceability of an emergency decision under Section 2(1)(d) and Section 17(2) respectively.[191] A single bench of the Delhi High Court dismissed these objections, granted the petitioner's request for interim relief, and directed Future Group to maintain status quo till the pronouncement of the reserved order.[192] An appeal against this decision led to a division bench of the Delhi High Court staying the operation of the interim order;[193] however this was on the basis of issues regarding the "*group of companies*" doctrine, and not because of the nature of the emergency decision.

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185 A number of issues were raised in this case but this article only explores the issue regarding the "status" of the New Delhi-seated SIAC emergency arbitrator and the "enforcement" of his award under the Arbitration Act.

186 Amazon.com NV Inv. Holdings LLC v. Future Coupons Pvt. Ltd., 2021 SCC OnLine Del 1279, ¶¶ 10, 11 (India) [*hereinafter* "Amazon"].

187 *Id.* ¶¶ 6–9.

188 *Id.* ¶ 19.

189 *Id.*

190 Arbitration Act, § 17(2) (India) read with Code of Civil Procedure, No. 5 of 1908, § 151 & Order XXXIX, r. 2A (India).

191 Amazon, 2021 SCC OnLine Del 1279, ¶ 7 (India).

192 *Id.* ¶¶ 8, 9.

193 Future Retail Ltd. v. Amazon.com NV Inv. Holdings LLC, 2021 SCC OnLine Del 412, ¶ 13 (India).

The single bench of the Delhi High Court passed its final order on March 18, 2021. Justice J.R. Midha imposed a fine of INR 20,00,000 on the respondents for violating the emergency decision and observed that the status of an emergency arbitrator is one of a "*sole arbitrator appointed by the Arbitration Institution to consider the Emergency Interim Relief Application in cases where the parties have agreed to arbitrate according to the Rules of that Arbitration Institution which contain provisions relating to Emergency Arbitration.*"[194] He provided that the decision of the emergency arbitrator does not bind the arbitral tribunal, but is binding on all parties.[195] In Justice Midha's view:

> "*[…] Emergency Arbitrator is an Arbitrator for all intents and purposes, which is clear from the conjoint reading of Sections 2(1)(d), 2(6), 2(8), 19(2) of the Arbitration and Conciliation Act and the Rules of SIAC which are part of the arbitration agreement by virtue of Section 2(8). Section 2(1)(d) is wide enough to include an Emergency Arbitrator. Under Section 17(1) of the Arbitration and Conciliation Act, the Arbitral Tribunal has the same powers to make interim order, as the Court has, and Section 17(2) makes such interim order enforceable in the same manner as if it was an order of the Court.*"[196]

In the author's opinion, Justice J.R. Midha's meticulously drafted judgment fuelled a quantum leap in the Indian arbitration regime. This judgment in itself was an in-depth analysis of the emergency arbitration mechanism and attempted to clarify the status of an emergency arbitrator and the resulting decisions, under the Indian arbitration regime.

However, despite the forward-thinking nature of the judgment, it was stayed by an order issued by a division bench of the Delhi High Court.[197] Subsequently, the Indian Supreme Court set aside this order, and in doing so, held that:

> "*Given that the definition of "arbitration" in Section 2(1)(a) means any arbitration, whether or not administered by a permanent arbitral institution, when read 35 with Sections 2(6) and 2(8), would make it clear that even interim orders that are passed by Emergency Arbitrators under the rules of a permanent arbitral institution would, on a proper reading of Section 17(1), be included within its ambit. […] The heart of Section 17(1) is the application by a party for interim reliefs. There is nothing in Section 17(1), when read with the other provisions of the Act, to interdict the application of rules of arbitral institutions that the parties may have agreed to. This being the position, at least insofar as Section 17(1) is concerned, the "arbitral tribunal" would, when institutional rules apply, include an Emergency Arbitrator.*"[198]

Notwithstanding the fact that this judgment effectively recognized the legitimacy of emergency arbitration and its resulting decisions in India, and is a colossal step forward for the Indian arbitration regime, it is pertinent to note that in this case, the arbitration was seated in New Delhi, i.e., it was not a foreign-seated arbitration. In this regard, the issue of enforcement of foreign-seated emergency arbitrations in India remains unsettled.

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194 Amazon, 2021 SCC OnLine Del 1279, ¶¶ 133, 192 (India).
195 *Id.* ¶ 133.
196 *Id.* ¶¶ 144, 145.
197 Future Coupons Pvt. Ltd. v. Amazon.Com NV Inv. Holdings LLC, 2021 SCC OnLine Del 4101 (India).
198 Amazon (SC), Civil Appeal Nos. 4492-4493 of 2021, ¶¶ 19–20 (India).

These widely differing approaches to emergency arbitration adopted by the Indian courts in recent years mirrors a time when India's arbitral process was caught in a litigation jamboree and was falling short of being an effective dispute resolution system.[199] The author sees no way forward except to finally settle the issue regarding enforcement of an emergency decision in India through the provision of statutory recognition to the mechanism. Such recognition will not only provide for permanence and predictability concerning the enforcement of India-seated emergency decisions, but will also ensure that foreign-seated emergency decisions are enforced in India without having to undergo the "*indirect method*" discussed previously.

IV. The way forward: An emergency arbitration regime

In the last couple of decades, there has been a seismic shift in the balance of economic power from developed economies to emerging economies, particularly towards Asia,[200] and the continual economic progress and foreign investment has driven the rapid development of international arbitration in Asia.[201] The question arose as to whether Asian countries could exhibit a strong arbitration regime; in response, many Asian countries adopted the UNCITRAL Model law—making Asia possess the "*highest concentration of Model law-based arbitration laws*"—laying the groundwork for such a regime[202] and also ensuring "*cross-continent uniformity.*"[203]

In 2018, Mr. Narendra Modi, the Prime Minister of India, stated, "*Now the continent finds itself at the centre of global economic activity, [...] we are now living through what many have termed the Asian Century*", while speaking at the third annual meeting of the Asian Infrastructure Investment Bank.[204] This is clearly indicative of India's current opportune moment to become a strong economic power, and rival economies the likes of Hong Kong and Singapore. However, the seizing of this moment will require India to step its game up in the field of dispute resolution by strengthening its arbitration regime.

In addition to the various arguments and reasons discussed previously in this article, the absolute need to recognize emergency arbitration is also evident from its regular utilization in times of crisis to resolve disputes, for example, in the persistence of devastation by the COVID-19 pandemic. The pandemic has had a considerable detrimental impact upon not only people, businesses and trade but also dispute resolution. However, emergency arbitration remained unaffected in the face of the circumstances. In fact, as per a recent survey, many arbitral institutions—such as ICC and SIAC—reported that there was a significant increase in emergency arbitration applications since the start of the pandemic.[205] The resilience of emergency arbitration and its demand during critical

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199 Nakul Dewan, *Arbitration in India: An Unenjoyable Litigating Jamboree!*, 3(1) ASIAN INT'L ARB. J. 99, 123 (2007).

200 Julian David Mathew Lew, *Increasing Influence of Asia in International Arbitration*, 16(1) ASIAN DISP. REV. 4, 5 (2014) [*hereinafter* "Lew"].

201 Donald Francis Donovan, Lord (Peter) Goldsmith, David V. Rivkin & Christopher K. Tahbaz, *Asia Leading the World into the Twenty-First Century: A Survey of Developments and Innovation in International Arbitration in Asia*, *in* INTERNATIONAL ARBITRATION: WHEN EAST MEETS WEST: LIBER AMICORUM MICHAEL MOSER 25, 26 (Neil Kaplan Michael Pryles & Chiann Bao eds., 2020) [*hereinafter* "KAPLAN ET AL."].

202 Lew, *supra* note 200, at 6–8.

203 KAPLAN ET AL., *supra* note 201, at 29.

204 *Id.* at 26; *see also* Valentina Romei & John Reed, *The Asian Century Is Set to Begin*, FIN. TIMES (Mar. 26, 2019), *available at* https://www.ft.com/content/520cb6f6-2958-11e9-a5ab-ff8ef2b976c7.

205 Patricia Louise Shaughnessy, *Initiating and Administering Arbitration Remotely, in* INTERNATIONAL ARBITRATION AND THE COVID-19 REVOLUTION 27, 42 (Maxi Scherer, Niuscha Bassiri & Mohamed S. Abdel Wahab eds., 2020).

periods by the international business community is another reason why it should be recognized in India.

It has been argued in this article that emergency decisions are enforceable under the New York Convention and the UNCITRAL Model Law. India is already a signatory to the former, and it is possible for it to adopt the 2006 revisions of the latter, especially Article 17H.[206] In the author's opinion, if this is done, an emergency decision—foreign or India-seated—could then be enforced in India under these two regimes. That said, as it stands, enforcement of emergency decisions under these two regimes would depend on the interpretation of the Indian courts deciding the particular enforcement application. There is no guarantee under the current Indian arbitration regime of these decisions being enforced. Therefore, India needs to adopt a clear-cut regime that allows parties to avoid having to justify the status of their emergency decisions, and instead be able to seek direct enforcement of the same.

Taking this idea forward, it is crucial that, in accordance with the recommendations of the Law Commission of India and the Srikrishna Committee,[207] India provides statutory recognition to the emergency arbitration mechanism. Although the Supreme Court of India in *Amazon* has already made progress in this regard, by validating the mechanism and its resulting decisions, the Arbitration Act should nevertheless be amended to expressly include: (1.) "*emergency arbitrator*" within the definition of an "*arbitral tribunal*" under Section 2(1)(d) of the Arbitration Act; and (2.) the decisions of an emergency arbitrator under Section 2(1)(c)—irrespective of the terminology of the decision in the definition of an arbitral award. Making the above amendments would strengthen India's arbitration regime, and would not only provide permanence and predictability for India-seated emergency decisions, but also for those that are foreign-seated. Consequently, the amendments would have the effect of making foreign-seated emergency decisions final and binding on the parties under Section 35,[208] and enforceable under Section 36(1), of the Arbitration Act.

Going above and beyond, India should also implement a specialized emergency arbitration regime, specifically for foreign-seated emergency decisions. In this regard, inspiration can be sought from the regime in Hong Kong,[209] where the legislation provides that "*any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court.*"[210] Furthermore, certain limitations could be provided so that the enforcement of foreign-seated emergency decisions would depend on whether these decisions grant the usual accepted standard

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206 *See supra* note 125 and accompanying text.

207 *See supra* text accompanying notes 159–60.

208 Arbitration Act, No. 26 of 1996, § 35 (India) ("Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.").

209 Arbitration Ordinance, (2011) Cap. 609, §§ 22A, 22B (H.K.).

210 *Id.* § 22B(1).

of provisional measures. In this regard, inspiration can be sought, once again, from Hong Kong's regime.[211]

The Indian arbitration regime may have been subject to heavy criticism in the past, but it is now in a good position to implement a strong arbitration regime and keep pace with its contemporaries. A clear-cut and reliable statutory recourse to urgent arbitral relief at the pre-formation stage in the form of emergency arbitration, will not only bolster India's position as a predictable arbitration environment within the international arbitration community but also instil confidence and faith in the international business community.

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[211] *Id.* § 22B(2) ("The Court may not grant leave to enforce any emergency relief granted outside Hong Kong unless the party seeking to enforce it can demonstrate that it consists only of one or more temporary measures (including an injunction) by which the emergency arbitrator orders a party to do one or more of the following: (a) maintain or restore the status quo pending the determination of the dispute concerned; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award made by an arbitral tribunal may be satisfied; (d) preserve evidence that may be relevant and material to resolving the dispute; (e) give security in connection with anything to be done under paragraph (a), (b), (c) or (d); give security for the costs of the arbitration.").