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PUSHING ARBITRAL BOUNDARIES TO PAVE WAY FOR EMERGENCY ARBITRATION

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Abstract

Emergency arbitration is not a new creature but has rebranded as such in the recent years. With most major institutional frameworks providing for and promoting emergency procedures, many national arbitration laws have been modified or interpreted to recognize this sui generis contractual machinery. Although it goes a long way, in genuine cases, to enable parties to obtain and efficaciously enforce urgent interim reliefs prior to the constitution of the tribunal, it ought not be done at the cost of legitimacy. The author asserts that forsaking legitimacy in the name of "pro-arbitration" approach has become the norm and demonstrates this by taking the example of the law surrounding the enforcement of emergency reliefs. This note, after brief yet comprehensive introduction to emergency arbitration, demonstrates that it can be further reformed. Finally, before concluding the discussion, it addresses the "elephant in the room," i.e., issues concerning enforcement of emergency reliefs, with a special focus on India.

I. Introduction to emergency arbitration

The avenue of emergency arbitration, made possible with the advent of institutional arbitration, allows parties to seek interim reliefs from a temporary sole arbitrator pending formation of the arbitral tribunal. Instead of asking national courts to maintain status quo, preserve evidence or protect assets after non-confidential and lengthy judicial proceedings (many a time in foreign jurisdictions), parties initiate emergency arbitration. It favours efficiency and party autonomy, and gives legitimacy to a third-party referee's decision, albeit by diluting due process.

In form, emergency arbitration first originated as "*opt-in*" rules, allowing urgent pre-arbitral provisional measures granted by a referee.[1] The next hurdle was to not treat decisions of such referees as mere contracts,[2] but to accord them the benefits of the arbitration machinery and *res judicata*. To achieve this, institutions have been criticised of re-branding—presenting a *sui generis* contractual mechanism with "*new packaging and using different labels*."[3]

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1 *See* International Chamber of Commerce (ICC) Pre-Arbitral Referee Rules 1990.

2 *See generally* Société Nationale des Pétroles du Congo v. Republic of Congo, Cour d'appel de Paris [Court of Appeal of Paris], Apr. 29, 2003 (Fr.).

3 *See* B. Baigel, *The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis*, 31(1) J. INT'L ARB. 1, 2, 9–15 (2014).

This ignited a debate on whether such decisions should be treated as contractual decisions[4] or jurisdictional ones deemed as court orders for enforcement.[5] For better or worse, emergency arbitration, as we know it today, has taken the form of default "*opt-out*" mechanism, forming a permanent part of the institutional arbitration framework and retaining its jurisdictional nature. It is a product of the need to fill a void relating to efficient pre-arbitral interim measures, success of out-of-court mechanisms to obtain them, and increased involvement of arbitral institutions.

This note covers two crucial areas in emergency arbitration that require reform. Part II analyses the divergences in emergency procedures to suggest balancing of parties' rights and interests. Part III proposes a stable and harmonised enforcement regime for emergency reliefs.

II. Divergence in emergency procedures and balancing of rights and interests

Even while sharing common elements, there are some divergences in emergency procedures across institutions. Some, for example, allow parties to challenge an emergency arbitrator's jurisdiction on lack of independence or impartiality only within a few days from the date of its appointment.[6] Any challenge raised later is likely to not be entertained to ensure a timely decision. This approach is justified more by the reasoning that the arbitral tribunal will, in any case, subsequently review the emergency decision, than by considerations of urgency. It can be argued that the short timelines are inadequate for parties to perform due diligence and be heard.

Another divergence pertains to the date of filing of the application for emergency arbitration. Some emergency procedures permit it even before a request for arbitration is filed, while others expressly require it to be filed concurrent with or subsequent to the request.[7] The former set-up is not without practical advantages. In cases involving pre-arbitral procedures, for example, dispute boards or mediation, or during cooling-off periods, a party can seek emergency relief, albeit only if a similar provisional measure cannot be granted under that procedure.[8]

Most rules provide that the mandate of the emergency arbitrator runs only until the main tribunal is formed.[9] This ends the risk of multiple proceedings and contradicting decisions of emergency

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4 *Id.* at 4, 5. The American Arbitration Association (AAA) was the first institution to introduce emergency arbitration as a mandatory component in 2006.

5 *See* R. Alnaber, *Emergency Arbitration: Mere Innovation or Vast Improvement*, 35(4) ARB. INT'L 441, 458 (2019) [*hereinafter* "Alnaber"].

6 *Cf.* Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016, sched. 1, ¶ 5 [*hereinafter* "SIAC Rules"], *and* Mumbai Centre International Arbitration (MCIA) Arbitration Rules 2016, r. 14.3 [*hereinafter* "MCIA Rules"], *with* 2021 International Chamber of Commerce (ICC) Arbitration Rules, app. V, art. 3(1) [*hereinafter* "ICC Rules"], *and* 2018 Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules, art. 11.7 & sched. 4, ¶ 7 [*hereinafter* "HKIAC Rules"].

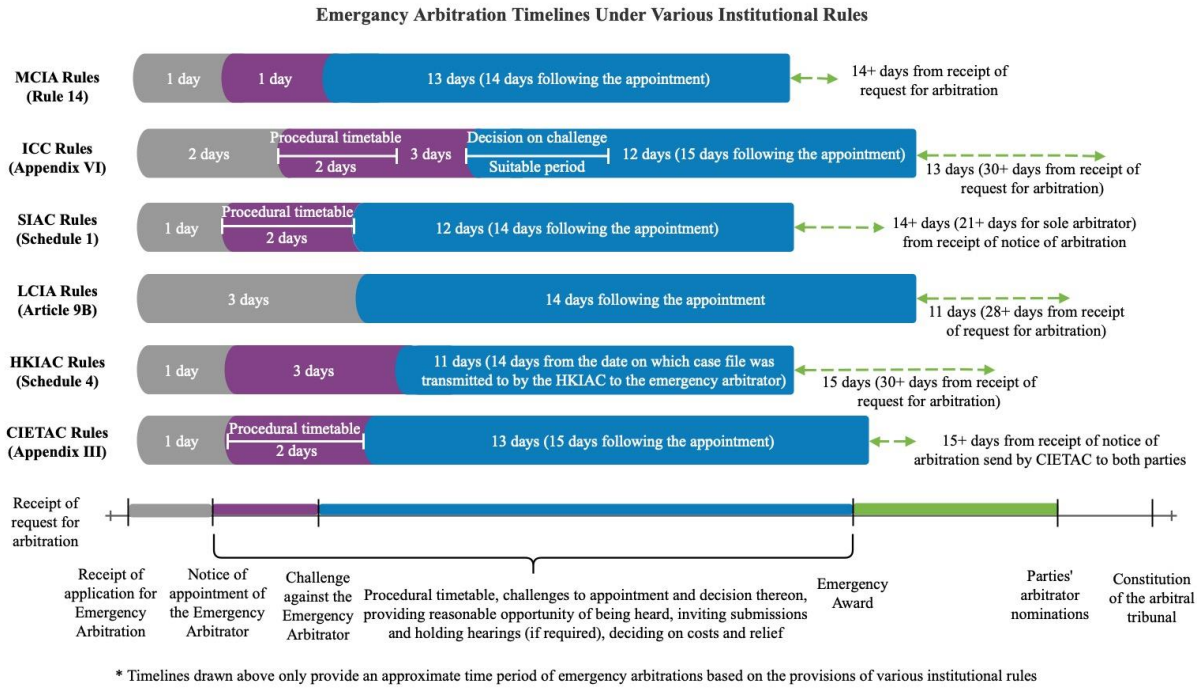
7 *Cf.* ICC Rules, app. V, art. 1(6), *and* HKIAC Rules, sched. 4, ¶ 1, *with* SIAC Rules, sched. 1, ¶ 1, *and* Korean Commercial Arbitration Board (KCAB) International Arbitration Rules 2016, app. 3, art. 1.1 [*hereinafter* "KCAB Rules"].

8 J. Petkute-Guriene, *Chapter 1: Access to Arbitral Justice in Construction Disputes (Dispute Board-Related Issues, Time Bar and Emergency Arbitration)*, *in* CONSTRUCTION ARBITRATION IN CENTRAL AND EASTERN EUROPE: CONTEMPORARY ISSUES 16 (C. Baltag & C. Vasile eds., 2019).

9 *See*, *e.g.*, MCIA Rules, r. 14.9; SIAC Rules, sched. 1, ¶ 10; China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules 2015, app. III, art. 5.3 [*hereinafter* "CIETAC Rules"]; Asian International Arbitration Centre

arbitrator and arbitral tribunal, which, some contend, is "*overstated.*"[10] Indeed, having heard from both parties, the emergency arbitrator would be in a better position to decide on the urgent relief than a freshly constituted tribunal. The best approach in such cases is perhaps to let the duly constituted tribunal decide the fate of the emergency arbitrator.

It can be seen from such divergences that emergency procedures include some key procedural aspects of arbitration for arbitral legitimacy, but simultaneously undermine others. By and large, several concessions are made to enable such procedures to hit the mark and provide users with a mechanism to obtain emergency reliefs as efficiently as possible. The author has traced emergency arbitration timelines under some selected arbitral institutions below:



* Timelines drawn above only provide an approximate time period of emergency arbitrations based on the provisions of various institutional rules

Emergency arbitration procedures contain safeguards to ensure a fair outcome, *viz.* emergency arbitrators typically provide cross-undertaking in damages—just as courts would, before granting an injunction[11]—and apply a widely-accepted "*substantive standard*" to grant emergency relief.[12]

(AIAC) Arbitration Rules, r. 18.13 [*hereinafter* "AIAC Rules"]; KCAB Rules, app. 3, art. 3.7. *But cf.* HKIAC Rules, sched. 4, ¶¶ 13 & 18.

10 *See* Alnaber, *supra* note 5, at 459.

11 JANE JENKINS, INTERNATIONAL CONSTRUCTION ARBITRATION LAW 401 (3d ed. 2021).

12 E. Storskrubb, *Chapter 8: Emergency Arbitration: A Maturing and Evolving Procedure*, *in* 2 STOCKHOLM ARBITRATION YEARBOOK 121 (A. Calissendorff & P. Schöldström eds., 2020) [*hereinafter* "Storskrubb"].

Some institutions have codified the standard in their rules,[13] while most take a minimalist approach and trust arbitral discretion (often guided by national laws) on which standard to apply,[14] if at all.[15] Considering the wide scope for misuse of emergency arbitration, institutions should require arbitrators to follow a codified standard to bring about certainty of outcome.

III. Ensuring a stable enforcement regime for emergency reliefs

In addition to the procedures themselves, a stable and harmonised enforcement regime is another primary factor influencing users' choice. The issue of enforcement is the "*Achilles' heel*" of emergency arbitration.[16] Here, we must note: *first*, that the form and nomenclature of emergency arbitrator's decision is important—it may be recognised as an "*order*" or "*award*"[17]—as it has consequences on its enforceability before national courts. And *second*, that the recognition of such decisions under national laws is of primary significance—institutional recognition by itself is not enough; it is ultimately up to the legislature and courts.

Indeed, an emergency arbitrator must be treated akin to an arbitral tribunal. This gives its decision a legal foundation under the relevant *lex arbitri*. But, for enforcement purposes, such decisions lack finality[18]—they are only temporarily binding, subject to arbitral review, and not intended to undergo annulment proceedings. It must also be questioned if emergency arbitrators can be "*permanent arbitral bodies*."[19] The author further submits that the term "*award*" to refer to such decisions (or interim measures in general) is a misnomer,[20] albeit required by some national laws. Such decisions are thus unenforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] in many jurisdictions.[21]

Admittedly, the United States' courts differ in approach, enabling such decisions to be "*final*," despite being subsequently re-opened by arbitral tribunals.[22] They are deemed to be "*sufficiently final*" as they are intended to protect the final award and must have teeth to serve their purpose. Some have gone

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13 *See*, *e.g.*, HKIAC Rules, art. 23.4 & sched. 4, ¶ 11; AIAC Rules, r. 16.4.

14 *See*, *e.g.*, MCIA Rules, art. 14; ICC Rules, art. 29 & app. V, art. 6; SIAC Rules, r. 30 & sched. 1, ¶ 8; CIETAC Rules, app. III, art. 6; KCAB Rules, art. 32 & app. 3, art. 3.

15 *See* Alnaber, *supra* note 5, at 452 ("An emergency arbitrator will likely depend on these standards when a positive relief is sought rather than when a relief to preserve the status quo is sought[.]").

16 L. Markert & R. Rawal, *Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?*, 37(1) J. INT'L ARB. 131, 134.

17 *See*, *e.g.*, MCIA Rules, r. 14.7; SIAC Rules, r. 30.1 & sched. 1 ¶ 8; HKIAC Rules, art. 23.3 & sched. 4, ¶ 12. *But see* ICC Rules, art. 29(2) & app. V, art. 6(1) (the emergency relief takes the form of an "order").

18 *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. I(1), June 10, 1958, 330 U.N.T.S 38 [*hereinafter* "NYC"] (it applies only for non-domestic awards that finally determine the rights of the parties).

19 *Id.* art. I(2).

20 *See generally* Jonathan Hill, *Is an Interim Measure of Protection Ordered by an Arbitral Tribunal an Arbitral Award?*, 9(4) J. INT'L DISPUT. SETTL. 590 (2018).

21 J. Sze Hui Low, *Emergency Arbitration: Practical Considerations*, 22(3) ASIAN DISP. REV. 109, 112–113 (2020) [*hereinafter* "Sze Hui Low"].

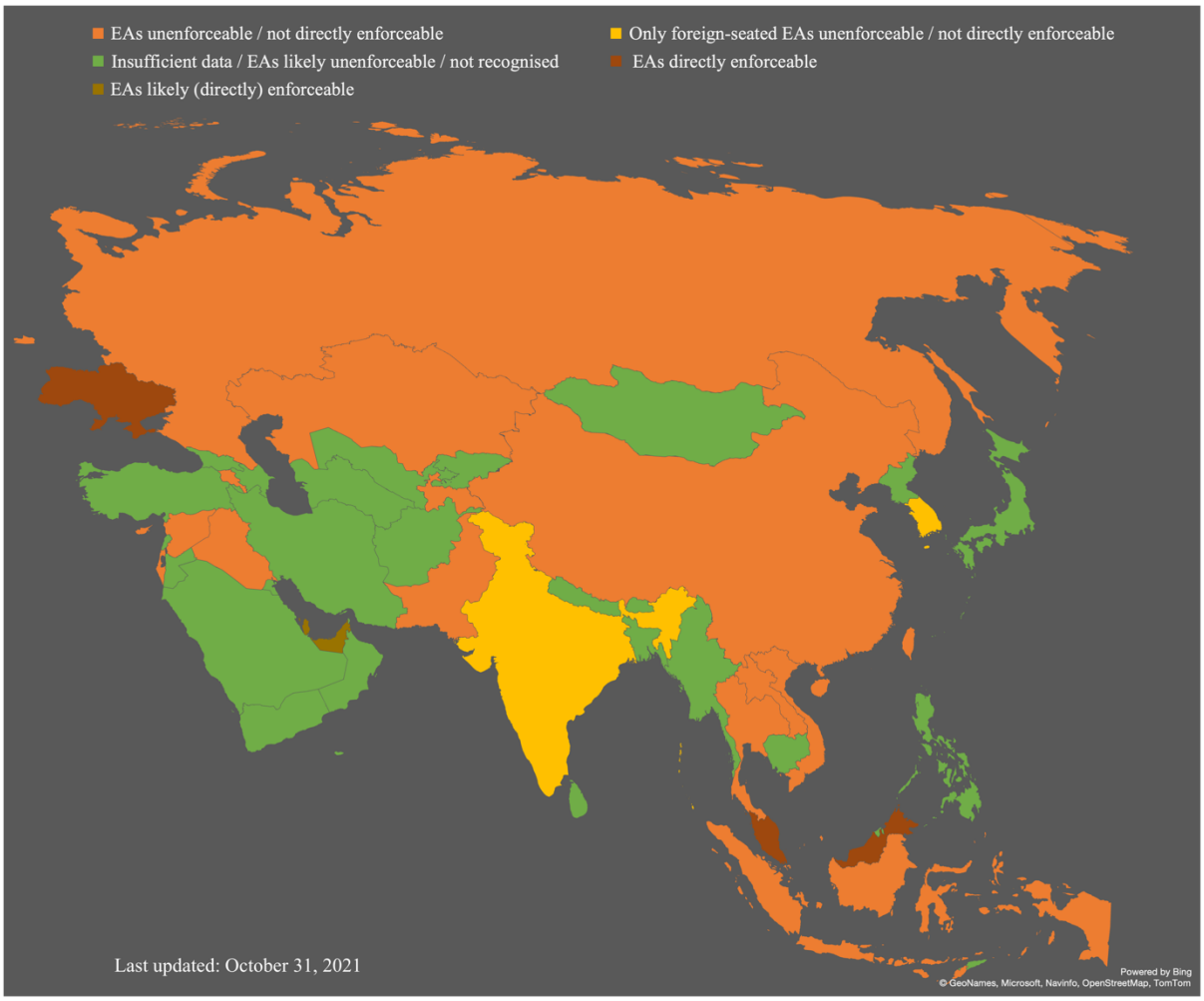
22 *See* Arrowhead Global Solutions v. Datapath Inc, 166 Fed. Appx. 39, 44 (4th Cir. 2006) (U.S.); Yahoo Inc. v. Microsoft Corporation, 983 F. Supp. 2d 310 (S.D.N.Y. 2013) (U.S.); Akash Srivastava, *Emergency Arbitration and India—A Long Overdue Friendship*, 10(1) IND. J. ARB. L., 98, 117 (2021).

so far as to call distinguishing between terms "*extreme and untenable formalism*."[23] The Canadian courts also seem to follow suit.[24] The author, however, submits that legitimate concerns of legality ought not be brushed aside as merely formalistic distinctions of label.

In addition to calling for a greater terminological rigour, the author advocates for express statutory recognition of emergency arbitration—while acknowledging its *sui generis* nature—and harmonisation globally to further uniformity and predictability. This can be accomplished by defining "*arbitral tribunal*" to include "*emergency arbitrator*" and incorporating the 2006 revisions of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985—addition of Articles 17H and 17I, which provide for enforcement of interim measures (even of foreign-seated arbitrations) and grounds for refusal respectively.[25]

Some jurisdictions such as Malaysia,[26] Hong Kong,[27] and Singapore (in both domestic[28] and international arbitration[29] governing laws) have statutory provisions expressly recognising emergency arbitration, in contrast to others like India[30] and South Korea.[31] Albeit, in both these countries, only the emergency reliefs in foreign-seated arbitrations are not directly enforceable. As things stand, emergency arbitrator's decisions remain unrecognised or unenforceable in many jurisdictions. The author has mapped the position in Asia on enforcement below:[32]

23 Publicis Communication v. True North Communications Inc., 206 F.3d 725, 728 (7th Cir. 2000) (U.S.).
24 *See* International Steel Services Inc. v. Dynatec Madagascar S.A., 2016 ONSC 2810, ¶¶ 36–39 (Can.).
25 UNCITRAL Model Law on Int'l Comm. Arbitration 1985 (as amended in 2006), arts. 17H & 17I [*hereinafter* "Model Law"].
26 *See* Arbitration Act 2005, Act 646, §§ 2(c), 19H & 19I (Malay.).
27 *See* Arbitration Ordinance, Cap. 609, §§ 22A & 22B(1) (H.K.).
28 *See* Arbitration Act, Cap. 10, §§ 2(1) & 28 (Sing.).
29 *See* International Arbitration Act, Cap. 143A, §§ 2(1) & 12 (Sing.).
30 *See infra* text accompanying notes 33–45.
31 *See* Arbitration Act, No. 14176 of 2016, arts. 18-7(1) (S. Kor.); Sze Hui Low, *supra* note 21, at 113.
32 Data available on file with author.



The case for express statutory recognition is best advanced by tracing the legal position in India. In brief, if the seat is foreign, such decisions are not directly enforceable under the New York Convention provisions in Part II of the Arbitration & Conciliation Act, 1996 ["**Arbitration Act**"].[33] Instead, an indirect, court-created mechanism is used, whereby such decisions are "*enforced*" as court-ordered interim measures under Section 9 of the Arbitration Act.[34] Albeit, in doing so, the courts apply an independent mind and perform their own analysis.[35]

Further, in *Ashwani Minda* v. *U-Shin Ltd.*, seeking a court-ordered interim relief under Section 9 of the Arbitration Act, after a failed attempt in a foreign-seated emergency arbitration, was disallowed.[36] This decision was affirmed on appeal,[37] and a special leave petition arising therefrom was dismissed.[38] Mere

33 Arbitration & Conciliation Act, No. 26 of 1996, pt. II (India).

34 HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd., 2014 SCC Online Bom 102, ¶¶ 65, 99 (India); Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd., 2016 SCC OnLine Del 5521, ¶¶ 104–05 (India); Plus Holdings Limited v. Xeitgeist Entertainment Group Ltd., 2019 SCC OnLine Bom 13069 (India).

35 *See* cases cited *supra* note 34.

36 Ashwani Minda v. U-Shin Ltd., 2020 SCC OnLine Del 1648, ¶¶ 53–56 (India).

37 Ashwani Minda v. U-Shin Ltd., 2020 SCC OnLine Del 721, ¶ 44 (India) [*hereinafter* "Ashwini Minda"].

38 Ashwani Minda v. U-Shin Ltd., 2020 SCC OnLine SC 1123 (India).

dismissal of a special leave petition, however, has no consequence on any question of law and it should not be taken a precedent in support of emergency arbitration.

The author opines that these were more of equity-based, case-specific rulings,[39] preventing parties from taking inconsistent positions and misusing the provision for court-ordered interim reliefs. After all, Section 9 of the Arbitration Act ought not to be used to effect quasi-appeals against emergency orders. In the author's opinion, the rulings referred to above[40] do not lend support in recognising emergency arbitration—a *sui generis* contractual mechanism which must be recognised and included by the legislature itself—under statutory scheme of the Arbitration Act, especially so when the seat is India. They do not set in stone any legal position or arguably even indicate a trend.

Yet, in the context of India-seated arbitrations, the Supreme Court held in *Amazon.com NV Investment Holdings LLC* v. *Future Retail Ltd.* ["**Amazon**"] that the term "*arbitral tribunal*" under Section 2(1)(d) of the Arbitration Act includes "*emergency arbitrator*" if the parties agree to emergency procedures, thereby recognising its decision as an arbitral tribunal's order of interim measure under Section 17(1) of the Arbitration Act.[41] In this context, it may be relevant to note that the legislature was recommended twice[42] and had three opportunities[43] to recognise emergency arbitration, but decided against including provisions to that effect. The Supreme Court, despite accounting for the aforesaid, reasoned that the procedural autonomy inherent in the statutory scheme of the Arbitration Act would enable parties to choose emergency arbitration.[44] The Amazon judgment was unsurprisingly a welcomed move by arbitration practitioners in India. However, a pro-arbitration jurisdiction should also be free from any unexpected twists and turns.

In light of this, we must raise two questions: *first*, is being pro-emergency arbitration the same as being pro-arbitration? *Second*, should this be determined by the legislature or the judiciary?

Parties often cannot predict a long-term stable legal position in India on several issues. There is always a small possibility that decisions such as the Amazon judgment may result in a tug-of-war between legislature and judiciary, should the former react.[45] If such a back and forth takes place, it may destabilise India's standing as a pro-arbitration jurisdiction by creating a continually changing position of law. It is important for the legislature and judiciary to operate in harmony if India aspires become a globally recognised seat of international arbitration.

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39 *See* Ashwini Minda, 2020 SCC OnLine Del 721, ¶ 49 (India).

40 *See* cases cited *supra* notes 34, 36–39.

41 Amazon.com NV Investment Holdings LLC v. Future Retail Ltd., 2021 SCC OnLine SC 557, ¶¶ 23, 24, 45, 68 (India) [*hereinafter* "Amazon"].

42 Law Comm'n of India, Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996 (2014), at 37, *available at* https://bit.ly/3qB8zoV; Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), at 76–77, *available at* https://bit.ly/3Tf52bs.

43 The Arbitration & Conciliation Act, No. 26 of 1996 has been amended times—in 2015, 2019 and 2021—after the recommendation was first made.

44 Amazon, 2021 SCC OnLine SC 557, ¶¶ 11, 21, 32, 40, 42 (India).

45 For example, previously, the repeated judicial and legislative overruling created an instable, continuously changing legal position on the retrospective application of Arbitration & Conciliation (Amendment) Act, 2015.

Additionally, it may be relevant to note that there is no good reason to treat emergency orders in India-seated arbitrations differently from those in foreign-seated arbitrations. Enforcement of emergency reliefs from the foreign-seated arbitrations, while possible indirectly, is grossly inefficient. Thus, only statutory recognition may resolve these issues and ensure predictability. The legislature should, therefore, follow suit and give statutory recognition to emergency arbitration.

Separately, while dealing with emergency reliefs, an issue that often comes before an emergency arbitrator and ultimately has a significant impact on enforcement is when an emergency relief is granted against non-consenting non-signatories by application of the "*group of companies*" doctrine. This arguably results in dilution of consent, considering the opt-out nature of emergency provisions. The author submits that the only avenue for seeking pre-arbitral interim relief in such cases should be through national courts. Admittedly, this is a departure from modern practice, but necessary nonetheless to respect the *inter partes* nature of emergency arbitration and further its legitimacy. It is perhaps on these considerations that the International Chamber of Commerce (ICC) Arbitration Rules have a specific provision to this effect.[46]

IV. Conclusion: The Way Forward

Emergency arbitration is a new creature—especially in Asia which owes significantly to the institutions for its creation. We must not overindulge emergency arbitration in its teenage for the sake of its stable foundation. Everyone will have their roles to play in its development: the institutions must acknowledge the imbalance of interests and compromise of procedural safeguards, and reform their rules to appropriately balance opposite party's rights; counsels will often use all tools at their disposal, but the emergency arbitrators must apply uniform standards and ensure that granting emergency relief remains an exception rather than a norm; the courts must ensure that they decide based on not just business but legal common sense—even judicial innovation must have legislative intent as its focal point; and, finally, the legislature must modify its laws to recognise emergency arbitration and provide a stable enforcement regime. Indeed, merely having a pro-arbitration judiciary is not enough to bring reforms; we also need legislative involvement to give them true legitimacy. The author also advocates for increased legal formalism, as unfettered legal realism is bound to take arbitration down the rabbit hole.

[46] *See* ICC Rules, art. 29(5).