EXPRESSIONS OF THE EMERGENCY ARBITRATOR: ORDER OR AWARD? LEGISLATIVE PERSPECTIVES

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Abstract

*Emergency Arbitration ["**EA**"] has gained significant traction in global arbitration framework. While the procedure has come to be established in the rules of multiple arbitral institutions, national legislations seem to be lacking. Often discussed questions are the nature of the expression by the Emergency Arbitrator ["**EAr**"] and enforceability thereof essentially needs backing up. This article examines the jurisprudence of EA in various jurisdictions to determine how national courts have considered questions of finality of the award/order, urgency considerations, and the kind of reliefs that may be sought and granted. Through this analysis, we assess how legislative support in recognising EA in the relevant municipal legislation helps in the recognition and enforcement of such expressions.*

I. Introduction

EA secures an urgent interim relief before the constitution of the arbitral tribunal and without approaching national courts.[1] There are many aspects that need to be investigated in EA, specifically with respect to enforcement, and swiftness *inter alia*. However, a bigger question is its recognition, either at the stage of being invoked or at the stage of being enforced. Through the

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1 Grant Hanessian & E. Alexandra Dosman, *Songs of Innocence & Experience: Ten Years of Emergency Arbitration*, 27 AM. REV. INT'L ARB. 216 (2016).

years, several arbitral institutions have made provisions for appointing an EAr. Initially, before the term '*EA*' was recognised, the International Chamber of Commerce ["**ICC**"] introduced its optional pre-arbitral referee procedure; World Intellectual Property Organisation ["**WIPO**"] brought the WIPO Emergency Relief Rules;[2] International Center for Dispute Resolution ["**ICDR**"] was the first to bring out a default procedure for EA in 2006 by way of the ICDR Rules.[3] Subsequently, institutions such as the Singapore International Arbitration Centre ["**SIAC**"], the Hong Kong International Arbitration Centre ["**HKIAC**"] and the Stockholm Chamber of Commerce ["**SCC**"] incorporated provisions pertaining to EA. Certain jurisdictions too have incorporated EA provisions in their national legislations. Singapore by amending the Singapore International Arbitration Act, 2012 and Hong Kong by passing the Arbitration (Amendment) Ordinance in 2013 have incorporated provisions in the national legislations, facilitating enforcement of decisions rendered by the EAr. Other examples include Bolivia (Bolivian Law on Conciliation and Arbitration 2015) and New Zealand (New Zealand Arbitration Act 1996).

EA should be conducted swiftly and should not pre-judge the merits of the case.[4] It is established in the rules of various Institutes that an application for EA must be made on an *inter-partes* basis such that both sides should have the opportunity of presenting their respective cases.[5] The EAr on one hand is a representative of the arbitral tribunal,[6] and an officer of the institution on the other. In such cases the EAr may be willing to defer

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2 *Supra* note 1, at 216.

3 International Centre for Dispute Resolution Rules, 2021, art. 37 (*hereinafter* "ICDR Rules").

4 SCAI Arbitration Rules 2012, art. 26(3) & art. 43; Paris Arbitration Rules 2013, art. 4.7.

5 ICC Rules of Arbitration 2012, Appendix V, art. 5(2) (*hereinafter* "ICC Rules"); The BAC Arbitration Rules, art. 63(4); United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006), art. 18 (*hereinafter* "UNCITRAL Model Law"); The CEPANI Rules 2013 Art. 26(9).

6 Ben Giaretta, *Analysis: Emergency Arbitration - What's the future?* 4, THE RESOLVER, (CHARTERED INSTITUTEOF ARBITRATORS (CIARB); KLUWER LAW INTERNATIONAL, 12 – 14 (2017).

substantive decisions to the arbitral tribunal itself.[7] If not from an institutional perspective, the applicable procedural law would define the relationship of the EAr with the tribunal, depending on which the award/order would be subjected to challenge in the national courts.[8]

Closely associated with incorporation in municipal legislations and institutional rules, are diverging opinions on dealing with enforcement of reliefs given by an EAr. Depending on the nature of relief which is sought, an expression of the EAr may be categorised as an order/award. In this light, the paper outlines the difference between *'order'* and *'award or decree'* (terms used to denote the finality and nature of an expression by an adjudicatory authority) and analyses whether the decision of an EAr can be categorised as an order or award for recognition and enforcement. There are different approaches followed by jurisdictions and arbitral institutions when it comes to implementation.

First, this article it delineates situations in which an EA may arise by analysing the pre-requisites to be fulfilled while invoking EA and emphasises the thresholds for urgency which need to be fulfilled while triggering the mechanism. *Second*, it attempts to understand the nature of a decision rendered by an EAr. This section brings forth a single explanation amongst the multitude of views regarding the enforcement of an EAr's decision. *Third*, it looks at how enforcement of orders/awards have been dealt with by different jurisdictions and sheds light on the various statutory amendments and/or judicial decisions brought about in order to incorporate EA within the legislations of various countries.

This article is divided into three parts. The first part gives an overview of the article. The second part talks about interim measures, laying the foundation for the legal discourse the article seeks to ignite. It further deals

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7 *Id.*

8 *Supra* note 4.

with the interplay of EA within the larger realm of interim measures and hence deals with proposition one and two. This section is further divided into four sub-parts; urgency, courts or EA for interim measures, nature and enforcement of decisions rendered by an EAr— order or award, and tracing finality in municipal law respectively. The last part deals with the third proposition. It is further divided into three sub-parts, the first dealing with arbitral institutions, the second dealing with recognition of an EA within various jurisdictions through multiple channels like statute or court decisions. This sub-part also includes jurisdictions which do not recognise EA. The third sub-part deals with enforcing EA awards/orders.

II. Interim measures & EA

The advent of EA is rooted in the principles of interim measures. Interim measures are temporary reliefs intended to safeguard the rights of the parties until the arbitral tribunal issues an award.[9] The first mention of interim measures in the context of arbitration can be seen in the United Nations Commission on International Trade Law [**"UNCITRAL"**] Working Group, where it was stated that "*the arbitral tribunal may, at the request of a party, order interim measures for conserving, or maintaining the value of, the goods forming the subject-matter in dispute, such as their deposit with a thirdperson or the sale of perishable merchandise*…."[10] The Working Group identified a general formula of measures as opposed to a specific list.[11]It observed that interim measures include measures of conservation of the subject matter and measures in respect of evidence as well as pre-award attachments. Municipal legislations and institutional rules alike have recognised and codified the right to seek interim reliefs in arbitration. Interim measures are *"intended to operate as holding*

9 INDU MALHOTRA, O.P. MALHOTRA ON THE LAW & PRACTICE OF ARBITRATION & CONCILIATION 478 (3d. ed. 2014).

10 United Nationals Commission on International Trade Law (UNCITRAL), Report of The Working Group on International Contract Practices on the work of its Sixth Session, A/CN.9/245, Sept. 22, 1983, ¶ 70, *available at* https://undocs.org/en/A/CN.9/245.

11 *Id.* at ¶86.

orders, pending theoutcome of the arbitral proceedings"[12] and can be of various kinds ranging from injunctions, attachment of property etc.

Article 17 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**Model Law**"] allows parties to seek interim relief of any kind unless otherwise agreed by the parties. Article 17A of the Model Law (as amended in 2006) lays down the dual requirement for a party seeking interim relief.

Judicial developments too have elaborated interim measures and laid down conditions for them to be granted. For example, in *Channel Tunnel Group Ltd.* v. *Balfour Beatty Construction Ltd*,[13] it was held, that the purpose of interim measures is to reinforce the powers of the arbitrators and not to encroach upon them.

It is important to understand the nature of an interim relief, as it may have ramifications, starting from a classification as an order or award. In *Braspetro Oil Services Company* v. *The Managementand Implementation Authority of the Great Man-Made River Project*[14] the ICC tribunal had passed an interim order, not an award, whereby it refused to re-examine a particular aspect of the case at hand despite there being potentially new documents. While reviewing an appeal against the order, the Paris Cour d'Appel held that the qualification of a decision to be an award or an order does not come from the terms used by arbitrators, that in this case, the decision passed was a reasoned one,[15] and both parties were heard in a final manner, therefore it could be an award. The requirements for seeking interim measures were promulgated in the landmark case of *American Cyanamid* v. *Ethicon Ltd.*,[16] a three-pronged

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12 *Supra* note 9, at 480.

13 Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd [1993] 1 All ER 664, 688 (HL).

14 Mealey's International Arbitration Report No. 8 (Fr.), Cour d' Appel, Paris, 1 July 1999.

15 YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 31 (2005).

16 American Cyanamid Co v. Ethicon Ltd [1975] UKHL 1.

test was laid down for granting interim measures which included the requirement of a prima facie case on the merits of the dispute, the accrual of irreparable harm to the applicant on rejection of the interim measure so requested and the balance of convenience to swing in the favour of the applicant. Although interim measures have gained wide recognition, there are still problems with regard to the enforcement of such orders.

To understand the intertwined nature of Interim Measures and EA, this part of the article is further divided into four sub-parts; (a) Urgency, (b) Courts or EA for Interim Measure, (c) Nature and Enforcement of decision rendered by the EAr—Order or Award?, and (d) Tracing finality in Municipal Law. EA stems in the backdrop of interim relief, two components are considered essential for it to be invoked.[17]

1. *Fumus Boni Iuris* – This term refers to the probability of the party succeeding on the merits of the claim. Parties resorting to EA need to demonstrate their likelihood of success.

2. *Periculum In Mora* – This encompasses both the components of irreparable harm accruing to the party and the balance of convenience test falling in favour of the applicant. It primarily refers to the fact that the urgent relief sought should be granted if the measures sought are essential.

These two requirements parallel the established tests laid down for granting interim measures.

The common understanding between the institutional arbitration rules is that EA can only be invoked when the relief is extremely essential. The question arises on how urgent the need is. In order to obtain clarity, we examine the provisions concerning EA of the major arbitral institutions. At the outset, it is noted that arbitral institutions do not define the term '*urgent*.'

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17 Ravi Singhania, *Emergency Arbitration – Journey from SIAC to India*, CHINA BUSINESS LAW JOURNAL (Mar. 28, 2019), *available at* https://law.asia/emergency-arbitration-journey-siac-india/.

The closest substantive definition can be found in the ICC Rules which state that it must be a situation "*which cannot await the constitution of the arbitral tribunal.*"[18] This may be seen to be further supplemented in the ICDR Rules which state that parties can opt for the procedure unless they have agreed to the contrary.[19] Under ICDR, the situations in which EA can be invoked is elaborated by the provisions which existed earlier. As per Rule 37(5) of the ICDR Rules, the purpose of granting interim relief was linked to the conservation of property. This reasoning is used to strengthen an application for urgent relief. The discretion of deciding whether the situation warrants an EA or not is also left to the EAr so appointed in most cases. For example, the London Court of International Arbitration ["**LCIA**"] brings forth EA by referring to the party that opts for this procedure in case of an *"emergency."*[20] This leaves the choice in the hands of the arbitrator appointed to evaluate the merits of the application and at the same time creates no hindrance with respect to the application for EA itself. SCC approaches the subjectby referring to the parties seeking an EA.[21]

The case of *JKX Oil & Gas plc, Poltava Gas B.V., and JV Poltava Petroleum Company* v. *Ukraine* elucidates the extent to which an EAr can rule on the merits of the case.[22] In this case, an EAr's decision was upheld by the Pecherskyi District Court on the reasoning that the decision did not differ from a foreign arbitral award in terms of its enforcement as laid down under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"]. It is noted that the EAr can view the

18 ICC Rules, art. 29(1).
19 ICDR Rules, art. 6.
20 LCIA Arbitration Rules 2020, art. 9B (*hereinafter* "LCIA Rules").
21 Stockholm Chamber of Commerce (SCC) Arbitration Rules, 2020, Appendix – II.
22 JKX Oil & Gas plc, Poltava Gas B.V. and JV Poltava Petroleum Company v. Ukraine, Case No. 757/5777/15, June 08, 2015, *available at* https://www.italaw.com/sites/default/files/casedocuments/italaw7391.pdf.

merits of the case as the award laid down is understood to be a final one and subject to challenge.

From a brief overview of the various rules, one notes that in order to establish '*urgency*', the parties have to showcase a situation of '*emergency*.' Therefore, one major threshold is proving why the relief sought cannot wait for the constitution of the tribunal so much so that the nature of the emergency in the relief needs to be visible.

A. Urgency

The aspect of urgency in EA connotes two perspectives. First, the extent of the EAr's powers to determine what constitutes '*urgent.*' Second, the aspects which can be included within the ambit of '*urgency*'.

There exists no established definition for what constitutes the term '*urgent.*' However, several judicial developments and arbitral institutions have elaborated on what can fall under the scope of the term.

With regard to the powers of the EAr to delve into the meaning of the term, a large part depends on whether the procedure for EA is contemplated to be opt-in or opt-out. The initial procedures such as the ICC Pre-Arbitral Referee Procedure were opt-in procedures and parties did not make much use of such procedures as local courts may have appeared as an attractive avenue. However, subsequently, several arbitral institutions have moved to the opt-out procedure, where EA can be invoked in a default manner.[23] In such cases where an arbitral institution finds place the EAr need not *per se* determine whether the case needs to be designated as '*urgent*.' The default procedure applies, and the EAr need only adjudicate on the relief sought. If the arbitration agreement is one between the parties without any reference to an institution, then the domestic laws of the relevant

[23] SCC Arbitration Rules, Appendix II; LCIA Rules, art. 9.14, Swiss Arbitration Rules, art. 43.

jurisdiction would apply to determine whether EA can be invoked or not thereby making a legislative backing warranted.

It must also be noted that EA provisions do not disallow the parties from seeking reliance on using other mechanisms. As per Article 29(7) of the ICC Rules, 2012, the "*EAr Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter.*"[24]

Over the years, there have been various kinds of reliefs sought by invoking EA including but not limited to, injunction requests, seeking to refrain parties from disposing goods, shares, etc. Maintenance of services, storing of products, and other specific requests have also been sought.[25] As per most institutional rules, EArs are also empowered to mandate the applicant to provide security as a pre-condition to granting the relief sought.[26] Thereby mandating a peek into the merits of the case.

B. Courts or EA for interim measures

Considering that the EAr may look into the merits of the case, a fundamental question arises, whether to approach the court or the EA for an interim relief.

A major case which delineated the factors involved while deciding a case for emergency relief was that of *Evrobalt LLC* v. *Republic of Moldova*, which reaffirmed and established certain thresholds.[27] The first criterion evolved was an assessment of the jurisdiction of the claim. *Moldova* contested that the SCC Rules, which incorporated EA provisions, only came into operation

24 ICC Rules 2012, art. 29(7).
25 *Supra* note 22, at 168.
26 ICC Rules 2012, appendix V, art. 6(7); SIAC Arbitration Rules 2016, schedule 1 (*hereinafter* "SIAC Rules").
27 Evrobalt LLC v. Republic of Moldova, SCC Arbitration EA (2016/082).

after the Bilateral Investment Treaty ["**BIT**"] was signed and therefore could not be contemplated under the initial agreement. Thus, there could be no consent with regard to the applicability of the SCC Rules which incorporated EA provisions then. The arbitrators ruled that as the BIT also did not state that any subsequent amendment to the rules would not be applicable therefore the new rules which contained provisions relating to EA would be applicable. Therefore, reaffirming the jurisdiction of the claim along with constructive consent being a possibility was evolved in this case. The scope of parties to approach a Court instead of invoking EA has been discussed in various judgments. In the case *of Seele Middle East FZE* v. *Drake & Scull International SA Co.*[28] it was held that:

> *"…the court under…shall only act if and 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 isunable for the time being to act effectively. Although this is a matter where there is an arbitration under the ICC Rules, it is not subject to the recent change in those rules in the formof the introduction of an EAr to deal with applications."*[29]

Subsequently, in *Gerald Metals* v. *Timis*,[30] a threshold was established with regard to the applicant pursuing a relief sought in court and not by EA. It was held that a court could not grant an order if there was sufficient time to invoke EA. The applicant had requested for an EA under the LCIA Rules which was rejected by the LCIA and the Court stated that it could not accede to the request. Justice Leggatt specifically referred to Section 44 (3) of the Arbitration Act, 1996 ["**British Arbitration Act**"] with regard to the right of parties to approach the courts but a clear preference was shown for the EA.

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28 Seele Middle East FZE v. Drake & Scull International SA Co [2013] EWHC 4350 (TCC).
29 *Id.* at ¶ 33.
30 Gerald Metals v. Timis [2016] EWHC 2327 (Ch).

This position, however, has been updated by the LCIA rules of 2020.[31] Article 9.13 and Article 25.3 have been amended to allow parties to apply to courts for interim relief. While the text of the rules themselves does not pose a categorical shift from the position enumerated in *Gerald Metals*, it remains up to the English Courts to decide how the same is to be interpreted.

In order to determine the threshold of emergency, the three conditions as laid down by the Model Law and *American Cynamide* are used extensively. However, in the subsequent case of *DP World Djibouti* v. *Port de Dijbouti*,[32] the commercial court granted an interim injunction to protect contractual rights arising out of a joint venture agreement. The bench opined that the principles laid down by *American Cynamide* are '*guidelines*' and are not a '*straitjacket*.' The court subsequently held that it is the function of the courts to '*hold the position as justly as possible pending trial*' and make whatever order would best enable justice to be served.

The facet of irreparable harm was first elaborated upon in the case of *Papua New Guinea Sustainable Development Program Ltd.* v. *Independent State of Papua New Guinea*,[33] where it was stated that –

> *"[T]he party requesting provisional measures must demonstrate that, if the requested measures are not granted, there is a material risk of serious or irreparable injury. There are variations in approach or the precise wording used by the ICSID tribunals as to whether this requirement is that of "irreparable" harm, or whether a demonstration of "serious" harm will suffice. In the Tribunal's view, the term "irreparable" harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party,*

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31 London Court of International Arbitration (LCIA), Arbitration Rules 2020, *available at* https://www.lcia.org/media/download.aspx?MediaId=837.

32 DP World Djibouti v. Port de Dijbouti FZCO 2023 EWHC 1189.

33 Sustainable Development Program Ltd. v. Independent State of Papua New Guinea, Award, ICSID Case No. ARB/13/33.

and not a harm that is literally "irreparable" in what is sometimes regarded as the narrow common law sense of the term. The degree of "gravity" or "seriousness" of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party; suffice it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures."

This interpretation of irreparable harm was endorsed in the context of EA in the case of *Kompozit LLC* v. *Republic of Moldov*,[34] thereby becoming a standard that can be invoked by EArs while determining what constitutes urgency. With regard to the parties establishing a prima facie case on merits, it is opined that it may be a little premature when the standard is applied at the stage of EA itself. The arbitrator need not be concerned about the final outcome and only concentrate in his mandate. It has been opined that the EAr for these reasons may not consider the prima facie merits of the case.

C. Nature & enforcement of decisions rendered by an EAr – order or award?

In terms of ascribing a nature, it is worth deliberating, whether the decision passed by the EAr could be considered an award and most importantly the connotation of the word '*finality*,' whether it covers all orders passed or the final adjudication which ends the dispute between the parties on substantial issues identified by the arbitrators and acts as *res judicata*. The distinction between the terms is that an award can be subjected to scrutiny by the courts whereas an order cannot be.[35] The SCC and SIAC Rules, for instance, label

[34] Kompozit LLC v. Republic of Moldov, Stockholm Chamber of Commerce Arbitration No. 2016/095.

[35] Craig Tevendale, Rutger Metsch, *Procedural Orders or Challengeable Awards? The English High Court Clarifies Its Position*, KLUWER ARBITRATION BLOG (Nov. 01, 2019), *available at* https://arbitrationblog.kluwerarbitration.com/2019/11/01/procedural-orders-or-challengeable-awards-the-english-high-court-clarifies-its-position/.

the decisions as '*awards*' and not '*orders*.'[36] Whereas, the ICC Rules designate the decisions as an order.[37] The Swiss Arbitration Rules have a somewhat hybrid approach where the decisions can be given in the form of preliminary orders or awards.[38] The question of enforcement of such a decision again depends on national laws and international conventions. The New York Convention stipulates that an enforceable award is a decision that is given by the arbitral tribunal, as per the arbitration agreement, and is both binding on the parties and final.[39] However, there is no settled definition of what could be constituted as a final award.[40]

In *Resort Condominiums*, while dismissing the enforcement of an interim injunction the court opined that "*The Convention does not include an interlocutory order made by an arbitrator, but only an award which finally determines the rights of the parties*."[41] The Court also rejected the contention that there can only be a single final award which could be made enforceable under the New York Convention.[42] The reasoning of the Court was based on the principle that an award enforceable under the New York Convention must determine some of the matters which have been referred to the arbitrator and therefore be binding on the parties to the arbitration.[43] An interim measure

36 SIAC Rules 2016, schedule 1(6); SCC Rules 2020, art. 32(3).

37 ICC Rules 2012, art. 29(6).

38 Swiss Rules of International Arbitration, art. 43(8), art. 26(2), art. 26(3).

39 D Di Pietro, *What constitutes an Arbitral Award under the New York Convention*?, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS. THE NEW YORK CONVENTION IN PRACTICE 139-160 (Emmanuel Gaillard & D Di Pietro eds., 2008).

40 Fabio G. Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?*, 31 ARB. INT'L. 283 (2015).

41 Resort Condominiums Int'l Inc. v. Bolwell (Supreme Court of Queensland 1993) XX YB Comm Arb 628, 640, (1995).

42 *Id.* at 641.

43 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art. V(1)(e), 1958.

did not fulfil this requirement as it could be suspended, rescinded, reopened, etc. by the tribunal.[44]

As per this interpretation, a decision of an EAr would not be final for two main reasons—*first*, such awards usually do not deal with substantive issues or look at the dispute on its merits. *Second*, EA decisions, akin to interim awards, are subject to amendment or revocation. This judgment has been criticised majorly on the ground that many times procedural orders play a large role in determining the substantive rights of the parties,[45] as most interim measures sought by parties are procedural in nature and do not involve adjudication on the substantive rights of the parties to the dispute.[46]

On the other hand, there exists a minority view like that in the United States of America ["**US**"], wherein the requirement of '*finality*' is given a broad connotation so as to include interim awards. This view suggests that an arbitral award is final when it resolves any one of the issues contested by the parties,[47] even if the effect of the decision is temporary. The rationale behind this view is the need to ensure that arbitral tribunals have the necessary tools to perform as an adjudicatory body. The idea, then is to ensure that the rights of the parties are protected to the greatest possible extent, pending the final resolution of the dispute.

Additionally, as per this interpretation, the finality requirement would be fulfilled if the tribunal resolves one of the issues presented, which is the

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44 Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty Ltd, Case No. 389 (Queensland Sup. Ct, 29 Oct 1993), at 642.

45 Abu Manneh Raid, *Emergency Arbitrators: the case for enforcement*, INTERNATIONAL BAR ASSOCIATION, *available at* https://www.ibanet.org/Art./NewDetail.aspx?Art.Uid=C39CA4AB-724F4B30-BCD2-041CD0B9CC14.

46 *Id.*; *see also* Publicis Communications & Publicis SA v. True North Communications Inc 203F 3d 725 (7th Cir 2000).

47 ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 265 (2005) (*hereinafter* "Ali Yesilirmark").

request for interim relief.[48] In this context, it may be expected that jurisdictions that approve of the enforcement of arbitral interim measures would also enforce the decisions of EAr.[49]

In the USA, the District Court for the Southern District of New York decided that an injunction given by an EAr was enforceable as per the American Arbitration Association Optional Rules for Emergency Measures for Protection.[50] The court stated that equitable relief which was awarded by the EAr was final for the purposes of enforcement, as per section 9 of the Federal Arbitration Act.[51] The court also took into consideration, the need to protect the applicant from time-sensitive irreparable harm which was effectively neutralised by the EAr. Non-enforcement in such a situation would hamper the applicant's rights. Although this decision was given in the context of a domestic arbitration, it is likely that a similar rationale could be used for foreign decisions under the Convention.[52]

In the case of *Chinmax Medical Systems Inc.* v. *Alere San Diego Inc.*,[53] the court had refused to vacate an award rendered by an EAr on the reasoning that it was not '*final*' and could still be reviewed by the arbitral tribunal under the ICDR Rules.

Subsequently, in *Yahoo!* v. *Microsoft*, Microsoft had requested an EA under the provisions of the American Arbitration Association["**AAA**"].[54] The EAr in order to adjudicate on the relief sought, found it necessary to peruse the original underlying contract between the parties and ruled against Yahoo!.

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48 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 240, 2515 (2d. ed. 2014) 2515.

49 *See* ALI YESILIRMAK, *supra* note 47 at 253-254 (2005).

50 Yahoo! v. Microsoft 2013 CV 07237 26 (S.D.N.Y. 2013).

51 Southern Seas Nav Ltd v. Petroleos Mexicanos of Mexico City (SDNY 1985), 606 F Supp.

52 Fabio G. Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?*, 31 ARB. INT. 283 (2015).

53 Chinmax Medical Systems Inc. v. Alere San Diego Inc 2011 WL 2135350 (S.D. Cal. 2011).

54 Yahoo! v. Microsoft 2013 cv 07237 26 (S.D.N.Y. 2013).

Yahoo! contended that the EAr had crossed his jurisdiction by basing the decision on the merits of the case. To this the Court responded by stating that the decision of an EAr is '*sufficiently final*' in disposing of the initial separate relief sought by the parties.[55] This reasoning imparts a sufficient degree of finality to the decision of an EAr, thereby strengthening the case for its enforcement under the NY Convention. However, in *Al Raha Group for Tech Services* v. *PKL Services Inc.*, the Court refused to enforce a decision rendered by an EAr on the grounds that it was not a final award.[56] It is significant to note the question of whether orders granting interim measures are understoodas final awards vary from jurisdiction to jurisdiction. A major example of this under English case law can be seen in the case of *BMBF (No 12) Ltd* v. *Harland and Wolff Shipbuilding and Heavy Industries Ltd.*[57] In this case, interim relief was awarded in the form of an award. However, subsequently it was also opined that such relief was an *'exception'* to a final arbitral award being passed.[58]

With regard to the New York Convention, it has been opined that an arbitral interim measure is of utmostimportance. A major argument for interim measures not falling under the ambit of the New York Convention was that it may allow recalcitrant parties to cause further hurdles in the arbitral process.[59] At the same time, one needs to be cognisant about the fact that the New York Convention neither expressly bars the enforceability of an

55 American Arbitration Association provisions: R-38., (b), 2001.

56 Al Raha Group for Tech Services v. PKL Services Inc., No. 1:18-cv-04194 (N.D. Ga. Sept. 6, 2019).

57 BMBF (No 12) Ltd v. Harland and Wolff Shipbuilding and Heavy Industries Ltd [2001] EWCA Civ 862.

58 Ronly Holdings Ltd v. JSC Zestafoni G Nikoladze Ferroalloy Plant [2004] EWHC 1354 (Comm).

59 V. V. Veeder, *Provisional and Conservatory Measures* in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, 2, 21, UN Publication Sales No. E.99.v.2, 21 (1999).

interim award nor does make it expressly permissible. However, judicial developments have favoured the former view.[60]

The definition of the term *'award'* does not appear in a comprehensive manner under the Model Law either. It has been erstwhile proposed that the Model Law should contain such a definition.[61] The Working Group on International Contract Parties proposed the following definition, which contains all the elements which most national legislations also impliedly include in defining an award –

> "*a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determine[s] any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award.*"[62]

The major reason for the definition not being adopted was the disagreement between what should or should not procedurally constitute as an award. In terms of recognition, the Model Law has been favourable with regard to interim measures. In 1976 itself, in its Arbitration Rules, a provision for interim measures was inserted.[63] It was opined at the time that the development by itself was a big step because earlier arbitrators were not vested with the powers to order interim measures.[64]

These measures authorised tribunals to take interim measures in the form of an '*interim award*' and also provided that a tribunal would be authorised to make such interim or partial award. It has been opined that such language

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60 JAMES E CASTELLO & RAMI CHAHINE, GAR GUIDE TO CHALLENGING AND ENFORCING ARBITRATION AWARDS, CHAPTER 10 ENFORCEMENT OF INTERIM MEASURES (2019) (*hereinafter* "Castello & Chahine").

61 Gerold Bermann, *The UNCITRAL Model Law – its background, salient features and purposes*, 1 ARB. INT'L 6, 6-39 (1985).

62 Working Group on International Contract Practices, UN Doc A/CN.9/246, 192.

63 UNCITRAL Arbitration Rules 1976, art. 26.1, 26.2 & 32.1.

64 GARY B BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1949-1950 (2009).

signalled the intent of the drafters to make such measures enforceable as awards under the New York Convention.[65]

Therefore, even though the term award is not defined in detail under the Model Law, there still exists a substantial recognition of interim measures.[66]

In the context of EA, the Model Law lacks clarity at multiple fronts. Apart from not defining an award it also does not define the term '*arbitral tribunal*', leaving it vague as to whether the decisions of an EAr have the same bearing as that of a conventional arbitral tribunal. The applicability of the Model Law also suffers from lack of implementation, even though several jurisdictions have based their domestic laws on the same, however many of them have not openly adopted it.

From the principles enunciated a *prima facie* case can be made for designating an EA relief as an '*award*' as the relief which is sought and adjudicated upon by an EAr cannot be re-adjudicated. The EAr would dispose of that particular relief sought.[67] The same can later be superseded by asking for subsequent relief but with regard to the initial relief, the adjudication is final.[68]

Imparting a nature may be possible only after having recognised EA legislatively because the effect of an EA has to be assessed on a case-to-case basis just as the difference between an interim relief and an adjudication. The EAr can do both, however the former only being recognised shall be prejudicial to the institution of EA. In the opinion of the authors, EA is stigmatised and also typified to correspond to urgent interim reliefs which leads to referring only pre-conceived category of issues. What if the EAr is called upon to decide the existence of an arbitration agreement or what if the arbitration agreement is a pathological clause are some

65 CASTELLO & CHAHINE, *supra* note 60 at 3.
66 The UNCITRAL Model Law, 2006, Art. 9 & 17.
67 *Supra* note 22, at 19.
68 *Id.*

questions that may require deliberation. An EA award may not be the final adjudication of the rights of the parties but it would be final in its own right with respect to that particular issue between the parties. It provides the requisiteinterim relief for that particular issue and can be considered final on its own accord. Moreover, even if it is a procedural direction, the same would be binding to the parties to the arbitration agreement.

Another facet which is of relevance here is the construction of the decision rendered by an EAr as an order or an award. The decisions of an EAr are recognised to have a legal bearing but when the term '*award*' is used it may become subject to further domestic procedures as well depending on the jurisdiction. An example of such a contestation can be seen in the ICC Rules which state that the decision made by an EAr would be considered to be an order and not an award. The same is enshrined under Art. 29(2) of the ICC Rules where it is stated that— "*the parties undertake to comply with any order made by the EAr.*" This allows the order to reach the enforcement stage without the scrutiny that would be undertaken if it was designated as an award.

D. Tracing finality in municipal law

The award given by an arbitral tribunal and the decree given by a court may be the same, at least to the extent that both are binding on the parties. They are similar in various ways. This section examines the nature of the two, and then sheds light on the nature of decisions rendered by an EAr in this context.

The term decree has been defined by Black's Law Dictionary as[69]–

> "*A decree, as distinguished from an order, is final, and is made at the hearing of the cause, whereas an order is interlocutory, and is made on motion or petition. Wherever an order may, in a certain event resulting from the direction contained*

[69] BLACK'S LAW DICTIONARY 498 (4d. ed., Bryan A. Garner eds., 1968).

in the order, lead to the termination of the suit in like manner as a decree made at the hearing, it is called a 'decretal order'."

Different national legislations have brought forth their own definitions of the term decree. In India, the Code of Civil Procedure, 1908 defines the term under Section 2(2) as "*the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties, with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final.*"[70]

In the case of *Madan Naik* v. *Hansubala Devi,* the Supreme Court of India ["**SCI**"] held that the matter has to be judicially determined for the decision to constitute a decree.[71] It has also been held that a decree ought tobe conclusive and final with regard to the court passing it.[72]

In order to draw the context towards EA, it becomes necessary to differentiate between a '*preliminary decree*' and a '*final decree.*' In this context, the SCI in the case of *Shankar* v. *Chandrakant* held that:[73]

"A preliminary decree is one which declares the rights and liabilities of the parties leaving theactual result to be worked out in further proceedings. Then, as a result of the further inquiries,conducted pursuant to the preliminary decree, the rights of the parties are fully determined, and a decree is passed in accordance with such determination which is final. Both the decreesare in the same suit.

A final decree may be said to be final in two ways:

when the time for appeal has expired without appeal being filed against the preliminary decree or the matter has been decided by the highest court;

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70 The Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908, § 2(2).
71 Madan Naik v. Hansubala Devi, (1983) 3 SCC 15.
72 Narayan Chandra v. Pratirodh Sahini, AIR 1991 Cal 53.
73 Shankar v. Chandrakant, AIR 1995 SC 1211.

> *When, as regards to the court passing the decree, the same stands completely disposed of. It is the latter sense that the word 'decree' is used in section 2(2) of the Code."*

Considering this definition, the requirement of '*finality*' appears to be one of the most fundamental requirements of a decree and can be implied to mean and include an award also. However, different jurisdictions have differing requirements when it comes to defining a decree**.** In the UK for instance a decree is subject to judicial review, creating a qualifier on theterm final.[74] Earlier, in the US, a decree was understood as an order passed by the court of equity which determined the rights of the parties to the dispute.[75]

Further, there are also interlocutory decrees.[76] Such decrees are not final and do not fully determine the rights and obligations of the parties. Different jurisdictions have varying approaches to the applicability of such decrees such as in the US, such decrees are generally not appealable except for special cases.[77]

The general construction of a '*decree*' by and large resembles that of an award. An award is understood as a decision of the arbitral tribunal which determines the questions raised by the parties in a final manner.[78] The decision should affect the rights between the parties and must be enforceable.[79]

When we come to decisions rendered by an EAr they fall within the latter part of the spectrum i.e. of interlocutory decrees. The decision made by an

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74 Walter Wheeler Cook, *Powers of Courts of Equity, Part III*, 15 COLUMBIA L.R., 228 (1915).
75 *Id.*
76 BLACK'S LAW DICTIONARY 498 (4d. Ed., Bryan A. Garner eds., 1968).
77 U.S. Code § 1292.
78 NIGEL BLACKABY, CONSTANTINE PARTASIDES & ALAN REDFERN, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 503 (6d. ed. 2015).
79 *Supra* note 1, ¶8.34, 8.44.

EAr is not a final adjudication of the rights of the parties. However, the factum also persists that many times parties may get their desired relief from the EAr and then the remaining proceedings, even though can question the EAr's decision, become pre-decided as the remaining demands are not the seminal demands ofthe parties.[80]

Since an enforceable award is both final and binding on the parties, it raises a matter of much controversy and dispute is whether the decision passed by the EAr could be considered an award and thereby enforceable in other jurisdictions.[81] It is clear that the decision of an EAr would fulfil the first two conditions. It is therefore important to determine whether the decision of the EAr can be deemed to be final. This makes it important to note that at the outset there is no settled definition of what could be constituted as a final award. [82]

Given that the objective of EAs is to protect the rights of the applicant in time sensitive issues, it may be argued that the enforcement of an interim measure given by an EAr would lay the foundation for the effective enforcement of the final award which is covered by the New York Convention. Thus, the rationale used by the US domestic courts would arguably uphold the objectives of the New York Convention.

Thus, the problem that exists is that even if the decision rendered by an EAr is understood as an arbitral award, its enforcement would still vary from jurisdiction to jurisdiction. There being no uniform international

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80 Rishab Gupta & Aonkan Ghosh, *Choice Between Interim Relief from Indian Courts and Emergency Arbitrator*, KLUWER ARBITRATION BLOG (May 10, 2017), *available at* https://arbitrationblog.kluwerarbitration.com/2017/05/10/choice-between-interim-relief-from-indian-courts-and-emergency-arbitrator/.

81 D Di Pietro, *What constitutes an Arbitral Award under the New York Convention?, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 139-160 (Emmauel Gaillard and D Di Pietro eds., 2008).

82 Fabio G. Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an Enforceable Decision?*, 31 ARB. INT. 283 (2015).

standard and no uniform acceptance among different jurisdictions regarding the applicability of such an award.

The following section will elaborate upon how the EAr decision is construed by different jurisdictions across the world and the enforceability of the award passed by the EAr whether by statutory principles or by the court evolved principles.

III. Jurisdictional Approaches towards Recognition and Enforcement of Emergency Awards/Orders

In order to deem EA as a more widely accepted mechanism, a uniform standard to construe the decision rendered by the EAr needs to be established. However, in light of the lack of such a standard, the parties to an EA are at the mercy of the statutory laws developed by each country or the laws evolved by the courts therein. The present section delves in detail into the EA provisions made by various arbitral institutions as well as jurisdictions across the world vide statutory provisions and/or court decisions.

A. Arbitral Institutions

In furthering a policy-based approach, arbitral institutions lie at the forefront in advocating the case for EA. The first instance is the ICC's Pre-Arbitral Referee Procedure ["**PAR**"].[83] In this the referee was the EAr. The procedure functioned on an opt-in basis,[84] and even involved the parties resorting to arbitration under the ICC to have a separate agreement for the application of the ICC PAR Rules.[85] These set of rules form an entirely

[83] ICC Pre-Arbitral Referee Procedure Rules, 1990.

[84] Justin D'Agostino, *First aid in arbitration: Emergency Arbitrators to the rescue*, KLUWER ARBITRATION BLOG (Nov. 15, 2011), *available at* https://arbitrationblog.kluwerarbitration.com/2011/11/15/first-aid-in-arbitration-emergency-arbitrators-to-the-rescue/.

[85] *Id.*

separate body of rules from the ICC Rules on Arbitration. The majorreason for the mechanism not attaining success was also the requirement of a separateagreement which took away the streamlined process advantage of institutional arbitration. The need for parties to expressly agree on a particular mechanism separately despite resorting to institutional arbitration was considered cumbersome by many parties when resorting to interim relief.

What is noteworthy is the validity of a decision that was rendered at the conclusion of such a procedure. The question was answered by the Paris Court of Appeal in the case of *Societe Nationale des Petroles du Congo and Republic of Congo* v. *Societe Total Fina Elf E&P Congo*.[86] The contention raised was regarding the annulment of an order passed by the Referee. Under the French Code of Civil Procedure, the Court has the power to annul an arbitral award. Therefore, the question that the Court had to first answer was whether the order passed by the referee amounted to an arbitral award.[87] The Court answered the same in the negative by stating that the PAR Rules did use the term '*arbitration*' therefore the Referee's decision could not amount to an arbitral award.[88]

However, subsequently several arbitral institutions developed rules specifically for EA. The first in this regard was the ICDR. Under Art. 6 of the ICDR Rules, power to seek emergency measures is given.[89] It is noted that the nature of the dispute with regard to which the relief is sought must be that it is soughtas interim relief and for the protection of property.

It is noted that it has been stated that the decision of the EAr will be made in the form of an '*interim award*' or an '*order*.' This by itself fulfils the requirement of being qualified as an award. Moreover, it also provides for

86 Societe Nationale des Petroles du Congo and Republic of Congo v. Societe Total Fina Elf E&P Congo, Judgment of 29th April 2003.

87 *Id.*

88 *Supra* note 86.

89 ICDR Rules 2021 (as amended in 2014), Art. 6.

a formal mechanism with which the EAr can sit on the tribunal by the consent of the parties once the tribunal has been constituted.[90]

The HKIAC amended the HKIAC Administered Arbitration Rules ["**HKIAC Rules**"] in 2018 to incorporate provisions for EA.[91] The HKIAC Rules bring forth certain interesting facets. They appear in Article 23.3 of the HKIAC Rules and the nature of disputes to be submitted to EAr are those in which relief is sought as conservatory measures or for preservation.[92] They warrant an agreement to be made between the parties to make good the EAr's decision without any delay. The nature of the relief granted is considered to be equivalent to an order of the High Court of the Hong Kong Special Administrative Region.[93]

These powers given to the EArs are not without qualifiers and can be terminated or suspended in the following conditions–[94]

- When the arbitral tribunal subsequently constituted renders a final arbitration award.
- The arbitration procedure is by itself terminated.
- The arbitral tribunal has to be constituted within a period of ninety days from the date of decision of the EAr, failing which the decision is not enforceable.

The procedure laid down does allow the EAr to function in an unhindered manner and at the same time tackles the problem of the arbitral tribunal being unable to interfere with the relief granted by the EAr. This reduces the possibility of frivolous claims and other such impediments.

90 ICDR Rules 2021, Clause (4) and Clause (5), Art 6.
91 HKIAC Administered Arbitration Rules, 2018.
92 HKIAC Rules 2018, Art. 23.3.
93 Hong Kong Arbitration (Amendment) Ordinance, 2013, art. 22B (1) (Hong Kong).
94 Hong Kong Arbitration (Amendment) Ordinance, 2013.

The International Institute for Conflict Prevention and Resolution ["**CPR**"] in its 2019 CPR Rules for Administered Arbitration of International Disputes also included provisions for emergencymeasures. The provisions for the same are contained in Article 14.[95] The nature of the decision to be made as an award or order is the same as that of the ICDR. What is noteworthy is Clause14.9 which sheds light on the nature of disputes that may be subjected to EA which includesmeasures for the preservation of assets, conversation of goods, sale of perishable goods, etc.[96]

The enumerated kind of disputes are not exhaustive in any manner but they do shed light on the kind of situations in which EA can be invoked in the first place. Also, the applicability of the rules is such that they would apply to an arbitration unless the parties specifically opt out of it.[97]

The SCC Rules themselves state that the power of the tribunal in granting interim measures is the same as the power of an ordinary tribunal.[98] The LCIA Rules also advocate the case for an EAr wherein it states that an arbitral tribunal includes a sole arbitrator which includes an EAr.[99] This kind of construction allows the decision of the EAr to be enforced without any hurdle as its ambit has been brought within the scope of the *'arbitral tribunal'* itself. Article 9B of the SCC Rules deals with the EAr and contains provisions similar to other institutions.

95 ICDR Rules 2021, art. 14.

96 ICDR Rules 2021, art. 14.9.

97 *Arbitration in 2017: Opting out of Emergency Arbitrator provisions*, SIMMONS SIMMONS (Jan 05, 2017), *available at* https://www.simmons-simmons.com/en/publications/ck0ahematnck60b33af1gthif/15-arbitration-in-2017-opting-out-of-emergency-arbitrator-provisions.

98 SCC Arbitration Rules 2020, art. 8, 37.

99 LCIA Arbitration Rules 2020, art. 5.2.

From the policy perspective, the following principles appear to have gained international recognition in the context of EA:[100]

1. The EAr does fall within the definition of an arbitral tribunal, therefore the decisions rendered by an EAr should ideally carry the same weight as the awards made or orders passed by an arbitral tribunal.

2. The procedure can be an opt out procedure, so that parties can expressly choose to not make it applicable, but it would otherwise exist as a swift recourse for parties to seek urgent interim relief.

3. The decision of an EAr is recognised to be made in the form of an interim order or award.

It is noted that such legislative support is essential to not only ensure the widespread acceptance of EA as a mechanism but also to ensure the enforcement of such awards. A potential solution can be a uniform recognition for enforcement of such awards through international instruments such as the New York Convention, however, even a uniform recognition cannot counter the approaches followed by different jurisdictions.

Even though several institutions do recognise the mechanism of EA however there still exists a lacuna with regard to the enforceability of awards rendered by an EAr. This is mainly due to the fact that some jurisdictions still do not consider the mechanism of EA valid. There are also certain jurisdictions where EA has not found its way in the national legislation but is at the same time widely accepted in the purview of judicial decisions. In this light, and in order to streamline the process, it becomes imperative to formulate legislative support on a national level. This would not only

[100] Patricia Louise Shaughnessy, *Chapter 32: The Ear, in* THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER 339-348 (Patricia Louise Shaughnessy & Sherlin Tung eds., 2017).

provide recognition to emergency arbitral orders/awards but wouldalso lead to speedy and seamless enforcement of the same.

B. Recognition of an EA within various jurisdictions

Different jurisdictions across the globe have accordingly treated the award/order passed by the EAr in different ways. This section seeks to shed light and draw a comparative analysis between jurisdictions where EA is either statutorily recognised or the arbitral institutions within that jurisdiction recognise it, there is another category of jurisdictions, where municipal courts have recognised and enforced EA award/orders.

i. Jurisdictions that have incorporated EA in their statutes

Singapore

The foremost example in this regard is the Singaporean International Arbitration Act, which was amended in 2012, to ensure that orders passed by an EAr are held to be legally at par with final awards as rendered by tribunals.[101] It has been done by adding Section 2(1) of the Act to include "*EAr*" in order to define "*Arbitral Tribunal*." This policy support, coupled with the institutional rules of the Singapore International Arbitration Centre, being the SIAC 2016 Rules which give the EAr the power to make any order or any kind of interim reliefthat they consider fit,[102] makes Singapore one of the jurisdictions to have accepted EA in a very efficient manner. Enforcement of emergency decisions under this piece of legislation is granted by virtue of sections 2(1) and 12(6).[103] Section 12(6) governs the interim relief made by an EAr seated in Singapore. Section 12(6) provides that "*all orders or directions—which pursuant to Section 12(1) include orders and directions on interim relief—made or given by an arbitral tribunal—thus, including an EAr, pursuant to Section 2(1)—shall, by leave of the High Court or a Judge thereof,*

101 Singapore International Arbitration Act (Cap. 143A), 1994.
102 SIAC Rules 2016, schedule 1, item 8.
103 Singapore International Arbitration Act 2012, § 2(1), 12(6).

be enforceable in the same manner as if they were orders made by a court."[104] Whereas on the other hand, section 27(1)(a) provides that the definition of "*award*" under the New York Convention includes interim orders made by a tribunal seated outside Singapore. It thereby permits foreign interim orders to be enforced as "*awards*" under the scheme of the New York Convention.[105]

The High Court of the Republic of Singapore further clarified the scope of enforcement of foreign EA awards vide its judgement in *CVG* v. *CVH*.[106] It was held that while foreign emergency awards were recognised owing to the legislative intent and scheme ofthe International Arbitration Act, 1994, the enforcement of the said award was stalled due to violation of the principles of natural justice.

Netherlands

Enforcement of interim measures issued by the EAr may also be granted under specialised legislation on the enforcement of emergency decisions. Article 1043b(2) of the Dutch Code of Civil Procedure provides for an EAr before the institution of the arbitral proceedings on merits. Pursuant to Article 1043b(4), the decision of such an EAr will be considered an arbitral award to which the municipal provisions would apply that apply to an arbitral decision rendered in the Netherlands.[107]

New Zealand

A similar provision is seen in New Zealand where Art. 2 (1) of the New Zealand Arbitration Act, 1996 was amended to bring the EAr within the ambit of the arbitral tribunal.[125] Apart fromrecognising recognising EA, the

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104 *Id.*

105 Fabio G. Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an EnforceableDecision?* 31 ARB. INT. 306, 306-310 (2015).

106 CVG v. CVH, 2022 SGHC 249.

107 Dutch Arbitration Act, Code of Civil Procedure, Book IV (1986) [Wetboek van Burgerlijke Rechtsvordering], art. 1043b.

amendment has a significant effect on the arbitration landscape of New Zealand. It has been a jurisdiction where directly approaching the courts to seek urgent relief has been encouraged. In the case of *Safe Kids* v. *McNeill*,[108] it was held that a court's power to grant interim measures was 'co-extensive' with that of the arbitrator. Also, in the case of *Discovery Geo* v. *STP. Energy Ltd*.[109] it has been upheld that *ex-parte* interim orders can be passed by courts in support of arbitration agreements. It is opined that in such a jurisdiction, EA provisions would add as a supplementing mechanism and not as an additional avenue to seek urgent interim relief per se.

Hong Kong

Hong Kong passed the Arbitration (Amendment) Ordinance, 2013 which gave the power to the Courts to grant leave to enforce decisions rendered by EA.[110] The legislation lays down a favourable regime for the enforcement of emergency decisions. Article 22(B) sets forth that any interim relief awarded by an EAr will be enforceable in Hong Kong, irrespective of the seat of the EA.[111] However, enforcement will only be allowed if the emergency decision is made temporarily and for one of the reasons listed in Article 22(B) paragraph 2 of the Ordinance if it is made outside the country.[112]

The enforcement of the relief so granted is viewed favourably both inside and outside Hong Kong.[113] At the same time a slight qualifier was based by quantifying the kinds of interim relief which could be sought, the list

108 Safe Kids v. McNeill [2012] 1 NZLR 714.

109 Discovery Geo v. STP Energy Pte Ltd [2013] 2 NZLR 122.

110 *Supra* note 93.

111 *Supra* note 93, art 22(B).

112 Fabio G. Santacroce, *The Emergency Arbitrator: A Full-Fledged Arbitrator Rendering an EnforceableDecision?*, 31 ARB. INT. 306, 306-310 (2015).

113 Haifeng Li, *First Emergency Arbitrator Proceedings in China and Enforcement in Hong Kong, 2018*, GLOBAL ARBITRATION NEWS (Oct. 09, 2018), *available at* https://globalarbitrationnews.com/first-emergency-arbitrator-proceedings-in-china-and-enforcement-in-hong- kong/.

includes—relief sought to maintain status quo, to restrain from actions which may cause any prejudice or harm to the arbitral process, preservation, security for costs, etc.[114] The qualifier list is by itself broad and at the same time gives some indications of how national legislations are proceeding with respect to enforcement on a cross-jurisdictional scale.

Bolivia

Bolivia, by amending the Bolivian Conciliation & Arbitration Law, 1997, has incorporated EA into their legislative frameworks.[115] The major feature that the amendment provides for is that if there is a need for further assistance in enforcing an EA award, then judicial assistance will be provided by a competent judge who would issue a compliance order within a span of three days from the date of decision notification by the respective arbitral institution.[116] It is imperative to note that the competent judge can only review whether the decision so given conforms to the following rules of public order: that it may only affect the rights of the goods,rights and obligations of the parties, and that a request for arbitration must be filed within fifteen days of the interim order.[117]

This becomes one of the most important developments in moving towards a policy-based approach where apart from widespread acceptance, the Courts have the power to enforce such awards.

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114 *Id.*

115 Bolivian Conciliation and Arbitration Law no 708, Art. 67–71.

116 Bolivian Conciliation and Arbitration Law no 708, Art. 71(II).

117 SAI RAMANI GARIMELLA & POOMINTR SOOKSRIPAISARNKIT, 60 YEARS OF THE NEW YORK CONVENTION KEY ISSUES AND FUTURE CHALLENGES, CHAPTER 5 EMERGENCY ARBITRATOR AWARDS: ADDRESSING ENFORCEABILITY CONCERNS THROUGH NATIONAL LAW AND THE NEW YORK CONVENTION, 73 (Kluwer Law International, 2019).

ii. Jurisdictions which have developed jurisprudence around EA vide Court decisions.

USA

Another prong to the various approaches developed can be seen in the US where no express legislation has been passed in favour of making EA decisions enforceable. However, favourable judicial pronouncements have been given.

In the case of *Rocky Mt. Biologicals Inc. and Skyway Purified Solutions Inc.* v. *Microbix Biosystems Inc. and Irvine Scientific Sales Company Inc.*,[118] the Court had refused to set aside an EAr's award by giving a pro-arbitration approach that the parties had decided to resolve disputes via arbitration and therefore there should be minimum interference by the courts. Subsequently, in the case of *Sharp Corporation and Sharp Electronics Corporation* v. *Hisense USA Corporation and Hisense International (Hong Kong) America Investment Co.*,[119] the Court refused to revisit the merits of a decision rendered by an EAr. These developments indicate that the US landscape looks favourably upon the finality of the decision given by an EAr.

In the case of *Yahoo!* v. *Microsoft Corp.*,[120] it was held by the Southern District of New York that a decision by an EAr under the AAA-ICDR Rules was valid. It was enunciated that[121] "*if an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made*."

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118 Rocky Mt. Biologicals Inc. and Skyway Purified Solutions Inc. v. Microbix Biosystems Inc. and Irvine Scientific Sales Company Inc. 986 F. Supp. 2d 1187 (D. Mont.2013).

119 Sharp Corporation and Sharp Electronics Corporation v. Hisense USA Corporation and Hisense International(Hong Kong) America Investment Co. 292 F. Supp. 3d 157 (DC 2017).

120 Yahoo! Inc. v Microsoft Corp [2013] 983 F Supp 2d 310.

121 Yahoo! Inc. v Microsoft Corp [2013] 983 F Supp 2d 310, 319.

From the various jurisdictions favouring EA, the following principles in support of a policy- based approach can be extracted –

1. The decision rendered by an EAr may be considered on the same pedestal as that of a Court order for purposes of enforcement.

2. Additionally, judicial assistance may be granted to enforce awards made in an EAr inorder to ensure speedy access to justice and compliance with the decision.

3. Avoidance of irreparable harm, maintenance of status quo and preservation are important factors to be considered while making an EA award enforceable.

India

India appears to be a jurisdiction, which lacks any significant legislative development pertaining to EA. However, lately, this mechanism has been accepted by the courts. The Supreme Court, in *Avitel Post Studioz* [122] upheld the award passed by the EAr for an arbitration seated in Singapore. Thereafter, a transcendent development of EA in India was seen in *Amazon.Com NV Investment Holdings Llc* v. *Future Retail Ltd. & Ors*,[123] wherein the SCI, while setting aside the judgement of the Division Bench of the Delhi High Court, stated that a party after agreeing to be governed by the institutional rules of an Arbitration Centre and participating in the EA proceedings, after losing cannot turn around and claim the award to be a nullity or *coram non judice*. Additionally, Section 17 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] only refers to interim measures or provisional measures.[124] There is no clear distinction of whether the

[122] Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings (Mauritius) Limited, 2020 SCC OnLine SC 656.

[123] Amazon.Com NV Investment Holdings LLC v. Future Retail Ltd. & Ors, (2022) 1 SCC 209.

[124] Arbitration and Conciliation Act, No. 26 of 1994, §17(2).

measures are to be made in the form or orders, awards or otherwise. The SCI stated that the parties are granted complete autonomy by the Arbitration Act to have a dispute decided in line with the institutional rules. This includes the EAr delivering 'interim' orders described as awards. Such orders, can be enforced under the provisions of Section 17(2) of the Arbitration Act and accordingly, the court opined the following:

> "*The Delhi High Court judgment in Raffles Design International (India) (P) Ltd. v. Educomp Professional Education Ltd. dealt with an award by an EAr in an arbitration seated outside India (as was mentioned in the Srikrishna Committee Report). What is of significance is that the said Report laid down that it is possible to interpret Section 17(2) of the Act to enforce Emergency Awards for arbitrations seated in India, and recommended that the Act be amended only so that it comes in line with international practice in favour of recognising and enforcing an emergency award.*"[125]

A legislative way to incorporate EAr in the municipal legislation i.e., the Arbitration Act was suggested by the Report of the 246th Law Commission of India by amending section 2(1)(d) to include EAr within its purview.[126] The consequence of the same would be statutory support for a decision by the EAr through the local legislation and not the *lex arbitri*.

However, the Court was conscious of the legal position that under Part II of the Arbitration Act, interim orders could not be enforced. Furthermore, the Court ruled that the parties had to rely on section 9 of the Arbitration Act in order to execute the EAr's ruling since Section 17 could not be applied in an arbitration with a foreign seat. This was on account of the scheme of the Arbitration Act that creates different regimes for India-seated and foreign-seated arbitrations—and not because the order was an order of an EAr. Thus, by implication, the Court equated the order of a foreign-seated EAr with interim measures of a foreign-seated arbitral

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125 Raffles Design v. Educomp, (2016) SCC Online Del 5521.

126 LAW COMMISSION OF INDIA, GOV'T OF IND., REPORT NO. 246 (2014).

tribunal. Thereafter, in *Ashwani* Minda v. *U-Shin*, which was seated in Japan, the Delhi High Court observed that the order passed by an EAr had the same character as an interim order passed by an arbitral tribunal, and in terms of Section 9(3) of the Arbitration Act, a court ought not to intervene if an EAr has already been appointed.[127] This finding was not interfered with by the Division Bench of the Delhi High Court. Importantly, the Division Bench also held that having failed to obtain relief from the EAr, a party could not maintain an application under Section 9 of the Arbitration Act seeking the same relief before a court. Thus, the Division Bench impliedly recognised that the forum of an EAr would serve as an alternate forum to proceedings before national courts under Section 9.

Germany

In Germany, neither the arbitration law nor the German Arbitration Institute [**"DIS"**] Sports Arbitration Rules, 2016 ["**DIS Rules**"] explicitly provide for EA. Although Section 20 of the DIS Rules empowers parties to opt for an arbitrator prior to the constitution of a tribunal.[128]

This, however, does not imply the nullity of EA within the jurisdiction. The Bavarian higher regional court,[129] stated that if the parties had agreed to DIS rules, a tribunal is authorised to order protective measures through interim relief as per Article 25 of the DIS rules. Additionally, it was held that, provided that the protective measure issued by the arbitral tribunal is within the scope of what the court could order, a closer control of the same by the courts is not required.

United Kingdom

127 Ashwani Minda v. U-Shin Limited, (2020) SCC Online Del 721.

128 DIS Sports Arbitration Rules, 2016 (Germany). *Available at* https://www.dis-sportschiedsgericht.de/en/tools-resources/sport-arbitration-rules.

129 BayObLG, Beschluss v. 18.08.2020 – 1 Sch 93/20 (Germany).

The final jurisdiction to be considered in this regard, which represents an amalgamation of thevarious approaches is that of United Kingdom ["**UK**"]. No specific legislation has been passed in favour of EA even though the LCIA has several provisions for the same.

Currently, the British Arbitration Act states that any party seeking urgent relief can approach the Courts for urgent measures and the Courts can subsequently pass orders when it comes with regard to the preservation of assets or evidence.[130] A qualifier to the same exists in Section 44(5) of the British Arbitration Act where it is stated that the power of the courts can only be invoked when the tribunal lacks the same.[131]

The distinction between Section 37 of the Senior Courts Act and Section 44 of the British Arbitration Act was brought into the limelight in *AES Ust Kamenogorsk* v. *Ust Kamenogosk Hydropower Plan*.[132] The Court here observed that arbitration agreements contained both positive and negative obligations. The positive obligation was to seek relief through arbitral proceedings. The negative obligation is to refrain from seeking a relief from alternate forums such as courts. While looking at the distinction between the two provisions, the Court held that the British Arbitration Act did not restrict the court's powers under the Senior Courts Act. In this regard, it was opined that in situations where Section 44 would be applicable, it would be principally wrong to apply section 37 of the Senior Courts Act. Thus, in a situation where the arbitration had already commenced or was close to commencement and a remedy was required for which there was no urgency, it would be wrong for the court to intervene under Section 37 of the Senior Courts Act. However, in a situation where there is no *'arbitration in being and none realistically in prospect'*, Section 44 is not applicable.[133] Thus, it could be concluded that for cases outside the scope of Section 44 of the Arbitration

130 The Arbitration Act, 1996 §44(3) (Eng.).
131 The Arbitration Act, 1996 §44(5) (Eng.).
132 AES Ust Kamenogorsk v. Ust Kamenogosk Hydropower Plan 2013 UK SC 35.
133 English Arbitration Act, 1996, §44 (Eng.).

Act, courts could intervene under Section 37 of the Senior Courts Act. When parties apply to national courts for interim relief, they may face concerns such as unfavorable jurisdiction, delay in court proceedings, etc. Beyond courts, in arbitrations (before EA) interim relief could be sought only after the Tribunal had been constituted which may be delayed owing to dilatory tactics, etc. However, EA provides an avenue to avoid these hindrances and ensure speedy and efficient dispute resolution.

The Law Commission observed that under Section 44 (5) of the Arbitration Act, majority of the consultees held the opinion that under Section 44 (4) a court cannot be said to be trespassing unless permitted by the tribunal or the agreement of the parties to approach the court for the interim measure.[134]

In the specific case of extreme urgency or necessity, the court could intervene in order to preserve evidence or assets and restore the status quo. This would not involve decision-making which is a role specifically of the arbitral tribunal. These include instances when the urgency overrides the time period of the EAr provisions. It has also been argued that if Section 44(5) is removed, it would invite a greater court intervention and that the section serves the purpose of setting out the prevailing position with regard to the relationship between the court and the tribunal. It is argued that Section 44 already allows an arbitral party to apply to the court, even when the EA provisions have been agreed to. And hence, for the above-mentioned reasons, the repeal or amendment of Section 44(5) would not be required.

A major case concerning EA appears to be that of *Gerald Metals SA* v. *Timi,*[135] where it was held that the EAr does have the power to grant relief subject to the fact that the arbitration agreement contains a clause for the same and there is sufficient time for the parties to invoke and seek relief via

134 LAW COMMISSION, REVIEW OF THE ARBITRATION ACT 1996: FINAL REPORT AND BILL, 2023, HC 1787 (UK).

135 Gerald Metals SA v. Timis [2016] 2327 (EWHC) (Ch).

the route. The problematic part of the judgment was that it also held that courts do not have the power to grant urgent interim relief. This raised a fundamental problem with respect to party autonomy to choose the forum of their choice even in light of an arbitration agreement.

The position was further elaborated upon in the case of *ZCCM Investments Holdings* v. *Kanasanshi Holdings Plc & Anr.*[136] The position brought forth in this case, was similar to French law, in that the Court held that the substance of the decision apart from the form will be looked at to determine whether the decision of an Ear will be considered to be an award or not.

The pro-arbitration approach of English courts continued in the case of *Schillings International LLP* v. *Christopher Howard Scott*[137] where the urgency of the interim relief was considered by the courts. The deputy judge held that an absence of urgency, alone would be fatal to an interimrelief application. The materials which the claimant sought to recover could be sought through arbitration as well. The judge found a lack of necessity for the courts to step in. Additionally, it was also opined that "*it is for the arbitral tribunal to decide what documentation and information should be provided and he will have to take into account the necessity for any information sought….it would be inappropriate for the court to step into that domain*"[138]

In the recent case of *SRS Middle East* v. *Chemie Tech*,[139] the English Commercial Court, relied on the cases of *Kallang No. 2*,[140] *Sam Purpose*[141] and *Angelic Grace*,[142] to refuse injunctive relief. The Court held that while there

136 ZCCM Investments Holdings v. Kanasanshi Holdings Plc & Anr. [2019] 1285 (EWHC Comm).

137 Schillings International LLP v. Christopher Howard Scott [2019] EWHC 1335 (Ch*).*

138 *Id.* ¶42.

139 SRS Middle East FZE v. Chemie Tech DMCC [2020] EWHC 2904 (Comm).

140 Kallang Shipping v. Axa Assurances and Comptoir Commercial Mandiaye Ndiaya [2008] EWHC 2761 (Comm).

141 Sam Purpose AS v. Transnav Purpose Navigation Ltd [2017] EWHC 719 (Comm).

142 Kompozit LLC v. Republic of Moldova, Stockholm Chamber of Commerce Arbitration No. 2016/095.

exists wide and general wording on the type of interim relief that can be sought, this cannot be read as permitting relief which requires a final determination of the merits of the case.[143] Such provisional measures would be seen as a breach of the arbitration agreement.

The English approach of having no specific legislation but at the same time, taking into account that the decision by an EAr is valid as long as it is practically within the powers of the arbitrator making it is also a major factor that furthers the argument for a policy-based approach, which would also avoid such a problem at all levels.

Finally, it is also noted that none of the jurisdictions have raised a question on the competence of an EAr. Therefore, it is not that the idea of an EAr is completely rejected in such jurisdictions and that an EAr cannot outright have the powers of an arbitral tribunal.

iii. Jurisdictions which do not recognise Emergency Arbitration

Most jurisdictions that do not accept EA are the ones that reject the enforcement of interim measures. Many of them propagate the requirement that only final awards as opposed to interimawards are enforceable.

An example of the same appears to be Sweden where interim measures themselves are not considered enforceable.[144] Similarly in Australia, it has been confirmed by the Supreme Court that an interlocutory order would not be considered as an enforceable award. It was stated that, "an award which has determined some or all of the issues submitted to the arbitrator for determination, rather than to an interlocutory order."[145]

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143 Kompozit LLC v. Republic of Moldova, Stockholm Chamber of Commerce Arbitration No. 2016/095, ¶44.

144 P SHAUGHNESSY, INTERIM MEASURES' IN EDS U FRANKE AND A MAGNUSSON, INTERNATIONAL ARBITRATION IN SWEDEN: A PRACTITIONER'S GUIDE (Kluwer Law International 2013).

145 Re Resort Condominiums (1993) 118 ALR 655.

A somewhat unique approach is seen under French law, where all tribunal decisions that qualify as awards are considered enforceable by the Courts. The definition of an award however in this context as brought forth by the case of *Groupe Antoine Tabet* v. *République du Congo*[146] was, "resolve in a definitive manner all or part of the dispute that is submitted to them on the merits, jurisdiction or a procedural matter which leads them to put an end to the proceedings."

This definition restricts EA awards as they are provisional in nature and can be further adjudicated and altered by the tribunal. However, this approach of seeing the substance of the award is a facet which can lead many jurisdictions to decide in favour of EA as the substance of an EA award, many times, does involve a determination of the rights of the parties.

C. Enforcing EA awards/orders:

In the practical realm, two situations arise with respect to enforcing an EAr's award/order for interim relief; the first is when the EAr is constituted in the same jurisdiction where the execution of the same is sought and the other is where the constitution of the EAr is constituted in a foreign seat to the execution of the interim relief rendered by the award/order of the EAr. With regard to the first scenario, the execution can be done in accordance with the municipal laws. The same can be evidenced through section 12(6) of the IAA, Singapore.

On the other hand, the enforcement of the interim relief rendered in the second situation is trickier. Article 17H and 17I of the UNCITRAL Model Law provide for enforcement of interim relief even by a foreign seated arbitral tribunal through an application to the competent court.[147] Article 17H(1) gives such awards/orders a binding nature. A similar understanding can be evidenced by section 27(1)(a) of the IAA, Singapore as explained

146 Groupe Antoine Tabet v. République du Congo [12 Oct. 2011] Cass Civ 1e nos 09-72, 439.

147 The UNCITRAL Model Law, 2006, Art 17H & 17I.

above. Even Galliard concurs with such understanding while using Article 54 paragraph 3 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States which provides that the execution of an award shall be governed by the laws concerning the execution of judgements in force in the state in whose territories such execution is sought.[148] Being made subject to Article 17I means that the measure must be enforced, unless there are reasonable grounds for its non-enforcement, as set forth in Article 36.[149] Those grounds for non-enforcement are essentially the same grounds that are set forth in the New York Convention. The Model Law, however, avoids any need to establish whether the interim measure is an order or a final award. If the measure fits the Model Law definition of "*interim measure*," then it is binding, and a court in a country that has adopted this provision of the Model Law should enforce it.[150]

IV. Conclusion

EA has been used around the globe as a means to gain urgent interim relief prior to the constitution of arbitral tribunals. An analysis of multiple jurisdictions has showcased that while the mechanism has been used in principle and vide institutional rules, there is a significant lack of legislative support and recognition. Despite the substantial paucity of legislative reforms in favour of EA, the Courts in common law and civil law jurisdictions alike have strived to enforce EAr decisions within their respective jurisdictions. It is also noted that even in the jurisdictions that oppose EA, there exists a lot of ambiguity with regard to enforcement of such decisions. The approach of looking at the substance and not only at

148 GALLIARD GOLDMAN, INTERNATION COMMERCIAL ARBITRATION (Kluwer Law, 1999).
149 The UNCITRAL Model Law, 2006, Art 17I.
150 MOSES, M.L. THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 107 (Cambridge University Press, 3rd ed. 2017).

the form of the decision would render multiple EA decisions as enforceable awards under such jurisdictions.

While the persistent judicial support has engendered enforceability to/enforcement of many EAr decisions, negligible legislative support has markedly delayed the enforcement of such decisions thereby negating the purposes for which the decisions were delivered i.e. interim relief and/or speedy interim resolution. Thus, a policy-based approach appears to be essential in order to ensure that urgent interim relief measures are met in a timely manner as they create a backdrop for enforcement of such decisions without any hindrance.