EMERGENCY ARBITRATION: INDIAN PROSPECTS

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1. CONCEPTUAL INTRODUCTION

Emergency Arbitration, as a mode of resolution of disputes that arise, has the same characteristics and procedures just like a normal arbitral proceeding. What is of pivotal difference here is that of finality, that is to say, in case of emergency arbitration, the relief given to a party is an interim relief to cater the needs of the moment and *may* not be final. This is under the genesis of this emerging mode of dispute resolution. The scope of the paper is to discuss this new concept and its prospects in India *vis-à-vis* the Arbitration Amendment Act of 2015.

An emergency arbitration provides a degree of enabling power to the parties in dispute to approach a neutral person much before an arbitral tribunal is formed according to the requirements of their contract.[1] This emergency relief so claimed

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[1] Guillaume Lemenez and Paul Quigley, The ICDR's Emergency Arbitrator Emergency Arbitrator Procedure in Action, ICDR, available at https://www.icdr.org/icdr/ShowPDF?doc=ADRSTG_004356 (last accessed, 02.12.2016).

effects a smooth transition of the business between the parties for the brief time period on the merits of the case. So how this process actually arises, may be a prospective question. There are situations in a business transactions, specially international sales transaction, whereby a party might want to hold on to the property in dispute or to apply for other ancillary interim reliefs such as injunctions, etc., the necessity of which is of prime importance at that moment. Where the official appointment of arbitrator, as according to the terms of the arbitration agreement or through the institutional rules, may take some time, an emergency arbitration fills such gap. Normally, if we rule out the existence of this mode then, the only remedy available would be to apply for interim relief to the Court under Section 9 of the Arbitration and Conciliation Act, 1996 ("1996 Act"). However, the omnipresent drawback with the application to Court is the time consuming mode and overdue-long process, which itself defeats the very purpose of having arbitration as the mode of dispute resolution.[2] Such an arrangement of interim resolution is likely to have been already agreed to by the parties to the contract.

[2] Madhu Sweta and Kanika Tandon, Emergency Arbitration In India: Concept And Beginning, Mondaq, available at http://www.mondaq.com/india/x/547970/trials+appeals+compensation/Emergency+Arbitration+In+India+Concept+And+Beginning (last accessed 02.12.2016).

The nature of this concept of dispute resolution lies in the stage of its implementation, that is, an emergency arbitration is a "pre-arbitration" resolution which is performed before the constitution of the designated arbitral tribunal or panel, as the case may be depending on the arbitration agreement.[3] Despite such pro-arbitration and private resolution mechanism, emergency arbitration does not find a "relevant" place in the Indian jurisdiction, despite the legislature's intent of glamorizing arbitration as the preferred mode of investment dispute resolution. However, this does not preclude the institutions of arbitration from incorporating such measure in their own rules. This shall be discussed in later sections of the paper. The aim of this paper is to delve into the conceptual understanding of this rising facet of arbitration and to look towards its prospects in Indian scenario given the recent Arbitration Amendment Act of 2015.

Although the benefits of an emergency arbitration may seem appalling, but regretfully, there are certain jurisdictions across the world which do not recognize the arbitrator's interim measures' power to cater the emergency needs of the parties making it difficult for the parties of that country to resort to

[3] Guillaume Lemenez and Paul Quigley, supra note 3.

international commercial arbitration.[4] This is, however, not to say that emergency arbitration is a new concept, the rules of which are emerging only now. There have been designated institutions such as the International Chamber of Commerce ("ICC") which has Pre-Arbitral Referee Procedure.

2. INSTITUTIONAL REFERENCES

As has already been discussed, there have been institutions which had already adopted or incorporated designated rules pertaining to emergency arbitration much before it came to be incorporated into the black letters. In the year 1990, the ICC has published its Pre-Arbitral Refree Procedure. A glance at the Article 6 of the ICC Rules of Arbitration, Appendix V, will provide an outline of emergency arbitration. The said article says:

"Article 6: Order

1) Pursuant to Article 29(2) of the Rules, the emergency arbitrator's decision shall take the form of an order (the "Order").

2) In the Order, the emergency arbitrator shall determine whether the Application is admissible pursuant to Article 29(1)

[4] Lawrence W. Newman – Colin Ong (ed.), Interim Measures in International Arbitration, 2014, at 169, 215-216, 438, 447-450.

of the Rules and whether the emergency arbitrator has jurisdiction to order Emergency Measures.

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6) The Order shall cease to be binding on the parties upon:
a) the President's termination of the emergency arbitrator proceedings pursuant to Article 1(6) of this Appendix;
b) the acceptance by the Court of a challenge against the emergency arbitrator pursuant to Article 3 of this Appendix;
c) the arbitral tribunal's final award, unless the arbitral tribunal expressly decides otherwise; or
d) the withdrawal of all claims or the termination of the arbitration before the rendering of a final award.

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The above-cited article establishes the nature of an emergency arbitration proceedings i.e., such proceedings' interim relief(s) is considered to be an Order for the purpose of the dispute and that, where the arbitral tribunal, when formed post emergency arbitration proceedings, thinks fit, *may* give finality to such interim order passed in the emergency arbitration.

Along the lines, the International Centre for Dispute Resolution ("ICDR") also provides, under its own rules, measures furthering emergency arbitration to cater immediate needs of the parties. Article 37 of the International Arbitration Rules

incorporates the principle of emergency arbitration. There is no requirement for a formal hearing and the arbitrator has the power to "order or award any interim or conservancy measure … including injunctive relief and measures for the protection or conservation of property."[5] Such interim or conservancy measure can range from interim awards or an order.[6]Apart from such interim measures, the Article also vests with the emergency arbitrator, powers to decide its own jurisdictional issues such as the one of arbitrability of the subject matter.[7]

Similarly, Singapore International Arbitration Centre ("SIAC") also gives the parties the availability of following an expedited relief mechanism. As the SIAC Rules *(updated from time to time)* state that, "an arbitral tribunal may, at the request of a party issue an order or an award granting an injunction or any other interim relief it deems appropriate".[8]It was in 2010 when SIAC also introduced similar provisions relating to emergency

[5] Article 37 of the International Arbitration Rules, 2006.

[6] Raja Bose and Ian Meredith, Emergency Arbitration Procedures: A Comparative Analysis, International Arbitration Law Review, [2012] Int.A.L.R., Issue 5, Page 191.

[7] Arbitrability of subject matter entails a phenomenon of "competence" of an arbitrator to be capable of resolving the disputes which are, by their very nature, can only be resolved by the state Courts. Such disputes may be range from banking matters to criminal cases, etc. Given their very nature, such cases are outside the competence of arbitration as a whole.

[8] Rule 26.1 of the SIAC Rules, 2013. Refer to http://siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience (last accessed, 04.12.2016).

arbitration. A SIAC emergency arbitrator enjoys the same powers as a normal arbitral tribunal, just like every other emergency arbitrator across other international institutions.[9] Unless parties agree, an emergency arbitrator cannot form part of the main tribunal. The order or award of an emergency arbitrator ceases to have effect if a tribunal is not constituted within 90 days.[10]

The presence of such provisions does not only exist outside India but also at the arbitral institutions in India. For instance, the Delhi High Court's Delhi International Arbitration Centre, New Delhi ("DAC"), also serves the needs of interim reliefs sought by the parties to an arbitration agreement. Part III-A i.e. Emergency Arbitration's sole section, Section 18A of the Arbitration Rules provides that every such emergency arbitration proceedings shall be completed within a period of seven days. This actually furthers the very purpose of having emergency arbitration in the first place.[11] As against the operative part of 90 days of the Order passed by an emergency

[9] Schedule 1 to SIAC Rules, 2013.

[10] *Supra note* 8. Also available at http://siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience (last accessed, 04.12.2016).

[11] Section 18 A (6) of the Delhi International Arbitration Centre (Arbitration Proceedings) Rules ("DAC Rules") available at http://www.dacdelhi.org/topics.aspx?mid=55#19._Interim_measures_ordered_by_Arbitral_Tribunal (last accessed, 04.12.2016).

arbitrator in case of SIAC, the DAC Rules, on the other hand, provide that the Order/interim relief so passed by an emergency arbitrator will be operative for a period of two months.[12]The Rules also lay down that the Order of the arbitrator so passed will not bind the Arbitral Tribunal, thereby ruling out the opportunity of finality in any sense, as compared to what has been enshrined under the ICC Rules discussed in the second paragraph of this section.

The Mumbai Centre for International Arbitration ("MCIA") is also a viable option for the parties pursuing this mode of arbitration. According to the Rules of the MCIA, the matter sought before an arbitrator is to be decided within a period of 14 days which may be extended contingent upon agreement of all the parties involved.[13] Most importantly, according to Rule 14.7 of the MCIA Rules, "an order or an award of an Emergency Arbitrator shall comply with Rule 30.7 and, when made, shall take effect as an Award under Rule 30.12." This provision, as against the rules of other institutions providing emergency arbitration, escalates the interim order to the status of an Award when the conditions so specified by the other rules mentioned are complied with. As being one of the most liberal rules

[12] Section 18A(9) of the DAC Rules.

[13] Rule 14.6 of the MCIA Rules, 2016 available at http://mcia.org.in/mcia-rules/english-pdf/#mcia_rule14 (last accessed, 05.12.2016).

enhancing emergency arbitration, the Rules give enough power to the emergency arbitrator "to decide as to in what manner will these Rules apply as appropriate, and his decision in such matters *is* final and binding on the parties, subject to Rule 14.9."[14]

So far, we have discussed relevant rules encompassing emergency arbitration across five arbitral institutions. Among these, the MCIA Rules are the one which have given much power, not only to the parties, but also to the arbitrators carrying out the emergency arbitration proceedings.

As these rules do not have the force of a statute, it is, therefore, imperative that such furthering provisions be recognised by the legislature in the relevant statute of the country. What follows is the next section which discusses the status of emergency arbitration under the Indian law and compares it with the other jurisdictions which have incorporated this mode in their law.

3. STATUS UNDER THE INDIAN LAW

As has already been stated earlier, the Indian law does not expressly recognise the emergency arbitration under its Arbitration and Conciliation Act, 1996 ("1996 Act"). But before we delve into such lacuna, it is imperative that we look on the

[14] Rule 14.12 of the MCIA Rules, 2016.

nature of the award involved in emergency arbitration. Since the relief so claimed under an emergency arbitration is of interim nature, the 1996 Act's definition of 'arbitral award' extends to include interim relief award.[15] Also, at first, it may appear that the 1996 Act also recognises the emergency arbitration awards, however, it recognises the interim order making power of the 'Tribunal' and not the arbitrator who is appointed before the formation of the tribunal.[16] This means, where an interim measure of protection is ordered by the Arbitral Tribunal, it will be deemed as an award, under Section 2(1)(c) of the 1996 Act. However, such power of the Arbitral Tribunal will only be limited to the orders made *during or after* the formation of the Arbitral Tribunal.[17] This position has further been intensified by the Arbitration (Amendment) Act of 2015, which will be discussed in later paragraphs. Towards this reference, the Supreme Court of India in *Firm Ashok Traders v. Gurumukh Das Saluja*[18] had pointed out the fact that, "the arbitral tribunal is empowered by Section 17 of the 1996 Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that, Section 17 would operate only during the existence of the arbitral and when it is

[15] Section 2 (1) (c) of the 1996 Act.
[16] Section 17 of the 1996 Act.
[17] Section 10 of the Arbitration and Conciliation (Amendment) Act, 2015.
[18] Ashok Traders v. Gurumukh Das Saluja, (2004) 3 SCC 155 at ¶18.

being functional. During that period, the power conferred on the arbitral tribunal under Section 17 and the power conferred by the Court under Section 9 may overlap to some extent but so far as the period pre and post the arbitral proceedings is concerned the party requiring an interim measures of protection shall have to approach only the Court."

Going on the same lines, the Supreme Court had earlier also held that, "Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned Arbitrator, therefore, being *coram non judice* was wholly without jurisdiction and, thus, a nullity."[19] Such positions, as enumerated above by the two decisions by the Supreme Court of India clearly reflect that, under the Indian law, the position of interim award or interim order making power of an arbitrator/arbitral tribunal is restricted for "during the pendency" of the arbitration proceedings before the tribunal.

The position so shown in the last two paragraphs is limited to the extent of recognition of interim award or interim order making power of an arbitrator. It does not include the status of Indian law with regards to the recognition of emergency

[19] M.D., Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619.

arbitration proceedings resorted to by the parties. We, therefore, for a better understanding, move to the second part of this section, i.e. emergency arbitration proceedings' recognition by the judiciary of India.

Since the Indian law does not accommodate emergency arbitration's award, and since such position is not expressly stated by the Legislature, it is incumbent to refer to the decision of Indian courts to get a fairer picture. The Delhi High Court in a a very recent case, delivered on 07.10.2016, *Raffles Design International India Pvt. Ltd. and Anr. v. Educomp Professional Education Ltd. and Ors.,*[20]emerged as a saviour for the parties by recognising the award that was passed by the emergency arbitrator at SIAC. The dispute between the parties at the Court concerned with the maintainability of the petition filed by the petitioners, Raffles Design Pvt. Ltd. and Anr., under Section 9 of the 1996 Act. The respondents had contended the maintainability on the grounds, *inter alia,* that, the emergency arbitrator's award so passed will not be applicable in India and that, such measure would be to defeat the role of Section 9 of the 1996 Act. Both of these rested on the premise of applicability of Section 9 of the 1996 Act in a foreign seated arbitration, given

[20] Raffles Design International India Pvt. Ltd. and Anr. v. Educomp Professional Education Ltd. and Ors, O.M.P.(I) (COMM.) 23/2015 & CCP(O) 59/2016, IA Nos.25949/2015 & 2179/2016.

the tussle between the *Bharat Aluminium Co. v. Kaiser Aluminum Technical Services*[21]and the Amendment Act of 2015. The Court ultimately concluded with the applicability of the Amendment Act of 2015 and therefore, established the applicability of Section 9 of the 1996 Act to this case. However, the reference point for the purpose of this paper is of the enforcement of the 'interim award' passed by the emergency arbitrator at SIAC. We may refer to the quoted lines of the judgement below:

"95. The SIAC Rules are clearly in conformity with the UNCITRAL Model Law and permit the parties to approach the Court for interim relief. .... Thus, the inescapable conclusion is that since the parties had agreed that the arbitration be conducted as per SIAC Rules, they had impliedly agreed that it would not be incompatible for them to approach the Courts for interim relief.

97. The only question that now remains to be considered is whether the petitioner can approach this Court for an interim relief considering that it has already approached the Arbitral Tribunal in Singapore and thereafter, also obtained a judgment in terms of the interim order from the Singapore High Court.

[21] Bharat Aluminium Co v. Kaiser Aluminium Technical. Services Inc. (2012) 9 SCC 552.

98. It is relevant to mention that Article 17H of the UNCITRAL Model Law contains express provisions for enforcement of interim measures. However the Act does not contain any provision pari materia to Article 17H for enforcement of interim orders granted by an Arbitral Tribunal outside the India. Section 17 of the Act is clearly not applicable in respect of arbitral proceedings held outside India.

99. In the circumstances, the emergency award passed by the Arbitral Tribunal cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit.

100. However, in my view, a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. ... Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted.

101. ... a Court while examining a similar relief under Section 9 of the Act would be unfettered by the findings or the view of the Arbitral Tribunal."

The Raffles case clearly solved the problem of the applicability of Section 9 of the 1996 Act, however, it does inexplicably

diminishes the opportunity of directly enforcing the interim award of the emergency arbitrator. For the purpose of enforcing the interim award of the emergency arbitrator, another suit is to be filed by the applicant so that the Court would pass interim relief along the same lines as those of arbitrator. It also may be that, the Court *might* not do so and may advance a differing interim award to that of what was passed by the emergency arbitrator. This interpretation follows directly from the paragraphs 100 and 101 of the above-referred judgement. Although there has been no concrete determination of this issue by the Indian judiciary, given the fact that the Supreme Court has not considered this point till now, nevertheless, reference could still be made to another celebrated judgement of the Bombay High Court, *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd &Ors.*,[22]in which, the High Court, considering the existence of an interim order passed by an emergency arbitrator, had passed its own order along the same lines.[23] In this case, the emergency arbitrator, appointed by SIAC, has passed an interim award freezing the assets of the respondents, i.e., Avitel Post Studios Ltd. and Ors., and they

[22] Arbitration Petition No. 1062/2012 (Bom).

[23] KC Lye and Samuel Leong, Emergency Arbitrators in Singapore, International Arbitration Report 2014, Issue 3, available at http://www.nortonrosefulbright.com/files/20141002-emergency-arbitrators-in-singapore-121534.pdf (last accessed, 07.12.2016).

were also not allowed to withdraw money from their bank accounts. As such, the contentions of the respondents rested on the maintainability and enforcement of the interim award passed by the emergency arbitrator. Towards the end, the High Court said that the petition was not for enforcement under Section 9 of the 1996 Act. For our purpose, the relevant paragraph of the judgement is:

"89. … in my view, since present application filed under section 9 of the Arbitration Act by the petitioner is not for enforcement of the interim award or jurisdictional award rendered by the arbitral tribunal but the petitioner seeks interim measures against the respondents, independently, parties by agreement having excluded the applicability of Part I of the Arbitration Act except section 9, the petitioner is thus entitled to invoke section 9 for interim measures. In my view petitioner has not bypassed any mandatory conditions of enforceability required by section 48 of the Act."

Through this case also, it is clear that the High Courts do recognise the interim award making power of the arbitrators located in different jurisdictions. However, the problem of independent action to be filed, besides already having pursued an emergency arbitration, accumulates the burden on the parties. This is because, from the reading of the Delhi High Court's judgement of *Raffles case*, andof the Bombay High Court's

judgement of *HSBC case*, there has to be an independent action which will have to be maintained at the national Courts. Here comes the stark difference of the benefits as to the recognition and enforcement of the emergency arbitration awards. This is what the following section discusses, i.e., the status of other jurisdictions and the approach their courts follow in reference to emergency arbitration.

4. STATUS UNDER OTHER JURISDICTIONS

After going through the two most important judgements of the High Courts in India, it is now appropriate that we look beyond the Indian jurisdiction so as to understand the gaps that the Indian law should cover for the purpose of developing a 'pro-arbitration' standard in India. In the first sub-part, we will look into the English law, thereafter, under the second part, Singapore's law, the country known as the arbitration-hub.

Under the United Kingdom's Arbitration Act of 1996[24] ("UK Arbitration Act"), the Courts have the power to enforce the peremptory order passed by the arbitral tribunal.[25]Under section 44 of the UK Arbitration Act, the Court further has the power to

[24] Arbitration Act, 1996 available at http://www.legislation.gov.uk/ukpga/1996/23/contents (last accessed, 09.12.2016).

[25] Section 42 of the UK Arbitration Act.

grant an urgent relief to the parties, as the case may arise. The relevant section is produced below:

"(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."[26]

The above-cited provision is limited by the next two sub-sections which are produced below:

"(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order."

Sub-section (5) provides powers of urgent relief making to the Court 'only' if the arbitral tribunal or any 'person' so conferred with such power is unable to deliver such urgent relief that is sought by the parties. This 'pro-arbitration' sub-section in ab

[26] Section 44(3) of the UK Arbitration Act.

Arbitration Act furthers the standards of the arbitration, because here, the Legislation itself puts an arbitral tribunal or any other person (for example, emergency arbitrator) at a superior level to that of the national Courts. Further, when we see sub-section (6) so produced above, the position described above of superiority is further enhanced.

Interpreting the above section, the High Court of England and Wales, in a very recent case of *Gerald Metals SA v. Timis*[27] the judgement of which was delivered in September, 2016, the High Court refused to interfere in the proceedings upon the application of the claimant herein, Gerald Metals SA. The Court held, inter alia, that:

"Accordingly, it is only in cases where those powers, as well as the powers of a tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the court may act under section 44."

The Court, while interpreting the London Court of International Arbitration Rules ("LCIA Rules"), highlighted the limited role of the Courts in an arbitration proceedings, whatever the stage they might be at. This decision is significant in the light of the limited role that the Court plays in granting urgent reliefs too.

[27] [2016] EWHC 2327 (Ch).

This reflects that, parties, by appointing emergency arbitrator, may escape the rigours of the Court practices.[28] For this purpose, the relevant paragraph from the judgement is produced below:

"It is common ground that the test of urgency under subsection (3) is to be assessed by reference to whether the arbitral tribunal has the power and the practical ability to grant effective relief within the relevant timescale: see Starlight Shipping v. Tai Ping Insurance [2008] 1 Lloyd's Rep 230, paras 22, 24, 27."[29]

Therefore, after seeing just a part of the law of arbitration and the approach followed by the Courts there, pursuant to the UK Arbitration Act, it definitely creates a gap of party's autonomy in our country by not recognizing the provision of emergency arbitration and by not minimizing, legislatively, the role of the Courts in arbitration proceedings, including emergency arbitration. To fill this gap, and to provide to the parties sufficient flexibility, the arbitral institutions providing arbitral

[28] Chris Parker and Aaron McDonald, English High Court has no power to grant urgent relief under Arbitration Act where urgent relief could be granted by expedited tribunal or emergency arbitrator under LCIA Rules, Herbert Smith Freehills Arbitration Notes available at http://hsfnotes.com/arbitration/2016/10/07/english-high-court-has-no-power-to-grant-urgent-relief-under-arbitration-act-where-urgent-relief-could-be-granted-by-expedited-tribunal-or-emergency-arbitrator-under-lcia-rules/ (last accessed, 09.12.2016).

[29] Gerald Metals SA v. Timis at page 15.

proceedings' services have enacted their own rules in such a manner, so as to cover what the Indian law does not cover.

To look towards other jurisdictions will be to further this assertion of gap that has been so described. New Zealand has, recently, carried out an amendment in its Arbitration Act of 1996.[30] The Amendment Act received the assent on the 17th of October this year which enlarges the scope of the arbitral tribunal so as to include the provision of 'emergency arbitrator' under its purview. This amendment has been done to clarify the position of the enforceability of emergency arbitration's award or order, and to put it at par with the final award which are passed by a constituted arbitral tribunal. As Timothy Lindsay puts it,

"Confirming the status of emergency arbitral tribunal awards as being on the same level as traditional arbitral awards reinforces arbitration as the "one stop shop" parties intend it to be."[31]

[30] For reference, please visit, http://www.legislation.govt.nz/act/public/2016/0053/latest/096be8ed813ff6f2.pdf (last accessed, 09.12.2016).

[31] Timothy Lindsay and Edith Offner, Important amendments to Arbitration Act 1996 (New Zealand), Lowndes Jordan, available at http://www.lojo.co.nz/updates-article/important-amendments-to-arbitration-act-1996-new-zealand-confirms-decisions-made-by-emergency-arbitrators-are-enforceable-as-arbitral-awards (last accessed, 09.12.2016).

Therefore, all what has been cited above, whether it in reference to common law countries carrying out a pro-arbitration step, is for the purpose of highlighting the lacunas that are present in the Indian Arbitration Act and which need to be covered by the Legislature. The next section i.e. the conclusion, talks about this, in reference to the Arbitration Amendment Act of 2015 passed by the Parliament and what the Parliament could have done, and thereafter, the section concludes the whole paper.

5. CONCLUSION

Throughout this paper, we have seen the position of arbitration in India and the analysis of the rules of different arbitral institutions which provide the parties to an arbitration agreement, flexibility and provision to claim urgent relief in case of emergency situations. However, as already stated in the last section, these institutional rules do what the 1996 Act fails to do. The Parliament of India had enacted an amendment Act in December, 2015 amending the 1996 Act. Before such amendment, the Law Commission, in its 246th Report[32], had recommended the recognition and enforcement of emergency

[32]Law Commission of India, Government of India, 246th Report – 'Amendments to the Arbitration and Conciliation Act 1996, August, 2014' available at http://lawcommissionofindia.nic.in/reports/Report246.pdf (last accessed, 09.12.2016).

arbitration award and orders. In its report, the Commission had stated:

"Amendment to Section 2 of the Principal Act:

In sub-section (1), clause (d), after the words "...panel of arbitrators" add "and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator;"

[NOTE: This amendment is to ensure that institutional rules such as the SIAC Arbitration Rules which provide for an emergency arbitrator are given statutory recognition in India.]"[33]

However, despite these suggestions by the Law Commission of India, the Amendment Act of 2015 failed to address the rising need of recognition of emergency arbitration. Had the Amendment Act recognised it, the role of the Courts would have much more minimized and would have been limited to the extent to providing the reliefs which an emergency arbitrator could notprovide, and of course, the enforcement.

For the purpose of garnering more investment in the country, one of the main concerns of the parties is the dispute resolution. Therefore, the government should endeavour to recognise such

[33] *Id*. at p. 37.

type of arbitration proceedings so as to give the parties enough flexibility to follow their own private process of dispute resolution. Although the Parliament has failed to address the issue of emergency arbitration, this still could be looked after if the Courts are proactive to follow the legacy of international courts, such as, the English High Court, as discussed above, and take a step towards recognising that, at last, arbitration is a private process. If a party is required to approach the Court, then, there is no need of having an arbitration agreement in the very first place.