IT'S AN EMERGENCY? LET'S ARBITRATE!

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There has been considerable uncertainty in India over the enforcement of 'awards' passed by emergency arbitrators. The Arbitration and Conciliation Act, 1996 ("Act") is silent on the issue. Neither does it recognize an emergency arbitrator, nor does it provide for the enforcement of emergency 'awards'. In fact, the 246th Law Commission Report in 2014, recommended the recognition of emergency arbitration in India, but the legislature failed to incorporate it in the 2015 Amendment to the Act. Similarly, the legislature paid no heed to the matter in the 2020 Amendment to the Act, though the Srikrishna Committee Report, 2017 echoed the same view. This is surprising, since emergency arbitration is rapidly emerging as a preferred forum for urgent interim relief in multi-jurisdictional commercial disputes. Indeed, emergency arbitration is enshrined in the rules of renowned arbitral institutions across the globe, including the LCIA, ICC and SIAC. Even in India, the DIAC and MCIA provide for emergency arbitration. This creates a catch-22 that is only amplified by the inconsistent approach of the Indian judiciary towards emergency 'awards'. In a welcome relief, on 6 August 2021, the Supreme Court of India upheld the validity of the 'award' issued by the emergency arbitrator appointed by SIAC in a high-profile dispute involving Amazon.com and Future Retail.[1] The Apex Court re-affirmed the paramountcy of party autonomy in arbitration and cautioned that the Act should not be interpreted as an ouster statute. This is certainly an encouraging development, but it is too soon to celebrate. Notably, the case involved an India-seated emergency arbitration; as such, the Apex Court limited itself to the enforceability of domestic emergency awards. It remains to be seen whether emergency awards in foreign-seated arbitrations will also gain recognition under the Act. The authors discuss the key aspects of Amazon v Future Retail and then proceed to analyse its relevance – or rather irrelevance - to emergency awards in foreign-seated arbitrations.

Keywords: Emergency Arbitration, Amazon, Future Retail, SIAC, Reliance.

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[1] *Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Others*, [2021] SCC OnLine SC 557. (Hereinafter, Amazon v Future Retail).

1. BRIEF BACKGROUND

In August 2019, Amazon and the Future Group had entered into two shareholders' agreements and one share subscription agreement, under which, certain material rights were granted to Future Coupons Pvt. Ltd ("FCPL") with regard to Future Retail Limited ("FRL")– FRL's retail stores/assets in particular. Based on these rights, Amazon had agreed to invest around INR 1431 crores in FCPL, which would flow down to FRL. The basic arrangement was that Amazon's investment in FRL and their retail assets would continue to be vested with FRL – which could not be dealt with, without FCPL's and Amazon's consent. FRL was also prohibited from transferring its retail assets to certain "restricted persons", which included the Reliance Group.

Disputes arose between the parties when Future Group entered into an agreement with Reliance Group for the amalgamation of FRL with Reliance Group and disposal of FRL's retail assets in favour of Reliance Group ("Transaction"). Accordingly, Amazon initiated arbitration proceedings and filed an application seeking emergency interim relief under the Singapore International Arbitration Centre Rules 2016 ("SIAC Rules"). On 25 October 2020, the emergency arbitrator passed an interim award restraining Future Group from taking any steps in relation to the Transaction ("Emergency Award"). Considering the Emergency Award in nullity, Future Group went ahead with the Transaction. It also filed a civil suit before the Delhi High Court to interdict arbitration proceedings and sought an injunction restraining Amazon from relying on the Emergency Award. Since then, Amazon and Future Group have been embroiled in legal battles on multiple fora.

In December 2021, the Competition Commission of India suspended its previous approval for Amazon's acquisition of shareholding in FCPL and imposed a fine on the former. In Early January 2022, the Delhi High Court stayed the SIAC arbitration proceedings. Accordingly, SIAC terminated the hearing scheduled in January 2022, until further notice. In the meantime, a Supreme Court appeal on miscellaneous cases filed by both parties remains pending

The August 2021 Apex Court decision dealt with two broad issues:

1. Is an award issued by an Emergency Arbitrator appointed under the SIAC Rules, an "*order*" under Section 17(1) of the Act?

2. Does an appeal lie against an order passed under Section 17(2) of the Act to enforce an Emergency Award?

A. AMAZON'S CASE

Amazon's case theory was that an emergency award is an order under Section 17(1) of the Act and it is not subject to appeal under Section 37. The key arguments put forth by Amazon are as follows:

1. Party autonomy is the *grundnorm,* or basic norm, of arbitration and the Act recognizes this. The legislative objective is to unburden the judiciary. This is reflected in the amendment to bring interim orders by an arbitral tribunal under Section 17 at par with court orders under Section 9. Emergency awards should be considered as awards under Section 17 to further the legislative intent.

2. An emergency award is not subject to an appeal, as the enforcement proceedings under Section 17(2) do not meet the limited grounds for appeal under Section 37.

3. The Emergency Arbitrator did not lack jurisdiction. Non-signatories to an arbitration agreement can be compelled to arbitrate since Mr. Kishore Biyani was the "*ultimate controlling person*"[2]

4. No equity can be found in favour of Future Retail since they admittedly flouted the Emergency Award.[3]

B. FUTURE GROUPS 'CASE

Au contraire, Future Group's case theory was that the emergency award was made in nullity; it is not an order under Section 17(1) of the Act, and it should not be recognized or enforced. Future Group advanced myriad innovative arguments in support of its contention. The key arguments are as follows:

1. The Act does not recognize emergency arbitration in any express provision. This is in stark contrast to jurisdictions such as those of England, Singapore, Hong Kong and New Zealand.[4]

2. The legislative intent behind the Act should be respected; emergency awards should not be given implicit statutory recognition under Section 17(1):

    a. In fact, the Parliament deliberately disregarded the recommendation of the 246th Law Commission of India ("LCI Report") on emergency arbitration and did not include the same in the Arbitration and Conciliation (Amendment) Act, 2015.

    b. Further, a high-level committee chaired by Justice Srikrishna issued a report in 2017, echoing the LCI's recommendation on emergency

[2] Ibid [17]

[3] The court did not discuss arguments 3 and 4 in detail in the judgment.

[4] *Amazon v Future Retail,* [23]

arbitration. Yet, the Parliament did not make a provision for emergency arbitration in the Arbitration and Conciliation (Amendment) Act, 2019.

c. This shows that the legislature deliberately decided against awarding any form of statutory recognition to emergency awards. As such, courts should defer to legislative intent and desist from legislating on emergency arbitration.

3. Section 25.2 of the FCPL Shareholders' Agreement (*pari materia* with section 15.2 of the FRL Shareholders' Agreement) subjects SIAC Rules to the Act. As a result, emergency arbitration under SIAC Rules cannot be recognized in violation of the Act.

4. An emergency arbitrator is not an arbitral tribunal under Section 2(1)(d) of the Act. An arbitral tribunal under the Act does not include "*a person who only decides, at best, an interim dispute between the parties which never culminates in a final award*"[5].

5. As held in *Raffles Design*[6] and in light of express provisions under the Act, emergency awards in foreign-seated arbitrations are not enforceable in India.

6. Any enforcement orders passed in relation to an emergency award is not subject to appeal under Section 37 of the Act. The relevant appellate process is provided under the Order XLIII, Rule 1(r) of the Code of Civil Procedure, 1908 (CPC).

2. THE DECISION

A. EMERGENCY AWARD IS AN "ORDER" UNDER THE ACT

Upon detailed analysis, the Apex Court was of the view that there is no express or implied bar to emergency arbitration under the Act; where provided for under institutional rules, emergency arbitration would be covered by the Act.[7] On this basis, the Supreme Court went on to interpret Section 17(1) of the Act to champion party autonomy, expedite interim relief and prevent the overburdening of judiciary.[8]

Section 17(1) provides for interim measures by "*arbitral tribunal*" at any time "*during the arbitral proceedings*". The question was whether an emergency arbitrator's order could be considered an interim measure within the meaning of this provision or not. The court said '**yes**' for the following reasons:

1. An "*arbitral tribunal*" for the limited purposes of Section 17(1) includes an emergency arbitrator when the applicable institutional rules provide for emergency

[5] Ibid, [21]
[6] *Raffles Design International India Pvt. Ltd.& Anr. v. Educomp Professional Education Ltd. & Ors*., [2016] 234 DLT 349. (hereinafter, "**Raffles Design**")
[7] *Amazon v Future Retail*, [42]
[8] Ibid, [68]

arbitration. This interpretation would also apply to Section 9(3) and courts should not entertain an application for interim measures after an emergency arbitrator is appointed, subject to the exception provided in the Act, i.e. inefficaciousness of the remedy under Section 17 of the Act.

2. Commencement of "*arbitral proceedings*" should be interpreted as per SIAC Rules, which are incorporated in the parties' agreement. Under Rule 3.3, the proceedings begin on the date of receipt of the notice of arbitration by the SIAC Registrar. This means that arbitral proceedings commence before the constitution of the proper arbitral tribunal and the proceedings before an emergency arbitrator would also amount to "*arbitral proceedings*" under the Act.

3. Accordingly, emergency awards, which are binding, but not final, are recognized as interim *"orders"* under the Act.

The Apex Court disagreed with the Future Group's arguments on legislative intent and its interpretation of the Act, as discussed further in the next section. Emergency award is not appealable under the Act.

B. NO APPEAL AGAINST ENFORCEMENT PROCEEDINGS FOR EMERGENCY AWARD

The Apex Court found that enforcement proceedings for an emergency award would not be subject to an appeal under Section 17(2) of the Act. The Court noted that reading Sections 17 and 9 jointly, the scope of interim relief is wide enough to cover enforcement proceedings.[9] It went to consider whether such an enforcement order would be subject to an appeal. The Court held "**no"** for the following reasons:

1. Section 17(2) indeed creates a legal fiction, and accordingly, the emergency arbitrator's awards would be enforceable. That said, the court cautioned that the legal fiction under Section 17(2) is restricted.[10] It would not extend to appeals against emergency awards, which are filed under the CPC, as the Act is a complete code in itself.

2. Emergency arbitrator awards are indeed treated as court decrees for the limited purpose of enforcement, but that would not subject them to appeal proceedings. Accordingly, appeals under Section 37 would be limited to challenges against orders granting or refusing to grant interim measures under Section 17(1).

In conclusion, the Apex court held that no appeal lies under Section 37 of the Act against an order of enforcement of an emergency award made under Section 17(2) of the Act.

[9] Ibid, [85], [93] and [94]
[10] Ibid, [99]

3. ANALYSIS

This is one more step in the right direction, after the Supreme Court recently clarified that two Indian parties could opt for a foreign seat of arbitration. The Court rightly held that the Act provides parties the autonomy to opt for institutional arbitration and this is a key mechanism to unburden the courts.

Once again, party autonomy is seen to be given prime importance, and rightly so. This is in line with the Supreme Court precedents, upholding the choice of the parties as "*the brooding and guiding spirit"* [11] and *"the backbone"*[12] of arbitration[13]. Indeed, as the Apex Court highlighted *"there is nothing in the Arbitration Act that prohibits the contracting parties from agreeing to a provision providing for an award being made by an Emergency Arbitrator"*.[14]

In *HSBC v. Avitel*, and *Raffles Design International Idnai Private Limited and Others v. Educomp Professional Education Limited and Others* (*Raffles Design*), the Bombay High Court and the Delhi High Court respectively, have emerged as the torchbearers wherein the courts granted interim reliefs in sync with the order of Emergency Arbitrator. The Apex court's clarification on the appellate process for emergency awards goes one step further and is highly encouraging for all stakeholders. The present judgement demonstrates the judicial approach to advance arbitration (including emergency arbitration) as an effective alternative to court proceedings.

The Supreme Court's approach is in line with the global trend. Most of the well-recognized institutional rules provide for emergency arbitration. This includes the rules of the International Chambers of Commerce, the London Centre for International Arbitration, the Mumbai Centre for International Arbitration, Singapore International Arbitration Centre and the Stockholm Chambers of Commerce.[15]

A. FOREIGN-SEATED EMERGENCY AWARDS REMAIN IN LIMBO

In *Amazon v Future Retail*, the emergency award passed in an India-seated SIAC arbitration was held to be an order under Section 17(1) and therefore enforceable under Section 17(2). The court buttressed this interpretation on the bulwark of party autonomy and the criticality of decongesting courts. These considerations equally apply to foreign-seated emergency awards.[16] Accordingly, the question arises whether it is possible to extend the court's reasoning to cover the recognition and enforcement of arbitral awards in foreign-seated emergency arbitrations. It is pertinent to note that *in Raffles Design*, the court held that an

[11] *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc*. [2016] 4 SCC 126, [5]
[12] *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd*. [2017] 2 SCC 228, [38]
[13] *Pasl Wind Solutions Private Limited v GE Power Conversion India Private Limited* [2021] 7 SCC 1, [61]-[62]
[14] Ibid [42]
[15] Article 9B, LCIA Arbitration Rules 2020; Article 29, ICC Arbitration Rules 2021; Rule 30 & Schedule I, SIAC Rules 2016; Rule 14, MCIA Rules 2016; Appendix II, Arbitration Rules of Stockholm Chambers of Commerce 2017.
[16] Gary B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International, 2021) 1164.

emergency award by a foreign seated arbitral tribunal was not enforceable under the Arbitration Act and it could only be enforced by filing a suit.[17]

The Apex Court missed the opportunity to weigh in on the enforceability of foreign-seated emergency awards in India. Some commentators argue that it is possible to enforce emergency awards in foreign-seated arbitrations through interim relief applications under Section 9 or generally under Part II. [18] The authors disagree.

i. As in Part I of the Act, there is no express prohibition on emergency awards in Part II (Enforcement of Certain Foreign Awards). Arguably, that's where the similarity ends. It is striking that Part II does not contain a provision that's comparable to Section 17 of Part I of the Act. Section 17(2) of the Act, inserted vide the 2015 Amendment, provides by a deeming fiction that any order issued by an arbitral tribunal (seated in India) shall be deemed to be an order of the court and shall be enforceable as such. Therefore, since the arbitral tribunal in Amazon v. Future was domestically seated, it could enforce the award under this provision. However, had the award been rendered by a foreign seated arbitral tribunal, the court could not have relied upon section 17(2) to enforce the emergency award since Part-I of the Arbitration Act does not apply to foreign seated arbitration.

ii. It is also impossible to create a back-door entry to recognize and enforce emergency awards in foreign seated arbitrations. The decision in *Raffles Design* is good law, and accordingly, neither interim awards nor emergency awards in foreign seated arbitrations are enforceable in India. The linchpin of this decision is the apparent lack of a provision in Part II to give effect to Article 17H of the UNCITRAL Model Law on International Commercial Arbitration 1985. This provision of the Model Law provides for enforcement of interim orders granted by an arbitral tribunal in foreign-seated arbitrations. Unless *Raffles Design* is set aside or a legislative amendment is introduced to incorporate Article 17H in Part II, it can be safely said that emergency awards in foreign-seated arbitrations would not be enforceable in India. The line of reasoning adopted by the Supreme Court in *Amazon v Future* – on the bases of party autonomy and decongestion of courts - would not apply to save emergency awards in foreign seated arbitrations when there is no thread to link such awards to Part II of the Act.

iii. Remedy under Section 9 in a foreign seated arbitration is available when the remedy available before the arbitral tribunal is not efficacious. It cannot be extended to an emergency award, which could be considered in an efficacious manner by an arbitral tribunal. In fact, the Delhi High Court had the opportunity to address this issue and refused to do so.[19]

iv. Further, an emergency award is not enforceable under Section 48 of the Act, which deals with conditions for the enforcement of foreign awards. Indian courts

[17] *Amazon v Future Retail,* [99]

[18] Adimesh Lochan, Kshama A. Loya & Vyapak Desai, "Amazon V. Future – Indian Supreme Court Recognizes Emergency Awards Under the A&C Act", (2021) 11 (238) NLR.

[19] *Ashwani Minda and Ors. v. U-shin Limited and Ors* [2020] SCC OnLine Del 721, [28], [44] & [62].

> have recognized that there are restrictions under Sections 46 to 49 of the Act, which prevent the enforcement of emergency awards in foreign-seated arbitrations.[20]

As such, there is no legal basis in the Act to enforce emergency awards in foreign-seated arbitrations.

B. JUDICIAL LEGISLATION?

Lastly, it appears that the Apex Court chose to impose and validate recommendations in the LCI Report, which were expressly rejected by the Legislature while amending the Act. The Report provided for enforcement of emergency awards recognizing the significant uncertainty in the law as it stood then. However, the legislature failed to incorporate it in the 2015 Amendment to the Act. Similarly, Srikrishna Committee Report, 2017 echoed the same view as the LCI Report, and the legislature once again paid no heed to the same in the 2020 Amendment to the Act.

Nevertheless, in *Amazon v Future Retail*, the Apex Court seeks to import into the Arbitration Act the very same recommendation. This approach was also followed in *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius)* Ltd: "*the mere fact that a recommendation of a Law Commission Report is not followed by Parliament, would not necessarily lead to the conclusion that what has been suggested by the Law Commission cannot form part of the statute as properly interpreted*".[21]

As such, this raises the question whether the judiciary is merely filling in the gaps left by the legislature or seeking to amend the Act through judicial legislation.

4. CONCLUSION

The Supreme Court's decision on the enforceability of India-seated emergency awards is indeed encouraging. However, one cannot ignore some concerns that may be raised with respect to this decision. Firstly, the Supreme Court's finding that emergency awards are 'orders' under Section 17 of the Act is almost entirely based on the principle of party autonomy. It is debatable if such principles can be relied upon when the language of the Act and the intent of the legislature is clear and unambiguous.

Despite the aforesaid concerns, one cannot deny that the legal recognition given to emergency arbitrations under the Indian arbitration regime is a huge step towards making India a pro-arbitration jurisdiction. The authors hope that the Parliament takes the cue and amends the Act to award statutory recognition to emergency arbitration. The authors also hope that the Act is not amended to overturn this decision. Arguably, it's an emergency!

[20] *Avitel Post Studioz Ltd v HSBCPI Holdings (Mauritius) Ltd* [2014] SCCOnline Bom 929, [28].
[21] Ibid [54]