

# Dispute Resolution Hotline

August 20, 2021

## AMAZON V. FUTURE – INDIAN SUPREME COURT RECOGNIZES EMERGENCY AWARDS UNDER THE A&C ACT

- Emergency Awards in India-seated arbitrations are enforceable under Section 17 of the Indian A&C Act.
- An appeal is not maintainable against an order of enforcement of an emergency award under Section 17(2) of the A&C Act.
- Depending on the circumstances, parties will need to evaluate whether emergency arbitration will provide a more effective remedy than seeking interim reliefs before courts in Section 9 of the A&C Act.

### INTRODUCTION

On August 6, 2021, the Supreme Court pronounced its much-awaited judgment in the matter of *Amazon.com Investment Holdings LLC (“Amazon”) v. Future Retail Limited & Ors. (“Future Group”)*. The Supreme Court allowed the appeal filed by Amazon against the order of the Division Bench of the Delhi High Court dated March 22, 2021 (“**Impugned Order**”), and recognized the validity of an emergency award passed in an India-seated arbitration under Section 17 of the Arbitration and Conciliation Act, 1996 (“**A&C Act**”).

### BACKGROUND

We have captured the factual developments leading to the matter before the Supreme Court in an earlier piece which can be accessed [here](#). To encapsulate the facts, Amazon initiated arbitration against Future Coupons Pvt. Ltd. (“**FCPL**”) and Future Retail Ltd. (“**FRL**”) under the Rules of Singapore International Arbitration Centre (**SIAC Rules**), pursuant to a shareholders’ agreement (“**FCPL SHA**”). As per the FCPL SHA, the seat of arbitration was New Delhi, India. An emergency award was rendered on October 25, 2020. Since FRL and FCPL did not comply with the emergency award, Amazon initiated proceedings in the Delhi High Court to enforce the emergency award. A Single Judge of the Delhi High Court recognized the emergency award and passed orders to enforce the emergency award. However, the Division Bench of the Delhi High Court granted stay on the operation of the order of the Single Judge.

In appeal against the order of the Division Bench of the Delhi High Court, the Supreme Court considered the following questions in the present matter:

- Whether an emergency arbitrator’s award is contemplated under the A&C Act, and whether an emergency arbitrator’s award is an order under Section 17 of the A&C Act.
- Whether an appeal against an order enforcing an emergency arbitrator’s order under Section 17(2) is maintainable under Order 43, Rule 1(r) of the Civil Procedure Code.

### ANALYSIS OF ISSUE I:

#### VALIDITY OF AN EMERGENCY AWARD UNDER THE A&C ACT

The Supreme Court stated that the emergency award is not a nullity, and is enforceable under Section 17 of the A&C Act. The Supreme Court’s analysis on the validity of an emergency award under the A&C Act can be placed under the following heads:

#### Parties have the autonomy to choose emergency arbitration

The Supreme Court noted that while the A&C Act does not contain the words “emergency award”, the freedom granted to parties under the A&C Act to agree to arbitral institutional rules implies that parties have a right to make use of the emergency arbitration provisions in the institutional rules chosen by the parties. By virtue of Section 2(6),<sup>1</sup> Section 2(8),<sup>2</sup> and Section 19(2)<sup>3</sup> of the A&C Act, parties can (a) agree to authorize an arbitral institution to determine issues that arise between the parties, (b) agree to include any arbitration rules in their arbitration agreement, and (c) agree on the procedure to be followed by an arbitral tribunal in conducting its proceedings.

The Supreme Court noted that the parties have an indefeasible right to exercise party autonomy in respect of choosing institutional rules which can include emergency arbitrators.<sup>4</sup> The Supreme Court further stated that the parties, while exercising such a right to party autonomy, do not bypass any mandatory provision of the A&C Act, as there is nothing under the A&C Act which prohibits parties from agreeing on a set of rules providing for the appointment of an emergency arbitrator.<sup>5</sup>

#### ‘Arbitral tribunal’ under the A&C Act includes an ‘emergency arbitrator’

The Court then considered whether the definition of “arbitral tribunal” contained in Section 2(1)(d) should so constrict Section 17(1), making it apply only to an arbitral tribunal that can give final reliefs by way of an interim or final award,

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and not to an emergency arbitrator that passes an emergency award.

Section 2(1)(d) of the A&C Act defines 'arbitral tribunal' to mean a sole arbitrator or a panel of arbitrators. The Supreme Court noted that the definition of 'arbitral tribunal' under Section 2(1)(d) of the A&C Act does not include an "emergency arbitrator".<sup>6</sup> However, it stated that Section 1 opens with the words "unless the context otherwise requires". When read with Section 2(1)(a) [that provides for "any" arbitration, whether or not administered by a permanent arbitral institution] and Sections 2(6) and 2(8) [which permit incorporation of rules of arbitral institutions], it is clear that interim orders passed by emergency arbitrators under the rules of an arbitral institution would be included within the ambit and context of orders passed by an 'arbitral tribunal' under Section 17(1).

Therefore, the Court held that when Section 17(1) is concerned, the "arbitral tribunal" would, when institutional rules apply, include an Emergency Arbitrator, the context of Section 17 "otherwise requiring" – the context being interim measures that are ordered by arbitrators.

### **Recommendation of the 246<sup>th</sup> Law Commission Report**

The 246<sup>th</sup> Law Commission Report had suggested that the definition of 'arbitral tribunal' be amended to include an emergency arbitrator. The Supreme Court noted that the mere fact that a recommendation of a Law Commission Report was not followed by the Indian Parliament, would not necessarily lead to the conclusion that the suggestion of the Law Commission can never form part of the interpretation of the statute.<sup>7</sup> The Supreme Court also referred to the report of the High-Level Committee constituted by the Government of India under the chairmanship of Justice B.N. Srikrishna (Retd.) to review the institutionalisation of arbitration mechanism in India ("**Srikrishna Committee Report**"). The Srikrishna Committee Report stated that it is possible to interpret Section 17(2) of the A&C Act to enforce emergency awards for India seated arbitrations and recommended that the A&C Act be amended so that it comes in line with international practice in favour of recognising and enforcing an emergency award.

### **Emergency arbitration occurs 'during arbitral proceedings'**

Remedy under Section 17 of the A&C Act is available to a party only 'during the arbitral proceedings'. FRL argued that Section 17 provides for interim reliefs only during the arbitral proceedings i.e. after the arbitral tribunal is constituted. Hence, emergency arbitration that occurs prior to arbitral proceedings or prior to the constitution of the arbitral tribunal, is not covered by Section 17 of the A&C Act.

The Court disagreed. It relied on Section 21 of the A&C Act, which provides that arbitral proceedings in respect of a dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Similarly, Rule 3.3 of the SIAC Rules provides for the commencement of the arbitration as the date of receipt of the complete 'Notice of Arbitration' by the registrar. Taking into account these provisions, the Supreme Court noted that arbitral proceedings commence when a notice of arbitration is issued, which is prior to the constitution of an arbitral tribunal.<sup>8</sup>

Since a remedy under Section 17 is available to a party 'during the arbitral proceedings', the powers of a tribunal in granting such a remedy would include powers exercisable by an emergency arbitrator soon after arbitral proceedings commence.<sup>9</sup> Further, the Supreme Court also stated that the words 'arbitral proceedings' under Section 17 are not limited by any definition and thus encompass proceedings before an emergency arbitrator.

### **Emergency Arbitration furthers the object of the A&C Act**

The Supreme Court further noted that the provision of an emergency award furthers multiple objectives, including, decongesting the court system and giving parties urgent interim relief in cases which deserve such relief.

Considering that party autonomy is respected by the A&C Act and that there is no prohibition under the A&C Act against the appointment of an emergency arbitrator, the Supreme Court concluded that an emergency arbitrator's award, which is exactly like an order of an arbitral tribunal once constituted, falls within the institutional rules to which the parties have agreed. As a result, the same is validly covered under Section 17(1) of the A&C Act.

Moreover, the Court stated that a party having agreed to institutional rules, cannot thereafter argue that it is not bound by an emergency arbitrator's ruling. Such orders are valid and are made under Section 17(1) of the A&C Act.<sup>10</sup>

## **ANALYSIS OF ISSUE II:**

### **MAINTAINABILITY OF APPEAL UNDER ORDER 43 RULE 1 (R)**

The Supreme Court referred to Section 94 and Order 39 of the CPC which prescribes the power of a civil court to grant interim measures. Rule 2A of Order 39 of the CPC states that a civil court can attach the property of a party if the party fails to comply with an order passed under Rule 1 or Rule 2 of Order 39. In this respect, the Supreme Court referred to its previous judgment in *UC Surendranath v. Mambally's Bakery*.<sup>11</sup> In this judgment, the Supreme Court had laid down that for a party to seek remedial measures under Order 39 Rule 2A, there has to be a 'wilful disobedience' on the part of the counter-party (against which the interim order was passed). However, the Supreme Court has now observed that the judgment in *UC Surendranath* might not be correct in this respect and would require a review by a larger bench of the Supreme Court.

Further, the Supreme Court noted that the words 'in relation to' and 'any proceedings' under Section 9(1) are wide enough to include the scope of enforcing an order passed under Section 9(1). Thus, enforcement under Order 39 Rule 2-A of the CPC of an order passed under Section 9 of the A&C Act, would also be referable to Section 9(1) of the A&C Act. Considering that the 2015 Amendment Act has brought parity in the scope and enforcement of orders passed in Section 9 with those of orders passed in Section 17,<sup>12</sup> the scope of enforcing an interim measure granted by the tribunal is similarly referable to Section 17 itself.

The Supreme Court observed that the legal fiction created under Section 17(2) is limited to the purpose of enforcing orders passed by the arbitral tribunal as orders of the court ("**Deeming Fiction**"). In this regard, the Supreme Court referred to its previous judgments to hold that a legal fiction created under any statute is limited to the purpose for which it is created under law.<sup>13</sup> The Supreme Court specifically relied on its judgment in *Union of India v. Vedanta*

*Ltd.*<sup>14</sup> that foreign award. In all other respects, an application to enforce a foreign award remains an application under the A&C Act only. Similarly, the Deeming Fiction under Section 17 cannot be extended to hold that appeals from court orders enforcing an order under Section 17(2) can be appealed in the same manner as a court order enforcing an interim measure under Section 9.

Thereafter, the Supreme Court referred to Section 37 of the A&C Act,<sup>15</sup> and noted that Section 37 is a complete code so far as appeals from orders and awards made under the A&C Act are concerned.<sup>16</sup> The Supreme Court pointed out that Section 37(2)(b) provides the scope of appeal against, *inter alia*, an order granting (or refusing to grant) interim measures under Section 17(1). There is no scope of appeal, however, against a court order under Section 17(2) enforcing (or refusing to enforce) an interim measure.

In this regard, the Supreme Court discussed its recent judgment in which it held that a dismissal of an application seeking condonation of delay in filing an application under Section 34 amounts to 'refusal to set aside an arbitral award' under Section 34, and, therefore, such an order is appealable under Section 37(1)(c) of the A&C Act.<sup>17</sup> The Supreme Court distinguished this judgment on the basis that unlike Section 34, a literal reading of Section 17 would show that the grant (or non-grant) of interim measures under Section 37(2)(b) refers only to Section 17(1) in which the interim measures are granted, and not under Section 17(2) under which the said measures are enforced.

The Supreme Court thus concluded an appeal under Section 37 of the A&C Act cannot be maintainable against an order of enforcement of an emergency arbitrator's order made under Section 17(2). Post the pronouncement of the judgment, the Future Group has reportedly filed a Special Leave Petition before the Supreme Court against the order of the Single Judge of Delhi High Court.<sup>18</sup>

## OUR ANALYSIS

### **Enforcement of emergency awards in India-seated arbitration**

With respect to the seat of an arbitration, the A&C Act operates in two parts - Part I of the A&C Act is applicable to India-seated arbitration and Part II is applicable to the enforcement of foreign-seated arbitration. This application carries certain exceptions viz.,<sup>19</sup> Section 9, Section 27 and Section 37(1)(b) and Section 37(3) of Part I of the A&C Act also apply to foreign-seated arbitrations awards which are recognized and enforceable under Part II of the A&C Act.<sup>20</sup>

The pending SIAC Arbitration between Amazon and Future Group stems from the arbitration clause in the FCPL SHA (details on the factual background in the matter are covered in our earlier piece [here](#)). The FCPL SHA stipulates that an ensuing arbitration would have its seat in New Delhi, India and accordingly, be governed by Part I of the A&C Act. Therefore, the decision and accompanying observations of the Single Judge / Division Bench of the Delhi High Court and the Supreme Court in the present matter is a decision/observation on the provisions of Part I of the A&C Act, applicable in cases of India-seated arbitrations only.

Further, orders of Indian courts enforcing emergency awards in India-seated arbitrations under Section 17(2) will not be appealable.

### **Enforcement of emergency awards in foreign seated arbitration**

Unlike Section 17, there is no provision in Part II of the A&C Act which provides for the enforcement of interim measures granted by an arbitral tribunal in a foreign seated arbitration. In absence of a specific provision under the A&C Act, parties have taken recourse to Section 9 to seek interim measures from courts, wherever applicable.<sup>21</sup> However, it must be understood that a grant of similar reliefs under Section 9 does not imply the actual enforcement of an emergency award in a foreign seated arbitration. Although Indian courts have been wary of the absence of a legislative stipulation on enforcement of emergency awards in a foreign seated arbitration, they have not shied away from admitting that similar reliefs can be granted under Section 9 by virtue of an *independent analysis*.<sup>22</sup>

Earlier, in *Ashwani Mnda and ors. v. U-shin Limited and Ors.*,<sup>23</sup> the Delhi High Court observed that a party approaching the court under Section 9 in a foreign seated arbitration must establish that the remedy available before the arbitral tribunal is not efficacious.<sup>24</sup> However, the court refrained from making a finding on whether the availability of a remedy before an emergency arbitrator would impede Indian courts from granting interim relief under Section 9.

According to the authors, the efficacy of the remedy can also depend on its enforceability. Potential non-enforceability of interim measures in certain situations could render the remedy by the arbitral tribunal inefficacious, and thereby unlock the scope for approaching the court under Section 9 in foreign-seated arbitrations.

Another route for the enforcement of emergency awards may be through enforcement proceedings under Part II of the A&C Act. It must be noted that even when there is no provision under Part II which provides for enforcement of emergency / interim awards in a foreign seated arbitration, there is no express bar to the enforcement of emergency awards either.

A foreign award can be enforced in India if it qualifies the conditions stipulated under Section 48 of the A&C Act, which is similar to the conditions under Article V of the New York Convention.<sup>25</sup> One of the pre-conditions for the enforcement of a foreign award is that the award must be binding on the parties. Leading arbitral institutions including the LCIA,<sup>26</sup> SIAC,<sup>27</sup> ICC,<sup>28</sup> HKIAC,<sup>29</sup> SCC,<sup>30</sup> etc., provide for an emergency award to be binding on the parties.

### **Boost to Emergency Arbitration and Arbitral Institutions**

The judgment provides significant boost to emergency arbitration provisions in institutional rules. Parties are expected to readily resort to institutional arbitration to avail benefits of emergency arbitration.

In its order, the Single Judge of the Delhi High Court had recognised arbitral institutions in India including Delhi International Arbitration Centre (DIAC), Mumbai Centre for International Arbitration (MCIA), Madras High Court Arbitration Centre India, Nani Palkhivala Arbitration Centre (NPAC); Indian Council of Arbitration (ICA); Indian

## TAKE-AWAYS:

Given the absence of guidance on enforcement of emergency awards in a foreign seated arbitration, it remains to be seen what approach Indian courts will adopt in enforcing such emergency awards. As for emergency awards in India-seated arbitration, the position on enforceability is now well-settled. However, depending on the facts and circumstances, parties will need to evaluate whether emergency arbitration will provide a more effective remedy than seeking interim reliefs before courts in Section 9 of the A&C Act.

– Adimesh Lochan, Kshama A. Loya & Vyapak Desai

You can direct your queries or comments to the authors

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<sup>1</sup> Section 2 – Definitions – A&C Act

(6) *Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.*

<sup>2</sup> Section 2 – Definitions – A&C Act

(8) *Where this Part— (a) refers to the fact that the parties have agreed or that they may agree, or (b) in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement.*

<sup>3</sup> Section 19 – Determination of rules of procedure - A&C Act

(2) *Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*<sup>4</sup>

<sup>4</sup> The Supreme Court referred to earlier decisions in the following cases in which courts have stressed on party autonomy - *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.* (2014) 11 SCC 560; *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126; *Centrotech Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228; *PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.*, 2021 SCC OnLine SC 331.

<sup>5</sup> Para 17 of the judgment dated August 6, 2021

<sup>6</sup> Section 2 – Definitions -

(d) *“arbitral tribunal” means a sole arbitrator or a panel of arbitrators;*

<sup>7</sup> Relying on *Avitel Post Studios Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713.

<sup>8</sup> Rule 3.3, SIAC Rules - Notice of Arbitration

*The date of receipt of the complete Notice of Arbitration by the Registrar shall be deemed to be the date of commencement of the arbitration. For the avoidance of doubt, the Notice of Arbitration is deemed to be complete when all the requirements of Rule 3.1 and Rule 6.1(b) (if applicable) are fulfilled or when the Registrar determines that there has been substantial compliance with such requirements. SIAC shall notify the parties of the commencement of the arbitration.*

<sup>9</sup> Para 12 of the judgment dated August 06, 2021.

<sup>10</sup> Para 35 – 36, Judgment of the Supreme Court dated August 6, 2021.

<sup>11</sup> (2019) 20 SCC 666.

<sup>12</sup> Arbitration and Conciliation (Amendment) Act, 2015.

<sup>13</sup> *Paramjeet Singh Patheja v. ICDS Ltd.*, (2006) 13 SCC 322; *Rajasthan State Industrial Development & Investment Corporation v. Diamond & Gem Development Corporation Ltd.*, (2013) 5 SCC 470. The Supreme Court also referred to a judgment of the House of Lords in *East End Dwellings Co. Ltd. v. Finsbury Borough Council*, 1952 AC 109.

<sup>14</sup> (2020) 10 SCC 1.

<sup>15</sup> Section 37 - Appealable orders – A&C Act

(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:— (a) granting or refusing to grant any measure under section 9; (b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.— (a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or (b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

<sup>16</sup> Relying on *BGS SGS SOMA JV v. NHPC*, (2020) 4 SCC 234; *Deep Industries v. ONGC*, (2020) 15 SCC 706 and *Kandla Export Corporation v. OCI Corporation*, (2018) 14 SCC 715.

<sup>17</sup> *Chintels (India) Ltd. v. Bhayan Builders Pvt. Ltd.*, (2021) 4 SCC 602. Section 37: Appealable Orders, A&C Act -

(1)(c) *setting aside or refusing to set aside an arbitral award under Section 34.*

<sup>18</sup> See <https://www.livemint.com/companies/news/kishore-biyani-future-group-companies-move-supreme-court-after-amazon-verdict-11628823626149.html> (last accessed on August 18, 2021)

<sup>19</sup> Applicability of this exception is further subject to an agreement to the contrary by the parties.

<sup>20</sup> Under Section 44 of the A&C Act, foreign awards are enforceable if such award is seated in a notified territory.

<sup>21</sup> Section 9 of Part I of the A&C Act is applicable to foreign seated arbitrations subject to an agreement to contrary by the parties. Therefore, if parties have agreed to exclude the application of Section 9 to the foreign seated arbitration, a remedy to seek interim measures from Indian courts under Section 9 would be foreclosed.

<sup>22</sup> *Raffles Design Int'l India Pvt. Ltd. v. Educomp Professional Education Ltd.*, (2016) 234 DLT 349 and *Avitel Post Studios Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd.*, 2104 SCC OnLine Bom 929.

<sup>23</sup> 2020 SCC OnLine Del 721

<sup>24</sup> Please see the complete analysis of the judgment of the division bench of the Delhi High Court in our earlier piece [here](#).

<sup>25</sup> Section 48 clarifies the scope of public policy of India and the scope of review in the contravention of the fundamental policy of Indian law; New York Convention stands for Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1959.

<sup>26</sup> Rule 9.9, LCIA Rules.

<sup>27</sup> Para 12, Schedule I, SIAC Rules.

<sup>28</sup> Rule 29.2, ICC Rules.

<sup>29</sup> Para 16, Schedule V, HKIAC Rules.

<sup>30</sup> Article 9, SCC Rules.

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