

# Dispute Resolution Hotline

October 17, 2022

## SINGAPORE HIGH COURT ENFORCES FOREIGN EMERGENCY ARBITRATOR AWARD

- "Foreign awards" in Sections 27 and 29 of the (Singapore) International Arbitration Act, 1994 ("IAA") includes foreign interim awards made by an emergency arbitrator.
- An interim award made by an emergency arbitrator in a foreign-seated arbitration is enforceable in Singapore.
- In India, awards made by emergency arbitrators in India-seated arbitrations are enforceable under the (Indian) Arbitration & Conciliation Act, 1996 ("**Arbitration Act**"). Courts in India have indirectly given effect to an emergency arbitrator's award in a foreign seated-arbitration in a petition under Section 9 of the Arbitration Act.

In *CVG v CVH*,<sup>1</sup> the Singapore High Court held that "foreign awards" within the International Arbitration Act, 1994 ("IAA") would include foreign interim awards made by an emergency arbitrator. This would allow an award-holder to enforce an interim award by an emergency arbitrator in a foreign-seated arbitration in Singapore. Despite this finding, in the present case, the Singapore High Court refused to enforce the emergency award in question on the ground that such award was given in violation of principles of natural justice.

### BRIEF FACTUAL BACKGROUND

CVH ("**Franchisee**") had been CVG's ("**Franchisor**") franchisee in Singapore since 1997. For this purpose, the parties entered into multiple agreements ("**Franchise Agreements**"). These agreements provided that any disputes between the parties would be resolved by arbitration seated in Pennsylvania and governed by the laws of Pennsylvania.

In 2020, certain disputes arose between the parties. In May 2022, the Franchisor sent a notice of default to the Franchisee for alleged breaches of the Franchise Agreements. Immediately thereafter, the Franchisee terminated the Franchise Agreements by claiming that the Franchisor materially breached and/or anticipatorily repudiated the agreements. The Franchisee then took certain steps to de-identify the stores since it would no longer be entitled to use the Franchisor's proprietary marks. The Franchisor, in response, removed the Franchisee's ability to order or procure new products to sell; cancelled pending orders; and sought to impose liability on the Franchisee for these cancellations.

### ARBITRATION PROCEEDINGS

On 25 May 2022, the Franchisor filed its Demand for Arbitration and Application for Emergency Measures of Protection Including Injunctive Relief ("**Demand for Arbitration**") with the International Centre for Dispute Resolution ("**ICDR**"). The Demand for Arbitration sought reliefs that included reliefs to enforce post-termination provisions in the Franchise Agreements. The Franchisor, however, did not seek an injunction against the termination of the Franchise Agreements. Further, during the hearing before the Emergency Arbitrator, the Franchisor's counsel confirmed that it was not seeking enjoinder of the termination of the Franchise Agreements.

In the post-hearing submissions, while the Franchisee responded to the Franchisor's case (i.e. enforcement of post-termination provisions) as it stood during and after the hearing, the Franchisor altered its position. The Franchisor stated that it did not consider the agreements to have been terminated. On 15 June 2022, the emergency arbitrator issued an award ("**Emergency Award**") whereby the arbitrator restored the status quo of the parties to the position before the Franchisee had terminated the Franchise Agreements. The Emergency Award was made on the basis that the Franchisor did not treat the Franchise Agreements as terminated.

On 29 June 2022, the Franchisor filed an application to enforce the Emergency Award in Singapore. By an order dated 7 July 2022, the Assistant Registrar of the Singapore High Court granted permission to the Franchisor to enforce the Pennsylvania-seated Emergency Award ("**Enforcement Order**"). The Franchisee subsequently filed the present application to aside the Enforcement Order.

### JUDGMENT OF THE SINGAPORE HIGH COURT

#### On Emergency Award being capable of recognition under the IAA

Emergency Award is covered within the definition of 'foreign award' under the IAA

The Singapore High Court held that a foreign interim award made by an emergency arbitrator is covered by Section 29(1)<sup>2</sup> of the IAA and falls within the definition of a 'foreign award' as defined in Section 27(1).<sup>3</sup> Section 29(1) prescribes that a foreign award may be enforced in a court either by action or in the same manner as an award of an

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arbitrator award in Singapore is enforceable under Section 19.<sup>4</sup> Section 27(1) defines a 'foreign award' as an arbitral award made pursuant to an arbitration agreement in the territory of a signatory country of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**Convention**"). Section 27(1) also sets out that an 'arbitral award' "*has the meaning given by the Convention, but also includes an order or a direction made or given by an arbitral tribunal in the course of an arbitration in respect of any of the matters set out in section 12(1)(c) to (j).*"

While the term 'arbitral tribunal' as defined by Section 2(1) includes "an emergency arbitrator",<sup>5</sup> this definition does not apply to Part III of the IAA which contains Sections 27 and 29. There is no separate definition of an arbitral tribunal in Part III of the IAA. Consequently, the Franchisee argued that if the legislature intended for emergency awards to be enforced in Singapore, it would have amended the definition of an 'arbitral award' in Section 27 to include awards made by emergency arbitrators. Rejecting the contention of the Franchisee, the Singapore High Court undertook purposive interpretation of the section to include awards made by emergency arbitrators within the ambit of the term 'arbitral award' as defined in Section 27(1) of the IAA.<sup>6</sup>

The Singapore High Court arrived at this conclusion by:

1. Ascertaining the possible interpretations of 'arbitral award' in Section 27(1) of the IAA by reading the statute as a whole, which according to the Singapore High Court, would include an order or direction made or given by an emergency arbitrator even if the definition of "arbitral tribunal" does not apply to Part III.
2. Determining the legislative purpose of the IAA: The Singapore High looked to the objective of the amendment made in 2012 which –
  - Added "emergency arbitrator" to the definition of "arbitral tribunal" in Section 2(1) of the IAA;
  - Amended definition of "arbitral award" in Section 27(1) of the IAA to include orders or directions made or given in respect of any matters set in Sections 12(1)(c) to (i). Section 12(1)(i) includes "*an interim injunction or any other interim measure*".

Referring to the proposal of amendments to gather the intention of the legislature, the Singapore High Court held that it accords emergency arbitrators with the same legal status and powers as that of any other arbitral tribunal and ensures that orders made by such emergency arbitrators are enforceable. The Singapore High Court stated that the phrase "...*emergency arbitrators (whether appointed under the SIAC rules or the rules of any other arbitral institution, in both foreign and local arbitrations)* ..." <sup>7</sup> in the proposal would cover foreign-seated arbitrations as well.

3. Finding that this interpretation was clearly consistent with the purpose of the IAA.

On this basis, the Singapore High Court found the emergency award to be a "foreign award" within the meaning of the IAA.

#### Emergency Award is "binding" under Section 29 of the IAA

The Singapore High court found that the Emergency Award was "binding" under Section 29(2) of the IAA.<sup>8</sup> The court relied on Article 7(4) of the ICDR Rules to find that any interim award by an emergency arbitrator under the rules has the same effect as any other interim measure under such rules and is considered binding on the parties.

The Franchisee argued, citing precedents in the United States,<sup>9</sup> that the emergency award should not be enforced since it is not "final" and a full arbitral tribunal may affirm, reconsider, modify or vacate the award. The Singapore High Court found that the Franchisee's reliance on these precedents is misplaced since Section 29(2) of the IAA merely requires that an award be "binding" and not "final" before its recognition. Therefore, the court held that the Emergency Award was "binding".

#### **On the Emergency Award meeting the grounds for refusal of recognition under the IAA**

Having recognized the Emergency Award as an award capable of recognition under Section 29 of the IAA, the Singapore High Court proceeded to analyze the grounds for refusal of recognition raised by the Franchisee. The Franchisee raised two grounds under Section 31 of the IAA to refuse recognition of the Emergency Award: (i) the Emergency Award exceeded the jurisdiction of the emergency arbitrator; and (ii) the Emergency Award breached rules of natural justice.

#### Emergency award is not in excess of the emergency arbitrator's jurisdiction

The Franchisee argued that the Emergency Award should not be recognized under Section 31(2)(d) of the IAA<sup>10</sup> since it exceeded the emergency arbitrator's jurisdiction by dealing with a subject-matter beyond the scope of the submission to arbitration. It sought to contend that the Franchisor's original case was to terminate the Franchise Agreements and enforce the post-termination provisions. After post-hearing submissions, the Franchisor adopted a different position by considering the Franchise Agreements not terminated and restoring the status quo as it existed before the breach. Hence, the Franchisee submitted that the Emergency Award dealt with matters beyond the scope of submission to arbitration since the award granted reliefs that were different from the Franchisor's original case.

To determine whether jurisdiction was exceeded, the Singapore High Court relied on **CJA v CIZ**<sup>11</sup> which held that the issues in question should have been live issues in arbitration by looking at the totality of pleadings, evidence, submissions or otherwise. The Singapore High Court concluded that the Franchisor's change in position was a direct result of queries posed by the Emergency Arbitrator. The Franchisor simply made it its alternate case in its post-hearing submissions based on such queries. Therefore, it was always a live issue throughout the proceedings, and hence within the jurisdiction of the emergency arbitrator.

#### Emergency award violated the principles of natural justice

Section 31(2)(c) of the IAA stipulates that a court may refuse enforcement of a foreign award if the party challenging the award shows that it was otherwise unable to present its case in the arbitration proceedings. The Singapore High Court found that after the Franchisor adopted its new position in the post-hearing submissions, the Franchisee was not given an opportunity to resist the same. On this ground, the Singapore High Court set aside the Emergency

Award. Thus, while the Singapore High Court lent credence to the foreign award made by the emergency arbitrator, and formally included such awards within the ambit of the IAA, it refused its enforcement on the ground of breach of principles of natural justice.

## INDIAN APPROACH

In India, awards made by emergency arbitrators in India-seated arbitrations have been formally recognized after the case of *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Others* (“**Amazon**”).<sup>12</sup> However, interim awards, including awards by emergency arbitrators, in foreign-seated arbitrations are yet to be recognized in India.<sup>13</sup> This is despite the recommendations of the Justice Srikrishna Committee Report of 2017 and the 246<sup>th</sup> Report of the Law Commission of India to include: (i) emergency arbitrators within the definition of an “*arbitral tribunal*” under Section 2(1)(d) of the Indian Arbitration & Conciliation Act, 1996 (“**Arbitration Act**”); (ii) include emergency award in the definition of an arbitral award under Section 2(1)(C) of the Arbitration Act; and (iii) define an emergency award as an “*award made by an emergency arbitrator*”.

Therefore, the usual route that parties take to indirectly enforce foreign emergency awards in India is to make an application under Section 9 of the Arbitration Act to procure the same interim reliefs as the emergency award. In such applications, the court may consider the emergency award while deciding whether to grant the interim relief sought by a party. For instance, in *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studios Ltd*,<sup>14</sup> and *Raffles Design International India Private Ltd v Educomp Professional Education Ltd*,<sup>15</sup> the parties applied for the same interim relief under Section 9 of the Arbitration Act that were granted to them under the emergency awards. In a case, the Delhi High Court refused to grant interim relief under Section 9 of the Arbitration Act when an emergency arbitrator had also refused to grant relief sought by the party.<sup>16</sup> The courts in these cases were explicit in stating that while they are granting the same reliefs as the foreign-seated emergency awards, they arrived at such a decision independently without considering the emergency awards. Therefore, while such a route may be available to the parties, the discretion to grant such remedy ultimately remains with the courts.

India's position contrasts with international practice which has increasingly promoted recognition of foreign interim awards, including emergency awards. The UNCITRAL Model Law was amended in 2006 to include a special framework which explicitly provides for recognition of domestic and foreign interim awards. Articles 17H and 17I were introduced in the UNCITRAL Model Law through this amendment to recognize domestic and foreign interim awards as binding, and provide grounds for refusing enforcement or recognition of such awards.

However, it remains questionable whether parties should seek emergency awards for recognition in India. An emergency award, by its very nature, awards relief which is urgently sought by a party. However, the processes for recognition of an emergency award including resolving challenges to recognition of a foreign emergency award under Section 48 of the Arbitration Act and Article V of the New York Convention may entail considerable time. A direct application under Section 9 of the Arbitration Act may then be a faster route to procure the desired interim reliefs even if foreign-seated emergency awards were enforceable under the Arbitration Act.

— Ansh Desai, Ritika Bansal & Ashish Kabra

You can direct your queries or comments to the authors

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<sup>1</sup> [2022] SGHC 249

<sup>2</sup> Section 29(1): “*Subject to this Part, a foreign award may be enforced in a court either by action or in the same manner as an award of an arbitrator made in Singapore is enforceable under section 19.*”

<sup>3</sup> Section 27(1): “*In this Part, unless the context otherwise requires - ‘foreign award’ means an arbitral award made pursuant to an arbitration agreement in the territory of a Convention country other than Singapore.*”

<sup>4</sup> Section 19: “*An award on an arbitration agreement may, by permission of the General Division of the High Court, be enforced in the same manner as a judgment or an order to the same effect and, where permission is so given, judgment may be entered in terms of the award.*”

<sup>5</sup> Section 2(1): “*‘arbitral tribunal’ means a sole arbitrator or a panel of arbitrators or a permanent arbitral institution, and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation.*”

<sup>6</sup> [2022] SGHC 249, Para 29. The court applied the test for purposive interpretation set out in *Tan Cheng Bock v. Attorney General*, [2017] 2 SLR 850.

<sup>7</sup> Ministry of Law, “Proposed amendments to the International Arbitration Act and the new Foreign Limitation Periods Act”, press release (8 March 2012), <https://www.mlaw.gov.sg/news/press-releases/proposed-amendments-to-the-international-arbitration-act-and-the-new-foreign-limitation-periods-act>.

<sup>8</sup> Section 29(2): “*Any foreign award which is enforceable under subsection (1) must be recognised as binding for all purposes upon the persons between whom it was made and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore.*”

<sup>9</sup> *Al Raha Group for Technical Services v PKL Services Inc*, No 1:18-cv-04194-AT, 6 September 2019, [2019] WL 4267765; *Chinmax Medical Systems Inc v Alere San Diego Inc*, No 10CV2467 WQH (NLS), 27 May 2011, [2011] WL 2135350.

<sup>10</sup> Section 31(2)(d): “*A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that —*

*subject to subsection (3), the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration.*”

<sup>11</sup> [2022] SGCA 41

<sup>12</sup> (2022) 1 SCC 209

<sup>13</sup> In fact, the Delhi High Court in *Raffles Design International India Private Ltd v Educomp Professional Education Ltd* [(2016) 234 DLT 349] held that an emergency award in an arbitration seated outside India is not enforceable in India.

<sup>14</sup> Arbitration Petition No 1062 of 2012

<sup>15</sup> (2016) 234 DLT 349.

<sup>16</sup> *Ashwani Minda & Anr vs U-Shin Ltd & Anr*, 2020 SCC OnLine Del 721. *Also see*

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