

Indian Supreme Court Recognises Emergency Arbitration Under SIAC Rules

The Supreme Court of India (“**Indian Supreme Court**”) has held that orders passed by emergency arbitrators under institutional arbitration rules are recognised and can be enforced under the (Indian) Arbitration and Conciliation Act, 1996 (“**Indian Arbitration Act**”): *Amazon.com NV Investment Holdings LLC v Future Retail Limited & Others* Civil Appeal Nos. 4492-4493 of 2021 (“**Amazon v Future Retail**”).

Our Comments

Emergency arbitration proceedings provide an avenue for parties to obtain expeditious interim relief. Because of the shorter timeframe involved, these proceedings provide a viable alternative to court proceedings and are especially useful when businesses need urgent orders, for example, to stop the invocation of a bank guarantee. Jurisdictions like Singapore and Hong Kong recognise and enforce orders made in emergency arbitration proceedings. However, the Indian Arbitration Act neither recognises emergency arbitration proceedings nor provides for enforcement of orders made by emergency arbitrators. This lack of statutory recognition was a challenge when enforcement of an order made in emergency arbitration proceedings was sought in India.

To get around this challenge, one option for parties was to file an application for interim measures under section 9 of the Indian Arbitration Act. In relation to arbitration proceedings seated outside India, parties would normally first invoke emergency arbitration proceedings and, if needed, then file a section 9 application in India. For example, in *HSBC v. Avitel Post Studios*¹, *Raffles Design v. Educomp Professional Education*² and *Plus Holdings v. Xeitgeist Entertainment*³, the Indian courts passed orders in similar terms to the orders made by the emergency arbitrators. This provided parties with an indirect mechanism to enforce an emergency arbitrator’s orders where the arbitral seat was outside India. For India-seated arbitrations, parties would generally directly file an application for interim measures under section 9 of the Indian Arbitration Act, instead of invoking emergency arbitration proceedings.

For the first time in a case where the seat of arbitration was in India, the Indian Supreme Court has explicitly recognised that “[t]here is nothing in the Arbitration Act that prohibits contracting parties from agreeing to a provision providing for an award made by an Emergency Arbitrator”. This pronouncement is significant for India-related businesses with contracts that provide for arbitration under institutional rules which include emergency arbitration proceedings. It paves the way for direct enforcement of an emergency arbitrator’s order (where the arbitral seat is in India), which is likely to act as a deterrent and prevent a recalcitrant party from flouting the order. This development, together with earlier ones, would make emergency arbitration proceedings even more attractive than seeking injunctive relief from Indian courts.

This case update briefly examines the Indian Supreme Court’s decision in *Amazon v Future Retail*.

¹ 2014 SCC OnLine Bom 102 (Bombay High Court)

² 2016 SCC OnLine Del 5521 (Delhi High Court)

³ Commercial Arbitration Petition No. 339 of 2019, Bombay High Court’s order dated 7 March 2019

Background

With a view to expanding its business in India, in August 2019, Amazon.com NV Investment Holdings LLC (“**Amazon**”) entered into a suite of three agreements with Future Retail Limited (“**FRL**”), individuals in the Biyani family and companies related to the Biyani family (collectively, “**Biyani Group**”). Pursuant to these agreements, Amazon made an investment in Future Coupons Pvt. Ltd. The scheme in the agreements stipulated that FRL could not, without Amazon’s consent, transfer its retail assets to certain “restricted persons” named in the agreements. These agreements were governed by Indian law and the dispute resolution clauses provided for arbitration under the Arbitration Rules of the Singapore International Arbitration Centre (“**SIAC Rules**”) with New Delhi as the seat of arbitration.

Disputes arose between the parties when the Biyani Group entered into a transaction with a “restricted person” to dispose of FRL’s assets in favour of the restricted person. Amazon commenced SIAC arbitration against the Biyani Group and filed an application seeking emergency interim relief. After hearing the parties, the emergency arbitrator appointed by the President of the Court of Arbitration of SIAC issued an interim order on 25 October 2020 (“**EA Order**”) *inter alia* injunctioning the Biyani Group from proceeding with its transaction with the “restricted person”. Nonetheless, the Biyani Group proceeded to consummate the transaction.

WongPartnership is acting for Amazon in the SIAC arbitration proceedings.

A number of proceedings were commenced in the Indian courts in relation to the EA Order. The Biyani Group filed a civil suit in the Delhi High Court seeking *inter alia* to restrain Amazon from proceeding with the SIAC arbitration. In this suit, it contended *inter alia* that the concept of emergency arbitration is outside the scope of the Indian Arbitration Act, and that the EA Order was therefore bereft of jurisdiction and a nullity. On the other hand, Amazon filed an application seeking enforcement of the EA Order under the Indian Arbitration Act. In the enforcement proceedings, a single judge of the Delhi High Court held that the EA Order was enforceable as an order under the Indian Arbitration Act. The Biyani Group challenged this order before a division bench, which stayed the operation of the single judge’s earlier decision. Against this order and other related orders, appeals were filed before the Indian Supreme Court.

The Indian Supreme Court’s Decision

Section 17(1) of the Indian Arbitration Act empowers an arbitral tribunal to order interim measures during the pendency of the arbitral proceedings. The critical question before the Indian Supreme Court was whether an award made by an emergency arbitrator under the SIAC Rules can be said to be an order under section 17(1) of the Indian Arbitration Act. If so, it could be enforced under section 17(2) of the Indian Arbitration Act.

Before the Indian Supreme Court, the Biyani Group contended, *inter alia*, that:

- First, despite suggestions made by the Law Commission of India in the past, the Indian parliament did not amend the Indian Arbitration Act to give legislative recognition to emergency arbitration proceedings. Therefore, an emergency arbitrator is not a recognised entity under the Indian Arbitration Act.

- Secondly, although the parties had agreed to arbitration under the SIAC Rules which provide for emergency arbitration, the arbitration agreement was subject to Indian law which does not recognise such proceedings. The part of the SIAC Rules regarding emergency arbitration was therefore inapplicable.

Rejecting the Biyani Group's arguments, the Indian Supreme Court held that, where parties have decided to resolve their disputes under institutional arbitration rules which provide for emergency arbitrators making interim orders, such orders are "*referable to and ... made under Section 17(1) of the Arbitration Act.*"

Scheme of Indian Arbitration Act and party autonomy

Recognising that party autonomy is one of the pillars of the Indian Arbitration Act, the Indian Supreme Court first observed that parties are free to authorise an arbitration institution to determine issues between them which have not been provided for in the arbitration agreement. It then found that there is neither an express nor implied prohibition against emergency arbitration proceedings under the Indian Arbitration Act. Moreover, it took the view that the mere fact that a recommendation of the Law Commission of India is not followed by the Indian 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*". Therefore, if the institutional arbitration rules provide for an emergency arbitrator making interim orders, such orders would be within the ambit of the Indian Arbitration Act and in the context of section 17(1), the definition of an arbitral tribunal would include an emergency arbitrator. The Indian Supreme Court therefore concluded that there was no inconsistency between the scheme of the Indian Arbitration Act and the SIAC Rules, which provide for emergency arbitration proceedings.

SIAC Rules

The Indian Supreme Court also noted paragraph 12 of Schedule 1 to the SIAC Rules, which in the relevant part provides as follows:

The parties agree that an order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made, and undertake to carry out the interim order or Award immediately and without delay.

In this regard, the Indian Supreme Court observed that "*it cannot lie in the mouth of a party to ignore an Emergency Arbitrator's award by stating that it is a nullity when such party expressly agrees to the binding nature of such award from the date it is made and further undertakes to carry out the said interim order immediately and without delay*".

Enforcement

Consequent to the Indian Supreme Court's holding that an emergency arbitrator's order is made under section 17(1) of the Indian Arbitration Act, that order was, pursuant to section 17(2) of the Indian Arbitration Act, deemed to be an order of a court and shall be enforceable under the (Indian) Code of Civil Procedure, 1908.

Conclusion

The absence of the recognition and enforcement mechanism under the Indian Arbitration Act was a limiting factor to the effectiveness of emergency arbitration under institutional arbitration rules. The Indian Supreme Court's judgment in *Amazon v Future Retail* addresses this lacuna, and may incentivise parties to choose emergency arbitration proceedings over court proceedings in India when seeking urgent orders.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following:



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