

India's Stand on Emergency Arbitrators and Emergency Awards



Authors **Nishant Menon** | nishant.menon@kochhar.com
Nikhil Bhatia | nikhil.bhatia@kochhar.com

The Supreme Court of India on 6th August, 2021 in *Amazon.com NV Investment Holdings LLC v Future Retail Limited & Others* handed down a seminal decision in relation to enforcement of an Emergency Arbitrator's ("EA") award. The ruling has great significance as it furthers India's mission of being a pro-arbitration State where there is greater ease of doing business.

Also, the judgment reaffirms the position under Indian law on the status and powers of an EA as a species of arbitrator and not a creature unlike it. Below, we briefly recount, analyse and comment upon the widely celebrated landmark judgement.

Brief Facts and Procedural History

Future Retail ("Future") and Amazon signed a Shareholder's Agreement on 12th August, 2019 ("Agreement") based on which Amazon made an investment in Future's retail assets. This Agreement included an arbitration clause which stipulated that any dispute would be resolved under the aegis of Singapore International Arbitration Centre ("SIAC") and with New Delhi as the seat.

Subsequently, Future struck a deal with Reliance on 29th August, 2020 which would entail the former's cessation and its amalgamation with the latter. According to Amazon, by agreeing to this deal Future had breached the terms of their Agreement as they asserted that,

- the deal was deemed to be violative of the 'Right of First Refusal' clause in Amazon's favour,
- Future was barred to sell their stake without Amazon's consent, and
- Reliance was demarcated as a 'restricted party', i.e., Future was not allowed to deal with the entity as part of the agreement.

In pursuance of the same, Amazon invoked emergency arbitration (which was permitted under SIAC's Rules as a means to grant interim protection) on 5th October, 2020 to restrict the Reliance deal from going through. Upon hearing

both parties, the EA adjudicated in favour of Amazon on 25th October, 2020 and passed an interim order granting relief to them by restricting Future to go ahead with its deal with Reliance till the matter was resolved by a regular Arbitral Tribunal as envisaged under the Agreement.

Disappointed with this outcome and without waiting for the constitution of an Arbitral Tribunal, Future approached the Delhi High Court to vacate the EA's stay order. The interim relief sought by Future was denied at this stage as the High Court by its order of 21st December, 2020 upheld the validity of the EA order. It was also of the opinion that the other arguments advanced by Future with respect to the merger's sanctity had been or were being considered by various statutory bodies like the Competition Commission of India, the National Company Law Tribunal as well as the Securities and Exchange Board of India, and that they should continue to do so without the Court's intervention.

Further bolstered by this outcome, an application under Section 17(2) of the Arbitration and Conciliation Act, 1996 ("Act") to enforce the award by the EA was filed by Amazon wherein the High Court on 2nd February, 2021 deemed the order to be legitimate and thus enforceable under the aforementioned section which gives an interim order of an arbitral tribunal the status of a court decree to facilitate execution.

Aggrieved by this, Future approached Delhi High Court's Division Bench in appeal which stayed the Single Judge's order for enforcement on 22nd March, 2021.

Consequently, Amazon filed a Special Leave Petition before the Supreme Court of India. While it examined the petition, on 19th April, 2021 the Supreme Court stayed proceedings of the lower courts while allowing the National Company Law Tribunal to keep working on determining the viability of the merger but instructed it to not pass any orders during the petition's pendency.

We now move towards the Apex Court's decision in the matter on August 6, 2021.

Judgment

The Supreme Court identified two core issues that were to be decided-

- Whether an award passed by the EA under the SIAC's rules could be construed as an "order" under Section 17(1) of the Act, and
- Whether an order to enforce an EA's award under Section 17(2) was appealable under the Act.

The Apex Court answered the first question in the affirmative, and the latter in the negative.

Some of the salient points noted by the Supreme Court ("Court") while coming to this conclusion are as follows:

- The Court examined the objective and scope of the Act's provisions as well as relying on numerous judgements to re-emphasize that party autonomy was one of the most crucial aspects of arbitration. Thus, parties were allowed to determine the procedure via which they wanted to resolve a dispute and that the Act did not contemplate a bar on emergency arbitration as a forum for adjudication. Furthermore, a reference to the SIAC Rules was made wherein it was clearly stated that an EA and an arbitral tribunal have the same powers.
- The Court stated that once a party has agreed to certain institutional rules and acted in pursuance of the same, in this case being bound by SIAC Rules that provide for emergency arbitration and participating in it, an argument cannot consequently be entertained that such an order or award is not bound to be followed.
- The Court noted that an emergency arbitration is a natural corollary and extension of the objectives of Section 9 of the Act, which provides for interim relief by courts prior to constitution of the arbitral tribunal, i.e., to unplug traditional forums and provide timely and efficient relief till such constitution.
- The Court quoted the B.N. Srikrishna Committee Report which had contemplated interpreting the Act in a manner that allows enforcement of EA orders in the nation.

Referencing the 246th Law Commission Report, the Court opined that even though its recommendation to allow EA rulings in the country was not inserted statutorily by the Parliament, that would not tantamount to the same being unenforceable if it was determined that its enforceability was within the scope of the Act.

- With respect to the issue of appealability, the Court held that enforcement under Section 17(2) of the Act has a very limited function and clear purpose. It is a legal fiction created to uphold interim orders of an arbitral tribunal akin to an order of the court. It was only created as the tribunal itself does not have the same powers to utilize the Code of Civil Procedure *vis a vis* a court of law. On inspecting the Act's scheme, the Court noted that Section 37, which lays down the law with respect to appealability of court/arbitral tribunal orders, is complete and sufficient and thus the legislature did not envisage appeals arising from Section 17(2) as that would be incorrectly extending the aforementioned fiction.

Conclusion

This is a landmark decision of great significance for dispute resolution in India. The ruling allows for India-seated arbitrations to conduct emergency arbitrations as the courts will now treat their orders at par with those of an arbitral tribunal, without requiring intervention from the legislature. It could potentially be a big step towards making India a hub for arbitration as parties dealing commercially in India will look at domestic-seated arbitrations in a more favorable light. This is also likely to be a shot in the arm for domestic arbitrations under the aegis of institutions as only institutional arbitrations provide for emergency arbitration in their rules.

In preparing this article, Nishant Menon was assisted by Nikhil Bhatia

Nishant Menon is a Senior Partner in the Dispute Resolution Practice Group.

Nikhil Bhatia is an Associate.

Both are based in the Kochhar & Co New Delhi office.