VOLUME 2 | ISSUE 4

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

INDIA'S QUANDARY OVER RECOGNITION OF EMERGENCY ARBITRATION: AN ONGOING SAGA

- Rahul Mahajan & Bhumika Khandelwal[1]

ABSTRACT

Reliance Retail Ventures Limited open subversion of the award passed by the Emergency Arbitrator in Singapore International Arbitration Centre Arbitration granting stay on ongoing acquisition deal between Reliance Retail Ventures Limited and Future Group Retail Ltd. at the instance of Amazon Investment Holding has once again reflected upon the gap in India's aspirations to facilitate ease of doing business in the country and the lacunae of the Indian Arbitration regime in recognizing the enforcement of such emergency awards. The authors of this short article, thus, aim at analyzing the recognition and working of the emergency arbitration in the light of foreign jurisdictions while highlighting the shortcomings in the Indian arbitration law in recognizing such international practices. This short article dwells into the powers and procedure of emergency arbitration and also looks into the current status of emergency arbitration in India in the light of 246th Law Commission Report, High-Level Committee Report, and institutional recognition. The authors attempt to gauge upon the challenges associated with the enforcement of emergency awards in India and understand the stance taken by the Indian judiciary in this subject by analyzing some important case laws pertaining to the subject. Therefore, taking into consideration the standard international practices, this short article strives to give the reader a thorough and comprehensive understanding of the concept of emergency arbitration and help them understand the ways that India could adopt for regulating the enforcement of emergency awards, in both Indian-seated and foreign-seated arbitration.

[1] Assistant Legal Counsel, Tech Mahindra Limited & Student at ILS Law College Pune Respectively.

INTRODUCTION

Future Retail Ltd.'s ["**FRL**"] willful disobedience of the award passed by the Emergency Arbitrator in Singapore International Arbitration Centre ["**SIAC**"] Arbitration initiated at the instance of Amazon Investment Holding ["**Amazon**"] challenging the ongoing deal between Reliance Retail Ventures Limited ["**RRVL**"] and FRL has once again reignited the debate surrounding the enforceability of such emergency awards in India.

Party autonomy and timely relief are the two foundation stones of the Law of Arbitration. To propagate these principles, the concept of Emergency Arbitration ["**EA**"] was introduced in the Asian region by the SIAC Rules in the year 2010.[2] In the contemporary international commercial arbitration, EA has proved to be a turning tide in situations where there is an imminent risk of irreparable damage being caused to one of the parties to the dispute.

EA is essentially a 'creature of consent' which derives its power from an agreement to arbitrate. The efficacy of an EA invoked by a party survives on a chariot of two wheels:

1. ***Fumusboniiuris***- reasonable possibility that the requesting party will succeed on merits; and
2. ***Periculum in mora*** – if the measure is not granted immediately, the loss would not and could not be compensated by way of damages.[3]

International Arbitral institutions such as SIAC and Hong Kong International Arbitration Centre ["**HKIAC**"] have added a new dimension to the field of arbitration by incorporating the concept of EA in their rules.[4] Even their respective states have walked an extra mile and

[2]Stephanie Khan and Benson Lim, *Emergency Arbitrator Procedures: What Should a Practice Note of Best Practices Consider?*, KLUWER ARBITRATION BLOG (Apr. 19, 2021, 3:00 PM), http://arbitrationblog.kluwerarbitration.com/2019/01/11/emergency-arbitrator-procedures-what-should-a-practice-note-of-best-practices-consider/.

[3]Singhania and Partners, *Emergency Arbitration In India: Concept And Beginning*, MONDAQ (Apr. 19, 2021, 3:00 PM), https://www.mondaq.com/advicecentre/content/3958/Emergency-Arbitration-In-India-Concept-And-Beginning.

[4]SINGAPORE INTERNATIONAL ARBITRATION CENTRE, Rule 26, https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule30 (last visited Apr. 19, 2021); HKIAC, Article 38, https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018 (last visited Apr. 19, 2021).

amended their municipal laws in order to give formal statutory recognition to the notion of EA.[5] With respect to the recognition and enforcement of the emergency award under the Indian Law of Arbitration, the sight is fuzzy.

In a situation that calls for securing speedy interim reliefs to safeguard the interest of the parties, an Emergency Arbitrator is appointed even before the constitution of the arbitral tribunal who is empowered to provide the necessary preventive and protective measures. The notion of EA is a little different from the normal process of arbitration. Following are a few notable characteristics of an EA are:

1. EA is constituted for a limited purpose;
2. The decision of EA is only interim binding, i.e., it is open to modification by an arbitral tribunal when constituted;
3. An emergency arbitrator enjoys the same powers as the regular arbitral tribunal and his decision is akin to the "award" made by the arbitral tribunal itself; and
4. EA becomes *functus officio* after the award is made or the time stipulated for awarding the relief lapses.

Apart from these salient features, the reason for EA gaining rapid global recognition are the defects in the current system, such as lack of confidentiality of information, high litigation cost, inefficient and delay interim reliefs by national courts.

This short article aims to analyze the concept of EA, its recognition and working in foreign jurisdictions while highlighting the shortcomings in the Indian arbitration law in recognizing such international practices. It dwells into the powers and procedures of EA and further reflects upon the status of EA in India in the light of 246th Law Commission Report[6], High-Level Committee Report[7], and institutional recognition. The authors attempt to gauge upon the challenges associated with the enforcement of emergency awards in India and understand the stance taken by the Indian judiciary on this matter by analyzing some critical case laws pertaining to the subject, paying special attention to the latest decision of the Delhi High Court

[5]International Arbitration (Amendment) Act, 2012, No. 12, Acts of Parliament, 2012 (Singapore); The Arbitration Ordinance, 2011, No. 30, Ordinance, 2011 (Hong Kong).
[6]THE LAW COMMISSION OF INDIA, https://lawcommissionofindia.nic.in/reports/report246.pdf (last visited Apr. 19, 2021)
[7] Justice B. N. Srikrishna, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India*, LEGAL AFFAIRS. GOV (July 30, 2017), https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

in the case of *Amazon.Com NV Investment Holdings LLCv.Future Retail Limited*.[8] In conclusion, the author would also discuss some plausible ways that India can adopt in order to regulate the enforcement of emergency awards, both in Indian seated and foreign seated arbitrations.

POWERS AND PROCEDURES OF EMERGENCY ARBITRATION

A vital consideration for any party seeking urgent interim relief is the time taken by the emergency arbitrator for passing the award. If an award is not delivered in a reasonable time, the entire process is rendered moot. Even though the rules of every arbitration institution differ slightly concerning the procedure of emergency arbitration, granting timely relief is the essence of emergency arbitration across the sphere.

Commonly recognized international procedure for seeking the emergency interim relief is that if the contract between the parties provides for an institutional arbitration clause, any party who in need of an urgent prohibitory or conservatory reliefs and cannot await the constitution of the arbitral tribunal, can apply for the appointment of an emergency arbitrator with the registrar of the arbitration institution.[9] The application should necessarily provide the nature of the relief sought, the reasons and justifications why the party is entitled to such relief, and an undertaking certifying that a copy of the application has been served upon the other party to the dispute.[10] Within twenty hours from the receipt of such an application along with the requisite administration fees and deposits, if the application receives the assent of the President of the arbitration institution, an emergency arbitrator is appointed.[11] The emergency arbitrator usually refrains from going into the thickets of the case and restricts itself to the documentary evidence and written submissions of the parties. However, it can consult the parties in case any major clarifications are sought. Timelines do vary under the rules of various arbitration institutions. However, on an average, the time limit prescribed for an emergency arbitrator to deliver an award is that of ten to fifteen days from the date of receipt of the application.

In addition to the powers given under the prescribed rules, an emergency arbitrator is also vested with the powers of the arbitral tribunal, including the power to rule on its own

[8]Amazon.Com NV Investment Holdings LLC v. Future Retail Limited, 2021 SCC OnLine Del 1279.
[9]SINGAPORE INTERNATIONAL ARBITRATION CENTRE, Schedule I, https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule30 (last visited Apr. 19, 2021)
[10]*Id.*
[11]*Id.*

jurisdiction, grant interim relief in the form of prohibitive and mandatory injunctions, give orders for the inspection or conservation of evidence, deliver preventive orders to avoid misuse of confidential information or intellectual property, and any other relief that the arbitrator may consider necessary in order to preserve the subject matter of the dispute.

Therefore, considering the expedited procedure involved, it is safe to say that an emergency arbitrator exercises similar functions as that of an ad-hoc tribunal that is constituted for a limited purpose and dissolves once the said purpose has been accomplished. Although the award passed by the emergency arbitrator is not binding on the arbitral tribunal, it has to be necessarily discharged, varied, or revoked in part or whole by a subsequent order of the tribunal.[12] While doing so, the tribunal may be acting upon an application made by either party or may even take *suo-moto* cognizance of the matter.

RECOGNITION OF EMERGENCY ARBITRATION: GLOBAL TREND

The United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration, 1985[13] was amended in 2006 to empower the arbitral tribunal to grant interim reliefs to parties.[14] Following this, in July 2010, the new SIAC Rules were formed, which provided for two innovative and effective provisions for parties at dispute: the emergency arbitrator and the expedited procedure for disposal of the dispute in case of an exceptional emergency.[15] Both procedures have proven to be remarkably successful in providing parties with alternative means to obtain speedy relief and reduce the time and costs involved in resolving their dispute. SIAC was the first Asian international arbitration institution to incorporate the concept of EA in its rules.[16] The purpose of introducing a provision pertaining to emergency arbitration in the SIAC Rules was to deal with the situations where a party is in dire need of an interim relief and cannot wait until the constitution of the arbitral tribunal. Following the progressive footsteps of SIAC, several other arbitration institutions also amended their rules and recognized the notion of EA.

[12] *Id.*
[13] G.A Res. 61/33, U.N. Doc A/RES/61/33 (Dec. 18, 2006).
[14] UNITED NATIONS, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (last visited Apr. 20, 2021)
[15] SINGAPORE INTERNATIONAL ARBITRATION CENTRE, Rule 5, 26, https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule30 (last visited Apr. 19, 2021).
[16] *Supra* note 1.

The current legislative and judicial trend worldwide is inclined to incorporate the provision of EA in national laws of maximum jurisdiction so as to provide it global recognition. Presently, on the one hand, institutions like the SIAC, the Swiss Chambers Arbitration Institution,[17] the Stockholm Chamber of Commerce, [18] and the Netherlands Arbitration Institute[19]provide for both expedited constitution of the arbitral tribunal as well as the EA, whereas, on the other hand, HKIAC[20], the London Court of International Arbitration ["**LCIA**"][21], the International Chamber of Commerce[22] and the International Centre for Dispute Resolution of the American Arbitration Association[23] have given recognition solely to EA.

Singapore and Hong Kong are considered to be the torchbearers among the Asian jurisdictions when it comes to the recognition of EA. Both these countries have passed amendments and modified their municipal statutes to provide express recognition to the interim orders passed by an emergency arbitrator. In 2012, Singapore amended its International Arbitration Act and accommodated "emergency arbitrator" within the definition of "arbitral tribunal".[24] It also provided for the enforceability of the awards and orders delivered by emergency arbitrators in both domestic seated and foreign seated arbitrations. This made Singapore the first jurisdiction globally to recognize and enforce awards and orders of an emergency arbitrator. Subsequently, Hong Kong also amended its Arbitration Ordinance by inserting Part 3A to recognize this new and cost-effective concept and regulate the enforcement of the orders passed by an emergency arbitrator.[25]

The recent decision of the English High Court in the case of *Gerald Metals S.A. v. Timis& Ors.*[26] further highlights this global trend of recognition of EA by various jurisdictions. It was

[17]SWISS CHAMBERS ARBITRATION INSTITUTION, Article 42, 43 https://www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws (last visited Apr. 20, 2021).
[18]ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, Appendix II, https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf (last visited Apr. 20, 2021).
[19]NETHERLANDS ARBITRATION INSTITUTE (NAI), Articles 42a and 42b, https://www.nai-nl.org/downloads/NAI%20Arbitration%20Rules%201%20January%202010.pdf (last visited Apr. 20, 2021)
[20]HKIAC, *Supra* note 3.
[21] LCIA, Article 9B, https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx (last visited Apr. 21, 2021).
[22]THE INTERNATIONAL CHAMBER OF COMMERCE (ICC), Article 29 and Appendix V, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (last visited Apr. 20, 2021).
[23] INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR), Article.38, https://www.adr.org/sites/default/files/Commercial-Rules-Web.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-commercial (last visited Apr. 20, 2021)
[24]International Arbitration (Amendment) Act, *Supra* note 4.
[25]Arbitration Ordinance, *Supra* note 4.
[26]Gerald Metals S.A. v. Timis& Ors., 2016 EWHC 2327 (Ch).

held that the Court has no power to grant any urgent relief under the Arbitration Act in situations where the party has the option to seek recourse to an expedited tribunal or an emergency arbitrator under the LCIA Rules. Such a stance not only gives recognition to the concept of EA but also reflects upon its emerging importance in the international community.

However, owing to the fact that an emergency arbitrator award is not an order in finality under law, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ["**New York Convention**"][27], the leading soft law on enforcement of foreign arbitral awards, does not give recognition to such an order. Therefore, the enforcement of the EA seated outside India has not been recognized and enforced under the Indian Arbitration Law as the order is tested on the touchstone of finality under the said convention.

STATUS OF EMERGENCY ARBITRATION IN INDIA

Indian Arbitration Regime does not recognize the enforcement of the award of an emergency arbitrator. Since the definition of "arbitral tribunal" under Section 2(d) of the Act does not include an "emergency arbitrator",[28] an emergency arbitrator cannot be considered as an arbitral tribunal under Section 17(1) of the Arbitration and Conciliation Act, 1996 ["**theAct**"] and consequently, an award passed by the emergency arbitrator is not eligible for being enforced under Section 17(2) of the Act.[29] Further, as discussed earlier, the New York Convention, which forms the basis for Part II of the Arbitration Act, also does not recognize an award passed by an emergency arbitrator on account of the fact that such an order has not attained finality under the law. Thus, in the absence of any express statutory recognition of EA in India, there is a lot of uncertainty regarding the enforcement of emergency awards in domestic and foreign seated arbitrations.

With an aim to remove such defects from the Indian legal landscape and to run parallel with the global practice, in 2014, the Law Commission in its 246th Report proposed some amendments in the Arbitration Act to incorporate the concept of EA in the municipal laws and set up an

[27]United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 U.N.T.S. 3 (July 10, 1958).
[28]The Arbitration and Conciliation Act, 1996, § 2(d), No. 26, Acts of Parliament, 1996 (India).
[29]The Arbitration and Conciliation Act, 1996, § 17, No. 26, Acts of Parliament, 1996 (India).

effective system to deal with its enforcement. The Commission suggested the following modification in the definition of "arbitral tribunal":

Amendment to Section 2(d): *"Arbitral tribunal" means a sole arbitrator or a panel of arbitrators and, in the case of an arbitration conducted under the rules of an institution providing for the appointment of an emergency arbitrator, includes such emergency arbitrator."*[30]

Therefore, the Commission sought to give legislative sanction to the notion of EA by broadening the ambit of the definition of "arbitral tribunal" provided under Section 2(d) of the Act.

It was expected that the recommendations of the 246th Law Commission Report will be imbibed in the Arbitration and Conciliation (Amendment) Act of 2015,[31] and changes would be made to finally provide statutory recognition to the appointment of an emergency arbitrator and the enforcement of its award. However, contrary to everyone's expectations, the 2015 Amendment Act did not even mention EA.

Later, in 2017, a High-Level Committee was formed under the chairmanship of Justice B.N. Srikrishna (Retd.) to review the institutionalization of arbitration mechanisms in India. In its report dated July 30, 2017, the High-Level Committee reiterated the recommendations made in the 246th report of the Law Commission of India.[32] The Committee observed that considering the international standards of allowing enforcement of emergency awards, India also needs to take necessary steps to allow the enforcement of such awards under the Act.

Although the legislators turned a blind eye towards the recommendations made by the Law Commission as well as the High-Level Committee, the leading institutional arbitration centers in India, taking inspiration from some major international arbitration institutions such as SIAC and HKIAC, have come forward and recognized the concept of EA by incorporating it in their rules.

[30] *Supra* note 5.
[31] The Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016 (India).
[32] *Supra* note 6.

For instance, Delhi International Arbitration Centre (Arbitration Proceedings) Rules 2018[33] includes an emergency arbitrator within its definition of an arbitral tribunal. Rule 14 of Part E explains the appointment, procedure, time period, and powers of an emergency arbitrator.[34] Similar provisions have been incorporated by the Madras High Court Arbitration Center,[35] Court of Arbitration of the International Chamber of Commerce-India ["**ICC**"]**[36]** as well as Mumbai Center for International Arbitration.[37]

However, without explicit statutory recognition of the concept of EA in the Act, the efforts made by these institutions mean nothing. Even though they have specifically modified their rules to include the concept of EA, they cannot practically implement it or enforce the awards so delivered by an emergency arbitrator unless there is some legal backing to it. Therefore, the need to accept the notion of EA in India is vital in order to provide legislative support to the rules of these arbitral institutions and revamp the Indian arbitration regime according to the latest trends in international commercial arbitration.

CHALLENGES TO THE ENFORCEMENT OF AN EMERGENCY AWARD IN INDIA

Despite the recommendations made by the Law Commission in its 246th Report as well as the High-Level Committee, the award passed by an emergency arbitrator has still not been included within the scope of the Act. Consequently, the enforcement of such emergency arbitrator's awards continues to be a bone of contention for many. This is due to the following legal lacunae in the present arbitration landscape:

a) Arbitral Tribunal

As mentioned earlier, the term "arbitral tribunal" is defined under Section 2(1)(d) of the Act.[38] However, this definition is construed to be ambiguous and unclear since it simply takes into account "a sole arbitrator or a panel of arbitrators" and does not talk about an arbitrator who is

[33]THE DELHI INTERNATIONAL ARBITRATION CENTRE (DIAC), http://www.dacdelhi.org/topics.aspx?mid=74 (last visited Apr. 20, 2021).
[34]*Id* at Rule 14.
[35] THE MADRAS HIGH Court, Part IV, Article 19, http://www.hcmadras.tn.nic.in/rules.html (last visited Apr. 20, 2021).
[36]ICC, Article 29, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (last visited Apr. 20, 2021).
[37]MUMBAI CENTER FOR INTERNATIONAL ARBITRATION, Article 14, https://mcia.org.in/mcia-rules/english-pdf/ (last visited Apr. 20, 2021).
[38]*Supra* note 27.

vested with the powers to grant only interim reliefs. This raises a serious issue because an action of a person not recognized as an "arbitral tribunal" under the Act will have no legal sanctity.

One plausible argument in this regard is that an arbitrator not vested with the power to finally decide the issues arising between the parties is not an "arbitral tribunal" within the meaning of the Act. Such an argument has particular merit in the context of institutional rules such as that of SIAC or ICC, where there is a clear distinction between a "tribunal" and an "emergency arbitrator". According to the SIAC Rules, an emergency arbitrator is explicitly forbidden to act as an arbitrator on the matter unless the parties agree otherwise.[39] Accordingly, many people contend that an "arbitral tribunal" as used in the Arbitration Act refers only to the "tribunal" as defined in the SIAC Rules and not to an "emergency arbitrator". However, there is no definite answer to this query yet since we still do not have an authoritative precedent interpreting this issue.

b) Seat of Arbitration

Depending upon the *situs* of arbitration, the issues pertaining to the enforceability of emergency awards in India vary. While Part I of the Act deals with arbitrations seated in India, foreign seated arbitrations are dealt with in Part II of the Act.[40] Consequently, even though Section 17 of the Act does talk about enforcing an interim order passed by the arbitral tribunal as a decree of Court, it is only applicable to arbitrations seated in India and not to orders passed outside India. Nonetheless, such a provision can at least be used to resolve the issue of enforcement of emergency awards in Indian seated arbitrations, although there is no definitive decision on this issue yet.

Furthermore, although Part II of the Act deals with the enforcement of foreign awards, which has attained finality. When it comes to enforcement of emergency awards of foreign seated arbitrations, the issue of finality arises. Since this part of the Act is based on the New York Convention, for an award to be enforceable under this part, it needs to be (i) binding upon the parties to the arbitration agreement; (ii) in consonance with the terms of the arbitration agreement; and (iii) final.[41] This is clearly reflected in the definition of foreign award given under Section 44 of the Act which only takes into account 'arbitral award' and not interim

[39] *Supra* note 8.
[40] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[41] *Supra* note 26, Article V.

awards.[42] Therefore, since the award of an emergency arbitration is only 'interim binding', i.e., it is capable of being modified by the arbitral tribunal and can even be vacated at any point during the proceedings, it is incapable of being enforced under the Arbitration Act.

Besides, as per Section 48 of the Act, the enforcement of a foreign award can be refused if the opposite party is able to prove that the award has not become binding or can be suspended or set aside.[43] Accordingly, because an emergency award is subject to modification and is not final in nature, it cannot be made enforceable under Part II of the Act. Thus, in the absence of a provision similar to Section 17 for foreign seated arbitrations in Part II of the Act, the emergency awards of foreign seated arbitrations cannot be enforced under the Act, and the only method available for enforcing the same would be to file a suit under Section 9, disposal of which might take a considerable amount of time, thereby defeating the very purpose of the emergency award itself.

ENFORCEMENT OF EMERGENCY AWARD IN INDIA: JUDICIAL TRENDS

In India, judicial decisions concerning emergency arbitration are scant. Owing to the absence of any express statutory recognition of emergency arbitration in the Indian Arbitration regime, the Courts have hardly got any opportunity to look into the validity of an emergency arbitrator award or deal with an enforcement application for enforcing such an award. Instead of seeking enforcement of the emergency award, parties, particularly in a foreign seated arbitration, tend to opt for filing an application under Section 9 of the Arbitration Act and seek interim relief from the Indian Courts in sync with the order of the emergency arbitrator. However, despite the lack of any explicit provision in this regard, the Bombay High Court and the Delhi High Court have emerged as the guiding light in this issue of emergency arbitration and have attempted to provide necessary relief to the parties.

In *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd.* (2014)[44], the parties resorted to an emergency arbitration seated in Singapore where an order was delivered in favour of HSBC. Based on the same order, HSBC sought interim injunctive relief against Avitel under Section 9 of the Arbitration Act. The Bombay High Court, in this case, reiterated the findings of the emergency arbitrator and granted necessary relief to HSBC in line with the emergency

[42] *Supra* note 39, § 44.
[43] *Supra* note 39, § 48.
[44] HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd., 2014 SCC OnLineBom 929.

award. While doing so, the Court specifically clarified that no conditions of enforceability were being bypassed since HSBC did not try to enforce the interim award directly.

Similarly, in the case of *Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors.* (2016),[45] the parties resorted to emergency arbitration seated in Singapore, and the interim order so passed was later enforced in the High Court of the Republic of Singapore. Later, having obtained the favorable order, Raffles filed a Section 9 application before the Delhi High Court alleging that the other party was acting in contravention to the orders passed by the emergency arbitrator. In this case, the Single Judge Bench, while allowing the maintainability of such applications, clearly held that an emergency arbitrator order cannot be directly enforced under the Arbitration Act, and the only way to implement the same is to file a separate suit seeking interim measures. The Court, in such a situation, may grant interim reliefs to the party without even considering the order passed by the emergency arbitrator.

On the other hand, recently, in the case of *AshwaniMinda v.U-Shin Ltd.* (2020),[46] when former approached the Delhi High Court under Section 9 with an intention to obtain the interim relief that was apparently rejected by the emergency arbitrator appointed under the rules of Japan Commercial Arbitration Association ["**JCAA Rules**"], the Court straight away rejected the maintainability of such an application and observed that the parties, having adopted the JCAA Rules, impliedly restricted the Court from entertaining any such application. In addition, the Court, in this case, also gave due regard to the proceedings of the emergency arbitration and held that a party, after being unsuccessful before the emergency arbitrator, cannot take a second bite of the same cherry and ask for a similar interim relief from the national Court.

These above-mentioned cases reflect upon the various issues surrounding international commercial arbitration in India, particularly the enforceability of orders passed by an emergency arbitrator. They highlight the lacunae of the Indian arbitration landscape with regard to the recognition of emergency arbitration and go on to show how rules of international arbitral institutions can affect the enforceability of these emergency awards in our country. Besides these cases, the ongoing dispute between Amazon.Com NV Investment Holdings LLC and FRL

[45]Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors., 2016 SCC OnLine Del 5521.
[46]AshwaniMinda v. U-Shin Ltd., 2020 SCC OnLine 721.

is the new talk of the town which has now been listed before the Supreme Court of India and is scheduled for hearing on May 04, 2021.[47]

THE AMAZON-FUTURE DISPUTE: A STEP FORWARD

Stuck at an impasse, this dispute between Amazon, Future Group, and Reliance has been making headlines every day. This dispute arose when the multinational e-commerce giant Amazon challenged a retail asset sale of worth USD 3.38 billion to MukeshDhirubhaiAmbani Group (Reliance) by the Future Group, claiming that such a transaction was in contravention with the Shareholders Agreement (SHA) entered into by Amazon along with the promoters of the Future Group (Biyanis).[48] Apparently, as per the provisions of the said SHA, it was mutually agreed between the parties that Amazon, having acquired 49% of the share capital, will have certain special negative rights, namely, the retail assets of the Future Retail Limited shall not be eliminated without its prior consent, and especially never to a 'restricted person' within the meaning of the agreement.[49] Despite these underlying provisions, Future Group went ahead with the disputed transaction, violating the terms of the agreement. On the other hand, Future Group denied any wrongdoing on their part and even accused Amazon of unlawfully interfering with the said transaction without any legitimate grounds, violating the Foreign Exchange Management Act (FEMA)-Foreign Direct Investment (FDI) Rules.[50]

Aggrieved by the actions of the Future Group and Amazon opted for an alternate dispute resolution mechanism as provided in the SHA, which was seated in New Delhi and governed by the SIAC Rules. Due to the urgency involved, Amazon resorted to emergency arbitration as envisaged in the SIAC Rules.[51] Subsequently, as an interim win for Amazon, the emergency arbitrator passed an order in its favour, putting a stay on the billion-dollar transaction until the arbitral tribunal was finally constituted.[52]

Dissatisfied by the award of the emergency arbitrator, Future Group filed a suit before the Delhi High Court in an attempt to restrain Amazon from interfering with their transaction with

[47] *Supreme Court Stays All Proceedings In Delhi High Court On Amazon-Future Case*, LIVE LAW.IN (Apr. 19, 2021, 12:04 PM), https://www.livelaw.in/top-stories/supreme-Court-stays-proceedings-in-delhi-high-Court-on-amazon-future-case-172761?infinitescroll=1.
[48] Bhumika Indulia, The conundrum of emergency Arbitration in India: the Amazon-Future dispute, SCC ONLINE (Apr. 20, 2021, 7:30 PM), https://www.scconline.com/blog/?p=246162.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

Reliance. Even though the Court, in the judgment dated 21.12.2020, found the suit to be maintainable, it refused to grant any such relief in the case.[53] This proved to be a partial win for Amazon. However, the proceedings before other forums, namely Securities and Exchange Board of India (SEBI), Competition Commission of India (CCI), and National Company Law Tribunal (NCLT) were progressing rather swiftly. Threatened by such parallel developments, Amazon, in an innovative attempt to hamper the disputed transaction, filed an application under Section 17(2) of the Arbitration Act before the Delhi High Court for the enforcement of the emergency award. In its order dated 2.2.2021, the learned Single Judge upheld the validity of the award under Section 17(1) and enforced the same under Section 17(2).[54] Although the Court reserved its reasoning for a later date, a status quo was to be maintained with respect to the disputed transaction.

As expected, Future Group, being aggrieved by order of the learned Single Judge, filed an appeal before the Division Bench even before the detailed order was passed. The Division Bench also, in complete oblivion of the fact that the impugned order did not even exist in finality at that point, took cognizance of the matter and, through its order dated 08.02.2021, stayed the implementation of the status quo order passed by the learned Single Judge.[55]

Again, Amazon, being extremely dissatisfied by the decision of the Division Bench, exercised its constitutional rights and filed a Special Leave Petition (SLP) before the Supreme Court of India. The Apex Court, however, refused to comment on the merits of the case and asked the parties to file rejoinders, after which the matter would be heard.[56] Besides, although the Supreme Court allowed NCLT to continue its proceedings, it directed that a final decision on the sanction of schemes should not be reached yet.[57]

It is pertinent to note that at this juncture, the judgment of the learned Single Judge of the Delhi High Court, Justice Midha was passed on 18.03.2021, where the Court recognized the emergency award as an order under Section 17(1) of the Arbitration Act.[58] The Court found the current legal framework sufficient to recognize the legitimacy of emergency arbitration in

[53]Future Retail Ltd. v. Amazon Com Investment Holdings LLC, 2020 SCC OnLine Del 1636.
[54]Amazon.Com NV Investment Holdings LLC v. Future Coupons (P) Ltd., 2021 SCC OnLine Del 279.
[55]Amazon.Com NV Investment Holdings LLC v. Future Coupons (P) Ltd., 2021 SCC OnLine Del 412.
[56]Amazon.Com NV Investment Holdings LLC v. Future Retail Ltd., 2021 SCC OnLine SC 145.
[57]*Id.*
[58]Amazon.Com NV Investment Holdings LLC v. Future Coupons (P) Ltd., 2021 SCC OnLine Del 1279.

India.[59] Adopting a liberal approach, the Court even observed the definition of "arbitral tribunal" under section 2(1)(d) to be wide enough to include emergency arbitrators.[60]

However, the Supreme Court, in its order dated 19.04.2021, has put a halt on all the proceedings in the Delhi High Court related to this matter and has directed the parties to complete their pleading for the final hearing scheduled on May 04, 2021.[61]

Even though the approach taken by the learned Single Judge has been perceived as a welcoming step towards India's dream of becoming an international hub for arbitration, a lot is yet to be settled by the Supreme Court when this matter will be heard on its merits.

CONCLUSION

The notion of EA has gained immense popularity all around the world in the last few years. Especially in a world stuck by a global pandemic where the Courts are shut, and even the arbitration proceedings are taking place through virtual mode, the convenience of having an arbitral instrument like EA cannot be understated. The availability of emergency relief provides the parties with an expedited procedure to obtain an urgent and enforceable remedy in a neutral and cost-effective manner.

Various foreign jurisdictions like Singapore, Hong Kong, and New Zealand have embraced the concept of EA and have even amended their legislation in order to give it statutory recognition. On the other hand, in India, despite the recommendations of the Law Commission as well as the High-Level Committee, the legislature has been reluctant to perform its duty towards upholding such legitimate arbitral instruments. Even the Indian Courts have seemed apprehensive to take any step in this direction.

However, the approach of the Single Judge Bench of the Delhi High Court in the recent case of *Future Retail Limited v. Amazon Investment Holdings LLC* is being seen as a positive step in the direction of the enforcement of emergency awards in India. By recognizing the compatibility of EA with the Indian Arbitration Act, the Court has attempted to bring the Indian law in line with the global trend to enforce emergency awards. Despite this, in the absence of a conclusive Supreme Court Judgment, much is left in the hands of the legislature.

[59] *Id.*
[60] *Id.*
[61] *Supra* note 46.

Moreover, the way forward to enforce the emergency awards in India by applying Section 17 of the Arbitration Act, as highlighted by the Amazon case, has its own limitations as it would only be applicable to domestic seated emergency awards. For the enforcement of foreign seated emergency awards, the parties would still have to seek recourse in Courts under Section 9. This undermines the very purpose of EA, taking away the benefits of an expedited procedure. Hence, in order to resolve this issue, it is necessary to insert a provision similar to Section 17(2) in Part II of the Arbitration Act too.

A provision of EA in domestic laws of the country will be curative to the disputes which require urgent interim relief in arbitration proceedings. Recognizing this global trend will definitely be a progressive step in the Indian arbitration regime, helping to achieve minimal judicial interference and quick disposal of disputes, which is necessary to push India towards becoming a hub for arbitration in the Southern-Asian Region. For the purpose of creating an arbitration-friendly ecosystem, it is essential to give precedence to upholding the best international practices based on the cornerstones of arbitration. Thus, it is high time to expand the horizons of arbitration practices in India by giving the long-pending recognition to EA, and reinstate the international community's belief in India's commitment towards international arbitration.