VOLUME IV

IALR

Indian Arbitration Law Review

VOLUME IV MARCH 2022

Indian Arbitration Law Review
VOLUME IV
2022

INDIAN ARBITRATION LAW REVIEW

Volume IV | 2022

March 2022

NATIONAL LAW INSTITUTE UNIVERSITY
Kerwa Dam Road, Bhopal, India-462 044

RECOGNITION AND ENFORCEMENT OF EMERGENCY ARBITRATION IN INDIA: A COMMENT ON THE SUPREME COURT'S RULING IN AMAZON- FUTURE DISPUTE

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1. INTRODUCTION

In a significant ruling that furthers Indian courts' recent pro-enforcement approach while dealing with international commercial arbitrations, the Hon'ble Supreme Court of India ("**Supreme Court**") in the matter of Amazon.com *NV Investment Holdings LLC* v. *Future Retail Ltd.*,[1] has recognised and allowed the enforcement of an "award" passed by an Emergency Arbitrator appointed under the Arbitration Rules of the Singapore International Arbitration Centre ("**SIAC Rules**"). The ruling assumes massive significance in the larger scheme of strengthening the Indian legal ecosystem and framework for international commercial arbitrations. Further, this could be one of the pioneering decisions granting recognition to Emergency Arbitrators around jurisdictions across the world, which may also prove to be pivotal for parties considering to be governed by the Indian law as the curial law of arbitration.

By way of this decision, the Supreme Court has approved the validity, recognition and enforcement of decisions/awards passed by an Emergency Arbitrator, despite the absence of an express statutory recognition to the concept of Emergency Arbitration (or Emergency Arbitrator proceedings) under the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The Supreme Court laid great emphasis on parties' autonomy to subject themselves to the rules of the institution providing for an Emergency Arbitrator and held that in view of there being no interdict, either express or implied, against an Emergency Arbitrator, the awards/orders passed by such Emergency Arbitrator shall be covered under the Arbitration

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1. Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. (2022) 1 SCC 209 : 2021 SCC OnLine SC 557.

Act.[2] Therefore, by filling the legislative void in respect of the legality of Emergency Arbitrations in the Indian scenario, the Supreme Court has also taken a progressive step towards cementing India's position as an international hub for resolving commercial disputes and arbitrations.

While the decision also concerns itself with an incidental question of whether an order passed under Section 17(2) of the Arbitration Act is appealable while enforcing the award of an Emergency Arbitrator, this case comment is restricted to analysing the decision on the issue of enforceability of an award delivered by an Emergency Arbitrator under Section 17(1) of the Arbitration Act.[3]

Through this case comment, the authors shall *firstly,* trace the historical development of the concept of Emergency Arbitrators around the globe; *secondly*, comment on the status accorded to Emergency Arbitrators in India prior to the *Amazon* ruling; *thirdly*, summarize the views expressed in the *Amazon* ruling; *fourthly*, analyse the decision and its relevance in the development of law; and *lastly*, opine on the unsettled issues and the way forward post the *Amazon* decision.

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2. *Ibid*, ¶ 35.
3. § 17 — **Interim measures ordered by arbitral tribunal** —(1) A party may, during the arbitral proceedings apply to the arbitral tribunal —
   (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
   (ii) for an interim measure of protection in respect of any of the following matters, namely:—
      (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
      (b) securing the amount in dispute in the arbitration;
      (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
      (d) interim injunction or the appointment of a receiver;
      (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

   (2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.

2. EMERGENCY ARBITRATION – A CREATION OF NECESSITY

Historically, parties to international arbitration agreements had no recourse to arbitration to preserve the status quo, conserve assets, prevent tampering with evidence, or seek other provisional reliefs until an arbitral tribunal was validly constituted.[4] Thus, for seeking urgent interim or provisional reliefs before the constitution of an arbitral tribunal, the parties had to necessarily approach the national courts, which had the inherent down sides of loss of confidentiality, delays and dependence on the local procedural rules that the parties had sought to avoid in the first place by electing for arbitration.[5] The other option was to await the constitution of an arbitral tribunal, which, in cases requiring urgent reliefs, undermined the very utility of seeking an urgent relief.

Thus, to reduce the involvement of national courts in the arbitral process, international arbitral institutions in modern jurisdictions introduced (in various forms) an "arbitrator" to whom the parties could apply for emergency interim reliefs, prior to the constitution of an arbitral tribunal.[6]

The first institution to introduce Emergency Arbitrator provisions into its rules was the International Centre for Dispute Resolution ("**ICDR**"), the international division of the American Arbitral Association ("**AAA"**). The ICDR introduced the concept of an Emergency Arbitrator in the year 2006.[7] Thereafter, most notable arbitral institutions around the world, such as the International Chamber of Commerce ("**ICC**"),[8] the London Court of International Arbitration ("**LCIA**"),[9] Singapore International Arbitration

4. Grant Hanessian & E. Alexandra Dosman, *Songs of Innocence and Experience: Ten Years of Emergency Arbitration* (2018) ARIA, https://arbitrationlaw.com/sites/default/files/free_pdfs/aria_-_songs_of_access.pdfaccessed 15 September 2021.
5. Report of the ICC Commission on Arbitration and ADR Task Force on Emergency Arbitrator Proceedings, *Emergency Arbitrator Proceedings*, (April 2019) ¶ 4, https://iccwbo.org/publication/emergency-arbitrator-proceedings-icc-arbitration-and-adr-commission-report/ accessed 15 September 2021.
6. Lye Kah Cheong, Yeo Chuan Tat and William Miller, 'Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules: Neither Fish nor Fowl', (2011) 23 SAcLJ, https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal/e-Archive/ctl/eFirstSALPDFJournalView/mid/495/ArticleId/569/Citation/JournalsOnlinePDF accessed 15 September 2021.
7. Originally ICDR International Arbitration Rules 2006, art. 37; Now ICDR International Arbitration Rules 2014, art. 6.
8. ICC Arbitration Rules 2017, art. 29, App. V.
9. LCIA Arbitration Rules 2014, art. 9B.

Centre ("**SIAC**"),[10] Stockholm Chambers of Commerce ("**SCC**")[11] and the Hong Kong International Arbitration Centre ("**HKIAC**")[12] introduced the concept of an Emergency Arbitrator to deal with urgent cases, that required the immediate intervention of an independent authority, pending the constitution of the arbitral tribunal. In India, the rules of arbitral institutions such as Mumbai Centre for International Arbitration ("**MCIA**")[13] and Delhi International Arbitration Centre ("**DIAC**")[14] (amongst others) provide for the appointment of an Emergency Arbitrator to deal with emergency situations requiring urgent interim reliefs.

As can be seen, the emergence of an Emergency Arbitrator is a fairly recent phenomenon which has found favor with the most prominent arbitration institutions around the globe due to the ability to provide immediate and efficient interim relief to parties to an arbitration agreement prior to the constitution of the arbitral tribunal. While certain shortcomings of an Emergency Arbitrator can be experienced on a case-to-case basis (such as, non-binding effect on third parties, non-availability of an *ex-parte* relief), there is no doubt that the concept of Emergency Arbitrator addresses various issues that are associated with approaching national courts, in cases where a party is desirous of obtaining interim reliefs on an urgent basis.

3. STATUS OF EMERGENCY ARBITRATOR IN INDIA PRIOR TO AMAZON RULING

Given the relatively recent emergence of Emergency Arbitration proceedings; with the exception of Hong Kong,[15] New Zealand,[16] and

10. SIAC Arbitration Rules 2016, r. 30, sch. 1.
11. Arbitration Rules of the Arbitration Institute of the SCC 2017, app. II.
12. HKIAC Administered Arbitration Rules 2018, art. 23, sch. 4.
13. Mumbai Centre for International Arbitration Rules 2016, r. 14.
14. Delhi International Arbitration Centre (Arbitral Proceedings) Rules 2018, r. 14.
15. § 22A of Hong Kong Arbitration Ordinance, reads as:
    § 22A Interpretation — In this part —
    emergency arbitrator means an emergency arbitrator appointed under the arbitration rules (including the arbitration rules of a permanent arbitral institution) agreed to or adopted by the parties to deal with the parties' applications for emergency relief before an arbitral tribunal is constituted.
    Also see, § 22B of Hong Kong Arbitration Ordinance dealing with enforcement of emergency relief granted by emergency arbitrator.
16. § 2(1) of New Zealand Arbitration Act 1996, as amended by Arbitration Amendment Act 2016 (2016 No. 53), reads as:
    § 2(1) Interpretation — In this Act, unless the context otherwise requires, —
    arbitral tribunal —
    (a) means a sole arbitrator, a panel of arbitrators, or an arbitral institution; and

Singapore,[17] there is currently no provision in the arbitration laws of any country (including India) expressly providing for the recognition and enforcement of orders passed by Emergency Arbitrators.[18]

A. Granting statutory recognition to Emergency Arbitration – So near, yet so far

In India, the 20th Law Commission of India ("**Law Commission**"), constituted in the year 2012, was entrusted with the task of reviewing the provisions of the Arbitration Act, in view of several inadequacies observed in the functioning of the Arbitration Act. The Law Commission *inter alia* made recommendations in its Report[19] to encourage the culture of institutional arbitration in India and to redress the institutional and systemic malaise that had seriously affected the growth of arbitration in the country.[20]

With a view of providing statutory recognition to emergency arbitration in India, the Report suggested broadening the definition of 'arbitral tribunal' under Section 2(1)(d) of the Arbitration Act[21] to include the "emergency arbitrator". However, this definition was not included in the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act, 2015**"), which otherwise largely incorporated the suggestions recommended by the Law Commission.

Thereafter, in the year 2016, a High-Level Committee to Review Institutionalization of Arbitration Mechanism in India ("**Committee**") was set up by the Government of India to identify the roadblocks to the

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(b) includes any emergency arbitrator appointed under—
(i) the arbitration agreement that the parties have entered into; or
(ii) the arbitration rules of any institution or organisation that the parties have adopted.

17. § 2(1) of Singapore International Arbitration Act (ch. 143A), as amended by [Act 12 of 2012 w.e.f. 1 June 2012] reads as:
§ 2 (1) — In this Part, unless the context otherwise requires —
"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 organization.
18. Report of the ICC Commission (n 5) [¶36].
19. Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996*, (246th Report) (August 2014).
20. *Ibid*, ch. II, [¶ 6].
21. § 2(1)(d) — In this Part, unless the context otherwise requires, —
"arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

development of institutional arbitration and examine specific issues affecting the Indian arbitration landscape. The Committee was given the responsibility to prepare a roadmap for making India "*a robust centre for international and domestic arbitration*".[22] The Committee noted that there is significant uncertainty in the Indian law regarding the recognition and enforceability of awards passed by Emergency Arbitrators. The Committee observed that India ought to permit enforcement of emergency awards in all arbitral proceedings and advised the adoption of recommendations made by the Law Commission to give statutory recognition to Emergency Arbitrators under the Arbitration Act.[23] However, once again, the Government of India chose to ignore the recommendation of the Committee in respect of Emergency Arbitrators and no provision thereof was made in the Arbitration and Conciliation (Amendment) Act, 2019.

Thus, despite recommendations made by the Law Commission, which were seconded by the Committee, no statutory recognition was granted to Emergency Arbitrators or the awards/orders passed by Emergency Arbitrators. Hence, the uncertainty as to whether the orders/awards passed by the Emergency Arbitrators would be enforceable in India continued, specifically in light of the non-acceptance of recommendations made by the Law Commission and the Committee.

B. Indian Courts' approach towards awards passed by Emergency Arbitrator

In the case of *Raffles Design International India (P) Ltd.* v. *Educomp Professional Education Ltd.*,[24] the Petitioner (Raffles), after having secured interim orders from the Emergency Arbitrator constituted under the SIAC Rules in a foreign seated arbitration, had approached the Hon'ble Delhi High Court for the grant of interim reliefs under Section 9[25] of the

22. Press Information Bureau Press Release, Ministry of Law and Justice, Government of India *Constitution of High Level Committee to Review Institutionalization of Arbitration Mechanism in India*, (December 2016), http://pib.nic.in/newsite/PrintRelease.aspx?relid=155959 accessed 15 September 2021.
23. *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India*, (July 2017, 76, https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf accessed 15 September 2021.
24. Raffles Design International India (P) Ltd. v. Educomp Professional Education Ltd. 2016 SCC OnLine Del 5521 : (2016) 234 DLT 349.
25. § 9 of the Arbitration Act deals with the Court's power to grant interim measures of protection to a party before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced as per the Arbitration Act.

Arbitration Act. The Delhi High Court held that the Arbitration Act does not contain any provision for enforcement of interim orders granted by an arbitral tribunal outside India and thus, the interim award passed by the Emergency Arbitrator (in foreign seated arbitration) could not be enforced under the Arbitration Act. However, the Delhi High also opined that while such interim awards/orders cannot be enforced in India, an Indian Court can independently apply its mind and grant interim reliefs under Section 9 of the Act, based on the same cause of action decided by the Emergency Arbitrator.[26]

Similarly, the Hon'ble Bombay High Court, in the case of *Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.*,[27] granted interim reliefs under Section 9 of the Arbitration Act, despite the emergency arbitrator having passed same interim reliefs under the SIAC Rules. The Bombay High Court held, "*merely because, in the present case such emergency or interim awards have been made by the Arbitral Tribunal at Singapore, that would make no difference, particularly when it comes to determination of the jurisdiction of the Indian Courts to grant interim measures by resort to section 9 of the Act. Ultimately, it has to be borne-in-mind that we are dealing with an international commercial arbitration, where perhaps the emergency or interim awards may be enforceable in other parts of the globe, without any further ado, on account of inapplicability of restrictions akin to those contained in sections 46 to 49 of the Act.*"

Thus, the Delhi and Bombay High Court alluded to the restrictions in India in enforcing emergency awards in a foreign seated arbitration, nevertheless granting interim reliefs by invoking Section 9 of the Arbitration Act.

In another case viz. *Ashwani Minda* v. *U-Shin Ltd.*,[28] the Emergency Arbitrator appointed in a foreign seated arbitration governed by the Japan Commercial Arbitration Association Rules ("**JCAA Rules**") had declined to grant interim reliefs by passing a detailed order. The Applicant (Ashwani Minda) then approached the Delhi High Court under Section 9 of the Act seeking similar interim reliefs as prayed before the Emergency Arbitrator. The Delhi High Court held that the Applicant, having unsuccessfully tried to obtain relief in an emergency arbitration, cannot have a second bite at the

26. *Ibid*, [¶ 103–105]. *See* also generally, Plus Holdings Ltd. v. Xeitgeist Entertainment Group Ltd. 2019 SCC OnLine Bom 13069, [¶ 6, 8].
27. Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. 2014 SCC OnLine Bom 929.
28. Ashwani Minda v. U-Shin Ltd. 2020 SCC OnLine Del 1648 : AIR 2020 (NOC 953) 314.

cherry by asking for the same interim relief from a Court. The Delhi High Court went on to hold that that the Court, in a petition under Section 9 of the Act, cannot sit as a Court of appeal to examine the order of the emergency arbitrator.[29] Thus, the Hon'ble Court impliedly affirmed the competency of an emergency arbitrator to grant interim reliefs as an alternate forum to proceedings before courts under section 9 of the Arbitration Act.

It is pertinent to note that all the above cases were adjudicated in the context of orders/awards passed by an Emergency Arbitrator in foreign seated arbitrations. In the absence of any statutory provision allowing enforcement of interim orders passed in foreign seated arbitrations, the Courts granted similar reliefs by invoking the powers under Section 9 of the Arbitration Act.

Considering that there is no enabling provision allowing enforcement of interim orders in a foreign seated arbitration, the parties had to experiment and use alternate routes such as invoking Section 9 of the Arbitration Act to seek the exact same reliefs as granted by the Emergency Arbitrator. In such a scenario, even though the award passed by an Emergency Arbitrator could not be directly recognized in view of the legislative void, the Courts in India adopted a liberal and experimental approach to grant interim reliefs (based on such Emergency Arbitrators' award/order) within the legislative framework of the Arbitration Act. This, however, cannot not be said to be the ideal option, as the Courts had to re-examine the issue already decided by the Emergency Arbitrator, which, in turn, led to both - an increased burden upon the already clogged Courts and unnecessary delays to those who sought these reliefs.

4. THE AMAZON RULING – WHAT DID THE SUPREME COURT HOLD?

The genesis of the dispute arose out of an investment made by Amazon.com NV Investment Holdings LLC ("**Amazon**") in Future Coupons Private Limited ("**FCPL**") and indirectly in Future Retail Limited ("**FRL**"), whereunder certain rights were given to FCPL, in relation to the retail assets of FRL. The rights granted in favour of FCPL were to be exercised for the benefit of Amazon such that FRL could not have transferred its retail assets without FCPL's consent which in turn, could not be granted unless Amazon had given its consent.

29. *Ibid*, [¶ 55, 56].

Being aggrieved by certain actions of the Biyani Group,[30] Amazon initiated arbitration proceedings under the SIAC Rules against the Biyani Group and an application was filed under paragraph 1 of Schedule 1[31] of the SIAC Rules seeking emergency interim reliefs. The arbitration agreement between the parties contemplated the seat of arbitration to be New Delhi, India.[32]

The Emergency Arbitrator passed an "interim award" dated 25th October 2020 *inter alia* granting certain injunctions/directions against the Biyani Group. The Biyani Group took a stand that the interim award was a nullity as per the Arbitration Act and continued to act as if the interim award did not exist. Biyani Group did not challenge the interim award dated 25th October 2020. Being aggrieved by such conduct, Amazon proceeded to file an application under Section 17(2) of the Arbitration Act before the Delhi High Court, seeking enforcement of the interim award passed by the Emergency Arbitrator. The Ld. Single Judge of the Delhi High Court *inter alia* held that the Emergency Arbitrator's interim award was an order under Section 17(1) of the Arbitration Act and was accordingly, enforceable under Section 17(2) of the Arbitration Act.[33] On appeal, the Division Bench of

30. Biyani Group comprised of: Future Retail Limited, Future Coupons Private Limited, Mr Kishore Biyani, Ms Ashni Kishore Biyani, Mr Anil Biyani, Mr Gopikishan Biyani, Mr Laxminarayan Biyani, Mr Rakesh Biyani, Mr Sunil Biyani, Mr Vijay Biyani, Mr Vivek Biyani, Future Corporate Resources Private Limited and Akar Estate and Finance Private Limited.
31. SIAC Arbitration Rules 2016, sch. 1, ¶ 1 reads as:
    A party that wishes to seek emergency interim relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, file an application for emergency interim relief with the Registrar. The party shall, at the same time as it files the application for emergency interim relief, send a copy of the application to all other parties. The application for emergency interim relief shall include:
    a. the nature of the relief sought;
    b. the reasons why the party is entitled to such relief; and
    c. a statement certifying that all other parties have been provided with a copy of the application or, if not, an explanation of the steps taken in good faith to provide a copy or notification to all other parties.
32. § 25.1 and § 25.2 of the Shareholders' Agreement dated 22nd August, 2019 entered into between Amazon.com NV Investment Holdings LLC, Future Coupons Private Limited, Mr Kishore Biyani, Ms Ashni Kishore Biyani, Mr Anil Biyani, Mr Gopikishan Biyani, Mr Laxminarayan Biyani, Mr Rakesh Biyani, Mr Sunil Biyani, Mr Vijay Biyani, Mr Vivek Biyani, Future Corporate Resources Private Limited and Akar Estate and Finance Private Limited.
33. Amazon COM NV Investment Holdings LLC v. Future Coupons (P) Ltd. 2021 SCC OnLine Del 1279 : (2021) 280 DLT 618, [¶ 187].

the Delhi High Court stayed the judgment of the Ld. Single Judge.[34] Being aggrieved by the order of the Division Bench, Amazon challenged the same before the Supreme Court.

The two significant questions that arose in the matter before the Hon'ble Supreme Court of India were[35]:

1. Whether an "Award" delivered by an Emergency Arbitrator under the SIAC Rules can be said to be an order under Section 17(1) of the Arbitration Act?

2. Whether an order passed under Section 17(2) of the Arbitration Act in the enforcement of the award of an Emergency Arbitrator by a Single Judge of the High Court is appealable?

As stated above, the authors shall be restricting this case comment to the first question i.e. the enforceability of an award passed by the Emergency Arbitrator in India.

A. Party autonomy as grundnorm of arbitration: No interdiction against an Emergency Arbitrator

Biyani Group's contention was that an Emergency Arbitrator is not an "arbitral tribunal" but a person who only decides, at best, an interim dispute between the parties, which does not culminate into a final award. It was also argued that the scheme of Section 17(1) of the Arbitration Act made it clear that a party may, during arbitral proceedings, apply to the arbitral tribunal for interim reliefs.[36] Thus, an Emergency Arbitrator who is appointed before the arbitral tribunal is constituted, falls outside the scope of Section 17(1) of the Arbitration Act.

The Hon'ble Supreme Court, while referring to Section 21 of the Arbitration Act[37] and Rule 3.3 of the SIAC

34. Future Coupons (P) Ltd. v. Amazon.com NV Investment Holdings LLC 2021 SCC OnLine Del 4101, [¶ 12].
35. Amazon (n 1), [¶ 1].
36. Amazon (n 1), [¶ 21, 22].
37. **Commencement of arbitral proceedings** — Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Rules,[38] held that the arbitral proceedings under the SIAC Rules can be said to have commenced from the date of receipt of a complete notice of arbitration by the Registrar of SIAC. Thus, when Section 17(1) uses the expression "during the arbitral proceedings", the said provision would include Emergency Arbitrator proceedings, which commence only after the receipt of notice of arbitration by the Registrar under Rule 3.3 of the SIAC Rules.[39]

The Supreme Court held that in view of various sections of the Arbitration Act, which expound the concept of party autonomy in choosing to be governed by institutional rules, coupled with the fact that there is no interdict, either express or implied, against an Emergency Arbitrator, would mean that an Emergency Arbitrator's orders, if provided under the institutional rules, would be covered under the Arbitration Act. While referring to the judgement of *Centrotrade Minerals and Metal Inc.* v. *Hindustan Copper Ltd.*,[40] the Hon'ble Supreme Court held that the parties to the contract (i.e. Amazon and Biyani Group), by agreeing to the SIAC Rules and the award of the Emergency Arbitrator, have not bypassed any provision of the Arbitration Act.[41]

The Hon'ble Supreme Court further held that if a party has agreed to the concerned institutional rules, it cannot argue that it will not be bound by an Emergency Arbitrator's ruling after it participates in an Emergency Award proceeding. The Hon'ble Supreme Court observed that it does not 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 agreed to the binding nature of such award and promised to carry out such an interim award without delay.[42]

38. The SIAC Arbitration Rules 2016, r. 3.3 reads as:
    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.
39. Amazon (n 1), ¶ 34.
40. Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd. (2017) 2 SCC 228. The importance of party autonomy in arbitration and commercial contracts was delineated in the judgement.
41. Amazon (n 1), ¶ 42.
42. SIAC Rules 2016, sch. 1 [¶ 12].

In essence, the Hon'ble Supreme Court reiterated the concept of party autonomy being the "brooding and guiding spirit in arbitration" where the parties are free to agree on the law of conduct of the arbitration.[43]

B. Interpreting the definition of "arbitral tribunal" under the Arbitration Act

The Biyani Group placed heavy emphasis on the definition of "arbitral tribunal" under Section 2(1)(d) of the Arbitration Act. They argued that an award of an Emergency Arbitrator, which is admittedly passed before an arbitral tribunal is constituted, cannot be treated as an order under Section 17(1) of the Arbitration Act. Section 17(1) can only be invoked by a party during the arbitral proceedings.[44]

The Hon'ble Supreme Court negated the aforesaid contention by referring to the words "*unless the context otherwise requires*" which the definition of "arbitral tribunal" is subjected to under the Arbitration Act. The Hon'ble Supreme Court, while relying on Sections (2)(1)(d), 2(6) and 2(8) of the Arbitration Act, held that the context of Section 17(1) of the Arbitration Act is unique and it "*otherwise requires*" the definition of "arbitral tribunal" to include an Emergency Arbitrator when institutional rules apply.[45] The Supreme Court held that a proper interpretation of Sections 2(1)(d) read with Sections 2(6)[46] and 2(8)[47] of the Arbitration Act makes it clear that even interim orders that are passed by Emergency Arbitrators under the rules of a permanent arbitral institution would be included in the ambit of Section 17(1) of the Arbitration Act. Further, there is nothing in Section 17(1) of the Arbitration Act to interdict the application of rules of arbitral institutions that the parties may have agreed to.

The Hon'ble Supreme Court gave a contextual interpretation to the definition of "arbitral tribunal" under the Arbitration Act. In ascertaining the true intention, the Hon'ble Supreme Court not only looked at the words used

43. Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (2016) 4 SCC 126, [¶ 5].
44. Amazon (n 1), ¶ 43.
45. Amazon (n 1), ¶ 45.
46. § 2(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.
47. § 2(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.

but also had regard to the context and the setting in which they occurred. The Hon'ble Supreme Court considered the aim, object and scope of the statute in its entirety to hold that in the absence of an interdiction under the Arbitration Act, the definition of "arbitral tribunal" shall have to be contextually interpreted to include even an Emergency Arbitrator, if rules of arbitration so provide.

C. Effect of non-implementation of the 246th Law Commission Report

The Biyani Group argued that despite the recommendation of the 246th Report of the Law Commission, the Parliament, in its wisdom decided not to grant statutory recognition to the concept of Emergency Arbitrator, thereby ousting Emergency Arbitrators from the scheme of the Arbitration Act.

The Supreme Court relied on the judgement of *Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.*[48] to discredit the above argument. It held that the mere fact that a recommendation of a law commission report is not followed by the Parliament would not necessarily lead to the conclusion that the suggestions of the law commission cannot form a part of the statute on its proper interpretation.[49] Additionally, the Supreme Court noted the observations made by the Committee, which had opined that even without statutory recognition, it was possible to interpret Section 17(2) of the Arbitration Act to enforce emergency awards for arbitration seated in India.

While the Hon'ble Supreme Court did not delve further into the possible reasons for non-acceptance of recommendations made by the Law Commission and the Committee, it was sufficiently indicated that development of the law cannot be thwarted merely because a certain provision recommended in a Law Commission Report is not enacted by the Parliament.

D. Tracing the legislative history of Section 17 of the Arbitration Act – A pro-enforcement approach

The Supreme Court, while tracing the legislative history of Section 17 of the Arbitration Act, noted that it was amended *vide* the Arbitration

48. Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. (2021) 4 SCC 713.
49. Amazon (n 1), [¶ 54].

(Amendment) Act, 2015. This amendment clothed the arbitral tribunal with the same powers as a civil court in relation to granting of interim measures. The Supreme Court noted that by virtue of the aforesaid amendment, Section 17 of the Arbitration Act was brought on par with Section 9 of the Arbitration Act, such that the interim reliefs passed by the arbitral tribunal were enforceable in the same manner as if it were an order of the Court.

By referring to the legislative history of the amended Section 17 of the Arbitration Act, the Hon'ble Supreme Court opined that granting recognition and enforcement of Emergency Awards would result in advancing the dual objectives of decongesting the court system in India and increasing efficacy in granting interim reliefs in cases which deserve such relief. The Hon'ble Supreme Court held that an Emergency Arbitrator's award, which is exactly like an order of an arbitral tribunal, once properly constituted, would be covered by Section 17(1) of the Arbitration Act.[50]

In summary, the Supreme Court answered the first question in the affirmative and declared that the Arbitration Act gives parties the full autonomy to have a dispute decided in accordance with the institutional rules they choose, which in some instances include Emergency Arbitrators delivering interim orders during such proceedings, described as "awards". The Hon'ble Supreme Court went on to hold that orders passed by an Emergency Arbitrator are made under Section 17(1) of the Arbitration Act and as such, are enforceable under Section 17(2) of the Arbitration Act.

5. KEY TAKEAWAYS AND WAY FORWARD

Undoubtedly, the Supreme Court has broken new ground with the recognition and enforcement of an award passed by the Emergency Arbitrator, despite the lack of a corresponding statutory framework in the country. The Supreme Court has constructively and contextually interpreted the existing provisions in the law and while doing so has once again echoed the concept of 'party autonomy' as being the backbone and guiding spirit to arbitration. The Supreme Court laid great emphasis on party autonomy to hold that there is nothing in the Arbitration Act that interdicts the free choice of parties to be governed by the rules of an arbitral institution, which includes an Emergency Arbitrator. The Supreme Court reiterated that the essence of arbitration is the mutual agreement to voluntarily agree to a dispute resolution mechanism that may involve an Emergency Arbitrator. The Supreme Court further opined that when parties

50. Amazon (n 1), [¶ 62].

have voluntarily agreed to a dispute resolution mechanism that involves an Emergency Arbitrator, any relief granted by such Emergency Arbitrator should be mandatorily binding upon the parties.

The authors believe that the decision of the Supreme Court will inspire investor confidence and give huge impetus to international parties entering into agreements with Indian parties and to agreeing to Indian seated arbitration proceedings. Considering the limited number of jurisdictions that have expressly granted statutory recognition to Emergency Arbitrators and relatively limited judicial decisions across jurisdictions on enforcement of an award by the Emergency Arbitrator, the Supreme Court has the noteworthy distinction of being one of the pioneers in recognising the concept of Emergency Arbitrator. This should have a good signalling effect on international parties who may now consider India as an investor-friendly and international commercial arbitration-friendly jurisdiction.

The authors further believe that the decision shall also encourage institutional arbitration in India, as parties will now be more comfortable adopting the rules of an arbitral institution in the arbitration agreement. As mentioned above, rules of arbitral institutions in India such as MCIA and DIAC have provisions for Emergency Arbitrators, similar to that of international arbitration institutions such as ICC, SIAC, and LCIA. Thus, on a cost-effective basis, international parties may now seriously consider adopting the rules of Indian arbitration institutions/centres in the arbitration agreements without having to be concerned about recognition of emergency awards and their enforcement in India.

The Supreme Court laid heavy emphasis on the object sought to be achieved by the Arbitration (Amendment) Act, 2015, i.e. avoiding courts to be flooded with applications for interim reliefs, when an arbitral tribunal is constituted, for two main reasons: (i) decongesting the clogged court system and, (ii) timely and the efficacious manner in which arbitral tribunal is able to grant interim reliefs. The decision furthers the aforesaid objectives to decongest the court system in India by recognizing the appointment of an Emergency Arbitrator, which is an efficient and efficacious alternative of approaching Courts under Section 9 of the Arbitration Act. The decision is also extremely relevant in cases where the Courts hearing Section 9 applications are located in remote areas of the country having little or no exposure to commercial disputes and the possibly high-stake commercial considerations at play.

While there is no questioning the relevance and significance of the decision on the international arbitration landscape in India, there are still certain unsettled issues and/or interpretational gaps surrounding Emergency Arbitrators, particularly in the Indian scenario. Some of these could be:

A. Limits on court's availability to grant pre-arbitration reliefs

The amendments made *vide* the Arbitration (Amendment) Act, 2015 mandate a party to apply to the arbitral tribunal for seeking interim reliefs once such arbitral tribunal has been constituted, except in cases where the circumstances render this remedy to be inefficacious. Thus, by virtue of the amendment, a party cannot approach the court under Section 9 of the Arbitration Act once the arbitral tribunal is constituted as the arbitral tribunal now has the same powers as a civil court in relation to granting of interim reliefs.

The Supreme Court in the *Amazon* case has held that an Emergency Arbitrator's award is an order akin to orders passed by an arbitral tribunal under Section 17 of the Arbitration Act and enforceable in the same manner as if it were an order of the Court. Therefore, it would be interesting to note if the Indian courts would continue to entertain applications under Section 9 of the Arbitration Act, in cases where the parties have chosen to be governed by rules of institutional arbitrations providing for Emergency Arbitrators for granting urgent interim reliefs. If so, then what would be the effect of not granting an urgent interim relief by an Emergency Arbitrator? Would the Indian courts still maintain a Section 9 application even after the Emergency Arbitrator has denied the interim relief? The law on this will have to be tested over time.

B. Non-applicability to foreign seated arbitration

While Article 17 H of the UNCITRAL Model Law[51] provides for enforcement of interim measures irrespective of the country in which it is issued, the Arbitration Act, as it stands, does not contemplate enforcement

51. Art. 17 H – Recognition and Enforcement
    (1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.
    (2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

of interim orders granted by the arbitral tribunal having the seat of arbitration outside India. Thus, interim orders of foreign seated arbitral tribunals are not enforceable under Section 17 of the Arbitration Act as Part I is not applicable to foreign seated arbitrations (except provisions of Sections 9, 27 [clause (b)] of sub-section (1) and sub-section (3) of Section 37).[52] As a logical corollary, the awards passed by Emergency Arbitrators, as held to be akin to an interim order, are currently not enforceable under Section 17(2) of the Arbitration Act, in a foreign seated arbitration. This was also observed in the cases of *Raffles* (supra) and *Avitel* (supra), wherein the Courts had to invoke the provisions of Section 9 of the Arbitration Act to grant same interim reliefs as was granted by the Emergency Arbitrator in a foreign seated arbitration; instead of directly enforcing such Emergency Arbitrator's award. Since the *Amazon* ruling only settles the law so far as domestically seated arbitrations are concerned, the authors opine that the Parliament may consider adopting provisions similar to Article 17 H of the UNCITRAL Model Law, with necessary safeguards, in the Arbitration Act, to allow recognition and enforcement of interim orders passed by foreign seated arbitral tribunals (extending to awards passed by Emergency Arbitrator). In doing so, the Parliament shall have to necessarily carve out an exception to Section 2(2) of the Arbitration Actor insert provisions similar to Section 17(2) of the Arbitration Act in Part II thereof, to allow recognition and enforcement of awards passed by Emergency Arbitrator.

C. Emergency Arbitrators in ad-hoc arbitrations – Too early too soon?

As things stand today, it is no secret that currently most of India's arbitrations are *ad–hoc* arbitrations, where the parties are free to determine the rules of procedure. Since the *Amazon* decision is limited to recognition and enforcement of Emergency Arbitrators appointed under the rules of an arbitral institution, there is no clarity on whether parties can name an Emergency Arbitrator in *ad-hoc* arbitrations while entering into arbitration agreements. If so, the parties shall necessarily have to lay down the set of rules of procedure and timelines in the arbitration agreement with necessary safeguards to prevent abuse of the process. Another aspect of this is whether jurisdiction should be vested in a court to appoint an Emergency

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

52. Proviso to § 2(2) (as amended).

Arbitrator in *ad-hoc* arbitrations? However, in the opinion of the authors, the process of approaching the Court for the appointment of an Emergency Arbitrator will be counter-intuitive to the entire concept of an Emergency Arbitration. The authors are of the view that in the absence of a legislative framework, some issues may arise while contemplating the applicability and validity of Emergency Arbitrators in *ad-hoc* arbitrations.

6. CONCLUSION

The *Amazon* ruling is a shot in the arm towards making India a robust center for international and domestic arbitration. The decision is a landmark judgment in the area of international commercial arbitration, not just for India but for jurisdictions across the globe. The striking feature of the decision is the dynamic, purposive, contextual and constructive interpretation of the existing provisions of the Arbitration Act to recognize the award of an Emergency Arbitrator in the absence of an express statutory framework of the law. The Supreme Court through this decision has upheld the fundamental principle of party autonomy while at the same time acknowledging the efficiency of arbitral tribunals (including Emergency Arbitrators) to grant urgent interim reliefs in appropriate cases. While the decision is certainly revolutionary in terms of its importance for global arbitration practice, the relatively recent phenomenon of Emergency Arbitrator still poses a host of issues that need to be identified, debated and addressed. Some of the issues that require to be addressed include the need to: (i) provide legislative framework for recognition of Emergency Arbitrators by amending definition of "arbitral tribunal"; (ii) strike a balance between the Court's power to grant interim relief vis-à-vis grant of interim relief by Emergency Arbitrators, in cases where the rules of arbitration provide for appointment of such Emergency Arbitrators; (iii) allow enforcement of awards/orders passed by an Emergency Arbitrator in a foreign seated arbitration, (iv) provide legislative framework for recognition and enforcement of Emergency Arbitrators in ad-hoc arbitrations. Thus, even though the Supreme Court has opened the doors to recognition and enforcement of Emergency Arbitrators in India, in practice, it remains to be seen if the concept of Emergency Arbitrator can find its place in the Indian legal/commercial ecosystem.