

## Delhi High Court's verdict on enforceability of emergency awards in India (Amazon v Future Coupons)

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**Arbitration analysis:** Recently, the Delhi High Court (Delhi HC) enforced an award issued by an emergency arbitrator (Emergency Award) in a Delhi-seated arbitration under Part I of the Indian Arbitration and Conciliation Act 1996 (A&C Act), in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules). Adimesh Lochan, Kshama A Loya & Vyapak Desai, member, leader and partner respectively in the International Litigation & Dispute Resolution Team at Nishith Desai Associates, consider the court's judgment.

*Amazon.com NV Investment Holdings LLC v Future Coupons Private Ltd & others. OMP(ENF)(COMM) 17/2021 (not reported by LexisNexis<sup>®</sup> UK)*

*Note: Indian court judgments referred to in this analysis are not reported by LexisNexis UK.*

### What are the practical implications of this judgment?

The ruling of the Delhi HC emphasises that the current legal framework in India is sufficient to recognise and enforce an emergency award, and that no amendment is required under the A&C Act to define an 'emergency arbitrator' or an 'emergency award'. Relying on the principles of party autonomy, the Delhi HC granted sanctity to an emergency award by recognising it as an order of the court.

### What was the background to the case?

#### The relevant agreements

Amazon.com NV Investment Holdings LLC (Amazon) had invested INR 14.31bn in Future Coupons Private Ltd (FCPL/Respondent No 1) based on certain special, material protective/negative rights available to FCPL in Future Retail Ltd (FRL/Respondent No 2) namely, that the Retail Assets of FRL would not be alienated without Amazon's prior written consent, and never to a 'Restricted Person' as defined in the agreement between Amazon and FCPL (as below). The entire investment of INR 14.31bn was invested by FCPL into FRL. In a separate agreement (as below), FCPL, FRL and their promoters ('Promoters/Respondent No 3–13') agreed that FRL would remain the sole vehicle for conduct of its retail business. Following agreements were executed between the respective parties:

- Shareholders' Agreement dated August 12, 2019 between FCPL, FRL and the Promoters ('FRL SHA')
- Shareholders' Agreement dated August 22, 2019 between Amazon, FCPL and Promoters ('FCPL SHA'), and
- Share Subscription Agreement dated August 22, 2019 between Amazon, FCPL and Promoters ('FCPL SSA') (collectively, 'Agreements')

On 29 August 2020, FRL approved a transaction relating to the transfer of its retail assets to Reliance Retail Ventures Ltd and Reliance Retail and Fashion Lifestyle Ltd (collectively, 'Reliance Group') ('Disputed Transaction'). In terms of the Disputed Transaction, FRL would amalgamate into another Future company, Future Enterprise Ltd ('FEL'). Shareholders of FRL, including FCPL, would receive shares of FEL, and FRL would cease its business operations and would be dissolved. Later, FEL would transfer the retail business to Reliance Group.

Amazon alleged that the Disputed Transaction was void, as FCPL was required to obtain Amazon's consent for proceeding with the Disputed Transaction. Additionally, the Disputed Transaction was illegal since it was entered into with a Restricted Person ie the Mukesh Dhirubhai Ambani Group, as defined under the FCPL SHA.

### **The emergency arbitration**

On October 05, 2020, Amazon initiated arbitration proceedings against FCPL, FRL and others on the basis of the arbitration agreement contained in Clause 25.2.1 of the FCPL SHA ('SIAC Arbitration'). Clause 25.2.1 provided that (a) the agreement would be governed by and construed in accordance with Indian laws, (b) courts at New Delhi shall have exclusive jurisdiction, (c) seat of arbitration shall be New Delhi, and (d) the disputes would be resolved in accordance with the SIAC Rules.

On the same day, Amazon also filed an application seeking emergency interim relief under SIAC Rules for restraining FCPL and FRL from pursuing the Disputed Transaction. Pursuant to Amazon's application, SIAC appointed the emergency arbitrator ('EA').

On 6 October 2020, FRL raised an objection to the jurisdiction of the EA, to the effect that: (a) there was no arbitration agreement between Amazon and FRL; (b) Part I of the A&C Act does not contemplate a remedy before an emergency arbitrator; (c) the appointment of the EA was invalid; (d) any order granted by the EA would not have any force of law under the A&C Act; and (e) 'Arbitral Tribunal' defined in section 2(1)(d) of the A&C Act does not include an emergency arbitrator.

The EA passed an interim order on 25 October 2020 holding that the EA is an arbitral tribunal for all intents and purposes and that the EA are recognised under the Indian arbitration framework. The EA noted that a party to an arbitration agreement defined in section 2(1)(h) of the A&C Act need not be a signatory to the arbitration agreement (¶ 118 of the Emergency Interim Order). Relying on three decisions of the Indian Supreme Court (*Chloro Control India Private Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641; *Cheran Properties Ltd v Kasturi and Sons Ltd*, (2018) 16 SCC 413 and *MTNL v Canara Bank*, (2020) 12 SCC 767), the EA recorded a prima facie satisfaction that FRL was a proper party to the arbitration, on the ground that there was cogent commonality, intimate interconnectivity and undeniable indivisibility between the FRL SHA and the FCPL SHA.

### **The civil suit by FRL**

Pursuant to the Emergency Award, FRL had filed a civil suit before a single judge of the Delhi High Court in 2020 ('Gupta J'), praying for permanent injunction against Amazon from unlawfully interfering with the performance of the Disputed Transaction ('Civil Suit'). FRL also prayed for a permanent injunction against Amazon from taking any steps to prevent FRL from taking statutory and regulatory approvals for the Dispute Transaction. In the order dated 21 December 2021, Gupta J noted that the curial law (here, SIAC Rules) applies to an arbitration to the extent the curial law is not contrary to public policy and/or the mandatory requirements of the law of the country in which the arbitration is seated (relying on the decision of the Supreme Court in *NTPC v Singer*, AIR 1993 SC 998). Observing that the provision of emergency arbitration under the SIAC rules are not, per se, contrary to any provision of the A&C Act, the single judge affirmed the validity of an emergency award within the Indian arbitration framework (*Future Retail Ltd Amazon.com Investment Holdings LLC and others*), MANU/DE/2274/2020 (Delhi High Court, 2020). It must be noted that FRL did not seek a declaration on the invalidity of the Emergency Award on merits in the Civil Suit.

Gupta J held that FRL had established a prima facie case for tortuous interference against Amazon. However, Gupta J held that Amazon cannot be restrained from representing its case before statutory and/or regulatory authorities in respect of the Disputed Transaction.

On 5 January 2021, the SIAC constituted the arbitral tribunal. Later, on 25 January 2021, Amazon filed a petition under section 17 of the A&C Act read with Order XXXIX Rule 2A and section 151 of Code of Civil Procedure, 1908 (CPC), for the enforcement of the Emergency Award.

### **What issues were before the Delhi High Court?**

The Delhi HC formulated the following issues:

- whether an emergency arbitrator is an arbitrator under the A&C Act, and whether the Emergency Award is an order under section 17(1) enforceable under section 17(2) of the A&C Act?
- whether the EA misapplied the Group of Companies doctrine to bind FRL to the arbitration agreement between FCPL and Amazon?
- whether the Emergency Award is 'nullity' as alleged by FRL?

## What did the court decide?

### Legal status of emergency arbitrator

The Delhi HC also observed that an emergency arbitrator is an arbitrator for all intents and purposes under section 2(1)(d) of the A&C Act (The Delhi HC relied on Sections 2(1)(d), 2(6), 2(8), 19(2), Arbitration and Conciliation Act, 1996). It held that the SIAC Rules would be binding on the parties to the arbitration agreement, by virtue of sections 2(6), 2(8) and 19(2) of the A&C Act. The Delhi HC noted that section 2(8) of the A&C Act merits the inclusion of the arbitration rules of an arbitral institution in an arbitration agreement. Section 2(6) of the A&C Act empowers the parties to authorise any arbitral institution to determine any issue which the parties are at liberty to determine under the A&C Act. Section 19(2) of the A&C Act states that the parties to an arbitration are at liberty to determine the procedure to be followed by the arbitral tribunal in conducting its proceedings. The Delhi HC further observed that the current legal framework is sufficient to recognise emergency arbitration. Therefore, it was not necessary to refer to the 246<sup>th</sup> Law Commission Report or an amendment to the A&C Act in this regard (The 246<sup>th</sup> Law Commission Report had suggested that the definition of 'arbitral tribunal' be amended to include an emergency arbitrator).

The Delhi HC also observed that a number of arbitral institutions across the globe had included a provision for emergency arbitrator in their institutional rules. It referred to the Delhi International Arbitration Centre, Mumbai Centre for International Arbitration, Madras High Court Arbitration Centre among other noteworthy institutions in India which include provisions pertaining to emergency arbitration (Nani Palkhivala Arbitration Centre; Indian Council of Arbitration; Indian Institute of Arbitration & Mediation; and Bangalore International Mediation, Arbitration and Conciliation Centre). It also noted that an emergency arbitration, arising strictly out of the principle of party autonomy, is a very effective and expeditious mechanism to deal with an emergency interim relief application. It further emphasised that if the order of an emergency arbitrator is not enforced, it would make the entire mechanism of emergency arbitration redundant. Therefore, the Delhi HC held that an order of an emergency arbitrator is valid and enforceable under the A&C Act.

The Delhi HC allowed the present petition under section 17(2) of the A&C Act. Section 17(2) of the A&C Act provides that an order of an arbitral tribunal granting interim reliefs is deemed to be an order of the court. Accordingly, it is clear from the decision of the Delhi HC the court held that an emergency award / order granted by an arbitral tribunal is enforceable as a court order under section 17(2) of the A&C Act.

### Group of Companies Doctrine

On the issue of binding FRL to the arbitration agreement between FCPL and Amazon, the Delhi HC applied the Group of Companies Doctrine and held that the FRL was bound by the arbitration agreement between FCPL and Amazon as it fulfilled the following tests, expounded in several decisions of the Supreme Court:

- the conduct of the parties reflects a clear intention of the parties to bind both the signatory as well as the non-signatory parties
- the non-signatory company is a necessary party with reference to the common intention of the parties
- the non-signatory entity of the group has been engaged in the negotiation or performance of the contract
- the non-signatory entity of the group has made statements indicating its intention to be bound by the contract

- a direct relationship between the signatory to the arbitration agreement and the non-signatory entity of the group; direct commonality of the subject-matter and composite nature of transaction between the parties
- the performance of the agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreement for achieving the common object
- there is tight group structure with strong organizational and financial links so as to constitute a single economic unit or a single economic reality
- the funds of one company are used to financially support or restructure other members of the group
- the composite reference of disputes of fresh parties would serve the ends of justice

The court considered the Emergency Arbitrator's ruling alongside the following factual grounds, and held that FRL was a proper party in the SIAC Arbitration. The grounds considered by the court are as follows:

- FCPL and FRL belong to the same Group of Companies
- the conduct of the parties reflects clear intention to bind FRL
- simultaneous discussions and negotiations of the Agreements and common negotiating and legal team represented FCPL and FRL
- statutory disclosure made by FRL on August 12, 2019 and August 22, 2019 to the public and statutory regulators of the material terms of the agreements
- direct relationship of the FRL to FCPL, direct commonality of the subject matter and composite nature of transaction between the parties. It is apparent that neither the FCPL SHA nor the FRL SHA would have been entered into without the others
- FCPL's funds have been used to financially support FRL
- the Agreements are so intrinsically intermingled that their composite performance only shall discharge the parties of their respective mutual obligations
- similar disputes resolution clause in both, FCPL SHA and the FRL SHA reflects common intention of all the parties, both signatory and non-signatory, to arbitrate
- the composite reference of disputes of all the parties including non-signatory would serve the ends of justice

### **Legality of emergency award**

The Respondents had contended that if the Agreements are combined/treated as a single integrated transaction, the same would result in Amazon acquiring control over FRL which would result in violation of the Foreign Exchange Management Act, 1999 and the Foreign Exchange Management (Non Debt Instruments) Rules, 2019 (FEMA FDI Rules).

The Delhi HC observed that the EA had rightly held the Agreements to be in accordance with law as the protective rights did not amount to control of Amazon over FRL and did not violate any law. The Delhi HC also noted that the Respondents had not advanced any further pleadings on the law on 'nullity', the essential ingredients of law on 'nullity' and how the essential ingredients of the law on 'nullity' were satisfied in the present case. Accordingly, the Delhi HC held that the Emergency Interim Order was legal, valid and enforceable as an order of the court.

### **Conclusion**

The Delhi HC allowed Amazon's petition to enforce the Emergency Award as a court order. Further, the Delhi HC also read section 17(2) of the A&C Act with Order XXXIX Rule 2A of the CPC and made an order for attachment of respondents' assets (FRL, FCPL and promoters) for disobedience of a court order (the Delhi HC further directed the respondents to file an affidavit of their assets as on the date of order).

FCPL preferred an appeal against the order of the single judge before a division bench of the Delhi HC. On 22 March 2021, the Division Bench stayed the order of single judge till the next date of hearing in the appeal (*Future Coupons Private Ltd v Amazon.com NV Investment Holdings LLC & others.*, FAO(OS)(COMM) 50/2021). At the time of publication of this article, Amazon has filed an appeal before the Supreme Court of

India against the order of the Division Bench dated 22 March 2021. The decision of the Supreme Court is awaited.