

The company lawyer

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Supervisory jurisdiction over arbitral tribunals challenges to interim orders in India.

There has been recent controversy in India regarding a dispute between Amazon (A) and the Future Group¹ (FG) when the Delhi High Court ordered an interim stay of arbitration proceedings being undertaken under the rules of the Singapore International Arbitration Centre.

The issue concerned the recognition of an interim award granted by an emergency arbitrator. Such enforcement required application to the Indian courts and of concern to those who arbitrate in India and who rely on the Indian courts for enforcement of awards made in India by such tribunals and in future clarification of Indian law as to the enforcement of an emergency arbitration award made in a foreign country for enforcement in India. The first of these points was clarified in the Amazon case. The second point will require confirmation if confidence in the process in India is to be maintained.

The parties entered into a series of contracts which entitled A to exclusive rights in the retail assets of FG and obliged FG to obtain written consent from A before delineating their assets. FG were prohibited from the transfer of its retail assets to restricted persons. The retail industries group which was listed under the category of restricted persons then entered into a transaction with Future Group for future amalgamation transferring the retail assets to the Reliance group. This transfer was the subject of a dispute that led to the arbitration between A and FG. A referred the matter to arbitration to be dealt with under the emergency SIAC rules procedure. The seat of the arbitration was New Delhi in India. The emergency arbitrator rendered a partial award in October 2021 in favour of Amazon in accordance with SIAC Rules. The seat of the arbitration being New Delhi (the Indian Arbitration and Conciliation Act and the SIAC rules being applicable under the terms of the agreement between the parties). This tribunal passed two awards; one held that FG was bound by the arbitration agreement, and the second refused to lift the stay on the asset sale deal between FG and Reliance.

After the Competition Commission of India suspended its approval for the 2019 deal between A and Future Coupons Private Ltd (FCPL) FG (Second Respondent) filed an application before the tribunal for termination of the arbitration. It argued that there were no grounds for proceeding as the Indian competition regulator had suspended its approval for the FCPL-A deal. FG asked the arbitrator to prioritise the termination application but the tribunal but this was not possible.

A then initiated proceedings in the Delhi High Court to restore the Emergency Award. The was finalised in the Supreme Court. The issues there were: whether the

¹ *Amazon. com NV Investment Holdings LLC v Future Retail Limited and Future Coupons Private Ltd.*

emergency arbitrator was an arbitrator under the Arbitration and Conciliation Act; whether the award delivered by the emergency arbitrator appointed under the SIAC rules could be considered as an order under section 17 (1) of the act; and whether the order passed under section 17 (2) of the act for the enforcement of the award of an emergency arbitrator by a single judge of the High Court was appropriate.

A key concern here was that the interim relief granted by the emergency arbitrator would be enforced by the court and not dismissed on a Petition under Article 227 of the Indian Constitution. At first instance the Single Judge held that it was only in “exceptional circumstances” or where the order was “so perverse that it is patently lacking in inherent jurisdiction” or the “perversity ...stare(s) in the face” that the court would interfere with such case management orders. FG then appealed this decision to the Division Bench which granted an interim stay of the arbitration frustrating the arbitration. A then appealed to the Supreme Court.

The Supreme Court decided in accordance with international commercial arbitration practice that the parties were free to agree to whatever institutional rules they felt appropriate. The parties had the right to use the SIAC Emergency Arbitration process. The Arbitration and Conciliation Act permitted parties to agree the rules to be applied. The Supreme Court thus upheld party autonomy. It noted that the emergency arbitrator in granting interim relief was acting under the SIAC rules and therefore he did not violate the Arbitration and Conciliation Act. But did the term “arbitration” in the statute include an emergency arbitrator? Interpreting Section 2(1)(d) of the Act literally did not include an emergency arbitrator. It included a sole arbitrator or a panel of arbitrators. Section 2(1)(d) however must include an emergency arbitrator as the section referred to “any arbitration.” Thus, the Supreme Court held that any interim award published by the emergency arbitrator would be an order passed by the arbitral tribunal. There was no difference between an order passed by an arbitral tribunal and an emergency arbitrator and both orders could be enforced by the High Court.

This decision of the Indian Supreme Court acknowledges the position of party autonomy as a guiding principle in such cases and recognises a fundamental aspect of international commercial arbitration. Following this controversy there is now a debate in India as to whether the Arbitration and Conciliation Act itself should be amended by expressly referring to emergency arbitration.