

Agreement (FRL Shareholders' Agreement and FCPL Shareholders' Agreement are collectively referred to as "**Shareholders' Agreements**").

- Based on the Shareholders' Agreements, Amazon invested in FCPL. Amazon, FCPL and Respondents No. 3 to 13 entered into a Share Subscription Agreement dated August 22, 2019 (**Amazon SSA**).

Amazon's investment in FCPL "flowed down" to FRL

The crux of Amazon's investment was that (i) the investment in FCPL would "*flow down*" to FRL; and (ii) the investment in the retail assets of FRL would continue to vest in FRL. FRL could not transfer its retail assets without FCPL's consent which, in turn, could not be granted without Amazon's consent. Amazon thus invested in FCPL and the investment "*flowed down*" to FRL on the same day.

FRL was prohibited from selling its retail assets to "restricted person" including MDA Group

As per the Shareholders' Agreements, FRL was prohibited from transferring/selling/divesting its retail assets to "*restricted person*" under the Shareholders' Agreements which would have included Mukesh Dhirubhai Ambani group (Reliance Industries Group) (**MDA**)⁴. However, the Respondents executed an agreement with MDA which provided for the amalgamation of FRL with MDA, the consequential end of FRL as an entity and the complete disposal of its retail assets in favor of MDA (**Disputed Transaction**).

Emergency Arbitrator holds in favor of Amazon

Aggrieved by the Disputed Transaction, Amazon initiated arbitration proceedings before SIAC. The arbitration clause between the parties provided New Delhi as the seat of the arbitral proceedings, and SIAC Rules were applicable.

By an application dated October 5, 2020, Amazon sought emergency interim relief under SIAC Rules and *inter alia* sought injunctions against the Disputed Transaction. On October 25, 2020, the Emergency Arbitrator issued injunctions/directions and *inter alia* enjoined the Respondents therein from taking any step to complete the Disputed Transaction (**EA Decision**).

Biyani Group filed a civil suit before the Delhi High Court to restrain Amazon from citing the EA's Decision to statutory authorities

Despite the EA Decision, the Biyani Group acted in furtherance of the Disputed Transaction and contended that the EA Decision was *coram non judice*. Biyani Group filed a civil suit before the Delhi High Court (**Civil Suit**), seeking interim relief to restrain Amazon from relying on the EA's Decision to write to statutory authorities. The Single Judge of the Delhi High Court refused to grant any interim injunction (**Civil Suit Order**). While no appeal against this order was filed by the Biyani Group, Amazon filed an appeal against certain observations in the Civil Suit Order which remains pending.

Amazon filed an application under section 17(2) of the Act

The proceedings leading to the special leave petition preferred by Amazon before the Supreme Court are discussed below:

Single Judge passed an order directing status quo

- Amazon filed an application under Section 17(2) of the Arbitration and Conciliation Act, 1996 (**Act**), read with Order XXXIX Rule 2A and Section 151 of the Code of Civil Procedure, 1908 (**CPC**), before the Single Judge of the Delhi High Court, seeking enforcement of the EA Decision. By an order dated February 2, 2021 (**Order I**), the Single Judge passed a status-quo order, *inter alia*, restraining Biyani Group from proceeding with the Disputed Transaction and stating that a detailed judgment would follow.

FRL filed an appeal before the Division Bench against the Single Judge's Order

- FRL filed an appeal against Order I, before the Division Bench of the Delhi High Court, under Order XLIII Rule 1(r) of the CPC read with Section 13 of Commercial Courts Act, 2015. By an order dated February 8, 2021 (**DB Order I**), the Division Bench stayed the operation, implementation, and execution of Order I, till the next date of hearing.

⁴ Paragraph 2.3 and 2.4, of the Judgment

- Meanwhile, on 22 February 2021, the Supreme Court allowed the amalgamation proceedings pending before the National Company Law Tribunal to continue, but not to culminate in any final order of sanction of scheme of amalgamation⁵.

Single Judge held that the EA decision was enforceable

- By an Order dated 18 March 2020 (**Order II**), the Single Judge passed a judgment giving reasons for the order under Section 17(2) read with Order XXXIX, Rule 2-A of the CPC. The Single Judge *inter alia* held that (i) an emergency arbitrator's award is an order under Section 17(1) of the Arbitration Act; (ii) the award was enforceable as an order under the Arbitration Act; (iii) the injunctions/directions granted by the EA Decision were deliberately flouted by the Biyani Group; and (iv) purported violations of Foreign Exchange Management Act, 1999 did not render the EA Decision as a nullity.

FRL and FCPL respectively filed an appeal before the Division Bench against the Single Judge's Order

- Aggrieved by Order II, FRL and FCPL respectively filed appeals before the Division Bench of the Delhi High Court. By a common order dated March 22, 2021 (**DB Order II** and **DB Order III**), the Division Bench referred to its earlier order dated February 8, 2021 and stayed Order II for the same reasons given by the earlier order, till the next date of hearing.

Special leave petition before Supreme Court

- Aggrieved by DB Order I, DB Order II, and DB Order III, Amazon preferred special leave petitions before the Supreme Court. By an Order dated April 19, 2021, the Supreme Court stayed further proceedings before the Single Judge as well as the Division Bench of the Delhi High Court and listed the matter for final disposal before the Supreme Court.

FINDINGS

In the above backdrop, the Supreme Court determined (i) whether the “**arbitral tribunal**” under section 17 (1) includes an emergency arbitrator (ii) whether the EA Decision qualifies as an order under Section 17 of the Act; and (ii) whether an appeal lies from an order passed under Section 17(2) of the Arbitration Act in enforcement of the EA Decision. The findings of the Supreme Court are discussed below.

The Act endorses party autonomy and rules of arbitral institutions

- The Supreme Court observed that under sections 2(6) and 19(2) of the Act, parties are free to authorize an institution to determine disputes arising between them and to agree on the procedure followed by an arbitral tribunal in conducting its proceedings. As per section 2(8) of the Act, party autonomy extends to agreements governed by arbitration rules.

The expression “arbitral tribunal” under Section 17(1) includes an emergency arbitrator appointed under institutional rules.

- Section 2(1)(d) defines “arbitral tribunal” as “a *sole arbitrator or panel of arbitrators*”. The “*arbitral tribunal*” as defined in Section 2(1)(d) refers to an arbitral tribunal constituted between the parties and which can grant interim and final relief. However, the Supreme Court observed that the definition only applies “*unless the context otherwise requires*”.
- “*Arbitration*” as defined in Section 2(1)(a), “*means any arbitration, whether or not administered by a permanent arbitral institution*”. Upon reading Sections 2(6) and 2(8), the Supreme Court observed that interim orders that are passed by emergency arbitrators under the rules of a permanent arbitral institution would therefore be included within Section 17(1) of the Act.
- With respect to the question of whether the definition of “*arbitral tribunal*” under Section 2(1)(d) constricts Section 17(1) to apply only to an arbitral tribunal that can give final reliefs by way of an interim or final award, the Supreme Court held that:

⁵ Para 2.7 of the Judgment

- Section 17(1) read with the Act does not bar the applicability of rules of arbitral institutions.
 - the “*arbitral tribunal*” under Section 17(1) would include an emergency arbitrator when institutional rules apply;
 - the “*arbitral tribunal*” under section 9 (3) would not be the “*arbitral tribunal*” as defined under section 2(1) (d). Since Section 9(3)⁶ and Section 17 are one scheme, the “*arbitral tribunal*” under Section 9(3) would be akin to the “*arbitral tribunal*” under Section 17(1), which includes an emergency arbitrator appointed under institutional rules.
- In *Project Director, National Highways*⁷, the Supreme Court held that since the power to modify an award was expressly not been granted by the legislature, section 34 of the Act does not provide the court with the power to modify an award. Thus, in the present case, the question arose as to whether the Supreme Court could read into section 17 of the Act to incorporate “emergency arbitrator”, given its decision in *National Highways*. Relying upon *Centrotrade*⁸, the Supreme Court observed that - by agreeing to SIAC Rules and the award of the emergency arbitrator, the parties did not bypass any mandatory provision of the Act. Provisions of the Act which provide for party autonomy in choosing to be governed by institutional rules clarify that the said rules would govern the rights between the parties and therefore, the Act does not prohibit the same.

The expression “during the arbitral proceedings” under section 17 (1) of the Act includes emergency arbitration proceedings

- The Supreme Court observed that the words “*arbitral proceedings*” are not limited by any definition and encompass proceedings before an emergency arbitrator. Upon perusing Rule 3 of the SIAC Rules, the Supreme Court construed the arbitral proceedings to have commenced from the date of receipt of a notice of arbitration by SIAC’s Registrar, which would indicate that arbitral proceedings under the SIAC Rules commence much before the constitution of an arbitral tribunal.
- The Supreme Court concluded that “*when Section 17(1) uses the expression ‘during the arbitral proceedings’, the said expression would be elastic enough, when read with the provisions of Section 21 of the Act, to include emergency arbitration proceedings, which only commence after receipt of notice of arbitration by the Registrar under Rule 3.3 of the SIAC Rules*”⁹.

The subject arbitration clause envisaged an emergency arbitrator

- Rule 1.3¹⁰ of the SIAC Rules indicates that an award of an emergency arbitrator is included within the ambit of an ‘award’, and emergency arbitrator means an arbitrator appointed in accordance with Schedule 1. Pursuant to Schedule 1 to the SIAC Rules, the emergency arbitrator has all the powers vested in the arbitral tribunal. Hence, “*arbitration*” mentioned in section 25.2 of the *FCPL Shareholders’ Agreement* would include an arbitrator appointed in accordance with the SIAC Rules which, in turn, would include an emergency arbitrator¹¹.

EA Decision is enforceable under section 17 (2) and is not a nullity

- Upon examining the amendments to sections 9 and 17 by the Arbitration and Conciliation (**Amendment**) Act, 2015 (**2015 Amendment Act**), the Supreme Court inferred as follows:
 - SIAC Rules and the other institutional rules are reflected in Sections 9(2)¹² and 9(3) with respect to interim orders passed by courts.

⁶“9 (3) Once the arbitral tribunal has been constituted, the court shall not entertain an application under sub-section (1), unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious”.

⁷ *National Highways Authority of India v. M. Hakeem*, 2021 SCC OnLine SC 473

⁸ *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228

⁹ Para 12 of the Judgment

¹⁰ “1.3 In these Rules: “Award” includes a partial, interim or final award and an award of an Emergency Arbitrator”

¹¹ Para 23 of the Judgment

¹²“9(2) Where, before the commencement of the arbitral proceedings, a court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the court may determine”.

- The aim of sections 9(2) and 9(3) was to avoid courts being flooded with petitions under section 9 when an arbitral tribunal is constituted since (i) the clogged court system ought to be decongested, and (ii) the arbitral tribunal, once constituted, would be able to grant interim relief efficaciously. Therefore, an arbitral tribunal is fully clothed with the same power as a court to provide for interim relief.
- Section 17(2)¹³ was added so as to provide for enforceability of such orders, again, as if they were orders passed by a court, thereby bringing Section 17 on par with Section 9.
- An emergency arbitrator’s “award”, i.e., order, furthers the same objectives as section 9. Given the fact that party autonomy is endorsed by the Act and that there is otherwise no ban against an emergency arbitrator being appointed, an emergency arbitrator’s order is exactly like an order of an arbitral tribunal once properly constituted. Therefore, such an order would fall within the institutional rules agreed by the parties and would consequently be covered by Section 17(1).
- The Supreme Court concluded that full party autonomy is envisaged under the Act to have a dispute decided in accordance with institutional rules, “which includes emergency arbitrators delivering interim orders, described as “awards”. The Supreme Court recognized that such orders aid in decongesting the civil courts and affording expeditious interim relief to the parties. Such orders are referable to and are made under Section 17(1) of the Arbitration Act.
- Section 17, as construed in the light of the other provisions of the Act, concludes that such emergency award is made under the provisions of Section 17(1) and can be enforced under the provisions of Section 17(2).
- Relying upon *Tayabhai M. Bagasarwalla*¹⁴, the Supreme Court observed that even if an order is set aside as it was passed without jurisdiction, for the period of its subsistence, it is an order that must be obeyed. The Supreme Court observed that after agreeing to be bound by SIAC Rules and participating in the emergency award proceedings, a party cannot turn around and content that the EA Decision is a nullity.

Enforcement proceedings are not covered by the appeal provision

- The Supreme Court determined whether the Division Bench has jurisdiction under Order XLIII Rule 1[r] of the CPC to hear the appeal filed before it, despite Section 37 of the Act. The relevant extracts of the said provision are produced below for ready reference:

<p>Order XLIII Rule 1[r] of CPC provides that:</p> <p><i>“ORDER XLIII – Appeals from Orders</i></p> <p><i>1. Appeals from orders.—An appeal shall lie from the</i></p> <p><i>following orders under the provisions of Section 104, namely:—</i></p> <p><i>* * *</i></p> <p><i>(r) an order under Rule 1, Rule 2, Rule 2-A, Rule 4 or Rule 10 of Order XXXIX;”</i></p>	<p>Section 37 of the act provides that:</p> <p><i>“37. Appealable orders.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the</i></p> <p><i>court authorized by law to hear appeals from original decrees of the Court passing the order, namely:—</i></p> <p><i>...</i></p> <p><i>(2) An appeal shall also lie to a court from an order of the arbitral tribunal-</i></p> <p><i>..</i></p> <p><i>(b) granting or refusing to grant an interim measure under Section 17.</i></p> <p><i>(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.”</i></p>
---	--

¹³ “17 (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.”

¹⁴ *Tayabhai M. Bagasarwalla v. Hind Rubber Industries (P) Ltd.*, (1997) 3 SCC 443

Enforcement of an order under section 9(1) and 17 of the Act routes to CPC

- Upon examining section 9 and section 17 along with CPC and the judicial precedents, the Supreme Court held that:
 - the expressions “*in relation to*” and “*any proceedings*” under section 9 would include the power to enforce orders that are made by the court under Section 9(1) and are not limited to incidental powers to make interim orders. Thus, if an order under Section 9(1) is flouted by any party, enforcement proceedings for the same are available to the court making such orders under Section 9(1) which routes to the CPC i.e., an order made under Order XXXIX Rule 2-A of the CPC, in enforcement of an order made under Section 9 will relate to Section 9(1) of the Act.
 - The arbitral tribunal cannot itself enforce its orders, which can only be done by a court under CPC. When the court acts under Section 17(2), it acts in the same manner as it acts to enforce a court order made under Section 9(1)¹⁵. If this is so, then the arbitral tribunal’s order is enforced under Section 17(2) read with CPC.
 - Since the arbitral tribunal under Section 17(1)¹⁶ has the same powers that are given to a court, it would be inconsistent to hold that if an interim order was passed by the tribunal and then enforced by the court with reference to Order XXXIX Rule 2-A of the CPC, such order would not relate to Section 17.
- The Supreme Court held that “*There is no doubt that Section 17(2) creates a legal fiction. This fiction is created only for the purpose of enforceability of interim orders made by the arbitral tribunal. To extend it to appeals being filed under the Code of Civil Procedure would be a big leap not envisaged by the legislature at all in enacting the said fiction.*”

Enforcement proceedings are not covered by the appeal provision

- Relying upon *Kandla Export*¹⁷, the Supreme Court held the Act is a self-contained and exhaustive code on arbitration matters, including on appeals from orders and awards made under the Act. This is buttressed by the addition of the non-obstante clause by the Arbitration and Conciliation (Amendment) Act, 2019.
- Relying upon *BGS Soma*¹⁸, the Supreme Court observed that it dealt with the maintainability of an appeal under Section 37 of the Act in a case in which an application under Section 34 of the Act was ordered to be transferred from a court which had no jurisdiction to a court which had jurisdiction. The Supreme Court held that the said judgment specifically ruled out appeals under Order XLIII Rule 1 of the CPC for orders passed under the Act.
- The Supreme Court observed that although Act was amended in 2015, Section 37 continued to only provide appeals only from an order granting or refusing to grant any interim measure under Section 17, which would only refer to the grant or non-grant of interim measures under Section 17(1)(i) and 17(1)(ii). The legislature did not introduce any change in Section 37(2) (b) to align it with Order XLIII, Rule 1(r) of the CPC.
- The opening words of Section 17(2), namely, “*subject to any orders passed in appeal under Section 37...*” show the legislature’s understanding that orders that are passed in an appeal under Section 37 are relatable only to Section 17(1).
- In view of the above, the Supreme Court held that enforcement proceedings are not covered by the appeal provision. Consequently, all interim orders of the Supreme Court stood vacated

¹⁵ “9(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court: ...”

¹⁶ “17 (1) A party may, during the arbitral proceedings, apply to the arbitral tribunal”

¹⁷ *Kandla Export Corporation v. OCI Corporation*, (2018) 14 SCC 715

¹⁸ *BGS SGS SOMA JV v. NHPC*, (2020) 4 SCC 234

CONCLUSION

The 246th Law Commission Report and thereafter the *Justice B.N. Srikrishna (Retd.) Report*¹⁹ recognized the need for the Indian regime to provide for enforcement of emergency arbitration. However, at the time, the recommendations did not come through in the amendments to the Act. Upon examining the Report, the Supreme Court observed that the said Report laid down that it is possible to interpret Section 17(2) of the Act to enforce emergency awards for arbitrations seated in India, and recommended that the Act be amended and brought at par with the international practice of enforcing an emergency award. Relying upon *Avitel Post*²⁰, the Supreme Court held that parliament not following a recommendation of a Law Commission Report “*does not necessarily conclude that what has been suggested by the Law Commission cannot form part of the statute as properly interpreted*”.

Although the Supreme Court distinguished *National Highways*²¹, it is relevant that the Supreme Court therein held that the power of the court under section 34 of the Act does not include the power to modify the award since the legislature had not provided for the same. Therefore, the Supreme Court followed the strict construction of the Act. Given that the legislature had two opportunities to import provisions in relation to emergency arbitrators and yet opted out, it remains to be seen if the Supreme Court extended its interpretation beyond the intent of the Act by stringing together various provisions of the Act to recognize the EA Decision.

The present decision is in context of an arbitration seated in India. Hence, in an India seated arbitration, an emergency arbitrator’s order under rules of an arbitral institution would be enforceable under section 17 (2) of the Act read with Order XXXIX Rule 2-A of the CPC. However, if the emergency arbitrator’s order was passed in an arbitration seated outside India, the law under consideration and the route for enforcement of such order would be different. Therefore, it remains to be seen whether parliament will introduce an amendment to incorporate the suggestions made under the 246th Law Commission Report and the *Justice B.N. Srikrishna (Retd.) Report*.

While the EA decision was enforced under section 17 (2) read with provisions of the CPC i.e. Order XXXIX Rule 2-A, at the outset, it appears that the applicant should have recourse to the next round of appeal under CPC as well i.e. Order XLIII. However, by rendering the appeals before the Division Bench non-maintainable, the Supreme Court has endorsed the objective of minimal court intervention and has recognized the Act as a self-contained statute.

We hope you have found this information useful. For any queries/clarifications please write to us at insights@elp-in.com or write to our authors:

Abhileen Chaturvedi, Associate Partner – Email – AbhileenChaturvedi@elp-in.com

Ria Dalwani, Senior Associate – Email – RiaDalwani@elp-in.com

Disclaimer: The information provided in this update is intended for informational purposes only and does not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided herein. This update is not intended to address the circumstances of any particular individual or corporate body. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.

¹⁹ High-Level Committee constituted by the Government of India under the chairmanship of Justice B.N. Srikrishna (Retd.) submitted a report on 30th July, 2017 which suggested that “..Given that international practice is in favour of enforcing emergency awards (Singapore, Hong Kong and the United Kingdom all permit enforcement of emergency awards), it is time that India permitted the enforcement of emergency awards in all arbitral proceedings..”

²⁰ *Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713

²¹ *National Highways Authority of India v. M. Hakeem*, 2021 SCC OnLine SC 473