

THE EMERGENCE OF EMERGENCY ARBITRATIONS IN INDIA

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I. INTRODUCTION

The advantages of arbitration as a method to solve disputes, such as party autonomy, confidentiality and fast procedures cannot be understated. However, even if parties decide to resolve their disputes by arbitration, there may be instances where the parties are faced with an imminent risk of irreparable damage such as a risk of dissipation of assets and resources before the constitution of the arbitral tribunal. At this stage, the parties may have to either wait for the arbitral tribunal to be constituted or may have to seek an interim relief from the courts under Section 9 of the Act in order to protect their assets and evidence that might otherwise be altered or lost. The parties may not find waiting for the constitution of the arbitral tribunal to be an effective solution as the parties would be facing an imminent risk of damage at that stage. While the second option of seeking interim relief from courts under Section 9 of the Act is widely practiced by parties, it has its own share of problems since the very reason the parties would have chosen arbitration as the dispute settlement mechanism may have been to avoid court proceedings in the first place in order to avail the above-mentioned advantages of arbitration as a dispute settlement mechanism. The problem, therefore, persists and a delayed remedy may render the aggrieved party unaided and at times, in a situation which is irreparable. In 1990, the International Chamber of Commerce [“ICC”] offered a solution to this problem and prescribed the ‘Pre-Arbitral Referee’ procedure.¹ The objective of the procedure was to provide urgent *pro tem* or conservatory measures to a party or parties that cannot await the formation of an arbitral tribunal.² It was described as an ‘excellent idea which thus far has not worked’,³ possibly because the procedure was offered separately from the ICC rules as a purely voluntary scheme, due to which there was probably relatively little uptake. However, despite the mixed response towards the ICC ‘Pre-Arbitral Referee’ procedure and after recognising the need for such interim measures, the International Centre for Dispute Resolution of the American Arbitration Association [“ICDR-AAA”] first introduced provisions for emergency arbitration in 2006,⁴ London

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¹ Pre-Arbitral Referee Rules by ICC available at <https://iccwbo.org/dispute-resolution-services/pre-arbitral-referee/rules/>.

² *Id.*

³ W.L. CRAIG, WILLIAM W. PARK AND JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, Oceana Publications Inc. (3rd ed. 2000), p 706.

⁴ ICDR-AAA Rules (2006), art. 37.

Court of International Arbitration [“LCIA”],⁵ Arbitration at Stockholm Chamber of Commerce [“SCC”],⁶ International Chamber of Commerce [“ICC”],⁷ Singapore International Arbitration Centre [“SIAC”]⁸ and Hong Kong International Arbitration Centre [“HKIAC”].⁹ In fact, countries like Singapore,¹⁰ Hong Kong,¹¹ New Zealand,¹² and Bolivia¹³ expressly introduced provisions on emergency arbitrations in their respective arbitration acts. The efficacy of an emergency arbitration rests on the maxims *Fumus boni iuris*, i.e., reasonable possibility that the requesting party will succeed on merits and *periculum in mora* – if the measure is not granted immediately, the loss would not and could not be compensated by way of damages. The article aims to explore the Indian approach towards emergency arbitration in followed by conclusion and suggestions to welcome the new kid on the block- emergency arbitration.

II. INDIAN SCENARIO ON EMERGENCY ARBITRATIONS

A. THE 2015 AMENDMENT: NO NEED TO EXPRESSLY INCLUDE AN EMERGENCY ARBITRATOR

An ‘arbitral tribunal’ is currently defined in Part I of the Act as a sole arbitrator or a panel of arbitrators.¹⁴ The 246th Report of the Law Commission of India suggested broadening the definition of ‘arbitral tribunal’ to include an emergency arbitrator appointed under any institutional rules.¹⁵ The report specifically stated that this amendment was to ensure that institutional rules such as the SIAC Arbitration Rules which provide for emergency arbitration are given statutory recognition in India. This suggestion was not incorporated in the Arbitration & Conciliation (Amendment) Act, 2015.¹⁶ Pertinently, the Lok Sabha did not even raise this issue when the bill for 2015 Amendment was being debated.¹⁷ Had the amendment to expressly include emergency arbitrator in the definition of an ‘arbitral tribunal’ been incorporated, the Act would have clearly stated that decisions of emergency arbitrators are deemed to be orders of court, thereby making

⁵ Even though article 9 provided for expedited formation of arbitral tribunal, LCIA amended its rules in 2014 to include provisions for emergency arbitrators, art. 9B in LCIA Rules.

⁶ SCC RULES (2010), Appendix II (Jan 1, 2010).

⁷ ICC RULES OF ARBITRATION (2012), art.29, Appendix V (Jan. 1, 2012).

⁸ SIAC RULES (2013), art. 26(2), sched. 1 (Apr. 1, 2013).

⁹ HKIAC Administered Arbitration Rules (2013), art. 23.1, sched. 4 (Nov. 1, 2013).

¹⁰ International Arbitration (Amendment) Act, 2012.

available at <https://sso.agc.gov.sg/Acts-Supp/12-2012/Published/20120528?DocDate=20120528>.

¹¹ CAP.609 Arbitration Ordinance available at

https://www.elegislation.gov.hk/hk/cap609?xid=ID_1498191921145_001.

¹² New Zealand Arbitration Act, §.2(1).

¹³ Bolivian Conciliation and Arbitration Law No. 708, arts. 67-71.

¹⁴ Indian Arbitration and Conciliation Act, 1996, Section 2(1)(d).

¹⁵ Law Commission of India, Report No. 246 – Amendments to The Arbitration and Conciliation Act, 1996 (2014), available at <http://lawcommissionofindia.nic.in/reports/Report246.pdf>.

¹⁶ Indian Arbitration and Conciliation Act, 1996.

¹⁷ Sixteenth Series, Vol. XIV, Sixth Session, 2015/1937 (Saka) No. 15, Wednesday, December 16, 2015/Agrahayana 25, 1937 (Saka), p. 215.

them enforceable and leaving no ambiguity. There can be two plausible reasons for not expressly providing for an emergency arbitrator under the Act- first, that the scheme of the Act implicitly provided for the scenario of an emergency arbitrator and hence no addition was required to be made in the Act and second, the legislature did not think it fit to provide for enforcement of decisions made by emergency arbitrators.

This issue of not expressly including an emergency arbitrator into the definition of ‘arbitral tribunal’ under the Act was also dealt with in *Amazon v. Future*,¹⁸ in which the Supreme Court took the former view. The Supreme Court relied upon *Avitel Post Studioz & Ors. v. HSBC PI Holdings (Mauritius) Ltd.*¹⁹ to state that only because suggestions of the 246th Report of the Law Commission of India were not accepted does not necessarily conclude that the suggestions are not part of the Act as properly interpreted. The Supreme Court analysed the amendments brought in by the 2015 Amendment and observed that Section 17(2) of the Act now deems any interim order issued by the arbitral tribunal as enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an order of the Court. Hence, an emergency arbitrator’s order, which is an order of an arbitral tribunal made under Section 17(1) of the Act can be enforced under Section 17(2) of the Act. Therefore, while the legislature abstained from indicating whether emergency arbitrations are recognized in the Act, the Supreme Court clearly stated that they in fact have always existed in the Act implicitly.

B. AN ANALYSIS OF JUDGEMENTS DEALING WITH EMERGENCY ARBITRATIONS IN INDIA

Various High Courts rejected the validity and enforcement of foreign-seated emergency awards and instead adopted Section 9 of the Act to grant interim measures. However, this has not been a uniform view as the recent decision of *Ashwani Minda & Anr. v. U-Shin Ltd. & Anr.* accepted the validity of a foreign-seated emergency award, as has been discussed below in Part I of this section.²⁰ Part II of this section appreciates the much-needed assistance rendered by *Amazon v. Future* with respect to Indian seated emergency awards, and questions whether the decision is sufficient to understand the approach towards enforcing such awards.²¹

i. Is it a foreign concept to enforce foreign-seated emergency arbitrations in India?

¹⁸ *Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors.*, 2021 SCCOnline SC 557.

¹⁹ *Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713.

²⁰ *Ashwani Minda & Anr. v. U-Shin Ltd. & Anr.*, 2020 SCCOnline Del 1648.

²¹ *Supra* note 18.

In *HSBC v. Avitel*,²² the High Court of Bombay was faced with a situation where an emergency arbitrator appointed under SIAC Rules had granted emergency relief, which the respondent failed to comply with. The claimant applied for similar relief under Section 9 of the Act for grant of interim relief pending the constitution of the tribunal and the High Court of Bombay indirectly enforced the decision of the emergency arbitrator. The claimant was therefore able to use the decision of the emergency arbitrator to persuade the Court to pass a similar order, which would be enforceable against the respondent. Similarly, in *Plus Holdings v. Xeitgeist Entertainment Group*,²³ the High Court of Bombay while deciding an application under Section 9 of the Act, reflected on the observations made by the emergency arbitrator, and granted reliefs similar to the reliefs granted by the emergency arbitrator.

The High Court of Delhi in *Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors.* [**“Raffles Design Case”**] held that the emergency award cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit.²⁴ Interestingly, the court still gave an order in sync with the decision of the emergency arbitrator.

However, approaching Indian courts under Section 9 of the Act for interim relief is not always a viable method of enforcing decisions of an emergency arbitrator as it increases the burden upon the courts as well as the parties. The introduction of sections 9(2) and 9(3) by the 2015 Amendment indicates that the objective was to reduce the burden on courts when an arbitral tribunal is constituted due to the overburdened system in courts and to ensure that an arbitral tribunal would grant interim relief timely and efficaciously.

Ashwani Minda & Anr. v. U-Shin Ltd. & Anr. is a case where the High Court of Delhi accepted a foreign-seated emergency award. The court opined that it was not open for the applicants to take a ‘second bite at the cherry’ as the emergency arbitrator had passed a very detailed and reasoned order after hearing the parties and there had been no change of circumstance after the order.²⁵ The court held that the applicants had consciously chosen to tread on a path and cannot turn around only because they were unsuccessful. The court also stated that it cannot sit as a court of appeal to examine the order of the emergency arbitrator under Section 9 of the Act.²⁶ This decision was a

²² *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd.*, 2014 SCCOnline Bom 102.

²³ *Plus Holdings v. Xeitgeist Entertainment Group*, (2019) SCCOnline Bom 13069.

²⁴ *Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors.*, 2016 SCCOnline Del 5521 at ¶104.

²⁵ *Ashwani Minda & Anr. v. U-Shin Ltd. & Anr.*, 2020 SCCOnline Del 1648.

²⁶ *Id.* at ¶¶55-56.

welcome diversion from the usual trend of adopting Section 9 to enforce orders similar to those passed by emergency arbitrators, but also indicated that Indian Courts do not have a general consensus on how foreign seated emergency arbitrations should be treated.

ii. **Did the Supreme Court pave a future for the Indian seated Emergency Arbitrations?**

The Amazon-Future dispute is a significant addition in the Indian landscape of emergency arbitration. In this dispute, as per agreements between the parties, Amazon's investment in Future Coupons Private Limited was to further flow into Future Retail Limited and Future Retail Limited was prohibited from transferring its retail assets to 'restricted persons', which included Reliance Industries. However, after Amazon's investment, the promoters of Future Group entered into a transaction with Reliance Industries which had the potential to completely dispose of the retail assets of Future Retail Limited. This led to Amazon commencing an arbitration under the SIAC Rules seeking emergency relief. The emergency arbitrator passed an order injunctioning the Future Group and its promoters from taking any steps to complete their transaction with Reliance Industries and from transferring any of their assets to Reliance industries, without the prior consent of Amazon. Amazon sought enforcement of the decision of the emergency arbitrator under Section 17(2) of the Act in the High Court of Delhi.

In connected matter *Future Retail Ltd. v. Amazon Com Investment Holdings LLC & Ors.*,²⁷ the Delhi High Court considered whether an emergency arbitrator lacks legal status under Part I of the Act. The Single Judge observed that the parties had to choose between availing interim relief from an emergency arbitrator on one hand or courts under Section 9 of the Act on the other hand. It was held that the Act does not prohibit the contracting parties from obtaining emergency relief from an emergency arbitrator, hence an emergency arbitrator is not a coram non iudice and the emergency arbitrator's award is not invalid on this count. Subsequently, Amazon moved the Division Bench and the matter is currently pending.

The Single Judge in *Amazon Com NV Investment Holdings LLC v. Future Coupons Private Limited & Ors.*,²⁸ held that the parties had explicitly agreed to conduct arbitration proceedings under the SIAC Rules and hence, it can necessarily be assumed that the parties had accepted and were aware of various provisions of the chosen rules, including the provisions relating to emergency arbitrations. Thus, the Single Judge recognized the decision of the emergency arbitrator as an order

²⁷ *Future Retail Ltd. v. Amazon Com Investment Holdings LLC & Ors.*, 2020 SCCOnline Del 1636.

²⁸ *Amazon Com NV Investment Holdings LLC v. Future Coupons Private Limited & Ors.*, 2021 SCCOnline Del 1279.

under section 17 of the Act.²⁹ However, a Division Bench stayed the said order of the Single Judge.³⁰ Subsequently, the Supreme Court stayed further proceedings before the Single Judge as well as the Division Bench of the High Court of Delhi and took up the matter for final disposal.³¹

The Supreme Court, in its judgment dated 06 August 2021,³² held that an award by an emergency arbitrator constitutes an order under the Act for the following reasons:

- i. **The present Act permits emergency arbitrations:** The Supreme Court observed that Section 2(1)(a) of the Act defines arbitration as any arbitration, whether or not administered by a permanent arbitral institution. Further, Section 2(6) of the Act gives parties liberty to authorize any person including an institution to determine issues that arise between the parties. Section 2(8) of the Act states that the parties are governed by arbitration rules referred in the agreements between the parties. These provisions read with Section 17(1) of the Act show that even interim orders passed by emergency arbitrators under the rule of a permanent arbitral institution would be included within the Act. Likewise, Section 19(2) of the Act also allows parties to agree on the procedure to be followed by an arbitral tribunal in conducting its proceedings. The Supreme Court also opined that when Section 17(1) of the Act is read with Section 21 of the Act, the expression “during the arbitral proceedings” includes emergency arbitration proceedings.

It was held that a conjoint reading of these provisions and no prohibition against emergency arbitrators would show that an emergency arbitrator’s decisions, if provided for under institutional rules, would be covered by the Act. The Supreme Court further held that the arbitral tribunal spoken of in Section 9(3) of the Act would be like the “arbitral tribunal” in Section 17(1) of the Act and hence would include an emergency arbitrator appointed under institutional rules.³³

- ii. **Party autonomy is crucial in arbitrations:** The Supreme Court laid heavy emphasis on the concept of party autonomy in arbitrations and opined that the decision of the emergency arbitrator was not in breach of the Act as the parties had agreed to SIAC Rules. Under the SIAC Rules, an emergency arbitrator had powers of an arbitral tribunal thereby having the power to order interim reliefs as may be necessary.

²⁹ *Id.* at ¶¶133-135.

³⁰ Future Coupons Private Limited & Ors. v. Amazon. Com NV Investment Holdings LLC & Ors., 2021 SCCOnline Del 4101.

³¹ Amazon. Com NV Investment Holdings LLC v. Future Retail Limited & Ors., 2021 SCCOnline SC 623.

³² *Supra* note 18.

³³ *Id.*

It is certain that *Amazon v. Future* is a landmark judgment as it holds that the current Act reflects the possibility of enforcing awards of emergency arbitrations in India as final and as a decree of the court. It is also certain that the Supreme Court has reinforced its pro-arbitration reforms.³⁴ However, what remains uncertain is the dispute between Amazon and Future Group as it has still not achieved quietus.

After the Supreme Court decision, Future Group moved Competition Commission of India [“CCI”] accusing Amazon Inc. of withholding pertinent information, thereby leading to a fresh round of litigations. CCI held that Amazon had not disclosed details of the shareholder agreement at the relevant time and its strategic purpose was to become a part of Indian retail.³⁵ CCI also suspended its prior approval for Reliance’s deal with Future Group.³⁶ After this order, Future Group sought termination of the arbitration proceedings from the SIAC on the ground that the basis of Amazon’s case no more existed after CCI suspended its own approval. However, SIAC decided to hear the main arbitration case and the schedule for the same was already fixed.³⁷ Future Group moved the Delhi High Court seeking stay of the main arbitration case before SIAC until its application on terminating the arbitration was not decided. While a Single Judge bench declined to suspend the arbitration proceedings,³⁸ a Division Bench stayed the same.³⁹

Future Group then moved the Supreme Court praying to set aside some orders of the Delhi High Court which had upheld the decision of the emergency arbitrator. By its order dated 01 February 2022,⁴⁰ the Supreme Court set aside the aforesaid orders citing procedural issues such as lack of reasonable opportunity given to Future Group to be heard and grant of punitive directions in the impugned orders. The Supreme Court also mentioned that the earlier judgment of *Amazon v. Future* dated 06 August 2021 did not adjudicate upon merits and limited its reasoning to answer legal questions due to which Future Group moved the Supreme Court on the merits of the case.⁴¹ This observation of the Supreme Court indicates that the reasoning given in the earlier judgment of 06 August 2021 while dealing with legal issues regarding emergency arbitrations still stands.

³⁴ *Id.*

³⁵ Proceedings Against Amazon.Com NV Investment Holdings LLC, Combination Case No.C-2019/09/668, 2021 SCC Online CCI 71.

³⁶ *Id.*

³⁷ See *Future Retail Ltd. v. Amazon.com NV Investment Holdings LLC & Ors.*, 2022 SCCOnline Del 13.

³⁸ *Id.*

³⁹ *Future Retail Ltd. v. Amazon.com NV Investment Holdings LLC & Ors.*, 2022 SCCOnline Del 78.

⁴⁰ *Future Coupons Private Limited. & Ors. v. Amazon.com NV Investment Holdings LLC & Ors.*, 2022 SCCOnline SC 126.

⁴¹ *Supra* note 18.

During the litigations, Future Group had filed an application under SIAC Rules for vacating the award of the emergency arbitrator, before the arbitral tribunal. This application was dismissed by the tribunal, resulting in Future Group moving an application before the Delhi High Court to stay the order of the tribunal, which was also dismissed by its order dated 29 October 2021. By its order dated 01 February 2022, the Supreme Court set aside this order dated 29 October 2021 of the Delhi High Court. This approach of the Supreme Court almost seems hypocritical as by its earlier judgment dated 06 August 2021, it heavily emphasized on the enforcement of decisions by emergency arbitrators, but then in this order of 01 February 2022, the Supreme Court moved away from its pro-arbitration stance by indicating that the emergency arbitrator award can be vacated, despite the arbitral tribunal wanting to accept it.

Future Group initiated the above-mentioned fresh litigations even after the decision of the Supreme Court dated 06 August 2021 which held that the decision of an emergency arbitrator can be enforceable, thereby proving that parties have a big role to play in the fruition of decisions relating to enforcement of emergency awards. Further, courts must also restrict themselves from interfering with emergency orders and awards, especially if the arbitral tribunal has accepted it. Without the assistance of the parties and courts, decisions attempting to make India into a pro-arbitration jurisdiction, will be rendered merely academic.

C. WHAT IS TAKING SO LONG IN ACCEPTING THE CONCEPT OF EMERGENCY ARBITRATIONS IN INDIA?

As discussed in the previous section, while *Amazon v. Future* helps bring some clarity on the status of emergency arbitrations in India, the matter is still not settled as Future Group has initiated fresh litigations.⁴² Therefore, while the matter may have been solved to some extent academically, there still are many practical hurdles which need to be crossed. Further, the Indian Courts have are still hanging on the idea of enforcing foreign seated emergency awards. The reasons for these problems may be the following:

- i. Ambiguity in the Act with respect to foreign seated emergency arbitrations:** Section 17 (2) of the Act was inserted by the 2015 Amendment to create a legal fiction that any order of an arbitral tribunal shall be considered an order of the court and shall become enforceable. *Amazon v. Future* further clarified that orders by emergency arbitrators can also be enforced under

³³ *Id.*

Section 17 of the Act. However, the approach for foreign seated emergency awards is still uncertain.⁴³

First, Section 49 of the Act states that a foreign award shall be deemed to be a decree of that Court, where the court is satisfied that such foreign award is enforceable. The terminology used in Section 17 is different than that used in Section 49. Section 17 former uses the term ‘order’ and Section 17(1) in fact lists down interim measures that can be sought by a party during arbitral proceedings. On the other hand, Section 49 uses the term ‘award’, which does not necessarily imply interim orders and is hence narrower in its ambit.

Second, the Act gives Indian courts wide and sweeping powers to grant reliefs under the Act as it expressly permits court intervention in arbitral proceedings inter alia, for purposes of interim measures before or during arbitral proceedings⁴⁴ and for supporting the arbitral tribunal in taking evidence.⁴⁵ Hence Section 9 of the Act has often been used by parties to meet their interim requirements.

ii. No express recognition for emergency arbitration decisions: Even though there was an attempt to give statutory recognition to emergency arbitrations by Law Commission’s 246th Report in the Arbitration & Conciliation (Amendment) Act, 2015, no such recognition was eventually granted. The High-Level Committee Report to review the institutionalization of arbitration mechanism in India, chaired by Justice B.N. Srikrishna also recommended in the year 2017 that it is time that India permitted the enforcement of emergency awards.⁴⁶ In the same vein, in *Amazon v. Future*,⁴⁷ Future Retail Ltd. argued that the Act does not contain an express mention of an emergency arbitrator like provisions contained in Singapore, New Zealand, Hong Kong and English statutes. The Supreme Court held that emergency arbitrators are included in the scope of an arbitral tribunal and hence there was no reason for the Indian legislatures to provide an express mention to emergency arbitrator.

The argument of Future Retail Ltd. did not convince the Supreme Court, but it begs the question of whether the Act should have been amended so that India comes in line with international practice. Another question worth considering is whether the legislature and the judiciary are on the same page with respect to emergency arbitrations. The inconsistency in decisions regarding

⁴³ *Supra* note 18.

⁴⁴ Indian Arbitration and Conciliation Act, 1996, Section 9,

⁴⁵ Indian Arbitration and Conciliation Act, 1996, Section 27.

⁴⁶ The High-Level Committee Report to Review the Institutionalization of Arbitration Mechanism in India available at <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf>, p.76.

⁴⁷ *Supra* note 18.

enforcement of foreign seated emergency awards is another issue that has arisen due to the absence of an express inclusion of the term ‘emergency arbitrator’.

iii. The approach of Indian Arbitral Institutions in favour of emergency arbitrations:

Even after the Indian legislature rejected the idea of expressly introducing emergency arbitration in India, many Indian arbitral institutions have framed rules on emergency arbitrations, which are largely synonymous to the leading international arbitral institutional rules. Admittedly the introduction of emergency arbitration in Indian arbitral institutions does not directly affect the Act since these are only institutional rules that parties can opt into even when they have a seat other than India. However, even if parties opt for arbitral institutions in India, they might not choose India as a seat due to ambiguities relating to enforcement of awards and orders, thereby taking India away from its pro-arbitration reforms. An illustrative list of such rules of the Indian arbitral institutions has been provided below:

Name of Arbitration Institution Rules	Provisions dealing with emergency arbitration
Madras High Court Arbitration Centre (Arbitration Proceedings) Rules, 2014	Section 20 under Part IV read with Schedule D
Indian Council of Arbitration Rules of Domestic Commercial Arbitration, 2016	Rule 57
Mumbai Centre for International Arbitration Rules, 2016	Sections 1.3, 14 and 32.6
Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018	Section 2.1(c) read with Part E
ICC Arbitration Rules, 2021 (applicable in India ICC)	Article 29 read with Appendix V
Nani Palkhivala Arbitration Centre Rules	Rule 20A

iv. The definition of award in New York Convention, 1958: The definition of arbitral awards in the New York Convention is unclear, but it is often argued that New York Convention only envisages enforcement of final awards⁴⁸. It is also argued that decisions of emergency

⁴⁸ Jean-Paul Beraudo, *Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals*, 22 J. INT'L ARB. 245, (2005).

arbitrators are not capable of being enforced under the New York Convention as they are not per se final in nature and are capable of being modified by the arbitral tribunal. Even in *Amazon v. Future*⁴⁹, the Supreme Court enforced the emergency decision as an interim order under section 17 of the Act. Pertinently, decisions of emergency arbitrators can take different forms, such as an order to an award. For instance, Article 29(2) of the ICC Rules for Arbitration⁵⁰ provides that emergency arbitrator's decision shall take the form of an order. Section 9 of Schedule 1 of the SIAC Rules⁵¹ as well as Article 9.9 of LCIA Rules⁵² state that the emergency arbitrator shall make an interim order or award. Hence, there is a void in understanding whether decisions of emergency arbitrators can be considered as final orders that can be enforced under the New York Convention.

III. CONCLUSION AND SUGGESTIONS

'Emergency Arbitration'- as is evident from the term, was envisioned to provide interim relief to parties, while simultaneously respecting party autonomy. However, due to above mentioned issues, emergency arbitrations have not been able to achieve their full potential in India. The global coronavirus pandemic has made the need for emergency arbitrations even more prominent with the courts operating in with limited staff and infrastructure. In this regard, the author lays down the following suggestions:

- i. **Enforcement of foreign-seated emergency awards:** While *Amazon v. Future* clarified that the Act implicitly provides for enforcement of Indian-seated emergency awards, there is no such clarity for foreign-seated emergency awards. Section 27(5) of the Act states that contempt to the arbitral tribunal is equivalent to contempt of court, and hence it can be argued that a person disobeying orders passed under Section 17 of the Act would be guilty of contempt as provided under Section 27(5) of the Act. However, this argument was rejected in the *Raffles Design case*⁵³ on the ground that non-compliance of an emergency order in Singapore cannot be stated to be contempt of court in India. Section 27(5) of the

⁴⁹ *Supra* note 18.

⁵⁰ Article 29(2) of ICC Rules, available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_29.

⁵¹ Section 9 of Schedule 1 of SIAC Rules, available at https://www.siac.org.sg/our-rules/rules/siac-rules2016#siac_schedule1.

⁵² Article 9.9 of LCIA Rules, available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitrationrules-2020.aspx#Article%209B.

⁵³ *Supra* note 24.

Act could potentially be an avenue to enforce foreign seated emergency orders as it is one of the rare sections under Part I of the Act which applies to foreign-seated arbitrations. In any case, to better streamline the landscape for emergency awards in India, it is desirable that the Act provide for enforcing interim orders passed by foreign seated arbitral tribunals, as is also provided in Article 17H and 17I of the UNCITRAL Model law and can be a provision similar to Section 17(2) of the Act, but for foreign seated arbitrations.

- ii. **Decisions of emergency arbitrators as ‘final’ award:** The decisions of emergency arbitrators must be considered as a final award to be in sync with the New York Convention and to provide more impetus for their enforcement. Decisions of emergency arbitrator may be considered final as they decide a particular interim measure confined to the facts on urgency of the matter. An issue that may arise then is that the order of an emergency arbitrator could be modified by the arbitral tribunal once it is constituted. However, this does not affect the final and binding nature of the emergency award or order as it can still be enforced until such modification, if any. In *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products*,⁵⁴ the Supreme Court while relying on *Satwant Singh Soghi v. State of Punjab*⁵⁵ and *McDermott International Inc. v. Burn Standard Co. Ltd.*⁵⁶ held that an interim award or partial award is a final award on matters covered therein made at an intermediate stage. *Amazon v. Future* did not and was not required to go into this question of whether emergency awards and orders can be considered as final awards so that they can be enforced under the New York Convention and only enforced the emergency orders under Section 17 of the Act. However, given the steady pro- arbitration reforms introduced by the Courts, one can hope that considering emergency decisions as final awards is not too far away.
- iii. **Efficiency of parties and arbitral institutions:** In the case of *Orangefish Entertainment Pvt. Ltd. v. NGC Network (India) Pvt. Ltd., NGC Network (India) Pvt. Ltd.*,⁵⁷ the respondent sought an ad-interim order against *Orangefish Entertainment Pvt. Ltd.*, the appellant for deceptively using similar marks on their selling tickets. The respondent first applied for emergency arbitration proceedings before the Delhi International Arbitration Centre. The appellant did not cooperate with stages of the emergency arbitration, and in fact went ahead with the advertisement of the disputed tickets. The Delhi International Arbitration Centre

⁵⁴ *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products*, (2018) 2 SCC 534.

⁵⁵ *Satwant Singh Soghi v. State of Punjab*, (1999) 3 SCC 487.

⁵⁶ *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181.

⁵⁷ *Orangefish Entertainment Pvt. Ltd. v. NGC Network (India) Pvt. Ltd.*, 2018 SCCOnline Del 11350.

also failed to move with alacrity to appoint the emergency arbitrator. The respondent was constrained to seek an injunction under Section 9 of the Act due to the non-cooperation of the appellant. To avoid such situations, parties must strive to stick to procedure and deadlines. In case the parties are non-cooperative, the arbitral institutions can investigate the reason for such delay and if found to be in bad faith, the parties can be punished in form of costs for the emergency arbitrator. Arbitral institutions also must respond to the parties' requests more promptly.

- iv. **Training emergency arbitrators:** The arbitral institutions can conduct voluntary workshops and seminars for emergency arbitrators relating to inter alia challenges faced by arbitrators in emergency arbitrations in granting an interim measure, issues of enforceability, and the role of public policy in granting interim orders.