

# Kluwer Arbitration Blog

## Rekindling the Debate on Enforcement of Foreign Seated Emergency Awards in India

Ashish Virmani · Sunday, October 3rd, 2021

Recently the Supreme Court of India in *Amazon.com NV Investment Holdings Inc. v. Future Retail Ltd.* (“**Amazon v. Future**”) took a progressive step by enforcing an emergency order/award rendered by an emergency arbitral tribunal appointed by Singapore International Arbitration Centre (“**SIAC**”). The Court held that the term ‘arbitral tribunal’ contained in section 17 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) includes an ‘emergency arbitrator’ within its fold. Therefore, the Court held that its order/award is enforceable in India.

However, this case is hardly an authority for the proposition that foreign-seated emergency awards are enforceable in India. This is because *Amazon* sought to enforce a Delhi-seated emergency award, i.e. though the administering institution was SIAC, the tribunal itself was not foreign-seated.

### Provisions enabling enforcement of emergency awards

Section 17(2) of the Arbitration Act, inserted vide the [Arbitration and Conciliation Amendment Act, 2015](#) (“**2015 Amendment**”), provides by a deeming fiction that any order issued by an arbitral tribunal (seated in India) shall be deemed to be an order of the court and shall be enforceable as such. Therefore, since the arbitral tribunal in *Amazon v. Future* was domestically seated, it was able to enforce the award under this provision.

However, had the award been rendered by a foreign seated arbitral tribunal, the court could not have relied upon section 17(2) to enforce the emergency award since Part-I of the Arbitration Act does not apply to a foreign seated arbitration (see *Bharat Aluminium Company v. Kaiser Aluminium Technical Services*; read here for a [detailed discussion](#) on the applicability of Part-I to foreign seated arbitrations).

While *Amazon v. Future* is a shot in the arm for enforcing domestically seated emergency awards, it has rekindled the debate on the enforceability of foreign seated emergency awards in India.

### Previous decisions on enforcement of foreign seated emergency awards in India

In 2016, the Delhi High Court in the case of *Raffles Design v. Educomp Professional Education* (“**Raffles v. Educomp**”) held that an emergency award by a foreign seated arbitral tribunal was not enforceable under the Arbitration Act and it could only be enforced by filing a suit (¶99). The court held that in the alternative, the party which had obtained a foreign seated emergency award would

have to *de novo* seek interim orders from the domestic court in terms of the emergency award.

This approach goes against the entire basis of lending credibility to awards/orders of emergency arbitral tribunals. The Supreme Court of India in *Amazon v. Future* (¶32, 35) has recognized the reasons underlying the setting up of emergency arbitral tribunals, which are:

1. to de-congest an already clogged court system; and
2. to grant timely and efficacious interim relief to a party.

Thus, there are sufficient policy considerations to recognize emergency awards.

### **Enforcing foreign seated emergency awards in India: Examining the provisions of the Arbitration Act**

The award/order of a foreign seated emergency arbitral tribunal may be enforced in India with the support of certain existing provisions under the Arbitration Act.

#### 1. **Section 27(5)**

As originally introduced, [Section 17](#) of the Arbitration Act empowered arbitrators to pass interim orders but did not provide for any mechanism to enforce such orders. (see *Sundaram Finance Ltd v. NEPC India Ltd.*) Against this backdrop, the Delhi High Court in *Sri Krishan v. Anand* held that under [section 27\(5\)](#) the court had the power to punish a party for contempt at the instance of the arbitral tribunal if the party is in breach of the interim orders passed by the arbitral tribunal. This interpretation received the imprimatur of the Supreme Court in *Alka Chandewar v. Shamshul Ishrar Khan* where the court held that the orders of the arbitral tribunal cannot be rendered a dead letter.

[Section 27\(5\)](#) is a salutary provision that does not trace its source to the UNCITRAL Model law but has been incorporated on the lines of [section 43\(2\)](#) of the now-repealed Arbitration Act, 1940. [Section 43\(2\)](#) empowered the court to subject persons guilty of contempt to the arbitrator to the same disadvantages, penalties, and punishments like offences in suits tried before the court. The same provision has now been incorporated legislatively in [section 27\(5\)](#) of the Arbitration Act.

After the 2015 Amendment applied [section 27](#) to foreign seated arbitrations (vide the amendment to proviso to [section 2\(2\)](#)), [section 27\(5\)](#) can *a fortiori* be used to enforce emergency awards of foreign seated arbitral tribunals, just as it had been pressed into service for enforcing interim orders by domestic tribunals. Not doing so would render the application of [section 27](#) to foreign seated arbitrations otiose.

Even the [246th Report of the Law Commission of India](#), which formed the basis of the 2015 Amendment, specifically observed that the purpose of the amendment to [section 2\(2\)](#) was to empower Indian courts to exercise jurisdiction under [section 27](#) even to foreign seated arbitrations. Further, in applying [section 27](#) to foreign seated arbitrations, the Arbitration Act has knowingly deviated from the UNCITRAL Model Law, which only intended to apply this provision to domestically seated arbitrations.

It appears from *Raffles v. Educomp* (supra) that this argument was advanced by the respondent, but was rejected without undertaking a proper examination (¶102). The court reasoned that a person guilty of not following interim orders of a foreign seated arbitral tribunal could not be punished in

India.

The court, however, failed to consider that the party breaching the order would be located within the jurisdiction of the court in India where the court can exercise its jurisdiction *in personam*. Section 27 is a provision to aid the arbitral tribunal where a party or witness is located within the jurisdiction of the court and the court would exercise this power even at the instance of a foreign seated arbitral tribunal. As such, this provision may be resorted to for enforcing orders of a foreign seated arbitral tribunal rendered during the conduct of the arbitral proceedings.

## 2. Enforcement as a foreign award

In appropriate cases, an emergency award may even be enforced as a foreign award under Part-II of the Arbitration Act. Under rule [Rule 1.3](#) of the SIAC Rules, 2016 an ‘Award’ is defined to include an award of an Emergency Arbitrator. Similarly, [Rule 9.9](#) of the DIFC-LCIA Arbitration Centre Arbitration Rules, 2021 prescribes that an emergency award shall take effect as an award.

Arguably, the term ‘arbitral awards’ under Article I section 2 of the New York Convention on the recognition and enforcement of foreign arbitral awards (“[New York Convention](#)”) is wide enough to encompass an ‘emergency award’ within its fold.

Thus, depending on the nature of the relief granted by the emergency tribunal, a foreign seated ‘emergency award’ may fall within the wide definition of a ‘foreign award’ under [section 44](#) of the Arbitration Act.

An equitable relief granted by the emergency arbitrator may fall within the meaning of an ‘interim award’ and even if an interim award is intended to have effect only so long as the final award is not delivered, such an award may also qualify to be an ‘interim award’, depending on its form ([Satwant Singh Sodhi v. State of Punjab ¶6](#)).

In case an equitable emergency award is granted by the arbitral tribunal to prevent an irreparable injury to the applicant, such an order may have the trappings of finality and thus, enforceable as an award. The New York District Court in [Yahoo! Inc. v. Microsoft Corp.](#) applied these tests to confirm an emergency award and enforced it. While there have been other cases in the United States [refusing to enforce](#) an emergency award, a case-to-case evaluation may be considered by the court and lean towards a pro-enforcement approach so as not to render the emergency award meaningless.

## Concluding remarks

It is desirable that [Article 17H and 17I of the UNCITRAL Model Law](#) recognizing and enforcing interim orders passed by foreign seated arbitral tribunals be legislatively inserted in the Arbitration Act, akin to the Singapore and Hong Kong legislations, for complete clarity on this subject.

However, until such time that legislators catch up to the international trend, these arguments will aid the enforcement of foreign seated emergency awards so that the orders passed by these tribunals are not rendered unenforceable in India. These interpretations would otherwise be in line with the New York Convention, which binds parties to enforce foreign arbitral awards unless they fall within the limited grounds enumerated under Article V of the Convention.

---

To make sure you do not miss out on regular updates from the *Kluwer Arbitration Blog*, please [subscribe here](#). To submit a proposal for a blog post, please consult our *Editorial Guidelines*.

### **Profile Navigator and Relationship Indicator**

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



 Wolters Kluwer

The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

This entry was posted on Sunday, October 3rd, 2021 at 8:33 am and is filed under [Emergency Arbitrator](#), [Enforceability](#), [Enforcement](#), [India](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.