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Emergency Award or Approaching Court for Interim Relief? – Has the Amazon Decision Made this a Question of Either One or the Other but Not Both?

Shalaka Patil · Monday, November 8th, 2021

In August 2021, the Indian Supreme Court ('Court') in *Amazon v. Future* found an emergency award rendered in an arbitration seated in India (New Delhi) to be enforceable as if it were an interim order of an arbitral tribunal under Section 17(1) of the Arbitration and Conciliation Act ("Act"). The Court also found that such an award when enforced under Section 17(2) would not be open to any challenge under Section 37 (which is the appeal provision in the Act).

The Court's decision was influenced by a four-pronged approach of (a) efficacy of the arbitral process and the availability of a quick remedy through the emergency arbitration process, (b) the aim to de-clog courts, (c) no interdict in the Act, and (d) parties having agreed to SIAC rules and emergency arbitration process could not renege from the award and treat it as invalid after the fact. As such, no order or award rendered pursuant to that agreement was inherently illegal and the relevant procedures had to be followed until or if the award was vacated.

While the decision has been discussed on the Blog earlier, this post highlights one important and far-reaching implication of this judgment, inferred from paragraphs 31 to 36 which does not seem to have been previously discussed elsewhere.

The regime for seeking interim relief in India after 2015

India amended its Act in 2015 where it introduced a new Section 9(3). Section 9 deals with the granting of interim reliefs by Indian courts in arbitration. Section 9(3) states as follows:

> *"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."*

The 2015 amendment to the Act also introduced Section 9(2) which states that if any interim relief is granted by the court before any arbitral proceedings have started, such proceedings are to be commenced within 90 days thereof. The whole purpose of these amendments was to ensure that

parties sought remedies and relief from the arbitral tribunal itself instead of "clogging" courts.

The consequence of the *Amazon d*ecision to seek interim reliefs before courts

The Court in *Amazon* recognized India-seated emergency awards akin to interim orders under Section 17(1) of the Act passed by arbitral tribunals. These orders have the same force of law as orders made by courts.

However, the consequence of Section 9(3), read with the exposition in the *Amazon* decision, is that once emergency arbitration is invoked, it may well be argued that the remedy under Section 9 (approaching courts for interim relief) would no longer remain available. This means that now parties would, at the outset, be required to choose between filing for emergency arbitration or applying to a court for interim relief. Indeed, if it can be shown that the emergency arbitration may not render an "efficacious" remedy, courts could be approached. But this threshold would have to be crossed.

While the Court does not explicitly state this in the decision, its reasoning indicates this approach – the reasoning being that once constituted, let arbitral tribunals do their job, whether emergency or otherwise and do not come to court, unless absolutely necessary. When reading emergency arbitrations as a category of arbitral proceedings in Section 17 (1), the Court states at paragraph 35,

> *"An Emergency Arbitrator's "award", i.e., order, would undoubtedly be an order which furthers these very objectives, i.e., to decongest the court system and to give the parties urgent interim relief in cases which deserve such relief. Given the fact that party autonomy is respected by the Act and that there is otherwise no interdict against an Emergency Arbitrator being appointed, as has been held by us hereinabove, it is clear that an Emergency Arbitrator's order, which is exactly like an order of an arbitral tribunal once properly constituted, in that parties have to be heard and reasons are to be given, would fall within the institutional rules to which the parties have agreed, and would consequently be covered by Section 17(1), when read with the other provisions of the Act, as delineated above."*

It is not unlikely for parties to file, simultaneously both for emergency relief and apply for interim protection in courts. Often the relief is applied for before the two fora one after the other. Another question that arises, if the decision is given the reading as suggested above, is that what happens after the completion of the emergency proceedings and the rendering of the emergency award but before the regular tribunal is constituted. In the interim period, it could be argued that no arbitral proceedings exist, no arbitral tribunal has been constituted although a notice of arbitration may have been issued. This interim period may be a good fit to argue that since there would be no "efficacious" remedy available in the arbitration, courts could be approached in Section 9 proceedings. Rules of institutions provide that no appeals should be sought from state courts of the decisions of emergency awards. To the extent that such interim relief applications are in the nature of seeking the same remedy again (having, let's assume, failed before the emergency arbitrator), they would amount to a quasi-appeal (a practice that is not unknown to emergency arbitration jurisprudence in India). So, another way to look at this argument is that during the window between the time that an emergency arbitrator has been appointed and she is yet to render an

award, Section 9 remedies may not be available (unless the former is inefficacious). However, right after the emergency award has been made but before a regular tribunal is constituted, one may approach a court. This may well be the unintended consequence of the decision, but it makes sense. At all times, parties must have some form of remedy available. If the tribunal is available, that should be the first port of call, Indian courts are already overburdened. However, in the absence of a tribunal, one may go back to court.

This decision raises another important question, what happens to foreign-seated emergency arbitrations? Since this decision has not ruled on the validity of foreign seated emergency awards, that question still remains open. Traditionally in India, the approach has been to file a Section 9 petition on the back of an emergency award in order to "indirectly" enforce the foreign emergency award by receiving similar orders through the Indian proceedings. Given that Section 17 is applicable only to Part I of the Act, the reading of emergency arbitrations into this provision would only apply to domestic arbitrations as of now. However, if orders of arbitral tribunals (generally whether seated in India or outside) are to include emergency awards then this would mean that such a choice would have to be made even for foreign seated arbitrations.

The Court has not ruled on this presently and as of now a dichotomous situation exists where one can argue that after *Amazon*, in domestically-seated arbitrations, parties would have to make a choice between proceeding with emergency arbitrations or interim relief proceedings before courts under Section 9, and once the former choice is made, the latter would be unavailable given the interdict in Section 9(3) unless of course it can be shown that the emergency arbitration remedy is not efficacious. On the other hand, for foreign-seated arbitrations, both remedies would be available.

Conclusion

Whether courts will read the *Amazon* judgment for such a result remains to be seen, but it is a far-reaching outcome of the decision. Indeed, for policy reasons, such an outcome makes sense since it lets tribunals take over and reduces the burden on courts. There is also no benefit of approaching courts once the same reliefs can be given by emergency tribunals (or subsequent tribunals) given that the power now between the two has been made co-extensive. It will also compel parties to be disciplined and make early choices so that they do not try their luck at different fora. However, closing a remedy as far-reaching as interim relief from courts may be a substantial one and courts may be hesitant to give the case such a specific reading. Either way, the field remains open for further interpretation and development – in the direction of more power to emergency arbitral tribunals in India.

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This entry was posted on Monday, November 8th, 2021 at 8:35 am and is filed under Emergency Arbitrator, Enforcement, India, Interim measures
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