ARBITRATING SHAREHOLDER DISPUTES: A CASE FOR EMERGENCY ARBITRATION IN INDIA

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Introduction

1. Domestic arbitrations in India are dominated by construction arbitrations and arbitrations in relation to the supply of goods and services. However, a niche has also been carved out under the construction and supply of goods or services contracts when the bids for such contracts are made by a consortium of bidders. Such a consortium also tends to incorporate a joint venture ("**JV**") company to perform such contracts. Such JV agreements or shareholding agreements usually also provide for the exit of the JV partners after a minimum fixed term as a member. However, such exit clauses entail that the exiting partner must allow the remaining JV partners to match the offer received by the exiting partner to buy the shares of the exiting partner. These clauses are referred to as Right of First Refusal ("**ROFR**") clauses. ROFR is a contract clause that provides a party the right to be the first to be entitled to accept an offer before others are so offered or entitled to accept.3 The idea behind the ROFR clause is that the current JV partners would rather keep the shares of the JV within themselves rather than allow an outsider to become a member of the JV. This backdrop forms the setting for the discussion in **Chapter 1** of this article relating to the sale by the exiting shareholder of its shares in Mumbai International Airport Limited.

2. It is pertinent to note that such ROFR clauses can also be found in agreements when one party buys shares in another party with an option to buy more shares in the future. The ROFR clauses in such cases are styled in such a manner that the selling party shall not sell shares in its company to a third party without giving an opportunity to the buying party to buy the further shares in the selling party. This forms the basis of the entire dispute between Future Group and Amazon when Future group decided to sell one of its companies to Reliance Group, wherein Amazon alleged that it had the right to buy the shares in this company before it was bought by Reliance. This discussion shall form **Chapter 2** of this article.

3. Thereafter in **Chapter 3** we shall move towards highlighting the relevance of emergency arbitration in such shareholder disputes and highlight the status of the law relating to emergency arbitration in India. This paper shall also show why such emergency arbitrations may also require legislative recognition which may be useful for the growth of arbitrations in India including resolution of disputes related to ROFR Clauses in shareholder agreements. Finally, we shall summarize our suggestions and takeaways in the **Final Conclusion** to this paper.

Chapter 1 – Mumbai International Airport Limited Shareholder Dispute

4. The Mumbai International Airport was one of the first airport modernization concession contracts awarded to a consortium based on bids received by the Airports Authority of India ("**AAI**").[4] The modernization was to be executed by a new JV company named Mumbai

[3] 'Definition of Right of First Refusal' (The Law Dictionary) <https://dictionary.thelaw.com/right-of-first-refusal/> accessed 14 July 2021.

[4] Rekha Jain, G. Raghuram, and Rachna Gangwar, 'Airport Privatization in India: Lessons from the Bidding Process in Delhi and Mumbai ' (Working Paper, IIM Ahmedabad 2007) 3

International Airport Limited ("**MIAL**") having an authorised share capital of INR 250 Crores. After the incorporation of MIAL, a shareholder agreement ("**Shareholder Agreement**") was executed between MIAL, AAI and the private participants who were members of the consortium, wherein concerned parties agreed to subscribe to the shareholding of MIAL as per the table below.[5]

	Shareholders	**Number of shares**	**Percentage holding**
	Government Holding		
1.	AAI (along with its Nominees)	**5,20,00,000**	**26%**
	Private Participants		
2.	GVK Airport Holdings Pvt. Ltd ("**GVK**")	7,40,00,000	37%
3.	Bid Services Division (Mauritius) Ltd. ("**BSDM**")	5,40,00,000	27%
4.	ACSA Global Ltd.	2,00,00,000	10%
	Sub Total	**14,80,00,000**	**74%**
	TOTAL	**20,00,00,000**	**100%**

5. In 2011, by mutual agreement, BSDM sold 50% of its stake (13.5% of MIAL's shares) for an undisclosed price to GVK and GVK became the owner of 50.5 % shares of MIAL. BSDM was left with 13.5% stake in MIAL.[6]

Offer by Adani and ROFR of GVK

6. In March 2019, Adani Group Company ("**Adani**") made an offer to BSDM to purchase the shares at INR 77 per share for the entire shareholding of BSDM, totalling to INR 1248 Crores.[7] The Shareholder Agreement contained a ROFR clause wherein, if one of the

<https://web.iima.ac.in/assets/snippets/workingpaperpdf/2007-05-01_RekhaJain.pdf#:~:text=Modernization%20of%20Delhi%20and%20Mumbai%20airports%20had%20been,traffic%20and%2038%25%20of%20aircraft%20movement%20in%202003-04.> accessed 21 June 2021.

[5] Clause 3.2, Shareholder Agreement, Mumbai International Airports Limited, 4 April 2006 available at https://www.civilaviation.gov.in/sites/default/files/moca_000981.pdf

[6] 'India's GVK Power Raises Stake in Mumbai Airport Firm to 50.5 Pct' *Reuters* (2 March 2011) <https://www.reuters.com/article/gvkpower-stake-idUSSGE72100W20110302> accessed 7 June 2021.

[7] 'Battle for Stake in Mumbai Airport: High Court Refuses Interim Relief to Adani' (*The Economic Times*, 6 November 2019) <https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/battle-for-stake-in-mumbai-airport-high-court-refuses-interim-relief-to-adani/articleshow/71941367.cms?from=mdr> accessed 12 June 2021.

consortium members wanted to sell its shares in MIAL, it had to offer the right to the other consortium members in the form of a notice indicating the number of shares, the price and other relevant information. GVK indicated its willingness to exercise its rights under the ROFR clause.[8] This clause was subject to Clause 2.5 of the Concession Agreement titled as Operation Management and Development Agreement ("**OMDA**") between the AAI and the Consortium Members wherein under sub-clause (c) of Clause 2.5; the consortium members were free to sell their shares after 7 (seven) years from the effective date without the approval of AAI, subject to the overall shareholding of the relevant member not going below 10%.[9] Since BSDM intended to sell its entire stake of 13.5%, it can be safely assumed that any sale would have required eventual approval of the AAI.

Seeking interim relief – Delhi High Court and the Arbitral Tribunal

7. A dispute arose between the GVK and BSDM when BSDM alleged that GVK had failed to make the payment as per the conditions under the ROFR clause of the Shareholder Agreement within 30 (thirty) days of the offer being sent to GVK and ACSA Global Ltd. in the form of the notice.[10] The time period of 30 (thirty) days was mandated under the ROFR clause. GVK filed an application for interim relief under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Act**") before the Hon'ble High Court of Delhi ("**DHC**") to restrain BSDM from selling their stake. GVK argued that it had exercised its right and invoked the ROFR clause and it was upon BSDM to conclude the sale. The DHC, by its order dated 1 July 2019, did not provide any interim relief and left it to the arbitral tribunal to take a decision if an application under Section 17 of the Act is moved by GVK before the arbitral tribunal.

8. The matter proceeded for arbitration before a three-member arbitral tribunal. It appears that the arbitration was initiated under Clause 9.4.3 of the Shareholder Agreement which provided for a three-member arbitral tribunal seated in New Delhi.[11] After the constitution of the tribunal, it can be safely assumed that GVK moved an application for interim relief. The arbitral tribunal directed GVK to deposit the amount for the purchase of the shares in an escrow account before hearing GVK's application to restrain BSDM from selling its stake.[12] Later, by a detailed order on 19.01.2020, the arbitral tribunal under Section 17 of

[8] Shahkar Abidi, 'GVK to Buy Bidvest Stake, Keep Adani out of MIAL' (*DNA India*, 25 February 2019) <https://www.dnaindia.com/business/report-gvk-to-buy-bidvest-stake-keep-adani-out-of-mial-2723653> accessed 7 June 2021.

[9] 'Operation, Management and Development Agreement between Airports Authority of India and Mumbai International Airport Private Limited for the Mumbai Airport' <https://www.civilaviation.gov.in/sites/default/files/moca_000979.pdf> accessed 8 June 2021.

[10] 'Battle for Stake in Mumbai Airport: High Court Refuses Interim Relief to Adani' (n 7) ("…GVK had offered to buy Bidvest's stake, but failed to arrange for the funds within the 30-day period.").

[11] Clause 9.4.3, Arbitration, Shareholder Agreement, Mumbai International Airports Limited, 4 April 2006 available at https://www.civilaviation.gov.in/sites/default/files/moca_000981.pdf.

[12] 'Battle for Stake in Mumbai Airport: High Court Refuses Interim Relief to Adani' (n 7) ("On September 15, an arbitral tribunal, which heard the case between GVK and Bidvest, gave GVK time till October 31 to deposit the money. According to the arbitral order, if GVK failed to deposit the money, Bidvest was free to sell its stake to anyone else.").

the Act restrained BSDM from selling their stake to anyone till the resolution of the dispute.[13] Hence, it can be assumed that a prima facie case existed on facts that the conditions under the ROFR clause had been fulfilled by GVK for the purchase of the shares of BSDM because of which interim protection was granted to GVK.

Vacation of interim protection provided to GVK

9. In a turn of events, about 300 Million USD of the money that was arranged and deposited in the escrow account by GVK had been withdrawn by its investors because of which GVK had to give up its claim for the purchase of the shares. Hence, the restraint on BSDM no longer existed. BSDM was eventually able to complete the sale of the shares to Adani in February 2021.[14] Eventually, GVK also got into a separate agreement altogether to sell its stake of about 50.5 % to Adani.[15] Adani closed the buyout of all three original private participants and became the owner of 74% of shares in MIAL.

Chapter Conclusion

10. The lesson that is learnt from the MIAL dispute is that a ROFR Clause having a short time period of 30 (thirty) days to finalise the transaction was not enough to conclude the same. We understand that due diligence of the background of the shareholder and the shares being bought itself may not be necessary as the party who is purchasing the shares is itself a shareholder; however, to complete any transaction which involves payout of substantial magnitude would require time greater than 30 (thirty) days to close the transaction. Hence, the parties while drafting the shareholder agreement must have the foresight of such a situation arising and the possibility of buying or selling their stake in a JV company having a ROFR clause.

11. We can see that in this case, even though a time period of 30 (thirty) days was provided, BSDM was not able to exit as intended for almost three years from the first offer it received from Adani. Hence, it could have been in favour of both BSDM and GVK to see that a more extended period be provided for fulfilling the conditions under the ROFR clause and see that BSDM received the payout of the funds by GVK exercising the ROFR clause or from the original offeror who intended to buy its stake.

[13] 'Breather for GVK Group! Arbitration Tribunal Restrains Bidvest from Selling Stake in Mumbai Airport' (*Business Today*) <https://www.businesstoday.in/latest/corporate/story/breather-for-gvk-group-arbitration-tribunal-restrains-bidvest-from-selling-stake-in-mumbai-airport-243665-2020-01-21> accessed 9 June 2021.

[14] Aneesh Phadnis, 'Adani Completes Purchase of 23.5% Stake in Mumbai International Airport' *Business Standard India* (8 February 2021) <https://www.business-standard.com/article/companies/adani-completes-purchase-of-23-5-stake-in-mumbai-international-airport-121020800001_1.html> accessed 9 June 2021.

[15] Forum Gandhi, 'Adani Takes over MIAL, Navi Mumbai Airports after a 2-Year Tussle with GVK' (*@businessline*) <https://www.thehindubusinessline.com/companies/gvk-in-deal-with-adani-group-for-mumbai-international-airport/article32484211.ece> accessed 17 June 2021.

Chapter 2 - Amazon-Future Group Dispute

Background

12. In the year 2019, Amazon.Com NV Investment Holdings LLC ("**Amazon**") after extensive exchanges with the Kishore Biyani driven Future Group, procured 49% stake in one of Future Group's unlisted firms Future Coupons Limited ("**Future Coupons**"). Future Coupons is the advertiser substance of Future Retail Ltd. ("**Future Retail**") and holds a 7.3% stake in Future Retail. By implication, Amazon got 3.6% shareholding in Future Retail. As a component of the arrangement, Amazon also negotiated a 'call option' permitting it to purchase halfway or whole stake of the advertisers in Future Retail for a period going from 3 (three) to 10 (ten) years from the date of the Agreement[16] ("**2019 Agreement**").

13. As part of the 2019 Agreement, the parties had a call option in the form of an exit clause which determined that Amazon would practice the privilege of the first refusal in a situation where Future Group wishes to sell all or part of Future Coupon's promoter or Future Retail's shareholding. Also, there was a provision that expressed that Future Group will not sell any resource within 10 (ten) years of the arrangement with Amazon. It is these provisos that became the premise of the disputes between Amazon and Future Group.

Reliance Deal

14. In 2020, Future Group being staggered under huge debts followed by a nationwide lockdown due to COVID-19, sustained heavy losses in its retail business. Hence, around August 2020, Future Group entered into an agreement with Reliance Retail Ventures Limited ("**Reliance Retail**") (a subsidiary of Reliance Industries Limited) for INR 24,713 Crore to sell its retail logistics and warehousing to Reliance Retail ("**Reliance Deal**"). As a part of the Reliance Deal, Future Group agreed to sell its supermarket chain Big Bazaar, premium food supply unit Food Hall and fashion stores and clothes supermarket Brand Factory's retails to Reliance Retail[17]. This turned into the significant conflict between Amazon and Future Group and progressed into arbitration under the 2019 Agreement.

Emergency Arbitration under SIAC Rules

15. Amazon and Future Retail, in their 2019 Agreement, concurred on New Delhi as the seat of arbitration and for the arbitration to be conducted under the aegis of Singapore International Arbitration Centre ("**SIAC**"). Accordingly, Amazon aggrieved by the Reliance Deal and in order to obstruct the Reliance Deal, initiated emergency arbitration against Future Group and sought interim protection by way of such emergency arbitration

[16] 'The Long Game: Amazon, Reliance & The Future Group Dispute' (*Algo Legal*, 18 December 2020) <https://algolegal.in/the-long-game-amazon-reliance-the-future-group-dispute/> accessed 25 June 2021.

[17] Pranav Mukul, 'Explained: Why Future Group Took Amazon to Court, and What the Delhi HC Said | Explained News, The Indian Express' (*The Indian Express*, 4 January 2021) <https://indianexpress.com/article/explained/explained-why-future-group-has-taken-amazon-to-court-what-the-court-said-7113612/> accessed 25 June 2021.

under the aegis of SIAC. SIAC thereafter appointed Mr. V.K. Rajah as the emergency arbitrator ("**Emergency Arbitrator**").

16. Amazon alleged that the Reliance Deal was in breach of the terms of the 2019 Agreement, which barred the Future Group from selling any stakes to any third party without Amazon's consent. Amazon further challenged the Reliance Deal to be in violation of the ROFR clause in the 2019 Agreement, which provided Amazon the first right to purchase the Future Group's shares under the 2019 Agreement[18]. However, the Future Group contented that the ROFR clause of the 2019 Agreement would not apply to the Reliance Deal till the completion of 3 (three) years of the 2019 Agreement.

17. The Emergency Arbitrator ruled in favour of Amazon and as an interim measure, put the Reliance Deal on hold and restrained the Future Group from proceeding with the Reliance Deal until the resolution of the dispute ("**Interim Order**"). The Future Group did not have any response to challenge this request that was passed by the Emergency Arbitrator except for holding up till the constitution of the arbitral tribunal.[19]

Enforcement of Interim Order before Single Judge of DHC

18. To enforce the Interim Order, Amazon filed an application before the DHC to restrain Future Group from concluding the Reliance Deal. The single judge of the DHC *vide* its decision dated 18 March 2021 in the matter titled ***Amazon.com NV Investment Holdings LLC vs. Future Coupons Private Limited***, [20] upheld the validity of the Interim Order by holding that an emergency arbitrator is an arbitrator for all intents and purposes under Section 17(2) of the Act. In view of this, DHC (single judge) held Future Group to be liable under Order XXXIX Rule 2A of the Code of Civil Procedure, 1908, which lead to the attachment of properties of Future Group companies and its promoters, including the properties of Kishore Biyani. Moreover, DHC further directed the Future Group to file an additional affidavit providing further details in relation to its assets and properties[21]. In addition to the same, the DHC also asked the Future Group not to take any further action in violation of the Interim Order.

Appeal before the Division Bench of DHC

19. Future Group appealed against the judgment dated 18 March 2021 of the DHC (single judge) before the Division Bench and the judgment of the Single Judge was stayed by the

[18] 'What Is Amazon-Future-Reliance Battle? Explained' (*India TV*, 27 March 2021) <https://www.indiatvnews.com/business/news-amazon-future-retail-reliance-case-legal-battle-all-you-to-know-explained-693662> accessed 25 June 2021.

[19] 'Singapore International Arbitration Centre | SIAC Rules 2016' <https://www.siac.org.sg/our-rules/rules/siac-rules-2016> accessed 25 June 2021.

[20] *AmazonCom NV Investment Holdings LLC v Future Coupons Private Limited & Ors* [2021] Delhi High Court O.M.P(ENF)(COMM) 17/2021 Order dated 18 March 2021, available at https://www.livelaw.in/pdf_upload/jrm18032021ompenfcomm172021200230-390779.pdf.

[21] ibid.

Division Bench *vide* order dated 22 March 2021[22]. The DHC (Division Bench) took note of the Supreme Court of India's ("**SCI**") order, which records that the proceedings before National Company Law Tribunal Mumbai ("**NCLT Mumbai**") will be allowed to go without a final order of sanction of the scheme between Future Group and Reliance. It also came over the petition filed by the Future Retail, which operates its business by the name Big Bazaar, FBB, Easy day, etc. In the said petition, the NCLT Mumbai has reserved its order over the scheme of arrangement of the Reliance Deal. The Reliance Deal, which is contested by Amazon, has already received clearance from the Competition Commission of India, and SEBI and the scheme of arrangement is now awaiting the nod from the NCLT and the shareholders.[23]

Special Leave to Appeal before the Supreme Court

20. The DHC (Division Bench) thereby entailed Amazon to file a special leave petition ("**SLP**") before the SCI. Amazon in its SLP, has sought a stay of the order dated 22 March 2021 of the DHC (Division Bench) till the issues are finally adjudicated by the SCI. Amazon has stated that the order dated 22 March 2021 of the DHC (Division Bench) is a grave error permitting Future Group to commit further breaches of the SIAC Award.[24] The SCI *vide* its order dated 19 April 2021 stayed the proceedings before the Delhi High Court and decided to start hearing the matter on 28 June 2021.[25] The matter has been partly heard by the SCI and is next listed on 27 July 2021 for the remaining arguments.[26]

SIAC Proceedings

21. Both the parties to the dispute are gearing up for the last leg of the proceedings at SIAC regarding Future Group's INR 24,713 Crore sales of its retail assets to Reliance Industries Ltd. Recently, the SIAC has constituted its panel to pass the final judgment on the case between Amazon and Future Group. As per the sources[27], the arbitration panel is as follows:

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[22] *Future Coupons Private Limited & Ors v Amazon.Com NV Investment Holdings LLC* [2021] Delhi High Court FAO(OS) (COMM) 50/2021 Order dated 22 March 2021 available at http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=52155&yr=2021.

[23] 'Future Group Says NCLT Can Continue Hearing on RIL Deal as per Supreme Court Direction' (*ETRetail.com*, 22 March 2021) <https://retail.economictimes.indiatimes.com/news/industry/future-group-says-nclt-can-continue-hearing-on-ril-deal-as-per-supreme-court-direction/81636215> accessed 22 June 2021.

[24] 'Amazon Moves SC for Stay on Delhi HC Order till Verdict on Future-Reliance Deal Dispute' (*The Times of India*, 9 April 2021) <https://timesofindia.indiatimes.com/business/india-business/amazon-moves-sc-for-stay-on-delhi-hc-order-till-verdict-on-future-reliance-deal-dispute/articleshow/81983052.cms> accessed 23 June 2021.

[25] *AmazonCom NV Investment Holdings LLC v Future Coupons Private Limited & Ors* [2021] Supreme Court of India SLP (C) 6113-6114/2021 Order dated 19 April 2021 available at https://main.sci.gov.in/supremecourt/2021/9459/9459_2021_33_24_27640_Order_19-Apr-2021.pdf .

[26] *AmazonCom NV Investment Holdings LLC v Future Coupons Private Limited & Ors* [2021] Supreme Court of India SLP (C) 6113-6114/2021 Order dated 22 July 2021 available at https://main.sci.gov.in/supremecourt/2021/3947/3947_2021_32_12_28754_Order_22-Jul-2021.pdf.

[27] Anirudh Laskar, 'Singapore Tribunal to Hear Amazon-Future Case on 12 July over RIL Deal' (*Mint*, 6 June 2021) <https://www.livemint.com/industry/retail/singapore-tribunal-to-hear-amazon-future-case-on-12-july-over-24-713-ril-deal-11622959962918.html> accessed 23 June 2021.

Albert Jan van den Berg (nominee arbitrator of Amazon), Jan Paulsson (nominee arbitrator of Future Group) and Michael Hwang (veteran barrister) (the presiding arbitrator).

Chapter Conclusion

22. The lesson learnt from the Amazon Future Dispute is that urgency of the matter is prime in cases involving the sale of shares if one party has an ROFR clause in their favour. Primarily because one of the parties already has a buyer ready to receive the shares on the payment of the sum. The emergency arbitration provisions under the SIAC Rules have hence helped Amazon to protect its interest in the interim. Interestingly, in both the disputes discussed above, the disputes were fought during the interim stage itself since the appointment of the tribunal which hears the arguments on merits, in any case, would delay the completion of the sale of the shares and the original offeror would have to walk away while the arbitration proceedings are ongoing, which would hence make the main arbitration proceedings infructuous. This is what happened in the MIAL Dispute.

23. The Amazon Future dispute is currently past the interim measures / emergency stage complete. It would be interesting to see if the arbitration proceeds to merits and how it would affect the deal between Reliance and Future Group.

Chapter 3 - Interim Measures and Emergency Arbitration

24. It is pertinent to note that interim measures of protection become extremely relevant to protect the subject matter of the dispute before arbitration. In the 2015 amendment, the (Indian) Arbitration and Conciliation Act, 1996 amended the applicability of certain sections of Part I of the Act including Section 9 and stated that Section 9 will be available for parties in foreign seated arbitrations as well. Prior to the amendment, parties in a foreign seated arbitration would not have the option of approaching Indian Courts under Section 9 of the Act to get interim relief. The alternate and quick approach in this regard would be to seek interim relief from the local courts or the emergency tribunal constituted by an arbitral institution in a foreign arbitration and then attempt to enforce the order in India.

Evolution of Emergency Arbitration

25. In Asia, the SIAC was the first institution to incorporate emergency arbitration provisions in its 2010 Rules. The emergency arbitrator provisions were introduced in the SIAC Rules in order to address situations where a party is in need of emergency interim relief before a Tribunal is constituted.[28]

Status of Emergency Arbitration under the Act

26. However, an issue may arise when the parties have received an interim relief from the emergency arbitrator in a foreign country attempt to enforce the same in India because

[28] 'The Emergency Arbitrator and Expedited Procedure in SIAC: A New Direction for Arbitration in Asia' (*Singapore International Arbitration Centre*) <https://www.siac.org.sg/images/stories/articles/siac_articles/SIAC_SReport%20-%20Asian%20MENA%20Magazine.pdf> accessed 14 July 2021.

under Part II of the Arbitration and Conciliation Act, 1996 only awards final or otherwise can be enforced and not interim orders. Under the SIAC Rules these interim orders are called 'awards'[29] and the emergency arbitrator has been recognized as an arbitrator under the International Arbitration Act of Singapore.[30] Such an 'award' and may not pass the test of being an award under Part 2 of the Arbitration and Conciliation Act, 1996 to be enforced as one.

Status of orders of Foreign Seated Emergency Arbitrators

HSBC v. Avitel Post

27. In a case dealing with an order of interim protection ordered by the emergency arbitrator prior to the 2015 amendment of the Act, the Bombay High Court in its judgments of the Single Judge and the Division Bench in the dispute between ***HSBC and Avitel Post Studioz***[31] held that the parties had expressly stated in the contract that the seat of arbitration will be Singapore and the arbitration will be governed by the SIAC Rules. The arbitration clause also stated that Part I of the Arbitration and Conciliation Act, 1996 will not be applicable save as except section 9 of the Act. To this extent while the courts in Single Bench and Division Bench were dealing with the applicability of Section 9 to this particular arbitration, it held that since the parties themselves allowed the applicability of Section 9 hence the same will be applicable even though Singapore is the seat of the arbitration and arbitration agreement is to be governed by the laws of Singapore.

28. The Single Judge held that this application under Section 9 has been made not for the enforceability of the emergency award but for grant of interim measures simpliciter under Section 9 which was available to the parties. Even the Division Bench agreed that even if an emergency award has been made by a foreign seated arbitrator, the order of Indian Courts exercising their jurisdiction under Section 9 has to be made independent of any such interim order of relief and that this application under Section 9 has not been made to circumvent the procedure of enforcement of a foreign seated award under Part II of the Act.

Raffles Design v. Educomp

29. To this extent the Hon'ble DHC in ***Raffles Design International Pvt Ltd v Educomp Professional Education Ltd & Ors*** 2016 (6) Arb.L.R 426 (Delhi) while dealing with an

[29] 'Singapore International Arbitration Centre Rules 2016' para 1.3 <https://siac.org.sg/our-rules/rules/siac-rules-2016> accessed 17 July 2021 ("Award" includes a partial, interim or final award and an award of an Emergency Arbitrator;).

[30] International Arbitration Act - Singapore s 2(1) *('"arbitral tribunal" means a sole arbitrator or a panel of arbitrators or a permanent arbitral institution and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation*'").

[31] *HSBC PI Holdings Mauritius v Avitel Post Studioz* High Court of Bombay (Single Judge) Arbitration Petition 1062 / 2012 decided on 22 January 2014.; *Avitel Post Studioz v HSBC PI Holdings Mauritius* High Court of Bombay (Division Bench) Appeal No. 196/2014 in Arbitration Petition No. 1062/2012 decided on 31 July 2014.

application under Section 9 of the Act for enforcement of an order of a foreign seated emergency arbitrator, held that Section 9 cannot be used to enforce an award of a foreign seated emergency arbitrator. The DHC held that an emergency award can be enforced only by filing a suit.

30. However, it held that the parties may independently approach courts of India under Section 9 for securing interim relief, as the applicability of Section 9 of the Act has been extended to foreign seated arbitrations as well by the 2015 amendment. The Court also held that the choosing Singapore as the seat of arbitration and SIAC Rules to govern the arbitration would not preclude a party from approaching a Court for obtaining interim relief as the SIAC Rules itself provides that the parties may approach a court for interim relief. However, the DHC finally held that the question whether the interim orders should be granted under Section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal.

Ashwini Minda v. U-Shin

31. The single judge of the DHC in ***Ashwani Minda v. U-Shin***[32] while dealing with an application for interim relief under Section 9 in a foreign seated arbitration distinguished the Raffles decision discussed above on the point that the institutional arbitration rules applicable in the Raffles case was SIAC which allowed seeking interim relief from courts unlike the Japan Commercial Arbitration Association ("**JCAA**") applicable to the case at hand. The DHC held that reading of the arbitration clauses clearly evinces the intention of the parties to exclude the applicability of Part I of the Act. Further, the DHC by applying the doctrine of election also held that having invoked the mechanism of the emergency arbitrator and inviting a detailed and reasoned order declining the relief, it is not open for the applicants to take a second bite at the cherry by way of an application under Section 9 and hence held the same to be not maintainable.

32. In appeal, the Division Bench in ***Ashwini Minda v. U-shin***[33] upheld the judgment of the Single Bench however it gave different reasons for the same. The Division Bench agreed with the single judge on principle of doctrine of election stating that the Indian Courts do have jurisdiction to grant relief under Section 9 in foreign seated arbitration however in the present case, the applicant having agitated similar points before the emergency arbitrator of JCAA and having lost on jurisdiction and merits before the Emergency Arbitrator it will not be open to it to approach the Indian Courts under Section 9 being aggrieved by such an order. Additionally, the Division Bench also referred to Section 9(3) of the Act wherein the Courts are not supposed to grant interim relief once the arbitral tribunal has been constituted or if an efficacious remedy is not available to the parties. When the application was filed before the single bench the arbitral tribunal had not been constituted and that was also one

[32] *Ashwani Minda and Ors vs U-Shin Ltd and Ors* High Court of Delhi - Single Judge OMP (I) (COMM.) 90/2020, MANU/DE/1043/2020.

[33] *Ashwani Minda and Ors vs U-shin Limited and Ors* High Court of Delhi - Division Bench FAO (OS) (COMM) 65/2020, 2020 (4) ArbLR 256 (Delhi).

of the reasons mentioned in the Section 9 application however by the time the application came to the be heard by the Division Bench, the arbitral tribunal had been constituted. Further, a remedy before the arbitral tribunal does exist and no arguments have been made that such a remedy is not efficacious.

33. Based on the aforesaid two points, the Division Bench fortified the reasons in declining to interfere with the judgment of the single judge. The Division Bench also gave further reasons to distinguish the Raffles Judgment by holding that in the Raffles case, the emergency award passed by the Emergency Arbitrator and upheld by the Singapore Court was being violated by the party and hence a relief was provided to the affected party by way of an order under Section 9. The same was not the issue in the case at hand. Based on these additional reasons, the Division Bench dismissed the appeal.

34. Considering the reasons given by the Division Bench above, it declined to rule on the observations of the single judge on the aspect of whether the applicability of Section 9 of the Act has been excluded by the parties by way of the dispute resolution clause. The Division Bench held that this issue would remain open and the judgment of the single bench has not closed the issue and the same will be available for discussion at the appropriate stage.

Analysis

35. Hence a combined reading of the aforesaid judgments demonstrates that although the power under Section 9 continues to exist under the Act for grant of interim measures, even in foreign seated arbitrations, the emergency award by a foreign seated arbitrator cannot be enforced under Section 9 of the Act. A similar relief however can be claimed under Section 9 and the Court while exercising jurisdiction has to remain independent of the order passed by the emergency arbitrator. However, if the emergency arbitrator has denied the relief to such an applicant seeking interim relief, then the applicant cannot invoke Section 9 of the Act as it would be presumed that the party has consciously elected to pursue an efficacious remedy before the emergency arbitrator and the Emergency Arbitrator refusing the remedy by way of a detailed reasoning, the parties have closed their right to approach Indian Courts under Section 9. Further, if the regular arbitral tribunal has already been constituted it would be a further impediment to the application to Indian Courts under section 9 as the party will have to necessarily prove that it does not have an efficacious remedy available before the arbitral tribunal because of which the Section 9 application has been sought.

Status of orders of India Seated Emergency Arbitrators

36. The three cases above dealt with emergency arbitrations orders made in a foreign seat. However, in the Amazon Future Dispute, the Emergency Arbitrator was appointed in an arbitration seated in New Delhi, India but under the aegis of SIAC and governed by SIAC Rules which provided for such emergency arbitration. Hence, when Amazon received a favourable order for interim relief from the Emergency Arbitrator, it approached the DHC for enforcing the same under Section 17(2) of the Arbitration and Conciliation Act, 1996

to recognize the interim order of the Emergency Arbitrator as an interim measure granted by the arbitral tribunal.

37. The DHC (single bench) in ***Amazon.Com NV Investment Holdings LLC v Future Coupons Private Limited & Ors.***[34] relied on the arguments made by the parties and the conclusions drawn by the Emergency Arbitrator as well and agreed with the Emergency Arbitrator that the (Indian) Arbitration and Conciliation Act, 1996 does not disallow an emergency arbitration and that the order of the emergency arbitrator can be enforced under Section 17(2) of the Act. It held that the Emergency Arbitrator is included in the definition of arbitral tribunal under the Act.

38. The judgment of the single bench of the DHC is a welcome step for Indian parties to approach Indian institutions for emergency arbitrations and including institutional arbitration in the dispute resolution clauses under the contract. Although a stay order was granted against this judgment by the Division Bench of the DHC, the same was done for reasons other than the reasoning provided by the single judge for enforcing the order of the emergency arbitrator and in any case the stay order was interim in nature and not the final judgment of the Division Bench.

39. It is pertinent to note that as of 2021, the Mumbai Centre for International Arbitration, Indian Council of Arbitration, Delhi International Arbitration Centre, Madras High Court Arbitration Centre, Nani Palkhivala Arbitration Centre and Hyderabad Arbitration Centre among others provide for emergency interim relief by way of appointment of an emergency arbitrator by the arbitration centre. This is a welcome step by the arbitration centres in India realising the utility of emergency arbitration in several arbitrations including the arbitrations related to shareholder dispute and disputes related to the invocation of the ROFR Clause.

40. Interestingly, the 246th Law Commission Report, which forms the basis of the 2015 amendment to the Arbitration and Conciliation Act, 1996, had proposed recognizing an emergency arbitrator as an arbitral tribunal under the Act to recognize arbitrators as provided for under the SIAC Arbitration Rules[35] however the change as recommended was not carried out in the amendment to the Act. In India's attempt to move towards an institutional arbitration, which is evident from the 2019 amendment made to the Act, it would not be out of place for the parliament out of abundant caution, to include the Emergency Arbitrator as an arbitral tribunal recognized under the Act in lines with the International Arbitration Act of Singapore and the judgment of the single bench of the DHC in Amazon.Com NV Investment Holdings LLC v Future Coupons Private Limited & Ors.

[34] *Amazon.Com NV Investment Holdings LLC v Future Coupons Private Limited & Ors* (n 20).

[35] 'Amendments to the Arbitration and Conciliation Act 1996' (Law Commission of India 2014) 246 <https://lawcommissionofindia.nic.in/reports/report246.pdf>.

Conclusion

41. Hence the authors in conclusion submit that parties to shareholder agreements should deliberate on a reasonable time for concluding a sale of shares under a ROFR Clause and further the dispute resolution clause should state that the arbitration would be conducted under the aegis of an institution which has the provision for appointing an emergency arbitrator to protect the rights of all involved.

42. In furtherance of the same, in case India wants to develop as a major hub for arbitration the parliament should consider amending the Act to recognize emergency arbitration just like the legislature of Singapore. It would provide much needed legitimacy to the emergency arbitrations provisions under the various Indian arbitration centres mentioned above and to protect the rights of the parties specifically in such disputes where grant of interim relief in a short time is of utmost importance. Further it may also explore whether the award of the emergency arbitrator should be considered for enforcement as an award under Part 2 of the Act or if provisions are to be made within Section 9 of Part 1 itself for enforcement of interim measures awarded under a foreign seated emergency arbitrator.