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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision: 18th March, 2021**

\+ O.M.P(ENF)(COMM) 17/2021

AMAZON.COM NV INVESTMENT HOLDINGS LLC .... Petitioner

Through: Mr. Gopal Subramanium, Mr. Gourab Banerji, Mr. Rajiv Nayar, Mr. Amit Sibal and Mr. Nakul Dewan, Senior Advocates along with Mr. Anand S. Pathak, Mr. Amit K. Mishra, Mr. Shashank Gautam, Ms. Sreemoyee Deb, Mr. Mohit Singh, Mr. Harshad Pathak, Mr. Promit Chatterjee, Mr. Shivam Pandey, Ms. Kanika Singhal, Ms. Saloni Agarwal, Ms. Didon Misri, Advocates of P&A Law Offices Mr. Vijayendra Pratap Singh, Mr. Rachit Bahl, Ms. Roopali Singh, Mr. Abhijnan Jha, Mr. Priyank Ladoia, Mr. Aman Sharma, Mr. Tanmay Sharma, Mr. Arnab Ray, Mr. Vedant Kapur, Advocates of AZB & Partners Mr. Pawan Bhushan, Ms. Hima Lawrence, Ms. Ujwala Uppaluri, Mr. Mohit Pandey, Ms. Raka Chatterji, Ms. Manjira Dasgupta, Mr. Aishvary Vikram, Mr. Ambar Bhushan, Mr. Vinay Tripathi, Ms. Anushka Shah and Ms. Neelu Mohan, Advocates

versus

FUTURE COUPONS PRIVATE LIMITED & ORS. ..... Respondents

Through: Mr. Vikram Nankani, Senior Advocate with Mr. Mahesh Agarwal, Mr. Rishi Agrawala, Mr. Karan Luthra, Mr. Pranjit Bhattacharyya, Mr. Ankit Banati, Advocates for R-1, R-3, R-12 and R-14

Mr. Harish Salve, Senior Advocate, Mr. Darius Khambata, Senior Advocate with Mr. Somasekhar Sundaresan, Mr. Ameet Naik, Mr. Raghav Shankar, Mr. Aditya Mehta, Mr. Tushar Hathiramani, Mr. Abhishek Kale, Ms. Madhu Gadodia, Mr. Harshvardhan Jha and Ms. Arshiya Sharda, Advocates for R-2, R-15 and R-16

Mr. Rohan Shah and Mr. Nakul Mohta, Advocates for R-4 to R-11 and R-13

CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA

J U D G M E N T

1. The petitioner has filed this petition under Section 17(2) of the Arbitration and Conciliation Act, 1996 read with Order XXXIX Rule 2A and Section 151 of Code of Civil Procedure for enforcement of the interim order dated 25th October, 2020 passed by the Emergency Arbitrator.

2. The respondents have raised a legal objection to the maintainability of this enforcement petition on the ground that the Emergency Arbitrator is not an Arbitrator within the meaning of Section 2(1)(d) of the Arbitration and Conciliation Act; the interim order dated 25th October, 2020 is not an order under Section 17(1) and, therefore, not enforceable under Section 17(2) of the Arbitration and Conciliation Act.

3. Respondent No.2 has raised two objections. The first objection is that there is no arbitration agreement between the petitioner and respondent No.2; and the Emergency Arbitrator has misapplied the concept of *Group of Companies doctrine* to implead respondent No.2. According to respondent No.2, the *Group of Companies doctrine* applies only in proceedings under Section 8 of the Arbitration and Conciliation Act for transfer of proceedings pending in Court to arbitration where the plaintiff claims through a person who is a party to an arbitration agreement. According to respondent No.2, *Group of Companies doctrine* cannot be invoked to implead respondent No.2.

4. The second objection of respondent No.2 is that the order of the Emergency Arbitrator is *Nullity* insofar as respondent No.2 is concerned as there is no arbitration agreement between the petitioner and respondent No.2 and combining/ treating all the agreements as a Single Integrated Transaction would result in the petitioner acquiring control over

respondent No.2 which would result in violation of the Foreign Exchange Management Act, 1999 and the Foreign Exchange Management (Non Debt Instruments) Rules, 2019 (FEMA FDI Rules).

5. Three important questions have arisen for consideration before this Court:-

5.1. ***What is the legal status of an Emergency Arbitrator i.e. whether the Emergency Arbitrator is an arbitrator and whether the interim order of the Emergency Arbitrator is an order under Section 17 (1) and is enforceable under 17(2) of the Arbitration and Conciliation Act?***

5.2. ***Whether the Emergency Arbitrator misapplied the Group of Companies doctrine which applies only to proceedings under Section 8 of the Arbitration and Conciliation Act as alleged by respondent No.2?***

5.3. ***Whether the interim order of Emergency Arbitrator is Nullity as alleged by respondent No.2?***

I. ***Background facts***

6. Amazon.com NV Investment Holdings LLC is the petitioner; Future Coupons Private Limited is respondent No.1 (hereinafter referred to as "**FCPL**"); Future Retail Limited is respondent No.2 (hereinafter referred to as "**FRL**"); the promoters of respondents No.1 and 2 are respondents No.3 to 13 (hereinafter referred to as "**Promoters**") and Key Managerial Personnel of respondents No.1 and 2 are respondents No.14 to 16.

7. The petitioner invested Rs.1431 Crore in FCPL based on certain special, material protective/negative rights available to FCPL in FRL

namely, that the Retail Assets of FRL would not be alienated without the petitioner's prior written consent, and never to a *Restricted Person*. FCPL and FRL further agreed that FRL would remain the sole vehicle for conduct of its retail business. The entire investment of Rs.1431 Crore was invested by FCPL into FRL. FRL received the benefit of the Petitioner's entire investment of Rs.1431 Crore.

8. Between 12th August 2019 and 22nd August 2019, the following agreements were executed between the following parties:-

(i) ***Shareholders' Agreement dated 12th August 2019*** between respondents No.1 to 13 (hereinafter referred to '***FRL – SHA***');

(ii) ***Shareholders' Agreement dated 22nd August 2019*** between petitioner and respondents No. 1, 3 to 13 (hereinafter referred to ' ***FCPL – SHA***'); and

(iii) ***Share Subscription Agreement dated 22nd August 2019*** between petitioner and respondents No. 1, 3 to 13 (hereinafter referred to '***SSA***').

9. According to the petitioner, the *Biyanis* began breaching the Agreements, within months of its investment, by permitting their shareholding in FRL to get further encumbered. On 29th August, 2020, FRL controlled by *Biyanis*, in violation of its contractual obligations, approved transaction relating to the transfer of its retails assets to Mukesh Dhirubhai Ambani Group (hereinafter referred to as "MDA") which is a *Restricted Person* as per FCPL-SHA (hereinafter referred to as "**Disputed Transaction**").

10. On 05th October 2020, the petitioner initiated the arbitration proceedings on the basis of the arbitration agreement contained in Clause 25.2.1 of the Shareholders Agreement dated 22nd August, 2019 which provides for resolution of disputes between the parties according to the Rules of *Singapore International Arbitration Centre* (SIAC). Clause 25.1 provides that the agreement shall be governed by and construed in accordance with Laws of India and Courts at New Delhi shall have exclusive jurisdiction over all matters relating to the agreement. Clause 25.2.2 stipulates that the seat of arbitration shall be New Delhi.

11. On 05th October 2020, the petitioner filed an application seeking an Emergency Interim Relief under Rule 30.2 and Schedule 1 of SIAC Rules for restraining the Respondents from pursuing Disputed Transaction whereupon SIAC appointed *Mr. V.K. Rajah*, SC as the Emergency Arbitrator.

12. On 06th October, 2020, respondent No.2 raised an objection to the jurisdiction of the Emergency Arbitrator that there was no arbitration agreement between the petitioner and respondent No.2. The petitioner submitted the response to the objections of respondent No.2 on 07th October, 2020.

13. On 09th October, 2020, the Emergency Arbitrator fixed the Schedule of the proceedings namely, the reply to be filed by the respondents by 12th October, 2020, rejoinder thereto to be filed by the petitioner by 14th October, 2020 and hearing on 16th October, 2020.

14. On 09th October, 2020, the petitioner requested the respondents to maintain *status quo* during the pendency of the proceedings. However,

the respondents declined to give any assurance to maintain *status quo* during the pendency of the proceedings before the Emergency Arbitrator.

15. On 13th October, 2020, the respondents submitted their reply before the Emergency Arbitrator to which the petitioner filed its response. On 13th October, 2020, the Emergency Arbitrator called upon both the parties to submit their response to the four Supreme Court judgments namely; ***MTNL v. Canara Bank***, 2019 SCC Online SC 995; ***Chatterjee Petrochem v. Haldia Petrochemicals Ltd,*** (2014) 14 SCC 574; ***M/s Duro Felguera S.A. v. M/S Gangavaram Port Ltd***., (2017) 9 SCC 729; and ***Ameet Lalchand Shah v. Rishabh Enterprises,*** (2018) 1SCC 678. Both the parties submitted their response to the aforesaid judgments.

16. The respondents raised an objection to the jurisdiction of the Emergency Arbitrator on various grounds *inter-alia* that Part I of the Arbitration & Conciliation Act does not contemplate a remedy before an Emergency Arbitrator; the appointment of an Emergency Arbitrator under SIAC Rules was invalid; any order granted by the Emergency Arbitrator would not have any force of law under the Arbitration and Conciliation Act; and '*Arbitral Tribunal'* defined in Section 2(1)(d) of the Arbitration and Conciliation Act does not include an Emergency Arbitrator.

17. On 16th October, 2020, the learned Arbitrator heard all the parties through video conference facilities hosted by Maxwell Chambers, Singapore.

18. The Emergency Arbitrator passed an interim order on 25th October, 2020. The interim order records the contentions of all the parties, detailed analysis of their submissions and the reasoned findings. The contentions of the petitioner are recorded in paras 51 to 57 whereas

contentions of the respondents are recorded in paras 58 to 93 of the interim order.

II. Findings of the Emergency Arbitrator

19. The Emergency Arbitrator held that the Emergency Arbitrator is an Arbitral Tribunal for all intents and purposes. The Emergency Arbitrator further noted that the Emergency Arbitrators are recognized under the Indian Arbitration framework. The relevant portion of the interim award containing the discussion on the objections raised by the respondents to the validity of the Emergency Arbitration are as under:

*"**VIII. EMERGENCY ARBITRATION***

A. The Validity of the Appointment

97. FRL and the Majority Respondents both object to the jurisdiction of this Tribunal on the basis that Part I of the Indian Arbitration Act 1996 does not contemplate a remedy before an emergency arbitrator. They submit that "the appointment of an emergency arbitrator under the SIAC Rules is invalid", and that "any order granted by the EA would not have any force of law" under the Indian Arbitration Act, 1996.

98. FRL also asserts that the term "arbitral tribunal" is defined under Section 2(1)(d) of the Indian Arbitration Act 1996 as "a sole arbitrator or a panel of arbitrators" and does not include a person appointed by an appointing authority as an emergency arbitrator. Further, the Law Commission of India's 246th Report (the "246th Law Commission Report") had suggested that the definition of "arbitral tribunal" be amended to include an emergency arbitrator, so as to ensure that that institutional rules such as the SIAC Rules which provide for emergency arbitrators are given statutory recognition in India. Parliament, however, did not deem it appropriate to do so. These submissions are incorrect.

99. *I accept the Claimant's submission that Section 2(6) of the Indian Arbitration Act 1996 acknowledges the existence party autonomy to determine certain issues relating to the arbitration between them, or "to authorise any person including an institution, to determine that issue". Indian law therefore accepts the parties have the right to agree to arbitrate under the rules of an arbitral institution (in this case, the SIAC). Indeed, Section 19(2) of the Indian Arbitration Act 1996 stipulates:*

> *Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings*

100. *In other words, the Indian Act allows parties to determine the arbitral procedure, which in the present case is manifested in the form of the SIAC Rules. This, in turn, envisages that such institutional rules may designate particular modalities and or an authorised body or person appointed in accordance with the institutional framework to determine an issue relating to the arbitration proceedings that have been initiated. The determination of an issue by such body or person is final and binding on the parties, subject to the provisions for limited review under the provisions of the Indian Arbitration Act 1996.*

101. *Section 2(8) of the Indian Arbitration Act 1996 expressly provides that where Part I of the Indian Arbitration Act 1996 refers to an "agreement of the parties", such agreement shall include the arbitration rules referred to in the parties' agreement. In this way, the Indian Arbitration Act 1996 provides that any arbitration rules agreed to by the parties are incorporated into the arbitration agreement. Unless expressly excluded, it is trite that the parties cannot resile from the terms of their arbitration agreement, including their agreement to allow either party to request the appointment of an emergency arbitrator. Further, Section 17 of the Indian Arbitration Act 1996, which empowers an arbitral tribunal to grant interim reliefs, does not preclude or*

intimate that parties cannot agree to institutional rules which allow recourse to emergency arbitration. In the absence of a mandatory prohibition contained in the Indian Arbitration Act 1996 or public policy constraints, the parties may agree to any arbitral procedure.

102. *The Indian Arbitration Act 1996, therefore, does not preclude parties from agreeing to arbitrate under institutional rules that allow either party to request appropriate reliefs from an emergency arbitrator. The Respondents' references to the 246th Law Commission Report do not assist its submissions on this issue in a meaningful way. It is just as plausible that Parliament, in its wisdom, did not consider it necessary to amend the Indian Arbitration Act 1996 to make a specific reference to emergency arbitrators because it was legally unnecessary - that is to say, it might have been an instance of the Law Commission making a suggestion to gild the lily. There was no need for statutory recognition if the courts and case law did not find this a problematic issue. Indeed, given the prevalence, even then, in the employment and use of this useful procedure internationally, this is likely to have been the case. It is also noteworthy that the power to appoint an emergency arbitrator is currently recognized in a number of domestic Indian arbitration institution rules, including (a) the Delhi International Arbitration Centre of the Delhi High Court; (b) the Mumbai Centre for International Arbitration; and (c) the Madras High Court Arbitration Centre, all of which include, under their rules, provisions for emergency arbitration and set out the appointment process, applicable procedures, and timing as well as the powers of an emergency arbitrator.*

103. *This jurisdiction over the parties is, in the final analysis, a question of contract. What have the Parties agreed to include in their armoury of remedies that might be employed if their relationship sours? In incorporating institutional rules promulgated by institutions such as the SIAC, ICC, and LCIA into an arbitration agreement the Parties must be*

deemed to have agreed to allow for recourse to the emergency arbitration procedure and other remedies that have been expressly provided for. In these proceedings, the Parties by incorporating the SIAC Rules in their arbitration agreement have agreed to the following provisions:

> *SCHEDULE 1*
>
> *EMERGENCY ARBITRATOR*
>
> *6. The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary. The Emergency Arbitrator shall give reasons for his decision in writing. The Emergency Arbitrator may modify or vacate the interim award or order for good cause shown.*
>
> ……
>
> *9. An order or award pursuant to this Schedule 1 shall be binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to comply with such an order or award without delay.*
>
> *(emphasis in italics added)*

104. To all intents and purposes the EA is the Tribunal and can as a result of the Parties' agreement exercise the powers to grant interim relief until the Tribunal is constituted. The Respondents ought to be held to this agreement they made with the Claimant.

B. Emergency Arbitrators are recognised under the Indian Arbitration Framework

105. The Claimant rightly asserts that the Respondents' insistence that the notion of emergency arbitration is alien to, or not contemplated by the Indian Arbitration Act 1996, is, in fact, contrary to the practice adopted by Indian courts. Indian courts, including the Supreme Court of India, have considered cases involving orders/awards issued by an emergency arbitrator within the framework of the Indian Arbitration Act 1996. In none of the cases did any Indian

Court cast any doubt over the recognition of the remedy of emergency arbitration under Indian law. That the Respondents could not cite any authority to support their submissions on this issue is telling.

106. *Notably, all the Parties were advised by first-tier Indian law firms when they entered into the Agreements and must have been aware of this legal position when they entered into their contractual agreements. They have expressly affirmed in the Agreements that the contractual provisions were valid and enforceable under Indian law. This includes the arbitration agreement in Section 25 of the FCPL SHA, by which the parties agreed that their disputes shall be referred to and finally resolved by arbitration in accordance with the arbitration rules of the SIAC Rules. Having made a conscious, valid, and enforceable choice, the Respondents cannot now resile from the terms of their arbitration agreement or diminish its efficacy.*

107. *I am therefore satisfied that, under Indian law, once parties agree to arbitrate under particular institutional rules or agree to a particular remedy as part of their arbitration agreement , they cannot ignore or resile from the agreed procedures and remedies. The SIAC Rules expressly stipulate that interim relief may be given by an emergency arbitrator before the formal constitution of the Tribunal and by the Tribunal once it is formally constituted. The Claimant has a valid right under the SIAC Rules to seek relief from an emergency arbitrator. Under Indian law, this choice will be respected.*

C. Power of the Emergency Arbitrator under SIAC Rules

108. *The following principles are settled:*

(a) An emergency arbitrator must ask himself whether the requested relief qualifies as an interim measure. He cannot grant final relief. That said there is no principle that precludes a tribunal or an emergency arbitrator from

granting interim relief that might be similar to the final relief that is being requested;

(b) Interim reliefs are aimed at maintaining the status quo pending the resolution of the dispute, preventing imminent harm or prejudice to the arbitral process, preserving assets, and preserving evidence; and

(c) The emergency arbitrator only has the power to grant interim measures that have a temporary effect and cannot by his orders definitively resolve any dispute.

109. The ultimate source of any arbitrator's authority to order provisional measures is the parties' agreement to arbitrate - that is to say, in contract. An international arbitration agreement confers the authority to order provisional measures if this is expressly provided for in the adopted institutional rules unless the parties provide otherwise. The Parties' choice of the SIAC Rules (even for the FRL SHA, which embraced domestic rather cross border issues) clearly shows that they had the common intention to confer authority on an emergency arbitrator to order emergency provisional measures, if this was merited."

(Emphasis supplied)

20. Future Retail Limited (respondent No.2) raised an objection before the Emergency Arbitrator that respondent No.2 was not signatory to the FCPL – SHA, and therefore, cannot be drawn into the arbitration proceedings. The learned Arbitrator rejected this objection after a detailed analysis of the submissions. Relevant portions of the interim order are reproduced hereunder:

"IX. <u>WHEN NON-SIGNATORIES CAN PROPERLY BE MADE PARTIES TO ARBITRAL PROCEEDINGS</u>

A. <u>The Arbitration Agreement</u>

1. <u>The Signatories to the Arbitration Agreement</u>

110. FRL was not a signatory to the FCPL SHA, which is the

Claimant's stated basis for these proceedings. FRL asserts that as it has not signed and is not otherwise a party to that agreement and/or the stipulated arbitration clause, it is a stranger to these proceedings. An emergency arbitrator or even the Tribunal, when duly constituted, has no jurisdiction over it. FRL argues that "Amazon [has failed] to establish that FRL is a non-signatory party to the FCPL [SHA], as a matter of law". It asserts that "the intention of the parties clearly was to ensure that there was no contractual relationship between FRL and Amazon". It further states that under the Indian Arbitration Act 1996, "an arbitral tribunal has no power to proceed against persons who are not parties to an arbitration agreement" and "[t]his power is vested solely with national courts". FRL therefore maintains that "[t]he Emergency Arbitrator has no jurisdiction to decide the issue of whether or not FRL is a non-signatory party to the FCPL SHA". I do not accept these submissions for the reasons given below.

B. <u>Indian Law on a Tribunal's Jurisdiction over Non-Signatories</u>

111. *Two distinct issues arise in analysing FRL's jurisdictional objection. First, is it essential under Indian law for an arbitration agreement to be in writing? Second, are only signatories, invariably, the proper parties to an arbitration agreement?*

112. *The Supreme Court of India in* ***Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc****. 2013 1 SCC 641 ("****Chloro****") noted that:*

> *[o]nce it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it [and that] The third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione persone scope.*

113. *<u>The Respondents accept that Section 25.2.1 of the FCPL SHA</u>*

constitutes a valid arbitration agreement. The issue that arises is whether FRL is bound by that arbitration agreement in Section 25.2.1 of the FCPL SHA, and, therefore, de jure a "party" to this arbitration under Indian law.

114. FRL initially relied heavily on the decision rendered by a two-judge bench of the Supreme Court of India in ***Indowind Energy Ltd v Wescare (India) Limited & Anothe****r (2010) 5 SCC 306 ("Indowind").*

115. However, Indian law has made consequential strides since that decision. Non- signatories may now be bound by an arbitration agreement if the circumstances compellingly show that it was the mutual intention of all the parties to bind both signatories to the arbitration agreement as well as certain non-signatory entities.

In ***Chloro****, a three-judge bench of the Supreme Court of India held that a "non-signatory or third party could be subjected to arbitration without their prior consent, but this would be in exceptional cases."*

116. As the Claimant points out, in ***Cheran Properties Ltd. v. Kasturi and Sons Ltd.*** *(2018) 16 SCC 413 ("Cheran"), another three-judge bench of the Supreme Court of India more recently emphasised that the Section 7 requirement of the Indian Arbitration Act 1996 that an arbitration agreement must be in writing, does not exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities. After specifically considering the earlier judgment in* ***Indowind****, it noted that the law has evolved. The Court explicitly noted "that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well."*

117. ***MTNL v. Canara Bank*** *2019 SCC Online SC 995 ("MTNL"), a decision of a two-judge bench of the Supreme Court of India, given in 2019, reaffirmed that a "non-signatory can be bound by an arbitration agreement on the basis of the Group of Companies doctrine, where the conduct of the parties evidences*

a clear intention of the parties to bind both the signatory as well as the non-signatory parties."

118. *The jurisprudence developed by the Supreme Court on the issues of non-signatories to an arbitration agreement is consistent with the definition of the term "party" under the Indian Arbitration Act 1996. Under Section 2(1)(h) of the Indian Arbitration Act 1996, a 'party' is defined as a 'party to the arbitration agreement' and, crucially, not as a 'signatory' to the arbitration agreement. In* ***Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia Private Ltd.*** *(2015) 13 SCC 477, the Supreme Court reiterated the importance of this distinction and emphasized that "in order to constitute an arbitration agreement, it need not be signed by all the parties."*

1. The Parties' Contentions

119. *In the course of the oral submissions FRL's Counsel, Mr. Salve, did not dispute the correctness of these legal propositions. However, he stressed, inter alia, that:*

> *(i) [t]he overarching consideration in the present case is the public policy element and the legal rubric in which the investment are made which prevented foreign direct investment in multi-brand retail. Applying the group company principal would lead to the conclusion that the transactions were designed to defeat Indian law and policy – a conclusion which should be eschewed for it would render the contract void.*
>
> *...*
>
> *(iii) [i]n the present case, as set out above, the intention of the parties clearly was to ensure that there was no contractual relationship between FRL and Amazon. Accordingly, whilst Amazon was not a party to the FRL SHA, FRL was not a party to the FCPL SHA. The FRL SHA and FCPL SHA also contain "entire agreement" clauses and "no agency clauses". This is the clear intention of the parties evident from the contractual clauses. The group of companies doctrine of implied*

consent cannot be used to override the clear meaning of a contract.

...

(vi) The "group of companies" doctrine cannot be extended to bind a listed company to private agreements between shareholders which purport to impose restrictions on the functioning of the Board of Directors of the company and the transferability of the shares of the company, particularly when the listed company is not itself a party to the agreement sought to be enforce. Admittedly, the Articles of Association of FRL have not been amended to reflect the restrictions contemplated in the FCRL SHA.

120. On the other hand, the Claimant asserts that:

FRL's objection is incorrect, and contradicted by (a) the content of the Agreements; (b) simultaneous discussions and negotiations on all the Agreements; (c) single / common team representing all Respondents including FRL vis-à-vis the Claimant in those discussions and negotiations including the FRL SHA; (d) full awareness and knowledge of all the Respondents (including FRL) that protective, special and material rights are being created in favour of Respondent No. 1 <u>for the Claimant's benefit</u>; (e) Respondent No. 2 being the beneficiary of investment by the Claimant; (f) statutory disclosures made by Respondent No. 2 to the public i.e. disclosures dated 12 August 2019 and 22 August 2019; (g) conduct of the parties; and (h) the object that the parties sought to achieve by entering into these agreements i.e. for the Claimant to become the single largest shareholder of FRL implemented through preservation of the Retail Assets in FRL and preservation of Promoters' shareholding in FRL free from any Encumbrance. Even as recently as April to July 2020, representatives from the Future group have sought additional investments from the Claimant into FRL, prepared and discussed various structure options for the Claimant's investment to benefit FRL, <u>increase in Claimant's stake in FRL</u> and had also proposed that the <u>Claimant's nominee would be on the board of directors of FRL</u>. It is very clear that rights were created in favour of

FCPL (through the FRL SHA) for the benefit of the Claimant (under the FCPL SHA) and all Respondents were fully aware and actively participated in those negotiations. The Claimant reserves its right to provide additional information and documentation in support of the above assertions.

[emphasis in italics and underlined in original]

121. *The Claimant submits that under Indian law, some of the circumstances evidencing a single "integrated bargain" include: (a) direct relationship with the party signatory to the arbitration agreement; (b) direct commonality of the subject matter; (c) the agreement between the parties being a composite transaction; and (d) the parties, especially the non-signatory, engaging in conduct that demonstrates its consent to be bound by the arbitration agreement.*

122. *It is the Claimant's case that FRL is a party in its own right by reason of having expressly and impliedly consented, as a beneficiary, under a single integrated economic understanding. FRL's reliance on Section 27.11 of the FCPL SHA and Section 16.11 of the FRL SHA, it adds, is entirely misplaced. Further, the circumstances set out in the Application show that FRL will be bound by the FCPL SHA owing to mutual intention of the Parties to bind both, signatories FCPL, Biyanis, FCRPL as well as non-signatories FRL. This is evident from the fact that the Parties engaged in conduct such as collective negotiations and undertaking acts and performance under the relevant contracts, as well as recognizing the FCPL SHA through statements, including public disclosures indicating the intention to be bound by the FCPL SHA in lieu of the benefits provided under the single integrated bargain.*

123. *FRL has a direct relationship with the Respondent companies, all of which are controlled by the Promoters and therefore, part of a group of companies, the Future Group, which comprises, inter alia, FCPL and FRL. There is direct commonality of subject matter, being the preservation of FRL's business, in general, and the Retail Assets. The inter-linkages of the clauses in the Agreements demonstrate that they*

constitute a single integrated transaction, with FRL being the beneficiary of the investment made by the Claimant into FCPL and rights created in favour of FCPL for the benefit of the Claimant.

124. FRL's conduct reinforces this position — its disclosures in August 2019 about the FRL SHA and the FCPL SHA, as well as its execution of the 19 December 2019 Letter confirms that it was aware of and in fact, considered itself bound by the terms of the FCPL SHA. FRL's contention that the disclosure dated 22 August 2019 was merely for informational purposes is misleading and contrary to legal requirements, which clearly stipulate disclosure requirements for events that are "material" for a listed entity. This is consistent with the Respondents' conduct in the present arbitration, in as much as both FCPL and FRL have adopted an identical position in these proceedings.

125. The Claimant submits that a cumulative consideration of all the aforementioned relevant considerations clarifies the frivolity of FRL's objection. The isolated references made to the extent of FCPL's shareholding in FRL, the presence of independent directors and the public shareholdings, or to the transferability of FRL's shares do not alter the fact that the Agreements are part of a single integrated bargain. The Respondents' argument that the Claimant's contention is not consistent with Section 15.17 of the FCPL SHA is misleading. That provision is meant to clarify that the FCPL SHA, by itself, does not trigger any open offer requirements under applicable Indian law, to ensure that this would only happen when the Claimant exercises its Call Option in accordance with the FCPL SHA. This is not to say that the Claimant does not have protective, special and material rights with respect to FRL's Retail Assets through FCPL.

126. The exchange between Mr. Kishore Biyani (Respondent No. 3) and Mr. Amit Agarwal (Amazon India) in and around March to August 2020 demonstrates that the Claimants' interest in FRL was recognized and admitted. At the time, representatives of

FRL initiated a dialogue regarding further investments into FRL and for the Claimant to take an active role in facilitating discussions with other potential investors. Mr. Sanjay Jain, the Group CFO of the Future Group, was facilitating discussions on behalf of FRL, and Mr. Rakesh Biyani (Respondent No. 8) also attended these discussions as a part of FRL's team.

127. FRL, on the other hand, denies the existence of a single integrated bargain on the premise that Section 27.2 of the FCPL SHA is an "Entire Agreement" provision, which precludes the Claimant from construing the FCPL SHA together with the other relevant Agreements.

128. In response, the Claimant asserts that the effect of an Entire Agreement clause depends primarily on its terms, since it is the language chosen by the Parties to express their agreement. It serves a dual objective of clarifying firstly, that the instrument contains the entire agreement relating to the subject matter, to the exclusion of any further term that may be implied by law; and secondly, that the agreement will supersede any prior written or oral understanding between the Parties. By alluding to the existence of the single integrated transaction, the Claimant states that it is not attempting to imply any term into either the FCPL SHA or the FRL SHA. Equally, the Claimant is not attempting to include any prior written or oral understanding into the terms of the FCPL SHA or the FRL SHA.

129. The Claimant's investment into FCPL (including the protective, special and material rights granted to it with respect to FRL's Retail Assets) under the FCPL SHA read with the FRL SHA is fully compliant with all laws. It is relevant that the Claimant could, in any event, have directly made the same investment into FRL under the foreign portfolio investor route recognized under Indian law and also obtained the same protective, special and material rights in FRL. Therefore, any question of the Claimant's investment being in violation of India's Foreign Direct Investment laws does not arise. Even otherwise, the Claimant's ability to exercise the FRL Call Option, as provided

under Section 15 of the FCPL SHA, clearly recognises that such an option will be exercised only in a manner compliant with Indian laws.

2. Analysing the Submissions

130. *Over the course of the last decade, the Supreme Court has conspicuously been at the forefront of a growing international consensus on how and when arbitral tribunals might legitimately exercise jurisdiction over intimately related parties involved in closely connected transactions. This is a sensible and pragmatic approach as it centralises in a single forum all the relevant parties that are intimately connected to the disputed transaction. It allows affiliated entities who have been intimately involved in negotiations and the performance of contracts to be subjected to and/or benefit from the presence of an arbitration clause entered into by another affiliate. This saves time and costs, hinders dilatory tactics, and precludes conflicting findings that may arise from satellite litigation in multiple forums. As a matter of business common-sense, it stands to reason that affiliated commercial parties would ordinarily intend that intertwined disputes with a counterparty be resolved in one forum, for reasons of efficiency and certainty.*

131. *In the three seminal decisions mentioned above, the Supreme Court set out the criteria that would satisfy a consent-based enquiry that seeks to ascertain whether a non-signatory ought to be brought within the scope of an arbitration clause it has not expressly acceded to. In the watershed decision of* ***Chloro****, the Supreme Court ruled:*

> *73. A non-signatory or a third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The*

transaction should be of a composite nature where performance of the mother agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object, and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non- signatory parties would fall within the exception afore-discussed.

…

76. The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or interdependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

…

78. In India, the law has been construed more liberally, towards accepting incorporation by reference. In ***Vessel M.V. Baltic Confidence v. State Trading Corpn. of India Ltd.,*** *the Court was considering the question as to whether the arbitration clause in a charter party agreement was incorporated by reference in the bill of lading and what*

the intention of the parties to the bill of lading was. The primary document was the bill of lading, which, if read in the manner provided in the incorporation clause thereof, would include the arbitration clause of the charter party agreement. The Court observed that while ascertaining the intention of the parties, attempt should be made to give meaning and effect to the incorporation clause and not to invalidate or frustrate it by giving it a literal, pedantic and technical reading.

(Emphasis supplied)

132. *In **Cheran**, the Supreme Court held (per **Dr Chandrachud** (sic) SCJ):*

> *23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non- signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and nonsignatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.*
>
> *…*
>
> *25. Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of*

binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well.

…

27. ***Gary B. Born*** *in his treatise on* ***International Commercial Arbitration*** *indicates that:*

> *The principal legal bases for holding that a non-signatory is bound (and benefited) by an arbitration agreement ... include both purely consensual theories (e.g., agency, assumption, assignment) and non- & consensual theories (e.g. estoppel, alter ego).*

Explaining the application of the ***alter ego principle*** *in arbitration,* ***Born*** *notes:*

> *Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an 'alter ego' of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from the fundamental principle ... that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities.*
>
> *28. Explaining group of companies doctrine,* ***Born*** *states:*
>
> *the doctrine provides that a non-signatory may be bound by an arbitration agreement where a group of companies exists and the parties have engaged in conduct (such as negotiation or performance of the relevant contract) or made statements indicating t he intention assessed objectively and in good faith, that the non-signatory be bound and benefited by the relevant contracts."*

*While the **alter ego principle** is a rule of law which disregards the effects of incorporation or separate legal personality, in contrast the group of companies doctrine is a means of identifying the intentions of parties and does not disturb the legal personality of the entities in question. In other words:*

> *"the group of companies doctrine is akin to principles of agency or implied consent, whereby the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be parties to an agreement, notwithstanding their formal status as non-signatories."*
>
> *[emphasis in italics and underlined added]*

133. *More recently, just last year, the Supreme Court in **MTNL** further clarified the position:*

> *10.3 A non-signatory can be bound by an arbitration agreement on the basis of the "Group of Companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties.*
>
> *Courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract.*
> *10.4 .....*
>
> *The 'Group of Companies' doctrine has been invoked by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the*

mutual intention of all parties to bind both the signatories and the non- signatory affiliates in the group.

The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts.

The circumstances in which the 'Group of Companies' Doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties.

A 'composite transaction' refers to a transaction which is inter-linked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

....

10.9. It will be a futile effort to decide the disputes only between MTNL and Canara Bank, in the absence of CANFINA, since undisputedly, the original transaction emanated from a transaction between MTNL and CANFINA - the original purchaser of the Bonds. The disputes arose on the cancellation of the

Bonds by MTNL on the ground that the entire consideration was not paid.

There is a clear and direct nexus between the issuance of the Bonds, its subsequent transfer by CANFINA to Canara Bank, and the cancellation by MTNL, which has led to disputes between the three parties.

Therefore, CANFINA is undoubtedly a necessary and proper party to the arbitration proceedings.

10.10. Given the tri-partite (sic) nature of the transaction, there can be a final resolution of the disputes, only if all three parties are joined in the arbitration proceedings, to finally resolve the disputes which have been pending for over 26 years now.
[emphasis in italics and bold italics added]

134. *It is evident from the passages cited above that the Supreme Court has adopted a broad common sense and pragmatic approach in formulating this criteria. The minutiae of the terms of the subject contracts, even though not insignificant, should not constrain an adjudicatory body from determining which parties are within the scope of the contested arbitration clause. All the circumstances are to be considered when there is a composite transaction involving affiliated entities who are intimately involved in the same transaction.*

135. *It is clearly not enough that the non-signatory party whom a claimant seeks to include in arbitration proceedings is from the same group of companies or an affiliate. It is only in exceptional cases, where there exists the closest of connections between the parties as well as an indivisibility of the transaction(s) in question, that a non-signatory ought to be included in an arbitration. This requires a consent-based enquiry to ascertain the existence and degree of relational intimacy as well as the presence of an indivisible community of*

interests to resolve the dispute through a single common modality.

136. The Claimant has prima facie satisfied the established legal criteria that makes FRL a proper party to these proceedings. The facts on record clearly establish the cogent commonality, intimate interconnectivity, and undeniable indivisibility of the contractual arrangements in the Agreements. It is apparent that none of these Agreements would have been entered into without the others. This indeed appears to be an intimate composite transaction between the Claimant and all the Respondents. FRL was actively involved in its negotiation, performance and was its ultimate beneficiary.

137. Mr. Darius Khambata argues that if the Claimant's single integrated contract approach was adopted, the arrangement might likely be illegal, since the Claimant's rights as a foreign investor were limited. He further suggests that the Claimant has misled the CCI on the structure of the relationships among the Parties. I do not think there is much substance in any of these arguments. First, the stake was not a direct investment made by the Claimant, but one through an Indian Owned Controlled Entity. This is a permissible arrangement under Indian law and appears to have received regulatory scrutiny. Second, the Agreements do not confer, and the Claimant has not attempted to assert control of or over FRL.

138. The documents that the Claimant filed with the CCI have to be read in their entirety, rather than cherry picked. A close reading does not suggest that there were misstatements made by the Claimant. It did not conceal its protective rights. Such protective rights do not amount to control of FRL. Rather, they oblige FRL not to act in a manner that would be inimical to the Claimant's interests, as its long-term stakeholder.

139. The following factors submitted by the Claimant prima facie make out a strong case for including FRL in these proceedings, by viewing it as being within the scope of the arbitration clause:

(a) *the intertwined content of the Agreements with several cross references and similar clauses in each of them;*

(b) *simultaneous discussions and negotiations in relation to the Agreements. The FRL SHA only came into existence because of the framework arrangement that the Agreements be entered into;*

(c) *single/common negotiating and legal team representing all Respondents including FRL vis-à-vis the Claimant in those discussions and negotiations including the FRL SHA;*

(d) *full awareness and knowledge of all the Respondents (including FRL) that protective, special and material rights are being created in favour of FCPL for the Claimant's benefit;*

(e) *the purpose of the Claimant's financial collaboration was to "strengthen and augment the business of FRL". It was the direct beneficiary of the investment by the Claimant. Section 6.4 of the SSA required FCPL to pay INR 14,990,000,000 to FRL in relation to the FRL Warrants within 3 Business Days of the SSA Closing Date;*

(f) *statutory disclosures made by FRL to the public and statutory regulators of material terms of the Parties' Agreements vide the disclosures of 12 August 2019 and 22 August 2019;*

(g) *the coordinated conduct and efforts of the Respondents before as well as after the Agreements were entered into and the control asserted and exerted by Respondent No 3 over all aspects of the entire transaction. He was, in fact, acknowledged to be the "Ultimate Controlling Person" as regards the Future Group;*

(h) *the objectives of the Agreements, i.e. for the Claimant (at some of time when permissible) to become the single largest shareholder of FRL, implemented through the preservation of (i) the Retail Assets of FRL and (ii) the Promoters' shareholding in FRL, free from any encumbrance. Notably, from April to July 2020, representatives from the Future Group have sought additional investments from the Claimant into FRL, prepared and discussed various structure options for the Claimant's investment to benefit FRL, increase the Claimant's stake in FRL and also proposed that the Claimant's nominee would be on the board of directors of FRL. It is clear that rights were created in favour of FCPL (through the FRL SHA), for the benefit of the Claimant (under the FCPL SHA), and all the Respondents were fully aware and actively participated in those negotiations; and*

(i) *similar dispute resolution clauses prevail in all the Agreements. Even the FRL SHA (which is essentially a domestic agreement) has an SIAC dispute resolution clause.*

140. *It is also material that, before the effective date of the Agreements, FRL accepted the 19 December 2019 Letter sent by FCPL, without qualification. The 19 December 2019 Letter manifested the interconnectivity of the Agreements and, in particular, the dispute resolution clauses. The sending and acceptance of the 19 December 2019 Letter stating the names of the Restricted Persons was a pre-condition required by the Claimant, prior to the Effective Date of the FCL SHA and SSA coming into force. The Claimant only made its investment on 26 December 2019 after this was done. Given its pertinence, the 19 December 2019 Letter is reproduced below, for easy reference:*

FUTURE COUPONS PRIVATE LIMITED

To

Secretarial Department
Copy to: Mr. Virendra Samani
Future Retail Limited
Knowledge House, Shyam Nagar,
Off Jogeshwari -Vikhroli Link Road,
Jogeshwari (East),
Mumbai - 400 060
Email: investorrelations@futureretail.in;
virendra.samani@futuregroup.in

Copy to:

Compliance Officer
Copy to: Mr. Rajesh Pathak
Future Corporate Resources Private Limited
Knowledge House, Shyam Nagar,
Off Jogeshwari-Vikhroli Link Road,
Jogeshwari (East), Mumbai - 400 060
Email: rajesh.pathak@futuregroup.in

Date: December 19, 2019

Subject: Shareholders Agreement dated August 12, 2019

1. We refer to the Shareholders Agreement dated August 12, 2019 entered by and amongst Future Retail Limited, certain Existing Shareholders (as defined therein), and Future Coupons Private Limited (the **"FRL SHA"**). Capitalized terms used, but not defined herein, shall have the meaning ascribed to them in the FRL SHA.

2. Pursuant to Clause 2 of the FRL SHA, we hereby designate that the 'Effective Date' for the purposes of the FRL SHA shall be the date of this letter.

3. We also hereby inform you that the list of 'Restricted Persons' shall be as set out in Annexure 1 of this letter.

4. Reference is also made to Clause 6.2.1 of the FRL SHA pursuant to which the Existing Shareholders (and the Existing Shareholder Affiliates), and FCL have agreed that that they shall not, Transfer or Encumber any of the Securities of the Company held by it to any Person or create any Encumbrance over the Securities of the Company held by it except pursuant to mutual written consent of FCL and the Existing Shareholders. Accordingly, FCL hereby provide its consent for any Transfer or Encumbrance over Securities of the Company, if such Transfer or Encumbrance is in accordance with the provisions of the FCL SHA. For the purposes of this paragraph 4, the term 'FCL SHA' shall mean the shareholders' agreement dated August 22, 2019 entered into between FCL, the Existing Shareholders and Amazon.com NV Investment Holdings LLC (as may be amended, modified or supplemented from time to time). Further, by executing, and returning a copy of this letter, the Existing Shareholders shall be deemed to have provided their irrevocable, and unconditional consent for any Transfer or Encumbrance over Securities of the Company held by FCL, if such Transfer or Encumbrance is in accordance with the provisions of the FCL SHA

5. The terms of Clauses 14 (*Confidentiality*), 15 (*Governing Law and Dispute Resolution*), and 16 (*Miscellaneous*) of the FRL SHA shall apply mutatis mutandis to the terms of this letter. Further, this letter shall be deemed to be an integral part of the FRL SHA.

2nd Floor, Sobo Central Mall, Pt. Madan Mohan Malviya Road, Haji Ali, Tardeo Mumbai - 400034
CIN: U74900MH2008PTC179447

FUTURE COUPONS PRIVATE LIMITED

Annexure 1

1. Softbank Group Corp.
2. Alibaba Group Holdings Limited, and its promoters, and any person (and its Affiliates) which owns, and operates any business under the name 'Alibaba', 'Alipay'
3. Tencent Holdings Limited
4. Meituan Dianping
5. Naspers Limited
6. Google LLC
7. eBay Inc.
8. Maplebear Inc.
9. Target Corporation
10. Walmart Inc., Flipkart Limited, Phonepe Private Limited and their respective promoters, and any person (and its Affiliates) which owns, and operates any business under the name 'Flipkart', 'Myntra', 'Jabong', 'PhonePe' and 'e-kart'
11. One 97 Communications Limited, Paytm Ecommerce Private Limited, and their respective promoters, and any person (and its Affiliates) which owns, and operates any business under the name 'Paytm'
12. Bundl Technologies Private Limited (Swiggy)
13. Zomato Media Private Limited
14. ANI Technologies Private Limited
15. Mukesh Dhirubhai Ambani Group
16. Any Person engaged in the business of online or offline retail of food and/or non-food grocery in India or globally.
17. Any Affiliate of the Persons mentioned in items (1) – (15) hereinabove.

Signed, for and on behalf of:

FUTURE COUPONS PRIVATE LIMITED

Name: Rajkumar Pande

Designation: Authorised Signatory.

Agreed, acknowledged and confirmed by:

FOR AND ON BEHALF OF FUTURE RETAIL LIMITED

Name: C. P. Toshniwal

Designation: Authorised Signatory.

141. Paragraph 5 of the 19 December 2019 Letter incorporates any dispute over the disposal of the Retail Assets to a Restricted Person, under the terms of the FRL SHA, into the FCPL SHA. It creates a direct link between the FCPL SHA (pursuant to which the letter was sent) and the FRL SHA to resolve disputes, should a breach take place. This is precisely the situation here.

*142. In **Chloro**, the Supreme Court set out four criteria to be met, in order for a non-signatory to be included in arbitral proceedings. They are that:*

(a) All parties have a direct relationship to the party signatory to the arbitration agreement.

(b) There be direct commonality of the subject-matter, with the agreement between the parties comprising a composite transaction.

(c) The transaction should be of a composite nature, where performance of the mother agreement may not be feasible without the aid, execution, and performance of

the supplementary or ancillary agreements, for achieving the common object, and collectively having bearing on the dispute.

(d) Besides all this, a composite reference of such parties must also serve the ends of justice.

143. Subsequently, the Supreme Court in Cheran and MTNL did not advert to the justice factor. This is likely because they were adopting a consent-based conceptual analysis to ascertain whether it was the parties' intention to include non-signatory affiliate companies within the scope of the arbitration agreement. This makes eminent sense and lends conceptual clarity to the rationale for including a non-signatory to arbitral proceedings as a proper party, by anchoring its inclusion to satisfying a consent analysis. After all, once there is consent, the non-signatory ought to be bound since a contractual relationship has already been found.

144. In this matter, criterion [142](a) has been prima facie satisfied by reason of the reasons stated in [139](a) to (d) and (h) above; criterion [142](b) has been prima facie satisfied by reason of the reasons stated in [139](a) to (e) and (h) above; criterion [142](c) has been prima facie satisfied by reason of the reasons stated in [139](a) to (i) above.

145. If it is necessary to satisfy criterion [142](d), this is also prima facie met as it is undoubtedly just that all the relevant affiliated parties, given their proximity and the indivisibility of the Agreements, be included in the same proceedings for reasons of efficiency, promptness, avoidance of conflicting or inconsistent decisions, and, crucially, after considering all the other criteria have been amply satisfied.

146. Last but not least, the Parties have all assented to SIAC arbitral proceedings on identical terms. The Parties' mutual obligations are inexorably linked. This matter is, at its core, about a group of affiliated companies entering into an indivisible contractual arrangement with the Claimant within a conceptual framework that they all unequivocally consented to."

21. The learned Arbitrator recorded the contentions of the petitioner on merits in paras 173 to 203 and the respondents' contentions in paras 204 to 223. The analysis of the contentions of the parties is recorded in paras 224 to 236 of the award. In para 237, the learned Arbitrator recorded his satisfaction that the petitioner has made out a strong *prima facie* case that the respondents are in breach of their contractual obligations and/or undertakings to the petitioner under the three agreements. Paras 224 to 237 of the interim order are reproduced hereunder:

> *"**4. Analysis of Parties Contentions***
>
> *i. The Merits*
>
> *224. It is not disputed by the Respondents that the Claimant entered into the subject transactions on the basis of being accorded two broad categories of special and protective rights. The first is that the Retail Assets of FRL would not be alienated without its prior written consent, and never to a Restricted Person. The Respondents further agreed that FRL would remain the sole vehicle for conduct of the retail business. The second set of rights are that, if Indian laws permitted, the Claimant could become the single largest shareholder of FRL. In relation to this right, the Majority Respondents specifically agreed to maintain the Minimum Shareholding of 16.18% free from Encumbrance.*
>
> *225. The Claimant is also correct in asserting that it is immaterial (i) that the Promoter FRL Securities were invoked on account of existing arrangement with Promoter Lenders, and (ii) that they were disclosed as part of the Disclosure Letters. It is clear that when the arrangements were entered into, the Claimant was already aware that the Promoter FRL Securities had been encumbered by the Promoters and that on 26 December 2019, Promoter FRL Securities constituting only ~17% were free from encumbrances. Because of this, the Parties agreed to the specific provisions relating to the Minimum Shareholding, enjoining the Promoters from further encumbering the Promoter FRL Securities. Preservation of the Minimum*

Shareholding was a solemn obligation under Section 17.2(i) of the FCPL SHA and the Promoters were, accordingly, under an obligation "notwithstanding anything to the contrary contained in" the Agreements. The Promoters acknowledge that they have failed to maintain the Minimum Shareholding free and clear from encumbrances.

226. On the basis of the FCPL SHA and the SSA, the Promoters were prima facie obliged to take steps to preserve the Minimum Shareholding. They baldly submit that they have no other financial resources. Other than this bare assertion, no evidence has been adduced about each of the Promoters' current financial position.

227. The Respondents are contractually obliged not to alienate the Retail Assets in favour of a Restricted Person. It is apparent, from the response(s) of the Majority Respondents, that they do not deny that they have breached their contractual obligations under the Agreements concerning the Retail Assets.

228. The Respondents have not disputed that the ownership of Retail Assets continues to be vested with FRL pending the completion of the Disputed Transaction. FRL has stated that statutory approvals for the completion of the Disputed Transaction will take quite some time.

229. It is plain as a pikestaff that, if the Disputed Transaction proceeds, the special and protective rights with respect to the Retail Assets that the Claimant has under the contractual arrangements entered into with the Respondents will be irretrievably lost. There is substance in the Claimant's submission that the widespread network of retail stores across India, which was built by FRL over a period of several years is a uniquely strategic asset for it.

230. It is apparent that the Respondents have acted in concert contrary to the obligations they have undertaken and in a manner that is inimical to the Claimant's interests.

231. Even accepting Mr. Singh's statement from the Bar that 5.53 %

of the shares were sold on 10 September 2020, the Promoters continue to collectively remain the single largest shareholders of FRL with fragmented public shareholding, and are therefore in control of FRL. In various public filings made by FRL, the Majority Respondents have been identified and hold themselves out as "promoters" of FRL. Indian law defines a 'promoter' to include a person or set of persons who have "control over the affairs of the issuer" "whether as a shareholder, director or otherwise", or a "person in accordance with whose advice, directions or instructions the board of directors of a company is accustomed to act".

232. I accept the Claimant's submission that Mr. Kishore Biyani, Respondent No. 3, the executive chairman, founder and Group CEO of the Future Group, and Mr. Rakesh Biyani, Respondent No. 8, the Managing Director of FRL, "[are]responsible for driving the business of" FRL. A "managing director", by definition, is a person who is vested with substantial powers of management of the affairs of a company. Respondents Nos. 4 to 7 and 9 to11 are related to Mr. Kishore Biyani and Mr. Rakesh Biyani. Respondents Nos. 1, 12 and 13 are private limited companies, which are owned and controlled by the Promoters. It cannot be gainsaid that the Majority Respondents first drove, then caused FRL to enter into the Disputed Transaction and are now seeking to implement that as early as possible.

233. Mr. Salve emphasised that FRL was not a party to the contractual framework set out in the FCPL SHA and the SSA, that it was entitled to assume that FCPL had acted properly in sanctioning the Disputed Transaction, and that its Board included a number of independent directors who were not related to the Promoters. As far as FRL was concerned, this was a regular transaction.

234. I do not accept this. First, FRL was aware that the Claimant's consent (and not just FCPL's) was needed for any sale of the Retail Assets, and in particular to a Restricted Person. It had notice of the contents of the 19 December 2019 Letter addressed to it and of the interconnectivity of the Agreements.

Second, the members of FRL's Board, and in particular Respondents Nos. 3 and 8 must have known that the Claimant's consent had not been obtained. It does not appear that they recused themselves when the Board Resolution was passed and/or the independent directors were acting on their own motion, uninfluenced by any of the Majority Respondents qua directors and shareholders (representing the Biyanis). Third, the other independent directors must have been aware of this restriction. They were holding office as directors when FRL sent the Disclosure Letters to the Indian Stock Exchanges about the terms of the FRL SHA, the FCPL SHA and the SSA. Before the Effective Date, FRL was also put on notice who were the Restricted Persons vide the 19 December 2020 Letter. Fourth, the Respondents had decided not to produce any of minutes of FRL's Board Meeting apropos the Disputed Transaction to show whether any enquiry was made as to whether the Claimant had given its consent and or the minutes of any FCPL board meeting on the "consent" issue. For completeness, I should add that I am not quite convinced that the Board Resolution is "void" as asserted by the Claimant. But that legal characterisation is not material for now. What is important for present purposes is that they have prima facie established that the Respondents have breached a number of their contractual obligations.

235. *Mr. Singh very properly did not attempt to argue that no contractual breaches had been committed by the Majority Respondents. Instead, he premised his submissions on the basis that I was "to assume against [his clients] the way that the cause of action has been framed by the [C]laimant". Mr. Salve also adopted a similar stance and made his submissions on a "demurrer basis" without accepting the correctness of the Claimant's factual assertions and the jurisdiction of this Tribunal apropos FRL. He, nevertheless, candidly acknowledged:*

> *And we know today that **the promoters have a serious case to answer on breach**, and they are saying there was a term where they would have had to help, they have not helped us, we are not in*

*breach……. **I am arguing this on the footing that the promoters have breached some arrangement with Amazon.*** *(emphasis in italics and bold added)*

236. Finally, I note that the Press Release sent by FRL to the two Stock Exchanges on 29 August 2020, is captioned "Future Group reorganises its businesses; to sell retail, wholesale, logistics and warehouse businesses to Reliance Retail". This says it all.

237. Taking into account the above circumstances, I am satisfied that on the merits that the Claimant has made out a strong prima facie case that the Respondents are in breach of their contractual obligations and or undertakings to the Claimant under the FCPL SHA, SSA and FRL SHA (insofar as it is incorporated into the FCPL SHA).

(Emphasis supplied)

22. The respondents raised an objection before the Emergency Arbitrator that there was delay on the part of the petitioner to invoke the arbitration and therefore, the petitioner was not entitled to the emergency relief. The Emergency Arbitrator rejected this objection holding that there was no undue delay on the part of the petitioner. The relevant discussion contained in paras 254 to 262 of the interim order is reproduced hereunder:

"254. I have set out in some detail the most significant interactions/exchanges between the Claimant and the Respondents that are on record, which show that the Respondents' assertion that the Claimant had given up its rights and or was aware of the nature and substance of the discussions that were being conducted with Reliance/MDA Group are incorrect. The discussions with Reliance were conducted behind its back. It appears that the Respondents have not been entirely candid. They have not disclosed

precisely when they began and or settled negotiations with the MDA Group for the sale of FRL's assets. The increasingly frantic nature of the Claimant's communications with Mr. Kishore Biyani and its stark reminders that its consent was needed for any disposal of FRL's Retail Assets indicates that it was not a nonchalant contractual by-stander.

255. The Claimant was at no material point of time informed by the Respondents of the nature, terms and or substance of the Disputed Transaction. During the several exchanges that the Claimant's officers had with the Promoters and key members of the Future Group between March 2019 and 29 August 2020, no disclosure was ever made by the Promoters about the key terms of Track 1. How was the Claimant expected to match this? When did the Respondents actually decide to disengage from the Claimant? Why were the Respondents not candid with the Claimant?

256. The central plank of Mr. Singh's submissions is attractive for its enticing simplicity. It is that since the unencumbered portion of the Promoters' shares is now merely "nearly 0.5%" there is no realistic possibility of the Claimant ever becoming FRL's largest shareholder if and when legally permitted. However, I cannot agree with this submission. The discussions that the Claimant and the Respondents were engaged in were meant to address this particular problem as well. Accepting that the Respondents' position(s) had been prejudiced, the Claimant agreed to work with the Respondents to repair the damage. Mr. Yeo is correct in saying that the Claimant was not sitting on [its] hands.

257. The correspondence and the exchanges summarised above clearly show that the Claimant was actively committed to working with the Respondents. The intention was to formulate a rescue package that would address all the existing financial problems confronting the Respondents. Indeed, in early June even after the amount of unencumbered shares had been dramatically and drastically reduced, Mr. Rakesh Biyani thanked the Claimant for support to build the strategic

partnership and solve the problem with an alternate solution. He stated that multiple solutions were being considered and that the involvement of the Claimant and other investors would be a better option. On 23 June 2020, the Claimant wrote to Mr. Kishore Biyani clearly requesting to know "what is it specifically that can help the premji or other financial investment offer to solve your problem". Mr. Rakesh Biyani responded on 24 June 2020 sharing a note that offered multiple options apropos FRL's business. It is evident from these discussions that multiple solutions were being considered that called for the Claimant to make additional investments into FRL. Mr. Rakesh Biyani requested that the Claimant support Samara. Indeed, even until 24 August 2020, Mr. Rakesh Biyani conveyed to the Claimant that he was still open to the Samara investment route. It appears to me odd he should communicate this, as it was just 5 days before the Disputed Transaction was announced. Why did he do this? There is no evidence on record to show that the Respondents were actively considering the Samara deal and continuing to engage the Claimant in good faith between July to 29 August 2020.

258. I am therefore prima facie satisfied that the Claimant was at all material times open to working with the Respondents for their common good and long-term benefit. Quite obviously this would have meant formulating a scheme that would concurrently protect its legitimate rights and expectations under the Agreements. It is striking that the Respondents have not asserted that the Claimant broke off the discussions/ engagement to assist them in their recapitalisation efforts and in the amelioration of their financial woes. Perhaps, they could not make such an assertion because the facts on record paint a clear picture of repeated enquiries and reminders from the Claimant as to when and how they could progress the rescue discussions. However, it now appears that the Claimant's forbearance to exercise its legal rights by giving the Respondents time to formulate a rescue scheme is being used against it.

259. It bears reiteration that while the Claimant was aware that the Respondents were engaged in discussions with Reliance it has not been suggested that they were aware of the precise details of what it entailed save for what was being reported in the media. The documents on record show that the Respondents fobbed off the Claimant when it queried them. All the Claimant could do (and did) was to ask for updates and remind them of their legal obligations not to dispose of the Retail Assets and or deal with a Restricted Entity.

260. The Respondents had, in good times, entered into a long-term commercial arrangement with the Claimant. In exchange for a very substantial investment that benefitted FRL the Respondents conferred a number of rights on the Claimant and emphatically undertook to protect them. Their relationship was by no means a short-term commercial flirtation of convenience. There were no force majeure clauses or exit terms that allowed any of the Parties to resile from their obligations if and when the going got tough. The Agreements envisaged an enduring and deep relationship that was intended to survive through thick and thin. These contractual undertakings obliged the Respondents to work with the Claimant to resolve the prevailing difficulties the Future Group's businesses were facing. And they make it apparent that the Respondents should not have entered into alternative arrangement which compromised the Claimant's rights without its express consent.

261. It would have been premature for the Claimant to have taken any steps against the Respondents prior to the public announcement of the Disputed Transaction. No reasonable Tribunal would rely on media reports as a basis for interim relief. The lapse of about a month between the time the public announcement was made and this Application being filed is neither long nor unreasonable in the circumstances. Filing an application of this nature is a complex and challenging process that requires painstaking research and preparation. The Claimant also used this period to make further enquiries, gather more information and make known its concerns about

the validity of the Disputed Transaction. It did not encourage the Respondents to proceed with the Disputed Transaction.

262. I now return to Mr. Singh's submissions. The horse has not bolted even though the Respondents have opened the stable door. Even assuming that the "horse has bolted", it is apparent that the Respondents are contractually obliged to work with the Claimant to cajole the "unruly horse" to return to its stable."

(Emphasis supplied)

23. The Emergency Arbitrator held the balance of convenience to be in favour of the petitioner and further held that the petitioner would suffer irreparable injury if the interim injunction was not granted. The relevant discussion is contained in paras 263 to 275 of the interim order is reproduced hereunder:

"iii. The Balance of Convenience

263. FRL has acknowledged that the Indian Stock Exchanges and CCI are now actively considering and reviewing the application for approval of the Disputed Transaction. It is also clear that it is actively engaged in pursuing these applications and is providing data, clarifications and responses to requests to facilitate the completion of the Disputed Transaction.

264. Should FRL receive the approval of the Indian Stock Exchanges, applications will then likely be made to the NCLT to approve the Disputed Transaction. FCPL has also stated that "it is also open to the Claimant to approach the NCLT (as and when the NCLT process commences), to seek to restrain the Disputed Transaction if it can make out the grounds for such relief". As the Parties have agreed to resolve all their differences under the auspices of an SIAC Tribunal, this is not a pertinent consideration.

265. As set out above, the Respondents additionally submit that

FRL is a listed company with more than three hundred thousand (300,000) shareholders, over twenty-five thousand (25,000) employees and several other stakeholders (including banks and financial institutions). The COVID-19 pandemic, they say has had a significant impact on Indian businesses, particularly the retail sector in which FRL carries on business. The Disputed Transaction seeks to protect the interest of all these stakeholders through a large infusion of funds and acquisition of liabilities of the business. If the reliefs sought by Amazon are granted, it may seriously jeopardise the Disputed Transaction and the interest of the FRL's stakeholders would be adversely affected. The loss and damage caused to FRL and its stakeholders would not be capable of being safeguarded by any cross- undertaking on damages by Amazon.

266. *These are not implausible considerations, although I remain to be persuaded that the doomsday scenario painted by the Respondents is inevitable. I accept that if interim relief is granted uncertainty as to the fate of the Disputed Transaction might likely arise and that inconvenience will be caused to the Respondents and certain third parties. However, I do not find these considerations particularly compelling, as it is clear that the Claimant has not walked away from the rescue table and continues to appear keen to work with the Respondents. It has not been suggested by the Respondents that the Claimant does not have the financial means or desire to find a meaningful solution that will work for their common benefit. It is after all a very substantial entity. Crucially, the Claimant also has every interest in protecting its very significant investment in FRL and its related entities by working with the Respondents to rejuvenate it. Rescuing FRL (and the Majority Respondents) from the current crisis is entirely aligned with the Claimant's interests in protecting its investment and strategic goals.*

267. *The Respondents are the primary authors of this unhappy situation. Granted, that the COVID-19 pandemic had caused them unforeseeable difficulties and substantial losses and,*

without fresh capital, the current situation appears dire. But even in these situations the law expects businesspersons to honour their contractual commitments unless these have been legally vitiated or modified. The Respondents had given unequivocal commitments to collaborate with the Claimant on a number of areas and not to compromise its legitimate interests. They have given no good legal reasons for conducting business behind the Claimant's back and gravely comprising its interests. Economic hardship alone is not a legal ground for disregarding legal obligations.

268. *The Respondents also assert that the Claimant's claims ought to sound entirely in damages. They state that there is no explanation why the Claimant's purported losses cannot be compensated in monetary terms other than a bare assertion that that is not the case. In response, the Claimant asserts that it stands to lose its strategic interest in an "irreplaceable and widespread network of retail stores across India, which was built over a period of several years". The special, protective and material rights with respect to the Retail Assets represent a valuable and strategic asset to the Claimant and the loss of its interests in these Retail Assets cannot be compensated in monetary terms. The Respondent's entire premise of damages being the only remedy is wrong.*

269. *In this context it is pertinent to note that the Parties themselves agreed in the FCPL SHA (as well as the FRL SHA and the SSA) that:*

27.7 ***Remedies***

...

(ii) The Parties also agree that damages may not be an adequate remedy for a breach of this Agreement and the Parties shall he entitled to an injunction, restraining order, right for recovery, suit for specific performance or such other equitable relief as a court of competent jurisdiction may deem necessary or appropriate to restrain the other Party from committing any violation or enforce the performance of the covenants,

representations and obligations contained in this Agreement. *[emphasis in italics added]*

270. *It is plain that the Claimant's interests in FRL and the related entities represent a unique proposition to it from a strategic national and global perspective. This was not just a skin-deep business investment by a sleeping partner. The Claimant evinced every intention of growing a deeper and broader relationship with the Future Group within lawful parameters. The Respondents had (until recently) enthusiastically responded to this. The Claimant is a global entity with massive resources and does not appear to be looking for quick returns in its engagement with the Respondents.*

271. *It is also a cogent consideration that the Disputed Transaction is with a competitor that the Claimant had expressly singled out as a Restricted Person. The Parties unequivocally agreed to this investment parameter. This restriction appears to have been a critical consideration for the Claimant and the Effective Date of the subject transaction took place only after notification of the List of Restricted Persons. While the Claimant was aware prior to the Disputed Transaction that the Respondents were considering a proposal from the MDA Group there is no evidence (or even assertion) that they knew about the substance of the discussions. In any event, it expressly made known its concerns once the channel of communications between the Parties broke down and it dawned upon the Claimant that it was being side-lined. The fact that the MDA Group, a strategic competitor, is willing to pay an enormous amount of money even in these troubled times for the purchase of FRL's Retail Assets is in itself a testament to the uniquely strategic value of the relationships and assets at stake.*

272. *Even after the Majority Respondents' free shares dropped to 0.65% it is apparent that they still have effective control of FRL. Indeed, they have not intimated that they have lost real control of FRL. Respondents No. 3 and 8 appear to be in effective control of the Future Group and its affiliates and*

they are driving the sale of FRL's assets and the restructuring plans. Despite this, in arguing against injunctive relief, the Majority Respondents now profess that they "have no ability of …deferring … any application before any authority… not having made any applications". I do not accept this for the reasons given above.

273. *If interim relief is not awarded to the Claimant now it is plain that the Respondents will continue to take steps to complete the Disputed Transaction. They have said as much. The Respondents when queried by me have plainly stated that they will not give any assurances to preserve the current status quo pending the outcome of these proceedings. It will take quite some time for the Tribunal to be constituted and after that to consider any applications for interim relief (let alone finally determine the Parties' differences). The greater the progress made towards the completion of the Disputed Transaction, the harder it will be to unravel it. Over time, the interests of additional third parties may also become entwined with the Disputed Transaction and be subsequently compromised.*

274. *In sum, the more delay in giving relief the greater the prejudice to the Claimant. It is apparent that at some point of time in the very near future, restoring the Claimant's rights will become impossible. The grave and imminent threat to the destruction of the rights conferred on it by the Respondents under the Agreements merit immediate interim relief.*

275. *In the circumstances, I am prima facie satisfied that it is just that the Claimant be entitled to orders/directions restraining the Respondents from proceeding further with the Disputed Transaction until further order from the Tribunal. This is to take effect immediately on notification of this Interim Award. The Claimant is to provide within 7 days from the date hereof a cross-undertaking in damages to the Respondents. The Parties are to immediately work together to settle the terms of this cross-undertaking. If they cannot agree on this, it should be referred to me for resolution."*

(Emphasis supplied)

24. The Emergency Arbitrator concluded that FRL is *prima facie* a proper party to the FCPL-SHA arbitration clause; petitioner has a strong *prima facie* case on the merits of the dispute; the petitioner's rights under the FCPL-SHA, the SSA, and the FRL-SHA (insofar as it has been incorporated into the FCPL SHA) have been apparently compromised by the Respondents and the Respondents have given no good legal reasons for effecting the sale of FRL's Retail Assets to the Restricted Person behind the petitioner's back. The conclusions drawn by the learned Arbitrator recorded in paras 277 to 284 of the interim order are reproduced hereunder:

> *"XII. CONCLUSION*
>
> *A.* ***Summary of Key Findings***
>
> *277. Considering the unquestionably significant consequences that the outcome of the Application could have on the Parties and others if it is decided in any number of ways, I have painstakingly reviewed all the submissions and facts to ascertain whether a prima facie case on the merits and on jurisdiction has been established as well as whether interim relief should be granted on the basis of the ascertainable facts. I now set out a summary of the views expressed above.*
>
> *278. FRL is prima facie a proper party to the FCPL SHA arbitration clause. There is therefore prima facie jurisdiction over it in these proceedings. These proceedings have been properly commenced against all the Respondents. The Claimant has built a strong prima facie case on the merits of the dispute by showing that its rights under the FCPL SHA, the SSA, and the FRL SHA, (insofar as it has been incorporated into the FCPL SHA) have been apparently compromised by the Respondents.*
>
> *279. The Claimant has an apparent right to be present at any*

table considering the restructuring of FRL and the Future Group. This is because the core assets of FRL cannot be compromised without its consent. Notwithstanding the Claimant's desire to work with them, the Respondents decided to enter into a transaction with a contractually prohibited entity to strip FRL of its core assets. This disregarded their obligations to the Claimant.

280. *The Respondents are the primary authors of this unhappy situation. Granted, the COVID-19 pandemic had caused them unforeseeable difficulties as well as substantial losses and, without fresh capital, FRL's future appears unstable. But, even in these situations, the law expects businesspersons to honour their contractual commitments unless these have been legally vitiated or modified. Economic hardship alone is not a legal ground for disregarding legal obligations. The Respondents have given no good legal reasons for effecting the sale of FRL's Retail Assets behind the Claimant's back and thereby gravely comprising its interests.*

281. *FRL's retail chains are unique and have peculiar strategic importance and value to the Claimant. The grave and imminent threat to the destruction of the rights conferred on it by the Respondents under the Agreements merit immediate interim relief.*

282. *The Majority Respondents have asserted that the "horse has bolted" and that, consequentially, the Claimant no longer has any legitimate interests meriting protection. This is incorrect. The horse has not bolted, even though the Respondents have opened the stable door. Even assuming that the "horse has bolted", it is apparent that the Respondents are contractually obliged to work with the Claimant to cajole the "unruly horse" to return to its stable.*

283. *In sum, the more delay in giving relief the greater the prejudice to the Claimant. It is apparent that at some point of time in the very near future, restoring the Claimant's rights will become impossible.*

284. <u>It is just, in the circumstances, to award interim relief to the Claimant to restrain and injunct the Respondents from taking any further steps in connection with the Disputed Transaction.</u>

(Emphasis supplied)

25. The operative part of the order and the directions given by the Emergency Arbitrator are recorded in para 285 of the interim order which is reproduced hereunder:-

*"**B. <u>Dispositive Orders/Directions</u>***

285. In the result, I award, direct, and order as follows:

(a) the Respondents are injuncted from taking any steps in furtherance or in aid of the Board Resolution made by the Board of Directors of FRL on 29 August 2020 in relation to the Disputed Transaction, including but not limited to filing or pursuing any application before any person, including regulatory bodies or agencies in India, or requesting for approval at any company meeting;

(b) the Respondents are injuncted from taking any steps to complete the Disputed Transaction with entities that are part of the MDA Group;

(c) without prejudice to the rights of any current Promoter Lenders, the Respondents are injuncted from directly or indirectly taking any steps to transfer/dispose/alienate/ encumber FRL's Retail Assets or the shares held in FRL by the Promoters in any manner without the prior written consent of the Claimant;

(d) the Respondents are injuncted from issuing securities of FRL or obtaining/securing any financing, directly or indirectly, from any Restricted Person that will be in any manner contrary to Section 13.3.1 of the FCPL SHA;

(e) the orders in (a) to (d) above are to take effect immediately and will remain in place until further order from the Tribunal, when constituted; and

(f) the Claimant is to provide within 7 days from the date hereof a cross-undertaking in damages to the Respondents. If the Parties are unable to agree on its terms they are to refer their differences to me qua EA for resolution; and

(g) the costs of this Application be part of the costs of this Arbitration."

III. Submissions of the petitioner

26. The *Biyanis* led by Kishore Biyani (respondent No. 3) and Rakesh Biyani (respondent No. 8) are the controlling shareholders of Future Retail Limited ("FRL") and Future Coupons Private Limited ("FCPL"). Mr. Kishore Biyani is the Executive Chairman and Director of FRL, and Mr. Rakesh Biyani is the Managing Director of FRL.

27. FRL is India's second largest organized offline retailer and has approximately 1,534 retail stores across India. Its widespread retail network is, therefore, an invaluable strategic asset.

28. The *Biyanis* wanted to collaborate with strategic foreign investors with a long-term vision to grow the business of the Future group, who would be a long-term partner and stakeholder in FRL, and would further enable *Biyanis* to monetize their existing shareholding in FRL. If and when Indian laws changed, this investor could choose to become the controlling shareholder of FRL.

29. As a first step, the *Biyanis* re-structured an existing Future group entity, FCPL, to acquire securities of FRL, and correspondingly, acquire

special, material and protective rights in FRL. This structure enabled the *Biyanis* to attract an investor and ensure that the investor and the *Biyanis* could jointly enjoy these rights in FRL.

30. Consequently, on 12th August 2019, FRL, FCPL and *Biyanis* entered into a Shareholders Agreement for providing certain special, protective and material rights to FCPL (FRL-SHA).

31. At the time of execution of the FRL-SHA, the *Biyanis* (together with FCPL) held approximately 50.89% shares of FRL.

32. The FRL-SHA provided that FRL would require FCPL's consent with respect to *only three matters*, i.e., (i) if FRL is proposing to transfer its retail assets ("Retail Assets"), (ii) amendment of Articles of Association of FRL not consistent with the FRL-SHA, and (iii) issuance of shares of FRL not in accordance with the FRL-SHA. *FCPL did not have any other veto rights with respect to FRL*. FRL was also restricted from transferring its assets to "*Restricted Persons*".

33. On 12th August 2019, FRL made a public disclosure regarding the execution of the FRL-SHA and limited veto rights of FCPL.

34. On 22nd August 2019, FCPL, *Biyanis* and Amazon also entered into a Shareholders Agreement (FCPL-SHA) relating to their rights as shareholders of FCPL.

35. On the same day, FCPL, *Biyanis* and Amazon entered into a Share Subscription Agreement (SSA) for an investment of INR 1431 Crores by Amazon to acquire 49% of FCPL.

36. Through the FCPL-SHA, the *Biyanis* undertook that Amazon and the *Biyanis* would jointly exercise the rights of FCPL in FRL (*on the limited three matters*), and agreed that they would not decide on these

matters without Amazon's consent. This was a fundamental inducement for Amazon.

37. Amazon was also granted a call option to become the single largest shareholder of FRL, when Indian laws permitted Amazon to become the single largest shareholder.

38. FRL was restricted from transferring its assets to a "*Restricted Person*". The FCPL-SHA also listed the restricted persons and included the MDA Group.

39. The *Biyanis* and FCPL confirmed and represented to Amazon that the provisions of the FCPL-SHA, including Amazon's rights with respect to FRL, were compliant with, and enforceable under, Indian law.

40. On 22nd August 2019, FRL, despite not being party to the FCPL-SHA, made a disclosure regarding the FCPL-SHA.

41. On 19th December 2019, FCPL issued a letter to FRL confirming that the FRL SHA had come into effect and provided the list of restricted persons which was identical to the list agreed by *Biyanis* in the FCPL-SHA.

42. On 26th December 2019, Amazon invested Rs.1431 Crore in FCPL and the FCPL-SHA came into effect. This entire amount was invested by FCPL in FRL as agreed in the SSA.

43. On 26th December 2019, the Articles of Association of FCPL were amended by the *Biyanis* to reflect Amazon's rights, including the fact that *Biyanis* will not exercise FCPL's limited rights in FRL without Amazon's consent.

44. In June 2020, the *Biyanis* and FRL directly approached Amazon to provide additional funding to FRL. At that time, FRL represented to

Amazon and other existing investors that FRL needed INR 5000 Crores to resolve its distress. FRL also indicated that any further funding from Amazon could come through the same structure as Amazon's investment in FCPL.

45. While Amazon was engaging in discussions with FRL to resolve FRL's problems, FRL entered into discussions with MDA Group.

46. On several occasions, including 27th August 2020, Amazon enquired about the discussions with MDA Group but FRL only provided vague responses.

47. On 29th August 2020, FRL announced that its Board of Directors had approved a transaction with a Restricted Person (the MDA Group) ("*Disputed Transaction*"). In terms of the transaction, FRL would amalgamate into another Future company, Future Enterprise Limited ("*FEL*"). Shareholders of FRL, including FCPL, would receive shares of FEL, and FRL would cease its business operations and would be dissolved.

48. FEL would then transfer the retail business to MDA Group at a pre-agreed price and FEL would be stripped of its core retail assets. The shareholders of FRL, and consequently, FEL would, therefore, become shareholders of an entity that has no material business, giving rise to a substantial loss to the shareholders of FEL and in turn of FRL.

49. The *Biyanis*, who control FRL, neither disclosed the transaction nor obtained consent for the Disputed Transaction (*Notably, evidence of consent from FCPL was not provided before the Emergency Arbitrator*). Under the FCPL-SHA read with the FRL-SHA, FCPL required Amazon's consent for giving any consent for the disputed transaction. Accordingly,

FCPL could not have consented to the Disputed Transaction.

50. Aggrieved by the egregious breaches of the agreements, on 05th October 2020, Amazon initiated arbitration proceedings against *Biyanis*, FCPL and FRL (*Arbitration Proceedings*) in terms of Section 25 and Section 27.7(ii) (enabling injunctive reliefs) of the FCPL-SHA before the Singapore International Arbitration Center ("*SIAC*").

51. Amazon also invoked Rule 30.1 of the Rules of Arbitration of SIAC, 2016 ("*SIAC Rules*") and sought appointment of an emergency arbitrator to grant emergency interim relief. On 5th October 2020, SIAC appointed Mr. V.K. Rajah, SC as the Emergency Arbitrator.

52. FRL participated in the proceedings before the Emergency Arbitrator by filing detailed written pleadings and participated in the oral hearing (including a plea that FRL was not a party to the FCPL-SHA and that the EA lacked jurisdiction). After hearing all the parties, the Emergency Arbitrator passed his order on 25th October, 2020 holding that FRL and the *Biyanis* had *prima facie* breached the Agreements, and restrained FRL and other respondents from proceeding with the Disputed Transaction ("*EA Order*").

53. The Emergency Arbitrator held that "*[s]uch protective rights do not amount to control of FRL. Rather, they oblige FRL not to act in a manner that would be inimical to the Claimant's interests, as its long-term stakeholder.*"

54. On and from 26th October 2020, FRL began publicly impugning the validity of the EA Order by claiming it was a nullity under Indian law. FRL also actively pursued regulators to ignore the EA Order and grant their approvals for the Disputed Transaction.

55. With a view to mount a collateral challenge to the ongoing Arbitral Proceedings and the EA Order, FRL filed a suit before this Court on the ground that Amazon was interfering with a lawful transaction between FRL and MDA Group. FRL also sought interim relief seeking to restrain Amazon from writing to regulators. However, during the hearing of the I.A No. 10376 of 2020, FRL stated that it was not claiming an anti-arbitration injunction, nor was it challenging the EA Award. The learned Single Judge in the order dated 21st December 2020 has noted:

> *"Mr. Harish Salve, learned Senior Counsel appearing for the plaintiff further stated that in the interim application, he is not seeking any anti arbitration injunction or any anti suit injunction*"

56. FRL had raised an objection to the jurisdiction before the SIAC Court on the ground that it was not a party to the arbitration agreement in terms of Rule 28 of the SIAC Rules. On 25th November 2020, the SIAC Court rejected FRL's objection and held that arbitration proceedings would continue against FRL.

57. On 21st December 2020, a learned Single Judge of this Court declined to grant interim relief to FRL and held that the EA Order was *coram judice* under Indian law. The learned Single Judge noted that the merits of the EA Order were not under challenge and such challenge would not have been maintainable. The Learned Single Judge has also recorded that the EA order was not invalid and not *coram non judice*.

58. Despite the learned Single Judge of this Court holding that the EA Order was valid and binding, *Biyanis*, FRL and its key managerial personnel made several false and misleading submissions to the Indian regulators claiming that the entire basis of the EA Order had been vitiated

pursuant to the Court Order.

59. On 5th January 2021, the SIAC constituted the Arbitral Tribunal. In terms of paragraph 10 of Schedule I of the SIAC Rules, the validity of the EA Order is extended during the duration of the Arbitral Proceedings.

60. Given that FRL was making misleading submissions on the basis of certain *prima facie* observations in the Court Order while rejecting the I.A. 10376 of 2020, seeking restraint on Amazon from making representations to the statutory authorities and falsely claimed that there was acquisition of control over FRL by Amazon; Amazon preferred a limited appeal before the Division Bench of this Hon'ble Court on 11th January 2021. The matter was heard on 13th January 2021, and while issuing notice to the respondents, the Division Bench fixed the next date of hearing on 12th February 2021.

61. On 20th January 2021, the Indian Stock Exchanges granted their conditional no-objection to the Disputed Transaction. The aforesaid non-objection is, by its own terms, subject to the outcome of the arbitral proceedings.

62. On 25th January 2021, Amazon served an advance copy of the present Petition to FRL. FRL made a disclosure relating to the same on the same day.

63. With a view to pre-empt any action in the present Petition and to effectively frustrate the present proceedings, FRL filed an application before the NCLT seeking approval of the Disputed Transaction on 26th January 2021. No official confirmation for NCLT filings has been submitted till date.

64. The interim order dated 25th October, 2020 passed by the

Emergency Arbitrator is enforceable as an order of the Court under Section 17(2) of the Arbitration and Conciliation Act.

65. Section 2(6) of the Arbitration and Conciliation Act gives freedom to the parties to authorize any person including an institution to determine the disputes between the parties. Section 2(8) of the Arbitration and Conciliation Act provides that the agreement to authorize an institution shall include any Arbitration Rules referred to in that agreement.

66. The Emergency Arbitrator is an arbitrator under SIAC Rules read with Section 2(1)(d), 2(6) and 2(8) of Arbitration and Conciliation Act. Under SIAC Rules, Emergency Arbitrator occupies the position of and functions as an arbitrator till the Arbitral Tribunal is fully constituted. Rule 1.3 of SIAC Rules defines an "*Emergency Arbitrator*" as an arbitrator appointed in accordance with Schedule 1. Rules 38, 39 and Schedule 1 - Rules 4, 5, 7, 8 and 12 reinforce the position that an Emergency Arbitrator occupies the position of an Arbitrator and functions as an Arbitrator.

67. The interim order dated 25th October, 2020 contains interim injunctions to protect and safeguard the subject matter of the disputes, which squarely falls within the ambit of an '*interim measure'* under Section 17(1) of the Arbitration and Conciliation Act.

68. The order passed under Section 17(1) of the Arbitration and Conciliation Act is enforceable as an order of the Civil Court under Section 17(2) of the Arbitration and Conciliation Act. Reliance is placed on ***Alka Chandewar v. Shamshul Ishrar Khan***, (2017) 16 SCC 119, ***HDB Financial Services Limited v. Kings Baker Private Limited***, 2019 SCC OnLine Ker 702, ***Tayabbhai M. Bagasarwalla v. Hind Rubber***

Industries, (1997) 3 SCC 443 and ***Manoj CJ v. Shriram Transport Finance Company Limited***, 2020 SCC Online Ker 4241.

69. The order dated 25th October, 2020 has attained finality in as much as no appeal has been filed by the petitioner under Section 37 of the Arbitration and Conciliation Act against the order dated 25th October, 2020.

70. The respondents and in particular FRL have consistently violated the Emergency Arbitrator order with impunity.

71. The respondent raised an objection to the jurisdiction before the Emergency Arbitrator. The Emergency Arbitrator analysed the relevant provisions including Section 17 of the Arbitration and Conciliation Act. The Emergency Arbitrator noted that the Rules of *Delhi International Arbitration Centre, 2018* provide for Emergency Arbitration and Rule 14.8 provides that the order of an Emergency Arbitrator shall be enforceable in the manner provided in Arbitration and Conciliation Act. The Emergency Arbitrator concluded that the Emergency Arbitrator is an Arbitral Tribunal for all intents and purposes. In paras 104 to 106, it is noted that the Emergency Arbitrators are recognized in the Indian Arbitration framework.

72. Despite claiming that the EA Order is a nullity and not binding on it, on 28th January 2021, FRL formally approached the Arbitral Tribunal to vacate the EA Order.

IV. Submissions of respondents

73. The Petition is *ex-facie* not maintainable. Section 17 of the Arbitration and Conciliation Act, 1996, after its Amendment in 2015, provides that an order issued by an Arbitral Tribunal shall be enforceable

as an order of the Court. Prior to this, an interim order could be made by the Tribunal, but its enforcement had to be through the Court. An interim order by the Tribunal was, by legal fiction, elevated to the status of an order of the Court.

74. Section 17(2) creates a legal fiction which has to be construed no wider than its plain language permits. The Section provides that any order issued by *"the arbitral tribunal under this section."* is enforceable as an order of the Court. The order under Sections 17 (1) is an order which may be made *"during the arbitral proceedings"*, or an order which may be made *"after the making of the arbitral award...."*. The arbitral proceedings before a Tribunal can only commence after the appointment of the Arbitral Tribunal.

75. The order of an Emergency Arbitrator is not an order of the Arbitral Tribunal. It is not an order that can be appealed under Section 37 since it is not an order "*of the arbitral tribunal"*.

76. The question whether an Emergency Arbitrator can or cannot be appointed, consistent with Indian law and in an arbitration governed by the Act is a secondary issue. In the first instance, even if the parties can, by an agreement, agree to the appointment of an Emergency Arbitrator (by choosing Rules of procedure which envisage the appointment of an Emergency Arbitrator), such an arbitrator is not the "*arbitral tribunal*" within the meaning of section 2 (1) (d) of the Act.

77. The language of Section 17 (2) cannot be stretched nor can the definition of "*arbitral tribunal*" be expanded by the process of construction to create a situation where an order of an Emergency Arbitrator is put at par with the order passed by an Arbitral Tribunal

constituted in accordance with the agreement of the parties.

78. Even under the *Singapore International Arbitration Centre Rules* (SIAC Rules), an "*Emergency Arbitrator*" is distinct from, and is not, the "*arbitral tribunal*"; Rule 30 of the SIAC Rules (pertaining to grant of interim reliefs) itself distinguishes between an "*arbitral tribunal*" and an "*emergency arbitrator*". Rule 30.1 states that the "*Tribunal*" may issue an order or Award granting injunction or interim reliefs as it deems appropriate. In contra-distinction, Rule 30.2 states that "*A party that wishes to seek emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1*." Alternatively, Rule 30.3 provides the option to the parties to approach "*a judicial authority prior to the constitution of the Tribunal*".

79. Rule 1.3 of the SIAC Rules defines an "*Emergency Arbitrator*" as an arbitrator appointed in accordance with paragraph 3 of Schedule 1 whereas it defines "*Tribunal*" to include a sole arbitrator or all the arbitrators where more than one arbitrator are appointed. Further, the definition of "*Award*" under Rule 1.3 also draws the same distinction. It is defined to include "*a partial, interim or final award and an award of an Emergency Arbitrator*." Schedule 1 of the SIAC Rules also makes it explicit that an Emergency Arbitrator is not an *'arbitral tribunal'*.

80. Rule 1 of Schedule 1 provides that a party seeking emergency interim reliefs may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, file an application for emergency interim relief with the Registrar.

81. Rule 6 of Schedule 1 provides that "*An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute,*

unless otherwise agreed by the parties."

82. Rule 10 of Schedule 1 of SIAC Rules provides that "*The Emergency Arbitrator shall have no power to act after the Tribunal is constituted.*." and that *"…The Tribunal may reconsider, modify or vacate any interim order or Award issued by the Emergency Arbitrator, including a ruling on his own jurisdiction. The Tribunal is not bound by the reasons given by the Emergency Arbitrator. Any interim order or Award issued by the Emergency Arbitrator shall, in any event, cease to be binding if the Tribunal is not constituted within 90 days of such order or Award or when the Tribunal makes a final Award or if the claim is withdrawn."*

83. According to respondent No.2, the petitioner's reliance on the Rules of the Delhi International Arbitration Centre, Mumbai Centre of International Arbitration and Madras High Court Arbitration Centre, which provide for emergency arbitration procedures to contend that Emergency Arbitration is recognised under Indian law is misconceived as these Rules cannot override the mandatory provisions of the Act. In fact, these Rules (Rule 1.2 of the DIAC Rules, Rule 1.1 of the MCIA Rules and Rule 1.4 of the MHCAC Rules) provide that in the event that any of the Rules are in conflict with a mandatory provision of law applicable to the arbitration / arbitration agreement from which the parties cannot derogate, the mandatory provision would prevail. These Rules are also applicable to foreign seated arbitrations, as they permit the parties to choose a seat of choice. In the context of foreign seated arbitrations, emergency arbitration procedure may be permitted if it is in consonance with the law of the seat of the arbitration.

84. The email dated 12th January, 2021 issued by the Presiding Arbitrator, the "*arbitral tribunal*" has been constituted only on 5th January, 2021. Thus, the EA Order could never be an order of the "*arbitral tribunal*" under the provisions of the Act or even under the SIAC Rules.

85. Indian courts have taken note of orders of Emergency Arbitrators only in the context of foreign seated arbitrations under Part II of the Act where proceedings were filed under Section 9 to seek enforcement of the foreign Emergency Arbitrator's order. Pertinently, there is no judgment of any Indian Court which treats an Emergency Arbitrator's order as one passed under Section 17 of the Act.

86. In ***Raffles Design International Pvt Ltd v Educomp Professional Education Ltd & Ors*** – 2016 SCC Online Del 5521 [case under Part II of the Act] this Court observed (at para 104) that an 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."* It was clarified (at para 105) that alternatively parties may independently approach the Court under Section 9 of the Act not for enforcing the order of the Emergency Arbitrator but instead for the Court to *"independently apply its mind and grant interim relief in the cases where it is warranted."* Thus, ***Raffles*** (supra) holds that an order of an Emergency Arbitrator is not valid under Indian law.

87. On 20th November, 2020, the Competition Commission of India granted its approval. On 20th January, 2021, the approvals were granted by SEBI and the Stock Exchanges respectively without any adverse observation, as the same is in the interest of all stakeholders (including

small investors, creditors, scheduled banks and other banks) who have lent funds to various Future Group Companies, employees and vendors attached to these companies and provide overall solution for benefit of all the stakeholders. In prayer clause (e) of the present petition, the petitioner has sought reliefs restraining the respondents from relying upon any approval granted by any regulatory body or agency in India, arising out of any application initiated or pursued by the respondents, contrary to the directions of the EA Order, including the no objection granted by SEBI dated 20th January 2021 as also the approvals granted by BSE, NSE and CCI. It is pertinent to mention that the Delhi High Court by its Order dated 21st December, 2020 has directed the statutory authorities /regulators to apply their mind to the facts and legal issues and come to the right conclusion and take a decision after considering the representations and counter representations of FRL and Amazon to the statutory authorities and regulators. Further to such directions of the Delhi High Court, SEBI/Stock Exchanges has granted approval in accordance with law.

88. On 26th January, 2021, FRL has filed the Scheme of Amalgamation with the National Company Law Tribunal, Mumbai Bench before whom the matter is pending and will be decided in accordance with the procedure under Section 230 of the Companies Act, which is a self-contained code.

89. Reliance is placed on paras 7.10, 9.17, 9.19, 9.18, 10.31, 11.16, 11.22, 12.3 and 13 of the judgment dated 21st December, 2020 in CS(COMM) 493/2020 titled ***Future Retail Ltd. v. Amazon.Com Investment Holdings LLC,*** 2020 SCC OnLine Del 1636.

V. Additional submissions of respondent No.2

90. The order dated 25th October, 2020 passed by the Emergency Arbitrator cannot be enforced under Section 17 of the Arbitration and Conciliation Act for the following reasons:

(i) Section 17 of the Act applies to orders passed by an "*arbitral tribunal*" constituted in accordance with the Act, and the Act does not include emergency arbitrators.

(ii) In any event, the EA Order is a nullity insofar as FRL is concerned, as there is admittedly no arbitration agreement between FRL and Amazon, and combining the two agreements or three agreements would result in Amazon acquiring control over FRL, and this would be violative of Indian law as held ***Future Retail Ltd. v. Amazon.Com Investment Holdings LLC*** (supra).

(iii) In ***Future Retail Ltd. v. Amazon.Com Investment Holdings LLC*** (supra), this Court has held that the Board Resolution dated 29th August 2020 of FRL approving the transaction with Reliance is valid and that FRL is within its legal rights to act upon the Resolution. A contrary interim order by an Emergency Arbitrator would necessarily stand superseded, for any relief granted pursuant to that interim order would be contrary to a later order passed by this Court in ***Future Retail Ltd. v. Amazon.Com Investment Holdings LLC*** (supra) to which Amazon was a party. The attempt by Amazon to enforce the EA Order, despite it being overridden by the Judgment, is an abuse of the process.

91. The order of the Emergency Arbitrator is a nullity insofar as FRL is concerned. The finding of the Emergency Arbitrator that he had jurisdiction over FRL is not conclusive because the Emergency Arbitrator has misapplied the law and the contracts to confer jurisdiction upon himself.

92. There is no arbitration agreement in writing between FRL and Amazon and the Emergency Arbitrator has misapplied the concept of '*group companies'* to hold that the two SHAs have to be read together. The agreements cannot be read together and if it is so done, it would result in violation of the Foreign Exchange Management Act, 1999.

93. The principle of '*group companies'* arises under Section 8 of the Arbitration and Conciliation Act to transfer proceedings in Court to arbitration not only where the plaintiff is a party to an arbitration agreement but also where a plaintiff is claiming through a person who is a party to an agreement.

94. FRL is not a party to Shareholders Agreement dated 22nd August, 2019 and to Share Subscription Agreement dated 22nd August, 2019 between Amazon, FCPL and the promoters, *Biyanis*, whereas Amazon is not a party to the agreement dated 12th August, 2019 between FRL, FCPL and the promoters. The plea of Amazon that the aforesaid three agreements constituted a '*single integrated bargain*' is misconceived which is clear from the relevant clauses of the agreement. If the three agreements are treated as a single integrated transaction, it would violate the provisions of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (FEMA FDI Rules). Reference is made to paras 10.29, 10.30 and 10.31 of the ***Future Retail Ltd. v. Amazon.Com***

Investment Holdings LLC (supra).

95. Prayer (e) of this petition seeking restraint against the respondents from relying upon the approval granted by any regulatory body/agency contrary to the Emergency Arbitrator order is a backdoor challenge to the regulatory authorities decision in accordance with law.

96. Amazon has challenged the order dated 21st December, 2020 in ***Future Retail Ltd. v. Amazon.Com Investment Holdings LLC*** (supra) before the Division Bench of this Court in appeal. Reference is made to Grounds 12, 14, 15 and 16 of the appeal.

VI. Petitioner's response to respondent's submissions

97. FRL has failed to appreciate that in the present proceedings, the validity of the EA Order cannot be detracted from. It was further conscious that the Court could not go behind the EA Order in a collateral attack. In ***Future Retail Ltd. v. Amazon.Com Investment Holdings LLC*** (supra), the learned Single Judge maintained that the Suit could not and did not constitute an action to challenge and annul the EA Order on merits. FRL seeks to re-agitate arguments on merits which cannot be gone into in the present proceedings. It may be added that these very arguments were urged before the EA and were rejected. There is no lack of inherent jurisdiction insofar as the Emergency Arbitrator is concerned. Hence, the EA Order cannot be declared void or a nullity. The admitted facts are as follows:

(i) FRL has agitated its case with respect to the Emergency Arbitrator having no authority, before the Emergency Arbitrator himself, which was rejected.

(ii) FRL has not appealed against the EA Order till date.

(iii) On the evening of 28th January 2021, i.e. shortly after the hearing on the Petition concluded, FRL stated its intent before the Arbitral Tribunal to file an application for vacation of the EA Order; hence, admitting that the EA Order is binding on FRL.

(iv) The only challenge to the EA Order, if at all, was a collateral challenge before the learned Single Judge of this Court in CS (COMM.) 493/2020 on the misconceived ground that the Emergency Arbitrator was '*coram non judice'* and outside the framework of the Arbitration and Conciliation Act, 1996. This challenge, which was earlier rejected by the Emergency Arbitrator himself, was also expressly rejected by the learned Single Judge, who held that the EA Order was valid under the Arbitration and Conciliation Act, 1996 and therefore, not a nullity.

(v) It is trite law that while enforcing an order under Section 17(2) of the Arbitration and Conciliation Act, 1996, a Court cannot sit in appeal over the order.

Emergency Arbitrator is within the scope of the definition of 'Arbitral Tribunal' under Section 2(1)(d) of the Arbitration and Conciliation Act

98. FRL uses the word '*nullity'* repeatedly in its additional submissions in a weak effort to camouflage its arguments on the merits of the EA Order as a *'jurisdictional challenge*'.

99. FRL had raised the same objections before the Emergency Arbitrator regarding its legal status under the Arbitration and Conciliation Act, 1996, which was rejected by the Emergency Arbitrator after a proper

hearing and through a detailed and reasoned order.

100. Having done so and lost before the Emergency Arbitrator, FRL cannot unilaterally claim that the EA Order is a nullity. The EA Order continues to be valid and binding qua parties having been passed in accordance with the SIAC Rules.

101. The concept of party autonomy and its consequences have been both accepted by the learned Single Judge who has found that an Emergency Arbitrator falls within the definition of "*arbitral tribunal*" and the selection of SIAC Rules which recognize an EA Order, is permissible under Indian law.

102. FRL erroneously alleges that the EA Order has been "*superseded"* by the order of the learned Single Judge. The learned Single Judge did not go into the merits of the EA Order and expressly holds that the court could not have gone into the same. The learned Single Judge has rejected not just FRL's argument that the EA Order is *coram non judice*, but has also denied it any interim reliefs sought. Consequently, FRL's allegation that the EA Order is a nullity stands rejected.

103. On the legal efficacy and the status of Emergency Arbitrator, the learned Single Judge observed:

> (i) Learned Single Judge did not go into the legality on merits of the EA Order because the same was not challenged before the court.
>
> (ii) The SIAC Rules entitle parties to seek emergency interim relief before an emergency arbitrator.
>
> (iii) There is no provision of the A&C Act that prohibits parties from approaching an emergency arbitrator.

(iv) Arguments regarding validity and status of the Emergency Arbitrator were raised before the learned Single Judge and were rejected.

(v) The EA is a Tribunal under Section 2(1)(d) of the A&C Act.

104. The learned Single Judge observed that "*it cannot be held that the provisions of Emergency Arbitration under the SIAC rules are, per se, contrary to any mandatory provisions of the Arbitration and Conciliation Act, 1996. Hence the Emergency Arbitrator prima facie is not a coram non judice and the consequential EA order not invalid on this count.*"

105. FRL not having challenged the EA Order in accordance with law, it is not open to FRL to disregard the order as mere wastepaper. In a proceeding under Section 17(2) of the Arbitration and Conciliation Act, 1996, an interim measure ordered by the Emergency Arbitrator not having been appealed in accordance with law, is effective and cannot be challenged.

106. FRL's self-serving proclamation that the EA Order is a nullity is a dangerous proposition as it undermines the credibility of the arbitration process and the Indian courts' ability to enforce valid orders passed during the arbitration proceedings.

107. The EA Order is not a nullity/ void and the Delhi High Court Order does not supersede the same.

FRL is a proper party to the Arbitration Proceedings

108. FRL now alleges that the EA Order is nullity insofar as FRL is concerned as there is no arbitration agreement with Amazon. It is an argument on merits, which has been rejected by the Emergency Arbitrator. This is not an argument of nullity. Nullity cannot be qua one

party.

109. FRL, vide its letter dated 06th October 2020, raised this objection for the first time under Rule 28.1 of the SIAC Rules before the SIAC Court. The SIAC Court rejected FRL's contention vide its letter dated 25th November 2020, holding that it is *prima facie* satisfied that the arbitration shall proceed.

110. FRL raised the same objection under Schedule I, Rule 7 of the SIAC Rules before the Emergency Arbitrator on 7th October 2020. This objection was rejected by the EA Order on 25th October 2020. This objection was rejected by the Emergency Arbitrator giving detailed reasons.

111. FRL has in accordance with Rule 28.2 of the SIAC Rules read with Section 16 of the Arbitration and Conciliation Act, 1996 raised this objection before the Tribunal vide its emails dated 16th January 2021 and 28th January 2021. A challenge to the jurisdiction of the Arbitral Tribunal can only be raised in a manner recognised under the Arbitration and Conciliation Act, 1996 and raising such a challenge in the present enforcement proceeding is not in accordance with the Arbitration and Conciliation Act, 1996.

112. The Emergency Arbitrator's finding that FRL is a proper party to the arbitration is now sought to be assailed on merits by urging this Court to go behind the EA Order, by erroneously mischaracterizing it as a "*nullity*".

113. The Emergency Arbitrator had jurisdiction to decide whether FRL was a proper party to the arbitration proceedings.

114. The Emergency Arbitrator held that Amazon has *prima facie*

satisfied the established legal criteria that makes FRL a proper party to the arbitral proceedings.

115. FRL now argues, albeit speciously, that the Emergency Arbitrator has misapplied the concept of the "*Group of Companies*" doctrine, and on that basis suggests that the EA Order is a "nullity".

116. The Emergency Arbitrator held that all parties have assented to SIAC arbitral proceedings on identical terms and their mutual obligations are inexorably linked. The Emergency Arbitrator further held that this matter is, at its core, about a group of affiliated companies entering into an indivisible contractual arrangement with Amazon within a conceptual framework that they all unequivocally consented to.

117. The Emergency Arbitrator has considered the application of the "*Group of Companies*" doctrine to the facts of the disputes before the Emergency Arbitrator, including landmark decisions of the Supreme Court in ***Chloro Controls India Pvt. Ltd.*** (supra), ***Cheran Properties*** (supra) and ***MTNL v. Canara Bank*** (supra). The Emergency Arbitrator has held that under Section 2(1)(h) of the Arbitration and Conciliation Act, 1996, a '*party'* is defined as a '*party'* to the arbitration agreement' and, crucially, not as a '*signatory*' to the arbitration agreement. Therefore, FRL is a party to the arbitration proceedings.

118. The close inter-connected nature of the Agreements, simultaneous negotiations and discussions of the Agreements by a single/ common legal team, FRL's awareness that the protective, special and material rights were being created for Amazon's benefit and FRL being a direct beneficiary of monies invested by Amazon were some of the key considerations for holding that FRL is a proper party to the Arbitration

Proceedings applying the doctrine of '*group of companies*'.

119. In view of the above, having elected to raise this jurisdictional challenge before the Emergency Arbitrator and the Court of SIAC, FRL cannot re-agitate this objection in the present proceedings, which are for enforcement of the EA Order. This is contrary to the principle of *kompetenz-kompetenz* under Section 16 of the Arbitration and Conciliation Act, 1996.

120. FRL has not challenged the EA Order on merits in the Suit. Further, during the course of arguments in the Suit, FRL gave up its prayer to interdict the proceedings in the arbitration to which FRL is a party. The occasion of adverting to the reasoning of the Emergency Arbitrator or superseding or vacating the EA Order did not arise in the Suit.

Amazon has no control over FRL

121. FRL now alleges that the EA Order is a nullity as combining the two agreements would result in Amazon acquiring control over FRL, and this would be violative of FEMA. This constitutes, at best a defence in the Arbitration proceedings and, in fact, was urged as a defence in the Arbitration Proceedings. This is not an argument on nullity. It is an argument on merits, which has been rejected by the Emergency Arbitrator.

122. The plain facts are that Respondents induced an investment from Amazon based on specific representations, that the investment is in accordance with law and that the control remains with the respondents despite the special, material and protective rights.

123. However, the Respondents, contrary to the express terms of the

Agreements and their representations, acted in egregious breach of their obligations without any justification by proposing to dispose of the Retail Assets to a Restricted Person, viz. Mukesh Dhirubhai Ambani Group.

124. In the absence of any defence to breach of contract, and the respondents having taken full benefit of Amazon's investments now seek to impugn the very agreements entered into by them, through common advocates, by alleging breach of FEMA.

125. In fact in May 2020, additional investments were sought from Amazon in FRL in a manner similar to its investment in FCPL along with a seat on the Board of Directors of FRL. The Emergency Arbitrator has specifically noted that these options for Amazon to invest were considered permissible by the parties to the dispute.

126. Having benefited from substantial investment from Amazon under the Agreements, FRL and the other Respondents are in breach of their contractual obligations. In particular, FRL's argument that Amazon's investment in FCPL and the exercise of such rights under the FCPL-SHA to prevent the sale of FRL's Retail Assets to a Restricted Person violates the law, cannot be permitted. This is especially so since this argument has been considered by the EA and expressly rejected.

127. The Emergency Arbitrator held that "*protective rights do not amount to control of FRL. Rather, they oblige FRL not to act in a manner that would be inimical to the Claimant's interest as its long time stakeholder*".

128. In the absence of filing an appeal, it is impermissible to assail the EA Order on merits.

The Doomsday Argument

129. Last but not least, FRL argues that if the Scheme falls through, it is inevitable that FRL will go into liquidation. This is an argument of desperation wholly alien to an enforcement proceeding and in any event rejected on the merits by the Emergency Arbitrator.

130. Amazon was always ready, willing and able to assist with helping FRL in a manner consistent with law through its distress and in fact did engage to find a commercial solution to the problems FRL was experiencing. It did so by way of finding partners to partner with FRL who are non Restricted Persons as well as look at infusing money through a structure similar to that of through FCPL. However, despite Amazon providing a contractually compliant arrangement to help FRL to get over the financial distress of FRL, the *Biyanis*, drove into a transaction with a Restricted Person, namely the MDA Group.

131. FRL entered into the Disputed Transaction, despite the fact that it had been engaging with Amazon until four days before the Disputed Transaction being announced. Hence, any allegation that Amazon did not engage to find a solution or to take care of FRL in their financial distress is factually incorrect and false. Amazon reiterates its stated position to assist FRL and explore viable solutions for FRL. In fact, this plea was rejected by the Emergency Arbitrator with the following findings;

(i) The respondents had, in good times, entered into a long term commercial arrangements with Amazon entities in exchange for a very substantial investment that benefitted FRL, the respondents conferred a number of rights on Amazon and emphatically undertook to protect them.

(ii) The relationship between Amazon and the respondents was by no means a short term commercial flirtation of convenience.

(iii) *Biyanis* first drove and then caused FRL to enter into the Disputed Transaction.

(iv) Amazon was not an idle spectator and actively sought to engage with the Respondents to support an alternative rescue scheme for FRL.

(v) A term sheet from potential investors acceptable to Amazon was provided to the Promoters.

(vi) Without providing Amazon the details of the Disputed Transaction or engaging in further negotiations, the Promoters chose to enter into the Disputed Transaction.

(vii) The Emergency Arbitrator was, therefore, satisfied that Amazon was, at all material times, open to working with the respondents for their common good and long term benefits.

(viii) It is clear that Amazon has not walked away from the rescue table and continues to appear keen to work with the respondents. It has not been suggested by the respondents that Amazon does not have the financial means or desire to find a meaningful solution that will work for their common benefit.

(ix) Amazon has every interest in protecting this very significant investment in FRL by working with the Respondents to rejuvenate it.

132. It may be noted regretfully that the respondent filed an application

under Sections 230-232 of the Companies Act, 2013 for seeking approval of the NCLT after having received a copy of the present petition on 25th January 2021. This attempt to over-reach the Court must be discountenanced.

*VII. **Relevant Provisions***

Arbitration and Conciliation Act, 1996

***Section 2** - **Definitions** (1) In this Part, unless the context otherwise requires,—*

(a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution;

(b) "arbitration agreement" means an agreement referred to in section 7;

(c) "arbitral award" includes an interim award;

xxx xxx xxx

(d) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

xxx xxx xxx

(h) "party" means a party to an arbitration agreement.

xxx xxx xxx

(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.

xxx xxx xxx

(8) Where this Part—

(a) refers to the fact that the parties have agreed or that they may agree, or

(b) in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement.

xxx xxx xxx

***Section 7** - **Arbitration agreement** (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may*

arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Section 17 *-* ***Interim measures ordered by arbitral tribunal*** *(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal—*

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to

enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under Section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.

Section 19 *-* ***Determination of rules of procedure*** *(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).*

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Section 37 *-* ***Appealable orders*** *(1) Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court*

authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) refusing to refer the parties to arbitration under Section 8;

(b) granting or refusing to grant any measure under Section 9;

(c) setting aside or refusing to set aside an arbitral award under Section 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Code of Civil Procedure, 1908

Section 51 - Powers of Court to enforce execution *Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—*

(a) by delivery of any property specifically decreed;

(b) by attachment and sale or by sale without attachment of any property;

(c) by arrest and detention in prison 72[for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that section];

(d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require:

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—

(a) *that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,—*

(i) *is likely to abscond or leave the local limits of the jurisdiction of the Court, or*

(ii) *has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or*

(b) *that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or*

(c) *that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.*

Explanation.—In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

Order XXI

Rule 32 *-* ***Decree for specific performance for restitution of conjugal rights, or for an injunction*** *(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract, or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.*

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Explanation.—For the removal of doubts, it is hereby declared that the expression "the act required to be done" covers prohibitory as well as mandatory injunctions.

Order XXXIX

Rule 2-A - Consequence of disobedience or breach of injunction

(1) In the case of disobedience of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, of the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the

injured party and shall pay the balance, if any, to the party entitled thereto.

Singapore International Arbitration Centre Rules, 2016

Rule 1.3

"Award" includes a partial, interim or final award and an award of an Emergency Arbitrator

xxx xxx xxx

"Emergency Arbitrator" means an arbitrator appointed in accordance with paragraph 3 of Schedule 1

xxx xxx xxx

"Tribunal" includes a sole arbitrator or all the arbitrators where more than one arbitrator is appointed

xxx xxx xxx

Rule 28: Jurisdiction of the Tribunal

28.1 If any party objects to the existence or validity of the arbitration agreement or to the competence of SIAC to administer an arbitration, before the Tribunal is constituted, the Registrar shall determine if such objection shall be referred to the Court. If the Registrar so determines, the Court shall decide if it is prima facie satisfied that the arbitration shall proceed. The arbitration shall be terminated if the Court is not so satisfied. Any decision by the Registrar or the Court that the arbitration shall proceed is without prejudice to the power of the Tribunal to rule on its own jurisdiction.

28.2 The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration agreement. An arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration agreement, and the Tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void.

28.3 Any objection that the Tribunal:

a. *does not have jurisdiction shall be raised no later than in a Statement of Defence or in a Statement of Defence to a Counterclaim; or*

b. *is exceeding the scope of its jurisdiction shall be raised within 14 days after the matter alleged to be beyond the scope of the Tribunal's jurisdiction arises during the arbitral proceedings.*

The Tribunal may admit an objection raised by a party outside the time limits under this Rule 28.3 if it considers the delay justified. A party is not precluded from raising an objection under this Rule 28.3 by the fact that it has nominated, or participated in the nomination of, an arbitrator.

28.4 The Tribunal may rule on an objection referred to in Rule 28.3 either as a preliminary question or in an Award on the merits.

28.5 A party may rely on a claim or defence for the purpose of a set-off to the extent permitted by these Rules and the applicable law.

Rule 30: Interim and Emergency Relief

30.1 The Tribunal may, at the request of a party, issue an order or an Award granting an injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.

30.2 A party that wishes to seek emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.

30.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules.

SCHEDULE 1
EMERGENCY ARBITRATOR

1. A party that wishes to seek emergency interim relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, file an application for emergency interim relief with the Registrar. The party shall, at the same time as it files the application for emergency interim

relief, send a copy of the application to all other parties. The application for emergency interim relief shall include:

a. the nature of the relief sought;

b. the reasons why the party is entitled to such relief; and

c. a statement certifying that all other parties have been provided with a copy of the application or, if not, an explanation of the steps taken in good faith to provide a copy or notification to all other parties

2. *Any application for emergency interim relief shall be accompanied by payment of the non-refundable administration fee and the requisite deposits under these Rules towards the Emergency Arbitrator's fees and expenses for proceedings pursuant to this Schedule 1. In appropriate cases, the Registrar may increase the amount of the deposits requested from the party making the application. If the additional deposits are not paid within the time limit set by the Registrar, the application shall be considered as withdrawn.*
3. *The President shall, if he determines that SIAC should accept the application for emergency interim relief, seek to appoint an Emergency Arbitrator within one day of receipt by the Registrar of such application and payment of the administration fee and deposits.*
4. *If the parties have agreed on the seat of the arbitration, such seat shall be the seat of the proceedings for emergency interim relief. Failing such an agreement, the seat of the proceedings for emergency interim relief shall be Singapore, without prejudice to the Tribunal's determination of the seat of the arbitration under Rule 21.1.*
5. *Prior to accepting appointment, a prospective Emergency Arbitrator shall disclose to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence. Any challenge to the appointment of the Emergency Arbitrator must be made within two days of the communication by the Registrar to the parties of the appointment of the Emergency Arbitrator and the circumstances disclosed.*

6. *An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties.*
7. *The Emergency Arbitrator shall, as soon as possible but, in any event, within two days of his appointment, establish a schedule for consideration of the application for emergency interim relief. Such schedule shall provide a reasonable opportunity for the parties to be heard, but may provide for proceedings by telephone or video conference or on written submissions as alternatives to a hearing in person. The Emergency Arbitrator shall have the powers vested in the Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction, without prejudice to the Tribunal's determination.*
8. *The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary, including preliminary orders that may be made pending any hearing, telephone or video conference or written submissions by the parties. The Emergency Arbitrator shall give summary reasons for his decision in writing. The Emergency Arbitrator may modify or vacate the preliminary order, the interim order or Award for good cause.*
9. *The Emergency Arbitrator shall make his interim order or Award within 14 days from the date of his appointment unless, in exceptional circumstances, the Registrar extends the time. No interim order or Award shall be made by the Emergency Arbitrator until it has been approved by the Registrar as to its form.*
10. *The Emergency Arbitrator shall have no power to act after the Tribunal is constituted. The Tribunal may reconsider, modify or vacate any interim order or Award issued by the Emergency Arbitrator, including a ruling on his own jurisdiction. The Tribunal is not bound by the reasons given by the Emergency Arbitrator. Any interim order or Award issued by the Emergency Arbitrator shall, in any event, cease to be binding if the Tribunal is not constituted within 90 days of such order or Award or when the Tribunal makes a final Award or if the claim is withdrawn.*

11. *Any interim order or Award by the Emergency Arbitrator may be conditioned on provision by the party seeking such relief of appropriate security.*
12. *The parties agree that an order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made, and undertake to carry out the interim order or Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made.*
13. *The costs associated with any application pursuant to this Schedule 1 may initially be apportioned by the Emergency Arbitrator, subject to the power of the Tribunal to determine finally the apportionment of such costs.*
14. *These Rules shall apply as appropriate to any proceeding pursuant to this Schedule 1, taking into account the urgency of such a proceeding. The Emergency Arbitrator may decide in what manner these Rules shall apply as appropriate, and his decision as to such matters is final and not subject to appeal, review or recourse. The Registrar may abbreviate any time limits under these Rules in applications made pursuant to proceedings commenced under Rule 30.2 and Schedule 1.*

(Emphasis supplied)

The Delhi International Arbitration Centre (DIAC) (Arbitration Proceedings) Rules 2018

2.1 (c) "Arbitral Tribunal" or "Tribunal" means person(s) acting as arbitrators or a sole arbitrator and includes an Emergency Arbitrator.

Part E - Emergency Arbitration And Interim Relief

14. Emergency Arbitration

14.1 If a party is in a requirement of urgent interim or conservatory measures that cannot await the formation of the Arbitration

Tribunal, it may make an application to the Secretariat addressed to the Coordinator, with a simultaneous copy thereof to the other parties to the arbitration agreement for such measures.

14.2 The party making such an application shall:

(a) include a statement briefly describing the nature and circumstances of the relief sought and specific reasons why such relief is required on an emergency basis and the reasons why the party is entitled to such relief;

(b) pay the relevant application fee for the appointment of the Emergency Arbitrator, and

(c) file proof of service of such application upon the opposite parties.

14.3 The Emergency Arbitrator's fee shall be as prescribed in The Delhi International Arbitration Centre (Administrative Costs and Arbitrators' Fees) Rules and the party invoking the provision of Emergency Arbitrator shall deposit such fees along with the Application.

14.4 The Secretariat, with the consent of the Chairperson or the Sub-Committee appointed by the Chairperson shall appoint the Emergency Arbitrator within two days of making of such request (excluding non-business days).

14.5 Prior to accepting his appointment, a prospective Emergency Arbitrator must disclose to the Coordinator any facts or circumstances which may give rise to justifiable doubts as to his impartiality or independence. Any challenge to the appointment of the Emergency Arbitrator must be made within one business day of the communication by the Coordinator to the parties of the appointment of the Emergency Arbitrator and the circumstances disclosed.

14.6 An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute unless agreed by all the parties.

14.7 The Emergency Arbitrator so appointed shall schedule a hearing including the filing of pleadings and documents by the parties within two business days of his appointment. The Emergency Arbitrator shall provide a reasonable opportunity of being heard to all the parties before granting any urgent, interim or conservatory measures and proceed to make an order by giving

reasons. The parties shall comply with any order made by the Emergency Arbitrator.

14.8 The Emergency Arbitrator shall have the power to order any interim relief that he deems necessary. An order of the Emergency Arbitrator shall be made in writing, with a brief statement of reasons. An order or award of an Emergency Arbitrator shall be enforceable in the manner as provided in the Act.

14.9 The Emergency Arbitrator shall ensure that the entire process from the appointment of the Emergency Arbitrator to making the order shall be completed within seven (7) days.

14.10 The Emergency Arbitrator shall become functus officio after the order is made and shall not be a part of the Arbitral Tribunal, which may be formed subsequently and in accordance with Rule 14 unless otherwise agreed to by all the parties.

14.11 The order for urgent interim or conservatory measures passed by the Emergency Arbitrator shall not bind the Arbitral Tribunal on the merits of any issue or dispute that the said Tribunal may be required to determine.

14.12 The order passed by the Emergency Arbitrator shall remain operative for a period of two months from the date of passing of the order unless modified, substituted or vacated by the Arbitral Tribunal. The Arbitral Tribunal will also have the power to extend the order beyond the period of two months.

14.13 Any order of the Emergency Arbitrator may be confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative.

VIII. Discussion and Findings

Legal status of Emergency Arbitrator

133. The Emergency Arbitrator is a sole arbitrator appointed by the Arbitration Institution to consider the Emergency Interim Relief Application in cases where the parties have agreed to arbitrate according to the Rules of that Arbitration Institution which contain provisions relating to Emergency Arbitration. The status of the Emergency

Arbitrator is based on party autonomy as the law gives complete freedom to the parties to choose an arbitrator or an Arbitral Institution. The powers of the Emergency Arbitrator are the same of those of a Arbitral Tribunal to decide the interim measures. The order/award of the Emergency Arbitrator is binding on all the parties. However, they do not bind the subsequently constituted Arbitral Tribunal and the Arbitral Tribunal is empowered to reconsider, modify, terminate or annul the order/award of the Emergency Arbitrator.

134. The important characteristics of an Emergency Arbitration are that the Emergency Arbitrator has power to deal only with Emergency Interim Relief Application; the Emergency Arbitrator has to decide the Emergency Interim Relief Application within a fixed time frame of about 15 days; the Emergency Arbitrator cannot continue after formation of the Arbitral Tribunal; the Emergency Arbitrator's order/award can be reviewed/altered by the Arbitral Tribunal; the Emergency Arbitrator order/award can be challenged where seat of arbitration is located; and ordinarily the Emergency Arbitrator will not be a part of the Arbitral Tribunal. Institutions like SIAC appoint an Emergency Arbitrator within 24 hours of the request by a party and the Emergency Interim Relief Application is decided within 15 days.

135. The Emergency Arbitration was first adopted by *International Centre for Dispute Resolution* of *American Arbitration Association (AAA)* in 2006, followed by *Singapore International Arbitration Centre (SIAC) in 2010; Stockholm Chambers of Commerce (SCC)* in 2010; *International Chamber of Commerce (ICC)* in 2012; and *Hong Kong International Arbitration Centre* in 2013. *Swiss Chambers' Arbitration Institution;*

London Court of International Arbitration (LCIA); International Institute for Conflict Prevention and Resolution; China International Economic and Trade Arbitration Commission; Australian Centre for International Commercial Arbitration; Kigali International Arbitration Centre; Asian International Arbitration Centre and Dubai International Finance Centre have also incorporated the provisions relating to the Emergency Arbitration in their Rules.

136. In our country, the provisions relating to Emergency Arbitration have been incorporated by *Delhi International Arbitration Centre* (DIAC); *Mumbai Centre for International Arbitration* (MCIA); *Madras High Court Arbitration Centre* (MHCAC)*; Nani Palkhivala Arbitration Centre*; *Indian Council of Arbitration; Indian Institute of Arbitration & Mediation; and Bangalore International Mediation, Arbitration and Conciliation Centre.*

137. Rule 2.1(c) of the Rules of *Delhi International Arbitration Centre* (DIAC) defines *'Arbitral Tribunal'* to include an Emergency Arbitrator. Rule 14 contains similar provisions for appointment of an Emergency Arbitrator as contained in Rules of SIAC. Rule 14.8 provides that an order or of an award of an Emergency Arbitrator shall be enforceable in the manner as provided in the Act. The Rules of *Mumbai Centre for International Arbitration* (MCIA) and *Madras High Court Arbitration Centre* (MHCAC) also contain similar provisions for appointment of an Emergency Arbitrator.

138. The Emergency Arbitration is a very effective and expeditious mechanism to deal with the Emergency Interim Relief Application and has added a new dimension to the protection of the rights of the parties.

The advantage of the Emergency Arbitration mechanism is that a litigant is able to get the justice within 15 days, which is not possible in Courts. However, if the order of the Emergency Arbitrator is not enforced, it would make the entire mechanism of Emergency Arbitration redundant.

139. In the present case, the arbitration agreement is contained in Clause 25.2.1 of the Shareholder's Agreement dated 22nd August, 2019 according to which, all disputes between the parties have to be referred to and resolved by arbitration in accordance with the Rules of *Singapore International Arbitration Centre* (SIAC). The seat of arbitration is New Delhi and the Courts at New Delhi have exclusive jurisdiction. The Rules of *Singapore International Arbitration Centre* contain provisions for appointment of an Emergency Arbitrator to consider the Emergency Interim Relief. Rule 1.3 defines an "*Emergency Arbitrator*" as an arbitrator appointed in accordance with Schedule I. Rule 7 of Schedule I empowers the Emergency Arbitrator to exercise all powers of an Arbitral Tribunal.

140. Section 2(6) of Arbitration and Conciliation Act gives complete freedom to the parties to authorise any person including an institution to determine the disputes between the parties. Section 2(8) of the Arbitration and Conciliation Act provides that where the parties have authorised an institution, the agreement shall include the Arbitration Rules of that institution. Section 19(2) of the Arbitration and Conciliation Act gives complete freedom to the parties to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings.

141. Section 2(1)(a) of the Arbitration and Conciliation Act defines "*arbitration*" as any arbitration whether or not administered by

permanent arbitral institution. Section 2(1)(a) is an inclusive definition which includes *ad hoc* as well as institutional arbitration. Section 2(1)(c) defines "*arbitral award*" to include an interim award. Section 2(1)(d) defines "*arbitral tribunal*" to mean a sole arbitrator or a panel of arbitrators.

142. Section 17 of the Arbitration and Conciliation Act empowers the arbitral tribunal to pass an interim order and Section 17(2) provides that the interim order passed by the Arbitral Tribunal shall be deemed to be an order of the Court and shall be enforceable as an order of the Court.

143. By virtue of Section 2(8) of the Arbitration and Conciliation Act, the Rules of *Singapore International Arbitration Centre* are incorporated in the arbitration agreement between the parties. By incorporating the Rules of SIAC into the arbitration agreement, the parties have agreed to the provisions relating to Emergency Arbitration.

144. This Court is of the view that the Emergency Arbitrator is an Arbitrator for all intents and purposes, which is clear from the conjoint reading of Sections 2(1)(d), 2(6), 2(8), 19(2) of the Arbitration and Conciliation Act and the Rules of SIAC which are part of the arbitration agreement by virtue of Section 2(8). Section 2(1)(d) is wide enough to include an Emergency Arbitrator.

145. Under Section 17(1) of the Arbitration and Conciliation Act, the Arbitral Tribunal has the same powers to make interim order, as the Court has, and Section 17(2) makes such interim order enforceable in the same manner as if it was an order of the Court. The Interim Order is appealable under Section 37 of the Arbitration and Conciliation Act.

146. The current legal framework is sufficient to recognize the

Emergency Arbitration and there is no necessity for an amendment in this regard. In that view of the matter, reference to 246th Law Commission Report does not help the respondents.

147. The respondents have referred to Rules 30, 30.1, 30.2, 30.3 and Schedule I Rules 1, 6 and 10 of SIAC Rules to contend that the Emergency Arbitrator is not an Arbitrator. However, in view of the clear language of Rule 1.3 of SIAC Rules, which defines the Emergency Arbitrator as an Arbitrator, there is no doubt with respect to the legal status of an Emergency Arbitrator that he is an arbitrator for all intents and purposes.

148. According to the respondents, Rules of DIAC, MCIA and MHCAC are contrary to the provisions of the Arbitration and Conciliation Act. There is no merit in this submission. All the aforesaid Rules are legal, valid and enforceable.

149. The Emergency Arbitrator considered all the objections of the respondents on the validity of appointment of Emergency Arbitrator and has given reasoned findings in paras 97 to 109 reproduced in para 19 above. This Court agrees with the findings of the Emergency Arbitrator in this regard.

150. There is no merit in the respondents' objection that an Emergency Arbitrator is not an Arbitrator within the meaning of Section 2(1)(d); and the interim order is not enforceable under Section 17(2) of Arbitration and Conciliation Act. All these objections are rejected.

151. The respondents have relied upon ***Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd.,*** (2016) 234 DLT 349, which was considered and distinguished by the Division Bench

of this Court in ***Ashwani Minda v. U-Shin Ltd.,*** (2020) SCC OnLine Del 721. In ***Ashwani Minda*** (supra), a dispute arose out of a joint venture agreement between an Indian entity and a Japanese entity. The joint venture agreement contained an arbitration clause for resolution of disputes raised by the Indian entity under the Rules of *Japan Commercial Arbitration Association* (JCAA) and the seat of arbitration was Japan. The Indian entity invoked the arbitration and filed an application for interim relief which was considered and rejected by the Emergency Arbitrator. The Indian entity thereafter filed a petition for interim relief before this Court under Section 9 of the Arbitration and Conciliation Act. The learned Single Judge dismissed the petition holding that the Emergency Arbitrator rejected the claim by a very detailed and reasoned order and the claimant cannot invoke the jurisdiction under Section 9 of the Arbitration and Conciliation Act. The learned Single Judge further noted that the Court, in a petition under Section 9 of the Act, cannot sit as a Court of Appeal to examine the order of the Emergency Arbitrator. The learned Single Judge further noted that the mandate of the Emergency Arbitrator was continuing and it was open to the appellant to seek modification, if so advised. The appellant relied upon ***Raffles Design*** (supra) which was distinguished by the learned Single Judge. The claimant challenged the judgment of learned Single Judge before the Division Bench. The Division Bench of this Court rejected the challenge holding that a party having chosen to go to the Emergency Arbitrator and having failed to its in endeavour to obtain interim relief, cannot seek the same relief in Section 9 proceedings. The Division Bench distinguished ***Raffles Design*** (supra). The Division Bench upheld that the petition

under Section 9 of the Arbitration and Conciliation Act was not maintainable. Thus, the Division Bench clearly recognized the legal status of the Emergency Arbitrator as an Arbitrator under the Arbitration and Conciliation Act.

Whether Doctrine of Group of Companies applies only to proceedings under Section 8 of the Arbitration and Conciliation Act, as alleged by respondent No.2

152. The law relating to the *Group of Companies doctrine* is well settled by the Supreme Court in ***Chloro Controls India Private Limited v. Sever N Trent Water Purification Inc.***, (2013) 1 SCC 641, ***Cheran Properties Limited v. Kasturi and Sons Limited***, (2018) 16 SCC 413 and ***MTNL vs. Canara Bank***, (2020) 12 SCC 767. The *Group of Companies doctrine* binds the non-signatory entity where the multiple agreements reflect a clear intention of the parties to bind both the signatory and non-signatory entities within the same Group. The Supreme Court has laid down various tests for invoking *Group of Companies doctrine* in the aforesaid judgments.

153. In ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc.***, (2013) 1 SCC 641, the Supreme Court examined the *Group of Companies doctrine*. In this case, seven agreements were signed between different parties out of which arbitration clause was contained only in three agreements. In para 20, the Supreme Court noted that all the parties had not signed all the agreements and respondent Nos.3 and 4 were not signatory to any of the agreements. The arbitration was invoked against a non-signatory on the basis of *Group of Companies doctrine*. In the opening para of the judgment, the Supreme Court noted the expanding

need for providing new dimensions to arbitration jurisprudence. Relevant portion of para 1 of the judgment is reproduced hereunder:

> *"The expanding need for international arbitration and divergent schools of thought, have provided new dimensions to the arbitration jurisprudence in the international field. The present case is an ideal example of invocation of arbitral reference in multiple, multi-party agreements with intrinsically interlinked causes of action, more so, where performance of ancillary agreements is substantially dependent upon effective execution of the principal agreement."*
>
> *(Emphasis supplied)*

154. The Supreme Court formulated the following question for consideration in para 1.3 of the judgment:

> *"1.3. Whether in a case where multiple agreements are signed between different parties and where some contain an arbitration clause and others do not and further the parties are not identically common in proceedings before the court (in a suit) and the arbitration agreement, a reference of disputes as a whole or in part can be made to the Arbitral Tribunal, more particularly, where the parties to an action are claiming under or through a party to the arbitration agreement?"*
>
> *(Emphasis supplied)*

155. The Supreme Court held that *Group of Companies doctrine* shall bind a non-signatory party to arbitration where there is a clear intention of the parties to bind both the signatory as well as the non-signatory parties who are part of group of companies. The '*intention of the parties'* is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties. Paras 71 and 72 of the judgment are reproduced hereunder:

> *"71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement.*
> *72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties."*
>
> *(Emphasis supplied)*

156. The Supreme Court laid down the tests to be applied for invoking the *Group of Companies doctrine* namely, (i) direct relationship to the party signatory to the arbitration agreement, (ii) direct commonality of the subject-matter and (iii) the agreement between the parties being a composite transaction. (iv) The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. (v) Besides all this, the Court has to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same

in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed. Relevant portions of the judgment are reproduced hereunder:

> *"73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.*
>
> *xxx xxx xxx*
>
> *76. The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or interdependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the*

parties and the attendant circumstances on the other.

xxx xxx xxx

78. In India, the law has been construed more liberally, towards accepting incorporation by reference. …. The Court observed that while ascertaining the intention of the parties, attempt should be made to give meaning and effect to the incorporation clause and not to invalidate or frustrate it by giving it a literal, pedantic and technical reading."

(Emphasis supplied)

157. In ***Cheran Properties Limited v. Kasturi and Sons Limited***, (2018) 16 SCC 413, the agreement between Kasturi Sons and a company called KCP contained the arbitration clause. The parties commenced the arbitration proceedings which resulted in the award. The successful party in the arbitration award filed a petition before NCLT to enforce the award against the appellant (*Cheran Properties*) who was not a party to the arbitration agreement or the arbitration proceedings. The appellant challenged the proceedings on various grounds *inter-alia* that the appellant was not a signatory to the arbitration agreement and therefore, the award cannot be enforced against the appellant.

158. The Supreme Court examined the entire law as to whether the award can be enforced against an entity who was not a party to the arbitration agreement or arbitration proceedings. The Supreme Court recognized the *Group of Companies doctrine* in modern business transactions. The Supreme Court held that (i) the circumstances in which the agreements were entered into would reflect the intention to bind both signatory and non-signatory entities within the same group. (ii) Factors such as relationship of a non-signatory to a signatory to the agreement, commonality of the subject matter, and (iii) the composite nature of the

transaction are to be taken into consideration. (iv) The effort is to find the true essence of the business arrangement, and to unravel from a layered structure of commercial arrangements, the intent to bind a party who is not formally a signatory, but has assumed the obligation to be bound by the actions of the signatory. The Court held the award to be enforceable against a non-signatory entity. The relevant portion of the judgment is reproduced as under:-

> *"23. As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group. In holding a non-signatory bound by an arbitration agreement, the court approaches the matter by attributing to the transactions a meaning consistent with the business sense which was intended to be ascribed to them. Therefore, factors such as the relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of subject-matter and the composite nature of the transaction weigh in the balance. The group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.*
>
> *xxx xxx xxx*
>
> *25. Does the requirement, as in Section 7, that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as well as adjudicatory trends indicate that in certain*

situations, an arbitration agreement between two or more parties may operate to bind other parties as well...

xxx xxx xxx

27. Garry B. Born in his treatise on International Commercial Arbitration indicates that:

> *"The principal legal bases for holding that a non-signatory is bound (and benefited) by an arbitration agreement ... include both purely consensual theories (e.g., agency, assumption, assignment) and non-consensual theories (e.g. estoppel, alter ego)"*

Explaining the application of the alter ego principle in arbitration, Born notes:

> *"Authorities from virtually all jurisdictions hold that a party who has not assented to a contract containing an arbitration clause may nonetheless be bound by the clause if that party is an 'alter ego' of an entity that did execute, or was otherwise a party to, the agreement. This is a significant, but exceptional, departure from the fundamental principle ... that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate rights and liabilities"*

28. Explaining group of companies doctrine, Born states:

> *"the doctrine provides that a non-signatory may be bound by an arbitration agreement where a group of companies exists and the parties have engaged in conduct (such as negotiation or performance of the relevant contract) or made statements indicating the intention assessed objectively and in good faith, that the non-signatory be bound and benefited by the relevant contracts. "*

While the alter ego principle is a rule of law which disregards the effects of incorporation or separate legal personality, in contrast the group of companies doctrine is a means of identifying the intentions of parties and does not disturb the legal personality of the entities in question. In other words:

> *"the group of companies doctrine is akin to principles of agency or implied consent, whereby the corporate affiliations among distinct legal entities provide the foundation for concluding that they were intended to be*

parties to an agreement, notwithstanding their formal status as non-signatories."

(Emphasis supplied)

159. Applying the aforesaid principles, the Supreme Court rejected the appellant's defence that the award cannot be enforced against the appellant. The Supreme Court held that to allow such a defence to prevail would be to cast the mutual intent of the parties to the winds and to put a premium on dishonesty. Relevant portion of para 35 is reproduced hereunder:

"35…Having regard to this factual context, the defence of the appellant against the enforcement of the award cannot be accepted. To allow such a defence to prevail would be to cast the mutual intent of the parties to the winds and to put a premium on dishonesty"

(Emphasis supplied)

160. The Supreme Court further noted that the arbitral award has the character of a decree of a Civil Court and is capable of being enforced as if it was a decree. The Supreme Court further noted that the arbitral award had attained finality and can be enforced in accordance with the provisions of the Code of Civil Procedure in the same manner as if it were a decree of the Court. Relevant portions of para 36 and 38 are reproduced hereunder:

"36. … The arbitral award has the character of a decree of a civil court under Section 36 and is capable of being enforced as if it were a decree. …"

xxx xxx xxx

"38. In the present case, the arbitral award required the shares to be transmitted to the claimants. The arbitral award attained finality. The award could be enforced in accordance with the provisions of the Code of Civil Procedure, in the same manner

> *as if it were a decree of the court. The award postulates a transmission of shares to the claimant. The directions contained in the award can be enforced only by moving the Tribunal for rectification in the manner contemplated by law."*
>
> *(Emphasis supplied)*

161. In ***Mahanagar Telephone Nigam Limited v. Canara Bank***, (2020) 12 SCC 767, the Supreme Court invoked the *Group of Companies doctrine* to join CANFINA, a wholly own subsidiary of Canara Bank in arbitration proceedings between MTNL and Canara Bank. The Supreme Court held that the *Group of Companies doctrine* can be invoked in cases where (i) there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality. (ii) This doctrine applies in particular when the funds of one company are used to financially support or re-structure the other members of the group. In such a situation, signatories and non-signatories have been bound together under the arbitration agreement. Relevant portions of the said judgment is reproduced hereunder:

> *"10.* ***Joinder of Canfina in the arbitral proceedings***
>
> *10.1. Canara Bank raised an objection to the joinder of Respondent 2 CANFINA as a party to the arbitration proceedings.*
>
> *10.2. As per the principles of contract law, an agreement entered into by one of the companies in a group, cannot be binding on the other members of the same group, as each company is a separate legal entity which has separate legal rights and liabilities. The parent, or the subsidiary company, entering into an agreement, unless acting in accord with the principles of agency or representation, will be the only entity in a group, to be bound by that agreement. Similarly, an arbitration agreement is also governed by the same principles, and normally, the company entering into the agreement, would*

alone be bound by it.

10.3. A non-signatory can be bound by an arbitration agreement on the basis of the "group of companies" doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties. Courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract.

10.4. The doctrine of "group of companies" had its origins in the 1970s from French arbitration practice. The "group of companies" doctrine indicates the implied consent to an agreement to arbitrate, in the context of modern multi-party business transactions. It was first propounded in ***Dow Chemical v. Isover-Saint-Gobain****, 1984 Rev Arb 137, where the Arbitral Tribunal held that:*

> *"... the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise."*

10.5. The group of companies doctrine has been invoked by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group. The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in

the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts.

10.6. The circumstances in which the "group of companies" doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject-matter; the composite nature of the transaction between the parties. A "composite transaction" refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

10.7. The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or restructure other members of the group.

10.8. The "group of companies" doctrine has been invoked and applied by this Court in Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc. with respect to an international commercial agreement. Recently, this Court in ***Ameet Lalchand Shah v. Rishabh Enterprises****, (2018) 15 SCC 678, invoked the group of companies doctrine in a domestic arbitration under Part I of the 1996 Act.*

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10.11. It will be a futile effort to decide the disputes only between MTNL and Canara Bank, in the absence of CANFINA, since undisputedly, the original transaction emanated from a transaction between MTNL and CANFINA — the original purchaser of the bonds. The disputes arose on the cancellation of the bonds by MTNL on the ground that the entire

consideration was not paid. <u>There is a clear and direct nexus between the issuance of the bonds, its subsequent transfer by CANFINA to Canara Bank, and the cancellation by MTNL, which has led to disputes between the three parties. Therefore, CANFINA is undoubtedly a necessary and proper party to the arbitration proceedings</u>.

10.12. Given the tripartite nature of the transaction, there can be a final resolution of the disputes, only if all three parties are joined in the arbitration proceedings, to finally resolve the disputes which have been pending for over 26 years now…

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11. In view of the aforesaid discussion, the present appeals are partly allowed. We invoke the group of companies doctrine, to join Respondent 2 CANFINA i.e. the wholly owned subsidiary of Respondent 1 Canara Bank, in the arbitration proceedings pending before the sole arbitrator…"

(Emphasis supplied)

162. The *Group of Companies doctrine* has been very succinctly explained in the fourth edition of *Malhotra's Commentary on the Law of Arbitration* by *Justice Indu Malhotra* as under:

*"**<u>Group of Companies Doctrine in International Commercial Arbitration</u>***

(At pages 154 to 158)

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<u>The group of companies doctrine has been developed to extend an arbitration clause to non-signatory parties. Multinational groups operate through several subsidiaries, affiliates, or holding companies, which may constitute a collective economic unit, rather than independent legal entities. This will apply also in cases when funds of one company are used to financially support or re-structure other members of the group. The group of companies doctrine originally developed in taxation and company law, wherein groups of companies are treated as a unit for taxation and accountancy purposes</u>.

*The group of companies doctrine was followed by the Supreme Court in the case of **Chloro Controls India Ltd. v.***

Severn Trent Water Purification Inc. & Ors., *(2013) 1 SCC 641, whereby the court held that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.*

The decision of the Supreme Court in ***Chloro Controls*** *was followed in* ***GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors.,*** *2017(6) Arb LR 447 (Delhi) wherein GMR Energy Limited, a guarantor to GMR Chattisgarh Energy Limited ("GCEL") was sought to be made a party to the arbitration proceedings between Doosan Power Systems India Private Limited, GMR Infrastructure Limited and GCEL. Relying on the decision in* ***Chloro Controls****, it was held that GMR Energy Limited was the alter ego of GCEL as (a) GCEL was a joint venture of the GMR Group with GMR Energy as the parent company; (b) GMR Energy and GCEL did not maintain their separate legal personalities and comingled corporate funds; (c) GMR Energy guaranteed to make certain payments on behalf of GCEL, and discharged its liability by making part payment of the same; (d) at the time of entering into two MoUs with Doosan India, GMR Energy had acquired a 100% stake in GCEL.*

The Madras High Court in ***SEI Adhavan Power Private Limited and Ors. v Jinneng Clean Energy Technology Limited and Ors.****, 2018 (4) CTC 464 also followed the decision in* ***Chloro Controls*** *to join a non-signatory as a party to arbitration. The court relied on factors such as shared office, e-mails, agent relationship, etc, to conclude that the signatory and non-signatory were alter egos of one another and therefore the non-signatory could be made party to the arbitration.*

The group of companies doctrine has, however, acquired particular relevance in international arbitration, to extend the arbitration agreements signed by one or more companies in a group, to non-signatory members of the same group. The doctrine was introduced into arbitration in the beginning of the 1980s in ***Dow Chemical v Isover-Saint-Gobain*** *ICC Award*

No. 4131 of 1982. In this case, two subsidiaries of the Dow Chemical company group entered into two separate distribution agreements with Boussois-Isolation, whose rights and obligations were subsequently assigned to Isover-Saint-Gobain. A dispute arose out of the distribution agreements, both of which contained an ICC arbitration clause, the two Dow Chemeical subsidiaries along with their parent company, Dow Chemical, USA and another subsidiary Dow Chemical France of the same group initiated arbitration proceedings against Isover-Saint-Gobain. It was contended by the respondent that the tribunal lacked jurisdiction over the non-signatory parties viz. the parent company and the third subsidiary, and second, that the claims brought by non-signatories were not admissible. The tribunal rejected the objections and assumed jurisdiction over the non-signatory companies of the Dow Chemical group. The tribunal invoked the group of companies concept. On that basis, the tribunal held that the arbitration clause in the distribution agreement extended to the non-signatory parties because: first, the signatories and the non-signatories were companies belonging to the same group; second, the factual context of the contractual relationship revealed the active role of the non-signatories in the conclusion and performance of the distribution agreements; third, there was a common intention of all the parties, both signatories and non-signatories, to arbitrate. The award was challenged before the Court of Appeal of Paris, which upheld the award to confirm jurisdiction of the tribunal over the non-signatories. Ever since, the group of companies doctrine has been endorsed and applied by tribunals and national courts.

For the group of companies doctrine to be invoked, tribunals will examine the corporate structure of the group. It is not enough for the signatory and the non-signatory members to belong to the same group. The doctrine can be invoked only if it is established that the signatory and the non-signatory have established a tight group structure, where the parent company holds the commanding role in the business strategy of the group, and several other subsidiaries have been set up to

execute its business project, and constitute executive branches of the parent company. A tight group structure is also evidenced when several companies share intellectual property rights, assets, and financial or human resources including corporate name, offices and premises, bank accounts and trademarks. In the ***Dow Chemical*** *case, the tribunal found that the several signatory and the non-signatory companies of the Dow Chemical group were sharing the use of the same trademarks. Additionally, it is required that the non-signatory company has had an active role in the negotiations, the performance, or the termination of the contract, which contains the arbitration agreement.*

In ***Contractor v Yugoslavian Enterprise****, ICC Award No. 6000 of 1988 the tribunal assumed jurisdiction over the non-signatory affiliate of the signatory company, as it was satisfied that the two affiliate companies had close business and corporate links because they were in all respects substantially identical entities, although separate companies under the US law as both companies were owned by the same shareholders in equal proportion. Furthermore, the subject-matter and business place of their activities were the same, and the persons had been acting as representatives for both of them.*

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Group of Companies Doctrine in Domestic Arbitrations

The decision of the Supreme Court in ***Chloro Controls*** *was in relation to an international commercial arbitration. In* ***Ameet Lalchand Shah & Ors. v. Rishabh Enterprises and Anr.*** *AIR 2018 SC 3041 the Supreme Court answered whether this principle would extend to domestic arbitrations as well. In Ameet Lalchand, Rishabh Enterprises had entered into four separate related agreements for the commissioning of a solar power plant in Uttar Pradesh. Of these, three contained arbitration agreements and one did not. In a civil suit filed by Rishabh Enterprises, the respondent to the suit filed an application under Section 8 of the 1996 for reference to arbitration. The Supreme Court observed that the 2015 Amendment to the Arbitration had brought in an amendment to Section 8 which made it in line with Section 45 of the Act...*

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The Supreme Court was of the view that "[a]ll the four agreements are interconnected" and that in the present case, "several parties [w]ere involved in a single commercial project (Solar Plant at Dongri) executed through several agreements/contracts" and therefore "all the parties can be covered by the arbitration clause in the main agreement."

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Can a Non-signatory be Bound by an Arbitration Agreement?
(At pages 283 to 287)

*Ordinarily, an arbitration takes place between the persons who are signatory parties to the arbitration agreement, as well as the underlying substantive commercial contract. The general principle is that if one or more parties are not signatories to the arbitration agreement, the dispute cannot be referred to arbitration. Each company is a separate and distinct legal entity, and the mere fact that companies may have common shareholders or directors would not make the two companies a single entity. For a company to be bound by an arbitration agreement, it should be a signatory and party to the said agreement. If there is a dispute between a party to an arbitration agreement with other parties to the arbitration agreement, as also non-parties, the reference may be made only with respect to the signatories to the arbitration agreement (**S.N. Prasad, Hitek Industries (Bihar) Ltd. v Monnet Finance Ltd.** (2011) 1 SCC 320.*

*A non-signatory has however been held to be bound by an arbitration agreement by invoking various doctrines such as the principal-agent relationship, piercing the corporate veil, joint venture agreements, succession, implied consent, third party beneficiaries, guarantors, assignment, (**Kotak Mahindra Bank v S. Nagabhushan and Ors.** 2018 (2) Arb LR 488 (Delhi)) and other concepts of contractual rights.*

*The 'group of companies' doctrine has been applied where an arbitration agreement is entered into by a company being a constituent of a group of corporate entities, to bind a non-signatory affiliate **Chloro Controls India (P) Ltd. v Severn Trent Water Purification Inc.** (2013) 1 SCC 641 in certain*

circumstances. For instance, it is invoked in a case where there is a composite transaction, and a clear intention of the parties to bind both the signatory and non-signatory parties.

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The doctrine implies that a non-signatory party could be subjected to arbitration provided the transactions were with a group of companies, and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, 'intention of the parties' is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

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In cases of composite transactions and multiple agreements, the intention of the parties to refer non-signatories to arbitration can be discerned if the agreements are so inter-linked that only their composite performance can discharge the mutual obligations of the parties.

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The doctrine was essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicated that the intent was to bind both signatories and non-signatories. The effort must be to find the true essence of the business arrangement and unravel from a layered structure of commercial arrangements, the intent to bind a party who is not formally a signatory to the agreement, but has assumed the obligations of the signatory.

In ***Chatterjee Petrochem Co. v Haldia Petrochemicals Ltd.,*** *(2011) 10 SCC 466, the parties entered into the principal agreement datd 12 January 2002 which provided for arbitration before the ICC. Subsequent agreements dated 8 March 2002 and 30 July 2004 were entered into between the parties and an affiliate of the appellant company. It was held that the principal agreement dated 12 January 2002 continued to remain valid as it was not novated by the subsequent agreements dated 8 March 2002 and 30 July 2004 which did not contain any arbitration clause. The court relied on the doctrine of group of companies and held that a non-signatory*

affiliate of the appellant could invoke the arbitration clause as it was a party to the subsidiary agreements dated 8 March 2002 and 30 July 2004 and was directly affected by the disputes.

Another illustration where the court invoked the group of companies doctrine was in ***Ameet Lalchand Shah & Ors. v Rishabh Enterprises & Anr****, (2018) 15 SCC 678, where the parties had entered into four inter-connected agreements, and several parties were involved for setting up a solar plant, which was a single commercial project. The clauses in the four agreements would make them an integral part of the principal agreement. The principal agreement and the agreements for purchase of the power generating equipments, and for engineering, installation and commission of the plant contained arbitration clauses. However, the fourth agreement for purchase of the photovoltaic products for energising the solar plant did not contain an arbitration clause. The court took the view that even though there are different agreements involving several parties, these agreements are inter-related and are in pursuance of a single commercial project. The disputes between all the parties, under the four agreements, were referred to a common arbitration.*

The Courts have held that where there is a tight group structure with strong organizational and financial links, so as to constitute the corporate entities into a single economic unit, or a single economic reality, the group of companies doctrine could be invoked. In ***MTNL v Canara Bank****, AIR 2019 SC 4449 the court invoked the group of companies doctrine, to join a wholly owned subsidiary to the arbitration proceedings. This doctrine would apply in particular when the funds of one company are used to financially support or restructure the other members of the group."*

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Non-Signatories/Third Parties to an Arbitration **(At pages 1362 to 1366)**

The amendments to Section 17 of the 1996 Act has conferred the power upon arbitral tribunals to grant interim

reliefs like preservation, interim custody or sale of goods which are the subject-matter of the arbitration agreement, etc. The amended Section 17(1) provides that the arbitral tribunal shall have the same power to make orders, as the court has, for the purpose of, and in relation to, any proceedings before it. Section 17(2) as amended by the 2015 Amendment, makes such interim orders passed by the arbitral tribunals, enforceable in the same manner as if it were an order passed by a court. For instance, passing an order of injunction restraining a bank from encashment of a bank guarantee.

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In recent arbitration jurisprudence, third parties in certain situations have been held to be a beneficiary of an arbitration clause, or bound by an arbitration agreement, as in the following circumstances: first, invoking the 'group of companies' doctrine, pursuant to which the rights and obligations arising from an arbitration agreement may, in certain circumstances, be extended to other members of the same group of companies'; second, by operation of general rules of private law-principally, those governing assignment, agency and succession. By way of illustration, the affiliate of a signatory to an arbitration clause may find itself joined as a co-respondent in an arbitration proceeding; an assignee of contract may be able to commence arbitration against the insurer of the original insured party; a principal may find itself bound by an arbitration agreement signed by its agent or affiliate; or a merged entity may continue to prosecute arbitral proceedings commenced by one of its original constituent entities.

In most jurisdictions, the necessary threshold for a third party beneficiary to be impleaded in an arbitration is to establish that the parties sought to confer a substantive benefit on the third party under the contract containing the arbitration agreement. Once this is established, the third party beneficiary will automatically be entitled to enforce the arbitration clause contained in the contract.

(a) The 'group of companies' doctrine

Arbitration agreements may be extended to the parent or an affiliate company of a contractual party, provided that such "non-signatory" was involved in the discussions, execution, performance or termination of the contract in dispute. The doctrine has its origin in French arbitration practice of the 1970s. The doctrine was first formulated by an ICC Tribunal in ***Dow Chemical v Isover Saint Gobain*** *wherein the tribunal decided that non-signatory companies in a group could rely on an arbitration clause in contracts between Isover St. Gobain and two Dow Chemical group companies. The tribunal held that a group of companies constituted one and the same economic reality (une realite economique unique) which the tribunal should take into account when ruling on its jurisdiction.*

Courts have relied on the doctrine to hold that an arbitration agreement is enforceable against third parties who are involved in the execution or performance of the contract, or when the contract and conduct of these parties make it possible to presume that they were aware of the existence and scope of the arbitration clause. The application of this doctrine is fact-dependent, and the conduct, involvement of the non-signatory parties is of crucial significance.

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In cases of composite transactions and multiple agreements, the intention of the parties to refer non-signatories to arbitration can be discerned if the agreements are so inter-linked that only their composite performance can discharge the mutual obligations of the parties.

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In a case where several inter-connected agreements are entered into involving several parties, for setting up a single commercial project, which makes each of the agreements an integral part of the principal agreement, the court would refer all the parties to arbitration. The disputes between the parties to various agreements could be resolved only by referring all the parties in the inter-connected agreements to the arbitration. In ***Ameet Lalchand Shah v Rishabh Enterprises****, the court held that even though the sale and purchase agreement did not*

contain an arbitration clause, a non-signatory may be bound by an arbitration agreement, since all the agreements were inter-connected, which was for the purpose of commissioning a Photovoltaic Solar Plant Project."

(Emphasis supplied)

163. ***Summary of Principles laid down by the Supreme Court on the Group of Companies doctrine***

163.1 *As the law has evolved, it has recognised that modern business transactions are often effectuated through multiple layers and agreements. There may be transactions within a Group of Companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group.*

163.2 *The Group of Companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories. The effort is to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.*

163.3 *Group of Companies doctrine can be invoked to bind a non-signatory entity where a Group of Companies exist and the parties have engaged in conduct, such as negotiation or performance of the relevant contract or made statements indicating the intention assessed objectively and in good faith, that the non-signatory be bound and benefited by the relevant*

contracts.

163.4 *The Group of Companies doctrine will bind a non-signatory entity where an arbitration agreement is entered into by a company, being one within a group of companies, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates.*

163.5 *A non-signatory party can be subjected to arbitration where there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties who are part of Group of Companies. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.*

163.6 *Direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court has to examine whether a composite reference of such parties would serve the ends of justice.*

163.7 *Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter*

containing the arbitration agreement and such agreements being so intrinsically intermingled or interdependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

163.8 *While ascertaining the intention of the parties, attempt should be made to give meaning and effect to the incorporation clause and not to invalidate or frustrate it by giving it a literal, pedantic and technical reading.*

163.9 *Tests laid down by the Supreme Court to bind a non-signatory of an arbitration agreement on the basis of Group of Companies doctrine:*

163.9.1 *The conduct of the parties reflect a clear intention of the parties to bind both the signatory as well as the non-signatory parties.*

163.9.2 *The non-signatory company is a necessary party with reference to the common intention of the parties.*

163.9.3 *The non-signatory entity of the group has been engaged in the negotiation or performance of the contract.*

163.9.4 *The non-signatory entity of the group has made statements indicating its intention to be bound by the contract.*

163.9.5 *A direct relationship between the signatory to the arbitration agreement and the non-signatory entity of the*

group; direct commonality of the subject-matter and composite nature of transaction between the parties.

163.9.6 *The performance of the agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreement for achieving the common object.*

163.9.7 *There is tight group structure with strong organizational and financial links so as to constitute a single economic unit or a single economic reality.*

163.9.8 *The funds of one company are used to financially support or restructure other members of the group.*

163.9.9 *The composite reference of disputes of fresh parties would serve the ends of justice.*

Findings of the Emergency Arbitrator on Group of Companies doctrine

164. The Emergency Arbitrator considered the objections of respondent No.2 in paras 110 to 146 of the interim order. The Emergency Arbitrator noted in para 118 of the interim order that a "*party"* to an arbitration agreement defined in Section 2(1)(h) of the Arbitration and Conciliation Act need not be a signatory to the arbitration agreement. The Emergency Arbitrator referred to and relied upon the aforesaid three Supreme Court judgments, namely, ***Chloro Controls*** (supra), ***Cheran Properties Ltd.*** (supra) and ***MTNL vs. Canara Bank*** (supra).

165. In para 136, the Emergency Arbitrator recorded the *prima facie* satisfaction that FRL is a proper party as the facts on record establish a cogent commonality, intimate interconnectivity and undeniable indivisibility. Para 136 of the interim order is reproduced hereunder:

> *"136. The Claimant has prima facie satisfied the established legal criteria that makes FRL a proper party to these proceedings. The facts on record clearly establish the cogent commonality, intimate*

interconnectivity, and undeniable indivisibility of the contractual arrangements in the Agreements. It is apparent that none of these Agreements would have been entered into without the others. This indeed appears to be an intimate composite transaction between the Claimant and all the Respondents. FRL was actively involved in its negotiation, performance and was its ultimate beneficiary."

(Emphasis supplied)

166. In para 139 of the interim order, the Emergency Arbitrator recorded nine factors which *prima facie* make out a strong case for including FRL in these proceedings. Para 139 of the interim order is reproduced hereunder:

> *"139. The following factors submitted by the Claimant prima facie make out a strong case for including FRL in these proceedings, by viewing it as being within the scope of the arbitration clause:*
> *(a) the intertwined content of the Agreements with several cross references and similar clauses in each of them;*
> *(b) simultaneous discussions and negotiations in relation to the Agreements. The FRL SHA only came into existence because of the framework arrangement that the Agreements be entered into;*
> *(c) single/common negotiating and legal team representing all Respondents including FRL vis-à-vis the Claimant in those discussions and negotiations including the FRL SHA;*
> *(d) full awareness and knowledge of all the Respondents (including FRL) that protective, special and material rights are being created in favour of FCPL for the Claimant's benefit;*
> *(e) the purpose of the Claimant's financial collaboration was to "strengthen and augment the business of FRL. It was the direct beneficiary of the investment by the Claimant. Section 6.4 of the SSA required FCPL to pay INR 14,990,000,000 to FRL in relation to the FRL Warrants within 3 Business Days of the SSA Closing Date;*
> *(f) statutory disclosures made by FRL to the public and statutory regulators of material terms of the Parties' Agreements vide the disclosures of 12 August 2019 and 22*

August 2019;

(g) the coordinated conduct and efforts of the Respondents before as well as after the Agreements were entered into and the control asserted and exerted by Respondent No 3 over all aspects of the entire transaction. He was, in fact, acknowledged to be the "Ultimate Controlling Person" as regards the Future Group;

(h) the objectives of the Agreements, i.e. for the Claimant (at some of time when permissible) to become the single largest shareholder of FRL, implemented through the preservation of (i) the Retail Assets of FRL and (ii) the Promoters' shareholding in FRL, free from any encumbrance. Notably, from April to July 2020, representatives from the Future Group have sought additional investments from the Claimant into FRL, prepared and discussed various structure options for the Claimant's investment to benefit FRL, increase the Claimant's stake in FRL, and also proposed that the Claimant's nominee would be on the board of directors of FRL. It is clear that rights were created in favour of FCPL (through the FRL SHA), for the benefit of the Claimant (under the FCPL SHA), and all the Respondents were fully aware and actively participated in those negotiations; and

(i) similar dispute resolution clauses prevail in all the Agreements. Even the FRL SHA (which is essentially a domestic agreement) has an SIAC dispute resolution clause."

167. Applying the well settled law relating to *Group of Companies doctrine* laid down by the Supreme Court to the present case, this Court is satisfied that the *Group of Companies doctrine* is applicable to the present case and respondent No.2 is a proper party to the arbitration proceedings for the reasons given by the learned Emergency Arbitrator and more particularly the following:-

167.1 Signatory and non-signatory company (FRL) belong to the same *Biyanis* Group.

167.2 The conduct of the parties reflects clear intention to bind the

signatory as well as non-signatory company (FRL) of *Biyanis* Group.

167.3 Simultaneous discussions and negotiations of the agreements, and common negotiating and legal team represented the signatory and non-signatory company (FRL).

167.4 Statutory disclosure made by non-signatory company (FRL) on 12th August, 2019 and 22nd August, 2019 to the public and statutory regulators of the material terms of the agreements.

167.5 Direct relationship of the non-signatory company to the signatory company of the Group, direct commonality of the subject matter and composite nature of transaction between the parties. It is apparent that none of these Agreements would have been entered into without the others.

167.6 The funds of the signatory company have been used to financially support the non-signatory company of the Group.

167.7 The agreements are so intrinsically intermingled that their composite performance only shall discharge the parties of their respective mutual obligations.

167.8 Similar disputes resolution clause in all the agreements reflects common intention of all the parties, both signatory and non-signatory, to arbitrate.

167.9 The composite reference of disputes of all the parties including non-signatory would serve the ends of justice.

167.10 The observations made by the Supreme Court in para 35 of ***Cheran Properties*** (supra) that "***To allow such a defence to prevail would be to cast the mutual intent of the parties to the***

winds and to put a premium on dishonesty*"* squarely applies to facts of the present case.

168. The Emergency Arbitrator has applied the well settled law laid down by the Supreme Court on the *Group of Companies doctrine* in ***Chloro Controls*** (supra), ***Cheran Properties*** (supra) and ***MTNL*** (supra) to the present case. All the tests laid down by the Supreme Court are satisfied in the present case and the Emergency Arbitrator has given nine reasons for applying the *Group of Companies doctrine* which are detailed in para 139 of the interim order. This Court is in complete agreement with the findings of the Emergency Arbitrator based on the well settled law laid down by the Supreme Court.

169. The respondents did not dispute the law laid down by the Supreme Court on *Group of Companies doctrine* in ***Chloro Controls*** (supra), ***Cheran Properties*** (supra) and ***MTNL*** (supra), before the Emergency Arbitrator. Reference be made to para 119 of the interim order in which the Emergency Arbitrator recorded that "*In the course of the oral submissions FRL's Counsel, Mr. Salve, did not dispute the correctness of these legal propositions*." However, respondent No.2 has set up a new plea before this Court that that the *Group of Companies doctrine* applies only to proceedings under Section 8 of the Arbitration and Conciliation Act, which is contrary to the law laid down by the Supreme Court. This Court is of the view that the law laid down by the Supreme Court is binding on all the parties and setting up a plea contrary to the well settled law declared by the Supreme Court is a very serious matter and is dealt with in the latter part of this judgment.

Whether the Interim Order is Nullity

170. According to the respondents, the interim order is *Nullity*. However, the respondents do not dispute that the three agreements in question are legal and valid. The basic feature of a valid agreement is that it is enforceable by law. A valid contract is *"An agreement enforceable by law"* whereas *"An agreement not enforceable by law"* is void (Section 2(g) and (h) of the Contract Act). The respondents have not disputed the agreements to be valid. All the three agreements are enforceable by law and the Emergency Arbitrator has merely enforced the valid agreements as per law.

171. The respondents have pleaded the interim order to be *Nullity* without pleading the law on *Nullity*; what are the essential ingredients of law on *Nullity* and how the essential ingredients of the law on *Nullity* are satisfied in the present case. At the outset, this Court finds the submission to be vague and unsubstantiated. It is like a litigant pleading before the Court that the interim order is *"Illegal"* without placing reliance on the applicable substantial law; what are the essential ingredients of the substantial law and how the essential ingredients are satisfied in the given case. The respondents' approach does not appear to be innocent as it is not believable that the respondents are not aware of the law on *Nullity*. This appears to be a deliberate attempt to mislead this Court. If the respondents had pleaded the agreements to be null and void, the respondents would be liable to return back the advantage/benefit received by them under Section 65 of the Contract Act. The respondents have therefore deliberately set up a vague plea of *Nullity* to mislead this Court.

172. According respondent No.2, combining/treating all the agreements as Single Integrated Transaction would result in the petitioner acquiring

control over respondent No.2 which would result in violation of the Foreign Exchange Management Act, 1999 and the Foreign Exchange Management (Non Debt Instruments) Rules, 2019 (FEMA FDI Rules).

173. The Emergency Arbitrator considered and rejected this contention in paras 137 & 138 of the interim order which are reproduced hereunder:-

> *"137. Mr. Darius Khambata argues that if the Claimant's single integrated contract approach was adopted, the arrangement might likely be illegal, since the Claimant's rights as a foreign investor were limited. He further suggests that the Claimant has misled the CCI on the structure of the relationships among the Parties. I do not think there is much substance in any of these arguments. First, the stake was not a direct investment made by the Claimant, but one through an Indian Owned Controlled Entity. This is a permissible arrangement under Indian law and appears to have received regulatory scrutiny. Second, the Agreements do not confer, and the claimant has not attempted to assert control of or over FRI.*
>
> *138. The documents that the Claimant filed with the CCI have to be read in their entirety, rather than cherry picked. A close reading does not suggest that there were misstatements made by the Claimant. It did not conceal its protective rights. Such protective rights do not amount to control of FRL. Rather, they oblige FRL not to act in a manner that would be inimical to the Claimant's interests as its long-term stakeholder."*
>
> *(Emphasis supplied)*

174. The Emergency Arbitrator held the investment to be in accordance with law as the control remains with FRL despite the protective rights. This Court agrees with the Emergency Arbitrator that the protective rights do not amount to control of the petitioner over FRL and do not violate any law.

175. The respondents have strongly relied upon the observations made in order dated 21st December, 2020 in ***Future Retail Ltd. v. Amazon.Com***

Investment Holdings LLC, 2020 SCC Online Del 1636. This Court notes that the Court has made certain *prima facie* observations while rejecting I.A.10376/2020 though the interim order of the Emergency Arbitrator was not under challenge in CS(COMM) 493/2020. Since the interim order of the Emergency Arbitrator was not under challenge in CS(COMM) 493/2020, the observations made by the Court while rejecting the stay application are *prima facie*. The law is well settled that findings of a Court on an issue is binding on the parties in subsequent proceedings in which the same issue arises for consideration if that issue was directly and substantially in issue in the previous suit and it was heard and finally decided by the Court meaning thereby that *prima facie* findings on an issue which was not directly and substantially in issue in previous case, do not have a binding effect.

176. The interim order dated 25th October, 2020 is legal, valid and enforceable as an order of the Court. Section 51 of the Code of Civil Procedure provides various modes by which the Court may execute a decree or order. Order XXI Rule 32(5) empowers the Court to enforce a decree or order for an injunction. Order XXXIX Rule 2A of the Code of Civil Procedure empowers the Court to attach the property of the person guilty of disobedience/ breach and to detain him in civil prison for a term not exceeding three months. In ***M/s Bhandari Engineers & Builders Pvt. Ltd. v. M/s Maharia Raj Joint Venture***, 2020 (270) DLT 582, this Court has laid down the guidelines relating to the execution of the decrees as well as enforcement of the awards. This Court has formulated the affidavit of assets and income to be filed by the judgment debtor/award debtor in execution/enforcement cases.

Conduct of the respondents

177. The hearing of this case commenced on 28th January, 2021 when this Court heard both the parties at length and directed both the parties to file written submissions and listed this case for hearing on 29th January, 2021. Both the parties filed their brief note of submissions by email on 28th January, 2021.

178. On 29th January, 2021, this Court continued the hearing. This Court considered the written submissions filed by both the parties. This Court directed respondent No.2 to file the additional note of submissions on the factual aspect and response to the written submissions of the petitioner relating to the facts.

179. Respondent No.2 filed additional legal submissions on 01st February, 2021. However, the respondents neither filed the submissions relating to the facts nor responded to the factual submissions of the petitioner. The hearing continued on 01st February, 2021 and 02nd February, 2021. On 02nd February, 2021, both the parties concluded their oral submissions whereupon this Court reserved the order. During the course of hearing, it was put to the respondents whether they were willing to withhold further action till the pronouncement of the order which was declined by the respondents whereupon this Court granted interim protection to the petitioner till the pronouncement of this detailed order.

180. On 29th January, 2021, this Court had directed the respondents to place on record their case on facts. This Court further directed the respondents to respond to the plaintiffs submissions on facts. However, the respondents neither disclosed their case on facts nor responded to the statement of facts made by the petitioner despite being directed by this

Court. The respondents have not given any justification for not disclosing their stand on facts despite being directed to do so. The purpose of calling for the statement of facts was to satisfy whether the interim order is not against the most basic notions of *Morality* or *Justice*. In ***Associate Builders v. Delhi Development Authority***, (2015) 3 SCC 49, the Supreme Court defined the terms *Morality* and *Justice*. In ***Ganesh Banzoplast v. Morgan Securities and Credits Pvt. Ltd.*** in OMP (COMM) 307/2016, this Court in the recent order dated 21st January, 2021 examined the scope of the doctrine of the most basic notions of *Morality* and *Justice*. *Justice* is truth in action. In ***Ved Prakash Kharbanda v. Vimal Bindal***, 198 (2013) DLT 555, this Court considered a catena of judgments in which the Supreme Court held that the truth is the foundation of justice and should be the guiding star in the entire judicial process. This Court also discussed the meaning of truth and how to discover truth.

181. Reverting back to the facts of the present case, the petitioner invested Rs.1431 crore solely on the basis of the protective rights of FCPL in FRL that the Retails Assets of FRL would not be alienated without the petitioner's written consent and never to a Restricted Person. According to the petitioner, the investment of Rs.1431 crores is based on the primary inducement by the respondents that they would protect, implement and enforce the special and material rights provided by FRL to FCPL but for the aforesaid inducement, the petitioner would not have parted with such a substantial amount.

182. The respondents have violated the aforesaid conditions whereupon the petitioner invoked the arbitration and filed an Emergency Relief Application before SIAC. The Emergency Arbitrator appointed by SIAC

has restrained the respondents from violating the agreements. However, the respondents are continuing with the violation and, therefore, the petitioner has approached this Court for enforcement of the interim order of the Emergency Arbitrator.

183. The respondents have not disputed the breach of the agreements either before the Emergency Arbitrator or before this Court. Reference be made to para 235 of the interim order at page 128 which is reproduced herein below:-

> *"235. Mr. Singh very properly did not attempt to argue that no contractual breaches had been committed by the Majority Respondents. Instead, he premised his submissions on the basis that I was "to assume against [his clients] the way that the cause of action has been framed by the [C]laimant". Mr. Salve also adopted a similar stance and made his submissions on a "demurrer basis" without accepting the correctness of the Claimant's factual assertions and the jurisdiction of this Tribunal apropos FRL. He, nevertheless, candidly acknowledged:*
>
> > *And we know today that **the promoters have a serious case to answer on breach**, and they are saying there was a term where they would have had to help, they have not helped us, we are not in breach…… **I am arguing this on the footing that the promoters have breached some arrangement with Amazon.** "*

184. The respondents have taken Rs.1431 crore from the petitioner solely on the basis of the rights provided by FRL to FCPL that they would not transfer their retail assets without the prior consent of the petitioner and never to a *Restrict Person*. Admittedly, the respondents have breached the agreements. However, there is no remorse. The intention of the respondents do not appear to be honest. The whole thrust

of the respondents before this Court is that the petitioner is a trillion dollar company and Rs.1430 crore invested by them in the present case is peanuts for them and they should forget about this money as it is worth zero today. To quote learned senior counsel for the respondent No.2 "*…What happens to his 1430 crores……..that is worth zero today. FRL is zero. FCPL coupon business is gone. For this American behemoth, 1400 crore would be rounded off……..".*

185. With respect to the *Group of Companies doctrine* applied by the Emergency Arbitrator, the respondents have urged that the *Group of Companies doctrine* applies only to Section 8 of the Arbitration and Conciliation Act, when the Court has to transfer the proceedings to Arbitrator. This submission of the respondent is contrary to the well settled law laid down by the Supreme Court. In ***Cheran Properties*** (supra), the Supreme Court invoked *Group of Companies doctrine* to enforce an award against an entity which was neither a signatory to the arbitration agreement nor a party in the arbitration proceedings, meaning thereby, even if the Emergency Arbitrator had not impleaded respondent No.2, the interim order of the Emergency Arbitrator is enforceable against respondent No.2 before this Court.

186. The law relating to the *Group of Companies doctrine* is well settled by the Supreme Court which is binding on all the parties. In that view of the matter, raising a plea contrary to the well settled law is a very serious matter and as it creates confusion in the administration of justice and shall undermine the law laid down by the Supreme Court. In ***Nidhi Kaushik v. Union of India***, (2013) 203 DLT 722, BHEL raised pleas contrary to the well settled law by the Supreme Court. In ***NDMC v. Prominent Hotels***

Limited, 222 (2015) DLT 706, the petitioner raised pleas contrary to the well settled law declared by the Supreme Court. In both these cases, this Court held the conduct of the litigants to be contemptuous and the action was initiated against the litigants. Reference be made to paras 13, 24 and 26.2 of the Division Bench judgment of this Court in ***Nidhi Kaushik*** (supra).

187. Before closing, this Court would like to record that the Emergency Arbitrator has given fair opportunity to both the parties to submit their written pleadings and the oral arguments. The Emergency Arbitrator has recorded the respective contentions of the parties and has given a very detailed reasoned findings. The Emergency Arbitrator, *Sh. V. K. Rajah, SC* is a well known *Jurist*. In ***H.S. Bedi v. National Highway Authority of India,*** 2016 (227) DLT 129, this Court examined the scope of Section 209 of the Indian Penal Code which makes dishonestly making a false claim in a Court an offence punishable imprisonment up to two years and fine. Section 209 is a very important provision to curb false claims but has been rarely invoked in our country. The leading case on Section 209 IPC is ***Bachoo Mohan Singh v. Public Prosecutor***, (2010) SGCA 25 by Singapore Supreme Court in which Three Judges Bench of Singapore Supreme Court interpreted Section 209 IPC. The majority judgment authored by *V.K. Rajah, J.*, as he then was, is reproduced in para 9 of the ***H.S. Bedi (Supra)***. This Court accepted the principles laid down by the Singapore Supreme Court. This Court has laid down the guidelines relating to Section 209 IPC.

Conclusion

188. The Emergency Arbitrator is an Arbitrator for all intents and

purposes; order of the Emergency Arbitrator is an order under Section 17(1) and enforceable as an order of this Court under Section 17(2) of the Arbitration and Conciliation Act.

189. Respondent No.2 is a proper party to the arbitration proceedings and the Emergency Arbitrator has rightly invoked the *Group of Companies doctrine* by applying the well settled principles laid down by the Supreme Court in ***Chloro Controls*** (supra), ***Cheran Properties*** (supra) and ***MTNL*** (supra). The respondents have raised a plea contrary to the well settled law relating to *Group of Companies doctrine* laid down by the Supreme Court.

190. The respondents have raised a vague plea of *Nullity* without substantiating the same. The interim order of the Emergency Arbitrator is not a *Nullity* as alleged by respondent No.2.

191. Combining/treating all the agreements as a single integrated transaction does not amount to control of the petitioner over FRL and therefore, the petitioner's investment does not violate any law.

192. All the objections raised by the respondents are hereby rejected with cost of Rs.20,00,000/- to be deposited by the respondents with the Prime Minister Relief Fund for being used for providing COVID vaccination to the *Below Poverty Line* (BPL) category - senior citizens of Delhi. The cost be deposited within a period of two weeks and the receipt be placed on record within one week of the deposit.

193. The respondents have deliberately and willfully violated the interim order dated 25th October, 2020 and are liable for the consequences enumerated in Order XXXIX Rule 2A of the Code of Civil Procedure.

194. In exercise of power under Order XXXIX Rule 2A(1) of the Code

of Civil Procedure, the assets of respondents No.1 to 13 are hereby attached. Respondents No.1 to 13 are directed to file an affidavit of their assets as on today in Form 16A, Appendix E under Order XXI Rule 41(2) of the Code of Civil Procedure within 30 days. Respondent No.1, 2, 12 and 13 are directed to file an additional affidavit in the format of *Annexure B-1* and respondents No.3 to 11 are directed to file an additional affidavit in the format of *Annexure A-1* to the judgment of ***M/s Bhandari Engineers & Builders Pvt. Ltd. v. M/s Maharia Raj Joint Venture***, (*supra*) along with the documents mentioned therein within 30 days.

195. Show cause notice is hereby issued to respondents No.3 to 13 to show cause why they be not detained in civil prison for a term not exceeding three months under Order XXXIX Rule 2A(1) of the Code of Civil Procedure for violation of the order dated 25th October, 2020. Reply to the show cause notice be filed within two weeks. Rejoinder within two weeks thereafter.

196. The respondents are directed not to take any further action in violation of the interim order dated 25th October, 2020. The respondents are further directed to approach all the competent authorities for recall of the orders passed on their applications in violation of the interim order dated 25th October, 2020 within two weeks. The respondents are directed to file an affidavit to place on record the actions taken by them after 25th October, 2020 and the present status of all those actions at least three days before the next date of hearing.

197. Respondents No.3 to 11 shall remain present before this Court on the next date of hearing.

198. List for reporting compliance as a part-heard matter on 28th April, 2021.

J.R. MIDHA, J.

MARCH 18, 2021
dk/ds/ak