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ISSUE BRIEF

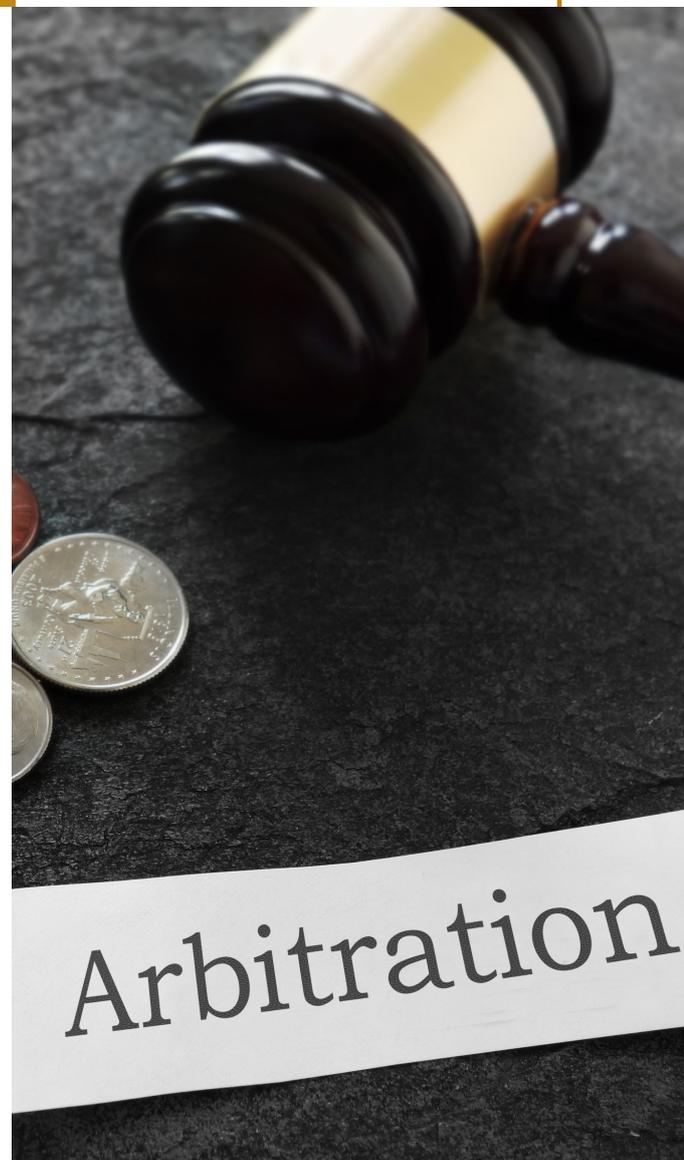
KNOWLEDGE

WEB-SERIES

SESSION VII

RECOGNITION & ENFORCEMENT OF EMERGENCY AWARDS IN INDIA

Jointly Organised by



SUMMARY

On 12th December 2020, Hammurabi & Solomon Partners & the India Strategy Group jointly convened **Knowledge Web Series ("KWS")** on Recognition and Enforcement of Emergency Awards in India. This report tries to capture the discussions with the distinguished speakers and to highlight the relevant key takeaways in this regard. The KWS was convened with the aim to discuss and review the Indian Legal perspective of recognition of emergency arbitrations and challenges in the enforceability of emergency awards in India.

DISTINGUISHED SPEAKERS



Hon'ble Mr. Justice B.N. Srikrishna
Former Judge,
Supreme Court of India



Dr. Manoj Kumar
Founder & Managing Partner,
Hammurabi & Solomon Partners



Mr. Gopal Jain
Senior Advocate,
Supreme Court Of India



Ms. Shweta Bharti
Senior Partner,
Hammurabi & Solomon Partners



Mr. Abhinav Bhushan
Director, South Asia, ICC Arbitration &
ADR International Court of Arbitration,
International Chambers of Commerce



Mr. Ylli Dautaj
Managing Partner,
D.E.R. Juridik, Stockholm



Ms. Sormistha Ghosh
Group General Counsel & Chief
Risk Officer (Senior VP Legal &
Secretarial), Strides Pharma
Science Limited

KEY POINTS

Why the concept of emergency award becomes important to discuss?

The judgment in the case of Future Reliance Group v Amazon (“Amazon case”) highlighted the recognition and enforcement of the Emergency Arbitration (“E.A.”) which as a concept becomes the primary issue to be discussed.

Before explaining the concept of E.A., it is imperative to mention that prior to the 2015 amendment of Arbitration Act, 1996, the Law Commission of India in its 246th report recommended to include E.A. under Sec 2 (1) (d) of the Act, however, it was not inserted. Prior to 2019, a committee headed by J. BN Srikrishnan had also recommended including E.A. in the Act, but the Parliament did not deem it fit to do so.

In regards to E.A., two issues need to be discussed:

- a. What the law is and;
- b. What the law should be.

The parliament even after recurring recommendations made by committees to include E.A. in the existing Act, did not add the concept in the law. Therefore, the law is silent about viability of such concept.

The award by an arbitrator emerges from the traditional dispute resolution system of panchayats or an elderly person deciding the disputes in a family. It is an accepted notion that the arbitrator possesses the knowledge and wisdom to give the correct award. It is while discussing the legality and enforceability of the same, we arrive at a standpoint wherein the former is not an issue as nothing is illegal in the awards and subsequent to passing of such award, and it becomes legal. The concerning issue is of the enforceability of such award as under the domestic law, this award is not recognized by any statute.

Why enforceability is an issue?

The judiciary cannot implement and/or enforce a piece of paper which is not statutorily backed. The judiciary cannot go beyond the statute and has to wait for the amendment in the Act. E.A. is the need of the hour and only can be used as a law if Apex Court declares such under Article 141 of the constitution. The E.A. can be enforced from the perspective of policy but cannot be treated as final in nature.

The basic principle of Private International Law, which states that if there exists a treaty between two sovereign countries, then any order passed by one is binding on the other country and hence enforceable. Similarly, Section 44 of C.P.C. also says that judgments of reciprocating countries are binding. However, the E.A. is an interim order/award and therefore cannot be enforced in domestic law since the courts have not decided anything on merits yet and it is just like an interim injunction under Order 39 which requires statutory backing to be enforced. The inaction of parliament to crystallize the law under the Arbitration Act will always hamper its enforceability in the domestic laws of India.

Business and Emergency Awards

The corporate setup demands timely adjudications of disputes to effectively manage the business and as a result businesses prefer arbitration as an effective substitute of the vastly time consuming litigation method. This caters to their need of effectively resolving all problems at the 11th hour.

Institutional arbitration such as Singapore International Arbitration Centre ("SIAC"), London Court of International Arbitration ("LCIA"), etc. are faster, effective and time conserving methods. Therefore, this dispute resolution process takes less time and delivers the result in a timely manner. In-house counsel have a tendency to choose a forum which incurs fewer expenses, takes less time and has a decision binding authority. Enforceability is not an issue for them as they will cope up later on, but due to 'as of yesterday routine' followed in the companies, they need quick decision-making institution and hence, E.A. is and will always be of great importance for them. These institutional arbitration center often have E.A. clauses in their drafts and the orders emanating thereto are accurate and effective.

To protect the goodwill of companies, confidentiality is of paramount importance and in such cases, even interim orders passed by an emergency arbitrator are worthy and helpful for M.N.C.s and companies for speedy dispute resolution.

However, domestic law needs to improve, and since awards by E.A. are very effective in terms of cost, time and manpower, the business houses will always opt for the same.

Why Amazon case is not a fit example of EA?

Although the Amazon case opened the Pandora's Box revealing all the necessities of the legislation bringing together the ideologies of an emergency award by an emergency arbitrator. Having discussed in "**The Amazon Case**" about E.A. and its recognition and enforceability, it is not a good example of E.A. as there are multiple issues in that case that should be called to attention.

Institutional Arbitration

E.A. emerged a few years ago when SIAC had enforced it in its laws. Subsequently International Chamber of Commerce ("I.C.C.") also included it in its laws but the only difference between the two is that SIAC has retrospective implication and I.C.C. has its application with effect from 1st Jan 2012. So far, I.C.C. has dealt with 143 cases of E.A., and SIAC has dealt with 114 cases of the same.

Hong Kong, Singapore and New Zealand are the only three countries which have the explicit provision of E.A. The reason why I.C.C. opted for E.A. was because the parties need a quick dispute resolution method, so even if the tribunal is not constituted, the status quo can be given before that.

An illustration was given where in a particular case a **Bank Guarantee** was to be called off and the claimant didn't want that. In that case, the Arbitrator told the respondent not to invoke the Bank Guarantee, but there wasn't enough time so he called up the bank himself and said ' I am the E.A. appointed with the I.C.C. rules & I have the authority to direct the respondents to not to invoke the bank guarantee, eventually the Bank Guarantee was not invoked.

Enforceability under Indian Law

I.C.C. is the only institution which uses the word order for 'E.A.' whereas all other institutions use the word 'award'. Under Section 9 of the Act, parties can enforce it, but no explicit provision is there under the domestic Act of India to enforce such. The E.A. can only have a persuasive value and not a binding value in India when it is not statutorily enforced.

Moreover, parties in India can choose to opt-out from drafting of E.A. clause in the agreement which implies that if they don't want an order from E.A., they can insert a clause stating that no interim order before the constitution of the arbitral tribunal shall be binding.

Persuasive value of Emergency Awards

In India such clauses and orders from E.A. merely have a persuasive value. In Raffle's judgment the dispute was that after approaching the Emergency Arbitrator, the parties filed a petition under Section 9 of the Act and relief was sought before the emergency arbitration.

In this case the Delhi High Court and the Bombay High Court respectively entertained the Section 9 petitions, on the basis that there was no prohibition from approaching the court under Section 9 before the Emergency Arbitrator; and that the court can independently apply its mind and grant interim relief in cases where it is warranted.

TAKEAWAYS

Conclusion

With the rise of domestic arbitration and emphasizing on questions like, what is the law today and how should it be, with the discussion can be of enforceability on the legal matrix in the country or legality of the act.

“It is the need of the hour to implement E.A. in domestic law” as well as the benefits arising from applicability of such are numerous for us to even predict. The Indian courts ought to recognize the effectiveness of E.A. as has been duly recognized and implemented by Institutional Arbitration Centers throughout world. It is the duty of Supreme Court, in a circumstance where the Parliament has despite repeated recommendations failed to enforce a beneficial law, to use the power given to it under Article 141 of the constitution and enact such law.

Where it is jurisprudentially examined “Each country is a sovereign in itself”, which was eventually passed and enforced by the bringing in the specific Acts for the same.

Well to end it, does recognition of E.A. becomes indispensable in order to make India a global hub for International Arbitration?

Without second thought, as an emergency arbitrator grants reliefs against a third party, this is the time for us to realize that “there is a need for us to make the correction and all for the institutions to also see behind the closed doors.”

Click below to watch the KWS session

<https://youtu.be/OdzyjsGNawA>



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Recognition & Enforcement of Emergency Awards in India
To discuss and review the Indian Legal perspective of recognition of emergency arbitrations and challenges in enforceability of emergency awards in India

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We have always aimed at being the change-maker for a newer India and the world around us. With our portfolio of services - law, public policy, regulation and justice converge to enable solutions to our client needs within the legal framework to operate in India with ease and predictability.

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