The SIAC Emergency Arbitrator Enforcement Experience

Update by Vivekananda N

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A. The SIAC EA experience

About 6 years ago, I penned a short piece on Singapore International Arbitration Centre's ("**SIAC**") experience with the emergency arbitrator ("**EA**") provisions which had been introduced in 2010 and had been in vogue for about 3 years then.[1] At the time, SIAC had received 34 applications seeking the appointment of an EA to consider urgent requests for interim relief. Currently, that number has grown to a total of almost 100 applications made to the institution under these provisions.[2]

By now, the benefits of the EA provisions are well known to the legal and business communities. A party that requires urgent interim relief in relation to an on-going or proposed arbitration normally only had two options, apply to a court, or apply to an arbitral tribunal. Where the arbitral tribunal is not in place or time is required to constitute it, a party had no choice but to approach a national court. However, parties often do not want their disputes before unfamiliar national courts, or in the public domain. In some situations, national courts do not entertain such applications at all, including in some cases, where the arbitration is seated in a different jurisdiction from the court. The EA provisions provide a panacea for these issues. Introduced by the International Centre for Dispute Resolution in 1999 and the Stockholm Chamber of Commerce in 2010, they were first adopted by an international arbitral institution based in Asia in 2010 by the SIAC.

SIAC is yet to reject an EA application although the President of the Court of Arbitration exercises that discretion on a case to case basis, primarily guided as a matter of practice, by the urgency of the issues at hand. SIAC EA cases have come from varied sectors and categories of contracts, and have involved parties from every continent except South America.[3] Much has been said on the tests to be adopted by EAs,[4] with a broad consensus leaning towards the adoption of transnational standards rather than tests that a local court would apply to the grant of interim relief. The most widely accepted formulation of these transnational standards are those set out in the celebrated treatise by Prof. Gary Born and include consideration of whether there is a prima facie case on merits, urgency, and the risk of irreparable injury.[5] It is also clear as night and day that the SIAC EA process is efficient and speedy. Historically, SIAC EAs made preliminary orders in as little as 2 days, and awards or orders on the application in about 10 days. The 2016 SIAC Rules further

[1] *The SIAC Emergency Arbitrator Experience*, June 2013, available at < https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience>.
[2]SIAC Annual Report 2019, p.19, available at: < https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20Annual%20Report%202019%20(FINAL).pdf >.SIAC Annual Report 2019, p.19, available at: < https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20Annual%20Report%202019%20(FINAL).pdf >.
[3] Ibid.
[4] See Steven Lim, *Interim Relief in International Arbitration*, available at: < https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/444-interim-relief-in-international-arbitration >.
[5]See Steven Lim, *Interim Relief in International Arbitration*, available at: < https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/444-interim-relief-in-international-arbitration >.

ensure efficiency by introducing a 14-day time limit for EAs to make orders or awards unless extended by the registrar in exceptional circumstances.[6]

The benefits and the vast experience of the SIAC in administering EA applications are unmistakable. However, parties rarely commence arbitration for the sheer joy of experiencing that heady world of translational jurisprudence, or the swiftness of interim orders. The real proof of the pudding lies in the eating which in this case is the enforcement of such orders.

B. Some countries have been progressive

Although EA provisions have been in vogue for almost 10 years now, and every major and minor international arbitral institution has incorporated them into their rules, legislations have been slow to catch up. As has often been the case with its quick legislative responses, Singapore was among the forerunners to introduce provisions for the enforceability of EA orders. The Singapore IAA[7] was amended to include EAs within the definition of an 'arbitral tribunal' such that orders and directions given by an EA would be enforceable in the same manner as if they were orders made by a court. However, even Singapore with its normally precise legislation appears to have missed the opportunity to provide for the enforceability of EA orders made in arbitrations seated outside Singapore. This was perhaps the intention behind the amendment to the definition of 'arbitral award' in section 27, but on a plain reading of that provision, it is arguable that EA orders from arbitrations seated elsewhere are not enforceable in Singapore. This is because the new inclusive definition of an 'arbitral tribunal' including an EA only applies to arbitrations seated in Singapore. This is yet to be tested.

Hong Kong[8] and New Zealand[9] are other prominent common law jurisdictions that have followed suit with amendments to their legislation to provide for the enforceability of EA orders. Elsewhere, such as in the US, local courts have adopted a pro-enforcement approach to EA orders even in the absence of specific legislative provisions, on the basis that enforcement of such provisional measures is necessary to safeguard the efficiency of arbitration[10] or that such measures did not violate a fundamental public policy including, for instance, First Amendment rights.[11]

C. Voluntary compliance

It is argued that there is a large number of orders made by EAs see voluntary compliance as parties do not wish to be seen by an EA or a future arbitral tribunal to disobey orders made in the arbitration. However, the powers of an arbitral tribunal or an EA to sanction non-compliance is limited. Moreover, as parties become more familiar with the EA process, they are likely to be innovative in finding approaches engineered to avoid compliance. Therefore, legislative and judicial mechanisms to enforce EA orders are all the more important.

D. The missed opportunity to create a legislative framework for enforcement of EA orders in India

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[6] See Steven Lim, *Interim Relief in International Arbitration*, available at: < https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/444-interim-relief-in-international-arbitration >.
[7] [Singapore] International Arbitration Act (Cap.143A).
[8] [Singapore] International Arbitration Act (Cap.143A).
[9] Section 2(1)(b) read with Chapter 4 of the New Zealand Arbitration Act 1996.
[10] *Publicis Communications v True North Communications Inc, [2000] 206 F 3d 725 (7th Cir)*; Y*ahoo! Inc. v Microsoft Corp, [2013] 983 F Supp 2d 310.*
[11] *Sharp Corp. v Hisense USA Corp.*, 292 F. Supp. 3d 157 (D.D.C. 2017).

The most interesting approach to this issue appears to arise from India. Firstly, this is not surprising on its own given that Indian parties have been the single largest participants in SIAC arbitrations for most of the last 10 years.[12] This is also reflected in the large number of EA cases involving Indian parties, 47 in just 2019 alone. Secondly, obtaining interim relief is often crucial in Indian litigation.

The Law Commission of India in its 246th Report released in August 2014 recommended that emergency arbitrators be given legislative recognition and consequent amendments are introduced to the Indian Arbitration and Conciliation Act, 1996 ("**Indian Arbitration Act**"). The amendments introduced in 2015 did not incorporate these suggestions. A further round of amendments to the Indian Arbitration Act introduced in 2019 also did not incorporate these suggestions. While amendments were introduced to provide for the enforceability of interim orders made by tribunals, these did not extend to tribunals seated outside India or to emergency arbitrators, either in India-seated or foreign-seated arbitrations.

E. The Indian judicial approach to enforcement of decisions of EAs

However, parties with the assistance of some progressive Indian courts have addressed the issue. The solution is quite straightforward. A request is made to an Indian court under section 9 of the Indian Arbitration Act seeking interim relief in aid of foreign seated arbitration, say in Singapore. In support of such an application, a party that has secured an EA order or award seeks to persuade the Indian court to adopt the reasoning of the EA and grant similar orders as those granted by the EA. This has been referred to as indirect enforcement of EA orders or awards. While the solution is not complicated, examples of the approach are worth examining not least because they have been confused as suggestive of a narrow approach by the Indian courts.

E1. *HSBC* v. *Avitel*

The first of these is *HSBC* v. *Avitel*[13]. HSBC secured two awards from a SIAC EA granting freezing orders against the respondents. The agreements among the parties preserved their right to approach the Indian courts for interim relief under section 9 of the Indian Arbitration Act. Under the regime then applicable in India, HSBC made the necessary applications to the High Court of Bombay under section 9. In doing so, HSBC sought to persuade the High Court to grant it similar freezing orders against the respondents as had been granted by the EA. The Bombay High Court granted interim reliefs in similar terms to those in the EA orders and took the view that HSBC was entitled to utilise the section 9 route to seek independent interim measures from the court without having to seek 'enforcement' of the EA orders. The Bombay High Court's decision was affirmed in appeal with the Division Bench of the same court taking the view that HSBC could not be denied the ability to apply for independent interim measures only because it had in place EA orders which could well be enforceable directly in other jurisdictions around the world.[14]

E2. Impact of *balco* and the 2015 amendments

The seminal decision of the Indian Supreme Court in BALCO[15] made on 6 September 2012 altered the landscape dramatically for the next few years because it took the view that Indian courts did not have the

[12] See SIAC Annual Reports from 2010 to 2019, available at < https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report >.
[13] See Orders of the Bombay High Court dated 3 Aug 2012, 9 Aug 2012, 30 Aug 2012, 5 Nov 2012 and Judgment dated 22 Jan 2014, all in Arbitration Petition No. 1062 of 2012 (available on the website of the High Court of Bombay).
[14] See Judgment dated 31 July 2014 of the Bombay High Court in Appeal No. 196 of 2014 in Arbitration Petition No. 1062 of 2012 (available on the website of the High Court of Bombay).
[15] *BALCO v Kaiser Aluminum Technical Services Inc.* (2012) 9 SCC 552.

power to grant interim measures in aid of foreign seated arbitrations under the provisions of the Indian Arbitration Act. While this was the correct position in law, it meant that section 9 applications to Indian courts for interim measures in aid of foreign seated arbitrations, or to seek similar orders as EA orders dried up.

This changed on 23 October 2015 when the 2015 amendments to the Indian Arbitration Act reinstated the power of Indian courts to grant such interim measures in aid of foreign seated arbitrations.[16]

E3. *Raffles* v. *Educomp*

One of the first section 9 applications to be filed with the High Court of Delhi in November 2015 is another important example of indirect enforcement of EA orders. Raffles Education, a Singapore company had sought and obtained a SIAC EA's award and orders against certain Educomp entities, incorporated in India and Singapore.[17] Raffles sought and obtained enforcement of the EA orders in Singapore under the provisions of the IAA.

Simultaneously, Raffles sought orders from the High Court of Delhi in similar terms as the EA orders particularly since the nature of the relief obtained in that case pertained to certain events and actions ongoing in India. The High Court of Delhi despite objection from the Educomp entities granted orders that were similar and wider than those granted by the EA.[18]

The *Raffles* v. *Educomp* decision[19] is often wrongly cited for the proposition that EA orders are not enforceable in India.[20] Raffles did not seek enforcement of the EA orders but instead sought the court's independent exercise of jurisdiction under section 9. Educomp on the other hand challenged the court's jurisdiction to grant such relief, among other grounds, on the basis that this would amount to the enforcement of the EA orders under the Indian Arbitration Act. The High Court clarified that the EA's orders could not be enforced under the Indian Arbitration Act, a position not disputed by Raffles, but set out that the court should carry out an independent review of the request for interim relief.

There is, therefore, no difference in the approaches of the High Courts in *HSBC* and *Raffles*, with both High Courts affirming the view that the section 9 courts should exercise their jurisdiction independently to decide if interim relief ought to be granted and if so, whether in similar terms as EA orders or not.

E4. *Hotel Mumbai*

A third example of the approach is the *Hotel Mumbai* case. Plus Holdings, a UAE based company secured distribution rights for the SAARC region for the movie 'Hotel Mumbai' based on the 2008 Mumbai terror attacks. The movie starred Dev Patel, Anupam Kher, Nazanin Boniadi and others and was critically acclaimed. The Singapore incorporated production house, Xeitgeist, attempted to terminate the distribution agreement on some flimsy grounds and had struck a deal with Netflix to release the movie in India on that

[16] New Proviso to Section 2(2) of the Indian Arbitration and Conciliation Act, 1996 added by Section 2(II) of the Arbitration and Conciliation (Amendment) Act, 2015.
[17] I was one of the counsel acting for Raffles Education in the SIAC arbitration and EA proceedings.
[18] See Order of the Delhi High Court dated 2 Dec 2015 in OMP (I) (Comm.) 23 of 2015 (available on the website of the High Court of Delhi).
[19] The decision that is often referred to is the Judgment of the Delhi High Court dated 7 October 2016, dealing with the jurisdictional objections of Educomp primarily centred around whether the 2015 Amendment applied to the case or not.
[20] For instance, see Kartikey Mahajan and Sagar Gupta, *Uncertainty of enforcement of emergency awards in India*, available at < http://arbitrationblog.kluwerarbitration.com/2016/12/07/uncertainty-of-enforcement-of-emergency-awards-in-india >.

platform. Plus Holdings applied to SIAC to seek the appointment of an EA, which SIAC accepted. The SIAC EA upon receiving and hearing submissions from the parties issued orders restraining Xeitgeist from entering into any agreements with third parties inconsistent with Plus Holdings' distribution rights and further ordered it to take steps within its power to ensure that third parties who may have been conferred with rights inconsistent with Plus Holdings' rights, not exercise such rights.[21]

The issue was far from fixed because Netflix was not a party to the arbitration or the EA proceedings. Plus Holdings applied to the High Court of Bombay under section 9 of the Indian Arbitration Act and joined Netflix as a party to those proceedings. Plus Holdings sought orders from the High Court on similar terms as those granted by the EA. The Bombay High Court granted Plus Holdings similar injunctive relief as those granted by the SIAC EA and noted in particular that[22]: "…*having considered the reliefs as granted by the learned Emergency Arbitrator under the Emergency Award, in favour of the petitioner, it appears that there is some substance in the contentions as raised on behalf of the petitioner… It appears that the rights of the petitioner in regard to the film in question have been sufficiently recognized in the Emergency Award*". Netflix thereafter terminated its agreement with Xeitgeist, and the matter came to be settled shortly thereafter.

It is, therefore, arguable that although the section 9 courts exercise their jurisdiction independently, there is great benefit in considering a previous EA order without being legally bound by it. After all, like in the *Raffles* and *Hotel Mumbai* cases, the respective EAs had considered witness statements and submissions on fact and law filed by both sets of parties, had the benefit of an in-person hearing to hear counsel for the parties, and rendered detailed orders in both cases before granting the urgent relief sought. A section 9 court in India would therefore benefit immensely from considering such EA orders in some detail (as was done in the above cases) without being legally bound to arrive at the same conclusion as the EA.

F. In conclusion

It is right to say that EA orders are not directly enforceable in India or several other jurisdictions. However, the above examples demonstrate that the Indian courts have been progressive in elegantly exercising their jurisdiction under section 9 to fill the gap left by the legislature, to provide parties with the ability to rely on EA orders and to seek the protection they require from the Indian courts. Other jurisdictions would do well to follow these examples to provide commercial efficacy to a procedure that has truly been a game-changer in international arbitration in the last decade. Singapore's Honourable Chief Justice Sundaresh Menon's remarks on the approach to arrive at transnational guidelines for ethics in international arbitration is equally appropriate here: "*in order to create a map of the world, one first needs to have maps of individual localities*."[23]

[21] I was one of the counsel acting for Plus Holdings in the SIAC arbitration and EA proceedings.
[22] Order of the High Court of Bombay dated 7 March 2019 in Commercial Arbitration Petition No.339 of 2019, (available on the website of the High Court of Delhi).
[23]Honourable Chief Justice Sundaresh Menon, *The special role and responsibility of arbitral institutions in charting the future of international arbitration*, Keynote Address, SIAC Congress 2018, available at < https://www.supremecourt.gov.sg/news/speeches/page/5 >.