

Indirect Enforceability of Emergency Arbitrator's Orders

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In recent years, arbitration institutions have made significant progress by adopting the provisions on emergency arbitrators ("EA"). One of the biggest appeals of the new mechanism is that it allows parties to obtain interim relief before a case is referred to the arbitral tribunal. The main purpose of EA is to protect assets and evidence that might otherwise be altered or lost. No party can disobey the orders provided under EA rules without impunity. However, in an international setting, this is easier said than done. Since the orders of an EA are of a contractual nature, deprived of finality, they are not enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention"). This post argues that there are number of mechanisms that makes the orders indirectly enforceable. As such, the orders issued by an EA, even if not directly enforceable, remain an effective means of emergency relief.

Indirect Enforceability by Analogy

Many legal scholars are trying to determine whether the order provided under EA rules has the same legal effect as an order for the interim measures of an arbitral tribunal. This parallel is drawn in order to suggest the enforceability of the EA orders under Article 17H of the 2006 revised UNCITRAL Model Law, which includes provisions for the recognition and enforcement of interim measures granted by arbitral tribunals. The main drawback of this approach, however, is that Article 17H requires interim measures to be ordered by the 'arbitral tribunal'. The major interesting question thereafter is whether an EA can be characterised as a 'tribunal'? The correct answer, I would suggest, is "no". Even if it was so characterised, however, it would still not benefit from Article 17H. What is meant by 'arbitral tribunal' in Article 17H is not any arbitral tribunal, but particularly the same tribunal which will render the final award. The EA however, unlike the main tribunal, never renders the final award.

The lack of finality seems to confirm the non-enforceability of EA orders. The final award is the last award determined by the tribunal, and the one that resolves the subject matter of the dispute and terminates the tribunal's mandate. On the contrary, the institutional rules, for instance the one of Article 29 (3) of ICC, expressly specifies that the arbitral tribunal is not bound by the decision made during EA. According to that Article, the tribunal '*may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator*'. Consequently, being not-final means not-enforceable under the NY Convention.

Indirect Enforceability in Judicial Practice

Despite this predominant view, some scholars argue that EA decisions are enforceable because they

are 'final' in terms of the issues they intend to address (A. Yesilirmak, *Provisional Measures in International Commercial Arbitration*, Kluwer Law International, The Netherlands, 2005, paras 4–38). This view is endorsed by US case law, which has accepted that interim measures have sufficient finality for the purposes of their enforcement. This is not because those measures are, in fact, final by nature, but because they are ordered with the intention of protecting the final award.

The similar approach was adopted in a 2013 case before the District Court of New York concerning the EA order in *Yahoo! Inc. v. Microsoft Corporation* case (*Yahoo! Inc. v. Microsoft Corporation*, United States District Court, Southern District of New York, 13 CV 7237, October 21, 2013). In that case, Yahoo's motion to vacate an EA award was rejected. The court found that the relief awarded by the EA was, "in essence final" and therefore confirmed it for the purposes of recognition and enforcement. The court followed the established view with respect to interim measures, reasoning that the possibility of having a final award on the merits does not prevent the EA from awarding final relief for the purposes of preserving the status quo of the subject of the dispute.

However, in 2011, Southern District Court of California came to the opposite conclusion in *Chinmax Medical Systems v. Alere San Diego* (*Chinmax Medical Systems Inc., v. Alere San Diego, Inc.*, Southern District of California, Case No. 10cv2467 WQH (NLS), May 27, 2011). In this case, the court addressed a request to vacate a decision of an emergency arbitrator. The court denied jurisdiction purporting that the decision was not final and binding for the purposes of the NY Convention. Therefore, finality seems to be recognized as the 'weakest point' of the EA orders even before the US national courts.

Due to the parties' voluntary compliance, there is, and probably will continue to be, a comparative lack of decisions available in this matter. One could assume, however, that due to the substantive differences between the interim measures and EA procedures as explained above, national courts will find it difficult to expand their previous pro-interim measures attitude on EA orders. Thus, as far as the enforceability of EA orders is concerned, the argument that 'the orders are final with respect to the issues they address' will, even before the US courts, be more difficult to support.

It seems that the only definite way to secure the enforceability of the EA is to provide an express provision in national legislation. Over the past few years, some states, such as Singapore and Hong Kong, have adopted an express rule for the recognition and enforcement of EA orders. On 9 April 2012, the Singapore Parliament introduced amendments to the International Arbitration Act. From the date the amendments entered into force, the orders of the EA had the same legal status as those handed down by regularly constituted arbitral tribunals.

The inclusion of such provisions may affect enforceability not only within that particular state's territory but also outside of it. An illustrative example comes from India, where in 2014 the EA decision was upheld through the interim relief granted by the Bombay High Court in *HSBC v. Avitel* case (*HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd and others*, Arbitration Petition No. 1062/2012, Judgment of 22 January 2014) ("HSBC Decision"). The case concerned an arbitration agreement in which the parties had preserved the right to seek interim relief before the national courts of India, even though the arbitration was conducted outside of the Country. One of the parties obtained the order from the EA seated in Singapore and sought to enforce it under the interim measures provisions in India. Even though Part II of Indian Arbitration Act states that only final awards are enforceable, the Bombay High Court passed interim reliefs in similar terms to those in the EA order. In the view of the court, the '*...petitioner has not bypassed any mandatory conditions of enforceability...*' since it was not trying to obtain a direct enforcement of the interim award (HSBC Decision, para. 89). Instead, it was independently asking for interim measures against the respondent, by virtue of parties' agreement set out in the contract (HSBC Decision, para. 89). Although the court did not directly enforce the EA order, this case provides an additional example of the indirect enforceability of the EA orders.

Voluntary Mechanisms of Enforcement

EA practice suggests that even if there is no enforceability mechanism in place, for numerous reasons, parties typically comply with the decisions of EA. Moreover, the parties themselves can create some formal mechanisms through which the EA orders can be enforced. More specifically, it is possible to include a term in the arbitration clause that specifies the EA right to incorporate a statement in their decision outlining the consequences of failing to comply with the orders. These consequences may be in the form of a penalties or fines. In such a case, a contractual penalty would later be included in the tribunal's award as part of its substantive issue in dispute. As such, even if the EA orders themselves are not enforceable, the breach of any term may be included in the final and binding award.

Concluding Remarks

Emergency arbitration has become an essential component of international commercial arbitration. Despite the inherent lack of enforceability, some national courts have adopted a position that enables direct or indirect enforcement of the EA orders. The EA orders are also enforceable under the express provisions contained in national legislation, such as those in Singapore and Hong Kong. This means that the benefits offered by the EA procedure are not undermined by uncertainty over enforceability. At the end of the day, the EA orders, even if not directly enforceable, remain an effective means of emergency relief.