

Emergency Arbitrator Procedures: What Should a Practice Note of Best Practices Consider?

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Emergency arbitrator (“EA”) applications are fast gaining popularity among both arbitral institutions and international arbitration users.

EA provisions were first introduced in the 2010 SIAC Rules to address the need for emergency interim relief before a tribunal is constituted, and many arbitral institutions have adopted relatively similar EA procedures over the past decade. For example, SIAC has administered a total of 72 EA applications as at December

2017,^[fn]http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf^[/fn] while 84 applications for ICC EA procedure have been made as of July 2018.^[fn] ICC News 31 July 2018, <https://iccwbo.org/media-wall/news-speeches/icc-court-releases-full-statistical-report-for-2017/>^[/fn]

The types of relief sought through these applications include preservation orders, freezing orders, Mareva injunctions and general injunctive relief.

Given these developments, it is now worth considering compiling the best practices for both EAs and parties to employ once such an EA procedure is established. We consider several such practices below.

Establishing the procedures early in the process: In general, EA rules permit the arbitrator to set his own procedure, which should be clear from the outset. Such procedures may include the timelines for exchange of submissions, a hearing (if any), the scope of the reply submissions, the mode of communications between the parties and evidence which can be adduced.

Tribunal secretaries / arbitral clerks can be of real assistance to both an EA and parties in view of the tight timelines. Parties should be informed at the outset of the option of and the practical advantages of speed and efficiency in appointing a tribunal secretary / arbitral clerk to assist the EA.

Establishing points of agreement between the parties: EAs should identify points of agreement between the parties, especially on issues which go towards the EA’s jurisdiction. For example, it would be prudent to confirm parties’ positions on the seat of the arbitration and applicable arbitration rules at the outset, which may be determinative of the scope and limits on the EA’s powers to order emergency relief sought.

Clarity on the standards for awarding emergency relief: As suggested by the point raised above, different national courts apply different standards in awarding emergency relief. Clarity would be welcome as to what these standards applied should be and whether they should be the same for the EA and main tribunal. We think no arguable grounds exist as to why an EA should apply different standards in granting relief simply because the parties' application came before the main tribunal was constituted.

Holding a hearing versus conduct on paper: In a time of greater user dissatisfaction with the time and costs involved with the arbitration process, due consideration should be given as to whether the parties are heard via an in-person hearing, or solely on written submissions. The EA may also consider whether any hearing is held by phone or video conference, with such options specifically referred to in various institutional rules including the SIAC, the LCIA and the ICC.[fn]See SIAC Rules 2016, Schedule 1, item 8; LCIA Arbitration Rules 2014, Article 9.7; ICC Rules of Arbitration 2017, Appendix IV(f)[/fn] Such options should be expressly stated in the practice note of best practices in an EA procedure.

Orders versus Awards: The nature of decisions of EAs (and whether they are rendered as an "award" or an "order") should be a consideration for reasons of enforceability. Although most institutions which provide for emergency arbitration expressly clarify that those rulings are binding on the parties (for example, SIAC Rules 2016 Schedule 1, Item 12), none provide a precise route for enforcement in the event of non-compliance, and the issue of enforcement remains uncertain.

The EA should keep in mind that the New York Convention applies to the "recognition and enforcement of arbitral awards" (emphasis added). Whilst the SIAC 2016 rules provide the EA with power to order an award or any interim relief deemed necessary,[fn]SIAC Rules 2016, Schedule 1 item 8[/fn] not all institutions are as accommodating. For example, the ICC Rules provide that the EA's decision shall take the form of an order,[fn]ICC Arbitration Rules 2017, Appendix V, Article 6(1)[/fn] thus avoiding the ICC's scrutiny process for awards which would delay the issuance of the decision. Article 29(2) of the ICC Rules also notes, however, that "*the parties undertake to comply with any order made by the emergency arbitrator*", which may generate reluctance on a party to breach such an undertaking. More generally, however, there is still uncertainty regarding whether a national court would enforce the EA's decision under the provisions of the New York Convention.

When it comes to the form of the order sought, the EA may also wish to consider adopting some standard forms, in particular for more typical relief such as Mareva injunctions. In litigation, the parties often look to the standard forms located in the civil procedure rules, and as there is no guidance currently offered to EAs, it may prove useful to adopt similar practices into the EA process.

Dealing with non-responsive parties in urgent situations: Although there is a general assumption that parties to an arbitration agreement will cooperate and actively participate in the proceedings, this is not always the case, and institutional rules often fail to deal with this situation, particularly in the context of an EA. As a first step, EAs should ensure that the non-participating party received proper notice of the EA application. Further, given the urgency of the proceedings, an EA should continue the proceedings despite such a situation so that the process is not stopped or frustrated by the party's non-participation. In this regard the EA should also satisfy him or herself that the applying party has demonstrated that there is an urgency that cannot await the constitution of the tribunal, that there is risk of irreparable or serious harm, proportionality and a prima facie case on jurisdiction and the merits.

Dealing with non-compliance: While the 2012 amendments to the Singapore International Arbitration Act provides for the enforceability of awards and orders issued by EAs, enforceability of decisions by EAs remains a real concern to

parties.[fn]<http://arbitrationblog.kluwerarbitration.com/2017/07/14/interim-relief-emergency-arbitration-upcoming-goal-still-illusion/>[/fn] While “*the record of enforcement of emergency arbitrator decisions is, on the whole, quite positive*”[fn]Santens and Kudrna, ‘The State of Play of Enforcement of Emergency Arbitrator Decisions’, in Maxi Scherer (ed), *Journal of International Arbitration* at [8][/fn], EAs and the main tribunal should consider whether they have the powers to order costs for non-compliance with the EA’s decision. Cost allocation has the promise of having direct impact on the parties’ compliance with an EA’s decisions. In practice, parties may also be motivated by the perception that non-compliance may adversely affect the main tribunal’s opinion of the party in breach.

Cross-undertakings and when to fortify with security: A cross-undertaking refers to an undertaking made by a party applying for interim relief to compensate the respondent if it is subsequently determined that the applicant was not entitled to the interim relief granted. The EA may consider requiring security in cases where there appears to be a sufficient risk of loss (including the likely kind and degree) requiring fortification.[fn]*Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295, as referenced in *Practical Law*, ‘Court’s wide discretion regarding conditions for granting or continuing an injunction (High Court)’[/fn] EAs may also consider whether an undertaking from the respondent would be more appropriate on balance than the emergency relief sought.

Dealing with applications for costs: Many arbitral rules require the EA to allocate costs in their decision. For example, the SIAC arbitration rules (Schedule 1, Rule 13) give power to the EA to provide an initial apportionment of the costs, subject to the power of the main tribunal to determine finally the apportionment of such costs. Note however that this power is discretionary and, in addition, no further guidance is provided. Accordingly, it may be desirable to defer the issue of costs to the arbitral tribunal or at least until after the substantive application has been dealt with. Alternatively, the EA may wish to make an initial order for costs, but defer payment of the costs until the tribunal has been appointed, leaving it open to the tribunal to incorporate the costs of the emergency arbitration into the costs award of the arbitration as a whole.[fn]*Kluwer Arbitration*, ‘*The Practice of Emergency Arbitration*’, *Belgian Review of Arbitration* (van Hooff and Tossens (eds); Jan 2017, at 9[/fn]

Closing Observations

EA caseloads for various institutions remain on the rise and parties continue to see value in EA proceedings as opposed to relief from national courts for reasons of confidentiality, time and cost effectiveness and impartiality of the relevant national court. Accordingly, guidance for EAs and parties would be of value now more than ever. Speed is often the aim of the game when it comes to EA proceedings and the above are just some of the factors that should be considered to improve efficiency in the process.