Local v. International Standards for Granting Emergency Interim Relief: A Page from SIAC's New Delhi Summit 2019

Kluwer Arbitration Blog
November 9, 2019

Chahat Chawla (SIAC)

Please refer to this post as: Chahat Chawla, 'Local v. International Standards for Granting Emergency Interim Relief: A Page from SIAC's New Delhi Summit 2019', Kluwer Arbitration Blog, November 9 2019,
http://arbitrationblog.kluwerarbitration.com/2019/11/09/local-v-international-standards-for-granting-emergency-interim-relief-a-page-from-siacs-new-delhi-summit-2019/

This post covers an interesting discourse during the Singapore International Arbitration Centre's Summit in New Delhi on 30 and 31 August 2019. In particular, the post focuses on the discussions during Panel Session 1: 'Masterclass on the use of Institutional Procedures in Arbitration' held on the second day of the summit. This session was moderated by Ms Sheila Ahuja (Allen & Overy LLP), and the panelists were Mr Gary Born (Wilmer Cutler Pickering Hale and Dorr LLP), Mr Bobby Chandhoke (L&L Partners), Prof Bernard Hanotiau (Hanotiau & van den Berg), Dr Michael Hwang, SC (Michael Hwang Chambers LLC), Mr Toby Landau QC (Essex Court Chambers) and Mr Andre Maniam, SC (WongPartnership LLP).

Summary of the discussion

Mr Andre Maniam, SC pointed out how institutions innovate and introduce different procedural tools to promote efficiency in the arbitration process. One such procedure discussed at length during the panel discussion was the Emergency Arbitrator (**EA**) provision under the SIAC Rules, 2016. Briefly, EA procedures allow parties to apply for urgent interim relief prior to the constitution of the tribunal. Accordingly, in cases where a party requires an immediate interim measure, SIAC will appoint an arbitrator (sometimes in a matter of few hours) to hear and decide an application in a time-bound manner.

Parties have frequently invoked the EA provisions under the SIAC Rules. Indeed, as of the date of this post, SIAC has received 93 applications for the appointment of EAs. Out of these 93 applications, 31 have been granted in favour of the applicant, 6 have been granted by consent, 17 have been granted in part, and 27 applications have been rejected. Further, in 8 instances the EA application was withdrawn and 4 EA applications are currently pending consideration.

It appears that there is no clear consensus in the international arbitration community regarding the applicable criteria to be used in cases of interim or emergency interim relief. It is therefore not surprising that the question of the applicable standard for provisional relief often becomes a point of contention between the disputing parties. This panel was no different.

During the panel discussion, Dr Michael Hwang, SC stated he was only dealing with interim injunctions in Singapore-seated arbitrations, but what he had to say might be applicable to:

1. Other common law countries (including India) depending on their arbitration law on interim injunctions; and
2. Other interim measures (which might, however, require other considerations than for injunctions).

In Dr Hwang's view, for a Singapore-seated tribunal, the natural interpretation of Section 12(1)(i) (read with Section 12(5)) of the Singapore International Arbitration Act (Cap. 143A) taking into account its legislative history) was that, if an interim injunction were claimed, then it would be appropriate to apply the domestic (and practiced in various common law jurisdictions) standard applied by the Singapore Courts in granting interim injunctions based on the *American Cyanamid* test. Dr Hwang suggested that given that the Indian legislation had a similar legislative history as Singapore's, it could also be argued that India-seated tribunals could apply the standards applied by the Indian Courts.

Mr Toby Landau, QC took a different view. He suggested that unless a tribunal is operating under "mandatory standards" as may be prescribed under the applicable *lex arbitri*, the tribunal ought to adopt an international approach. He argued that applying national court standards may pose a "danger" and prove to be a slippery slope if arbitrations were conducted in the same manner as court-based proceedings. Prof Bernard Hanotiau agreed with Mr Landau's proposition and said that tribunals should be guided by international standards.

Mr Gary Born summarised the state of play in his treatise that the "better view" is for a tribunal to look at international sources for appropriate standards. He argued that the absence of relevant standards from most national arbitration statutes suggests that the seat of arbitration may not be a conclusive factor for the determination of the governing standards. To support this view, Mr Born argued that applying an international approach is in furtherance of the parties' reasonable expectations for the following reasons. First, this approach will ensure the application of a uniform standard in international arbitrations. Second, this uniform standard will be applicable to all similar requests (regardless of the arbitral seat). Third and finally, this uniform standard would contribute towards achieving uniformity in the arbitral process.[fn]See Chapter 17; page 2465: Provisional Relief in International Arbitration', in Gary B. Born , International Commercial Arbitration (Second Edition), (Kluwer Law International; Kluwer Law International 2014.[/fn]

Comment

The SIAC Rules confer powers on tribunals or emergency arbitrators (as the case may be) to grant interim relief. However, the rules do not set out a standard to be applied by the arbitrators for the grant of such relief. In view of the same, it is for the tribunal to determine on a case-by-case basis the criteria which are to be applied in a particular set of facts and circumstances. Subject to the parties' agreement and in the absence of a mandatory standard, a tribunal would broadly choose between a local and an international standard.

Even in cases where some (or majority) of the standards prescribed under a local test and an international test overlap, an applicant in any international arbitration would be compelled to argue that a less burdensome standard ought to apply. For instance, a Claimant is likely to argue that international standards should apply in cases where a national court applies a more onerous standard. Ultimately, and as mentioned above, it will be within a tribunal's discretion to identify the

applicable standards in a given case.

Whilst the contents of the local standards may be determined by a review of the prescribed standards (if any) or by the tests adopted by a seat-court, there seems to be a debate on the breakdown of "international standards". One view is to apply the standards as set forth under the UNCITRAL Model Law (with amendments as adopted in 2006). In this regard, it may be noted that the 2006 amendments, and, in particular the amendments with regard to standard of interim relief, were subject to extensive deliberations and consultations with various governments and stakeholders. Viewed through this lens, an argument in favour of the codification of the "international standard" under the UNCITRAL Model Law (as revised in 2006) gains some traction.

Alternatively, parties and tribunals may look at previous awards and/or scholarly work to seek guidance on the contents of "international standards". For example, Mr Born in his treatise summarises these international standards as follows: "*stated generally…most international arbitral tribunals require showings of (a) risk of serious or irreparable harm to the claimant; (b) urgency; and (c) no prejudgment on the merits, while some tribunals require the claimant to establish a prima facie case on the merits, a prima facie case on jurisdiction, and to establish that the balance of hardships weighs in its favour*".[fn]See Chapter 17; page 2468: Provisional Relief in International Arbitration', in Gary B. Born , International Commercial Arbitration (Second Edition), (Kluwer Law International; Kluwer Law International 2014.[/fn]

Therefore, in a given case and depending on the nature of interim relief being sought, the following alternative tests may be adopted by a tribunal:

1. Local/National Standards (tests adopted by the seat courts or under the governing law which applies to the substance of the dispute).
2. International Standards (as envisaged under the UNCITRAL Model Law 2006).
3. International standards as put forth by scholars and/or previous decisions.
4. Combination/hybrid version of these tests as may be deemed appropriate by a tribunal.

The SIAC India Summit 2019 did well to highlight these issues, especially given that the Indian Arbitration and Conciliation Act (**Indian Act**) and its 2019 amendments do not prescribe any standards for granting provisional measures. Like most national arbitration legislation, the Indian Act recognises broad powers of India-seated tribunals to grant interim relief. The Indian Act further clarifies that under section 19, tribunals shall not be bound by the Indian Code of Civil Procedure (or the Rules of Court), thereby allowing arbitrators and parties to determine the rules of procedure for the conduct of arbitration.

It will be interesting to see how India-seated tribunals approach the question of standards of emergency relief. Anecdotal evidence and recent decisions of the Bombay and the Delhi High Court seem to suggest that tribunals are likely to apply national or local standards (for instance see *VIL Rohtak Jind Highway*). However, India's efforts to develop as an international hub for arbitration may have a bearing on how tribunals approach the question of applicable standards in the coming years. (See discussions on India's recent arbitral reforms here, here, and here).

With a rise of institutional arbitration in India, and the EA mechanisms available under most sets of institutional rules, it bears watching how the Indian Courts will view EA decisions. As suggested by Mr Bobby Chandhoke at the panel discussion, Indian Courts may continue to take the approach adopted in Raffles Design and enforce EA decisions through section 9 of the Indian Act after a re-hearing.

Taken all together, given the emphasis and focus to bring the Indian Act in conformity with global trends, one could look at the 2019 amendments (as was opined by the moderator, Ms Sheila Ahuja) as

a missed opportunity to introduce legislative provisions to support EA decisions. The next round of Indian amendments may well look to the Lion City and provide for the enforceability of EA orders and awards.

The views expressed herein are personal and do not reflect the views or the position of the Singapore International Arbitration Centre. The author reserves the right to amend his position if appropriate.