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The Coming of Age of Interim Relief in International Arbitration: A Report from the 28th Annual ITA Workshop

Michelle Grando (White & Case LLP) · Wednesday, July 20th, 2016 · Institute for Transnational Arbitration (ITA), Academic Council

"When Justice Delayed Would be Justice Denied: Emergency Arbitrators and Interim Measures in International Arbitration" was the subject of the 28th Annual Workshop of the Institute for Transnational Arbitration (ITA), which took place on 16 June 2016 in Dallas, Texas. Under the leadership of ITA's Chair, Abby Cohen Smutny (White & Case), and the conference co-chairs, Dr. Shahla Ali (University of Hong Kong), Jennifer Kirby (Kirby), and David Brynmor Thomas (39 Essex Chambers), the speakers addressed a variety of issues concerning applications for interim measures to arbitral tribunals and emergency arbitrators.

The stage for a mock interim measures hearing and five speaker panels was set by the keynote speeches of James Castello (King & Spalding) and Patricia Shaughnessy (University of Stockholm), who provided an overview of the evolution and current state of interim measures and emergency arbitrator rules. Several themes emerged from their speeches that recurred throughout the panel discussions, revealing the existence of a general consensus among the arbitral community about key aspects of interim relief in international arbitration. These are addressed in turn.

Increased use of arbitral interim measures

The possibility of arbitral tribunals granting interim measures has been recognized for many decades now. It was, for instance, expressly considered in the 1976 version of the UNCITRAL Arbitration Rules, which provided that "the arbitral tribunal may take any interim measures it deems necessary." For a long time, however, such power remained largely dormant as most parties preferred to seek interim measures from local courts instead of going to arbitral tribunals. This trend started to change in the late 1990s-early 2000s. The turning point became clear in the 2012 edition of the Queen Mary University and White & Case International Arbitration Survey, in which survey participants indicated that in their experience requests for interim measures to arbitral tribunals were more common than to courts.

The emergence of the emergency arbitrator, a special procedure to provide parties access to interim measures before the constitution of the arbitral tribunal, constitutes further evidence of the increased popularity and maturity of arbitral interim measures. The International Centre for Dispute Resolution (ICDR) was the first to adopt emergency arbitrator provisions in 2006, being followed by the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre (SIAC) in 2010, the International Chamber of Commerce (ICC) in 2012, the

Hong Kong International Arbitration Centre (HKIAC) in 2013, and the London Court of International Arbitration (LCIA) in 2014. As Shaughnessy observed, despite the relative novelty of the procedure, there have already been a significant number of applications for emergency measures. Her research revealed that as of June 2016, ICDR registered 67 emergency arbitrator requests, SIAC 50, ICC 34, SCC 23, and HKIAC 6 requests.

To be clear, although requests to arbitral tribunals for interim relief have increased, the speakers agreed that such requests are still not common, appearing in about one-quarter or less of arbitrations. This number reflects, at least in part, the fact that interim relief is not relevant to all cases.

What factors contributed to the increased use of arbitral interim measures?

The speakers discussed a variety of factors that have led to the increased use of arbitral interim measures. Such factors include:

– The lifting of restrictions in domestic legislation reserving the power to order interim measures to state courts. Castello observed that at some point in time such restrictions were found in the laws of most countries in continental Europe, including Austria, Germany, Greece, Italy, Spain, and Switzerland; only Italy maintains the restriction at present.

– The adoption by major arbitral institutions of rules that favor applications for interim measures to arbitrators, instead of courts, such as Article 28 of ICC Arbitration Rules, and Article 25.3 of the LCIA Rules.

– Experience has demonstrated that it might be better to request interim measures from arbitral tribunals instead of courts because arbitrators might be already familiar with the facts of the dispute; have the specialized legal or technical knowledge required to decide the application; know the language of the dispute; provide a neutral alternative to potentially unfriendly courts; and be in a better position to ensure the privacy of the proceedings. Moreover, interim measures ordered by an arbitral tribunal may cover many jurisdictions, while the effectiveness of a court order is limited to the territory of the court. This would also obviate the need to hire local counsel in multiple jurisdictions.

– The work of UNCITRAL, incorporated in the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration (Article 17) and the 2010 version of the UNCITRAL Arbitration Rules (Article 26). These rules, as Castello observed, have provided helpful guidance to arbitral tribunals as to the scope of interim measures and the conditions for granting them; to courts in deciding whether to enforce arbitral interim measures; and to national legislatures in passing legislation commanding the courts to enforce arbitral interim measures.

– Discussion of the subject and guidance provided by members of the arbitral community.

How is compliance ensured?

In light of the arbitrators' lack of coercive power to enforce their orders, several speakers discussed the issue of the enforceability of arbitral interim measures. The general conclusion was that in the vast majority of cases, enforcement issues do not arise because the parties voluntarily comply with the orders. This is supported by the results of the 2012 International Arbitration Survey, which revealed that the majority (62%) of interim measures orders are complied with voluntarily.

Voluntary compliance seems to be encouraged by the potential for sanctions, such as cost awards, and the reputational effect of non-compliance.

Castello observed that despite calls from certain members of the arbitral community for the adoption of a "New York Convention" for the enforcement of interim measures, UNCITRAL has preferred to focus on developing the Model Law, which if implemented or used as inspiration by States will produce the same effect. In this regard, Article 17H of the 2006 version of the Model Law provides that "[a]n interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued."

Prerequisites for granting interim measures

Most institutional arbitration rules, including the ICSID Arbitration Rules, have opted not to set forth specific criteria, but rather provide arbitrators broad powers to decide when and what kind of interim relief to grant. An example of this is Article 28 of the ICC Arbitration Rules, which provides that "the arbitral tribunal may … order any interim or conservatory measure it deems appropriate." The most significant exception to this approach is Article 26 of the 2010 version of UNCITRAL Arbitration Rules. As Costello observed, UNCITRAL chose to provide more precise guidance because of the general perception that the broad authority to grant "any interim measures it deems necessary," contained in the 1976 version of the Rules, was leaving some tribunals uncertain about the scope of their interim measures power, and thus leading them to decline to exercise such power.

Despite the absence of specific criteria in most institutional rules, the speakers converged that in practice arbitral tribunals, including investor-state tribunals operating pursuant to the ICSID Convention, require that four criteria be met for interim measures to be ordered: (i) reasonable possibility of success, that is, a *prima facie* case on jurisdiction and merits; (ii) risk of irreparable harm; (iii) urgency; and (iv) proportionality, i.e., balance of hardships in favor of interim relief. These are essentially the criteria contained in Article 26(3) of the 2010 UNCITRAL Arbitration Rules, which, the speakers concluded, reflect the practice of international arbitral tribunals.

It was also noted that these same criteria have been applied by emergency arbitrators, in which context "urgency" has played a crucial role. As Shaughnessy explained, the question is "Can this wait until the arbitral tribunal is constituted and until it is operating and able to consider interim relief?" The lack of urgency is apparently one of the major reasons for denying emergency relief.

New frontiers

In light of the relative novelty of the emergency arbitrator rules, many questions were raised concerning their application.

One question concerned the compatibility of emergency arbitration with pre-arbitral procedures such as cooling-off periods and multi-tiered clauses requiring the parties to engage in mediation, expert determination, or dispute board procedures prior to filing a request for arbitration. This question was apparently considered by emergency arbitrators in three SCC cases. They concluded that the cooling-off period requirement contained in certain investment treaties did not prevent emergency proceedings because of the nature of emergency relief. It was noted that this interpretation might eventually give rise to enforcement problems, because SCC emergency orders cease to be binding if the "case is not referred to an Arbitral Tribunal within 90 days" of their

issuance. In the case of other rules, the requirement that the request for arbitration be filed within a brief period of time after the request for emergency arbitrator relief might also pose difficulties.

Another question regarded the enforcement of emergency arbitrator orders or awards. In this regard, a representative from HKIAC noted that Hong Kong has amended its legislation to provide for the enforceability of emergency arbitrator orders in proceedings seated in Hong Kong or abroad. It was also noted that Ukrainian courts have recently enforced a SCC emergency arbitrator award issued in the context of an investment treaty dispute between JKX Oil & Gas and Ukraine. Notably, the UNCITRAL Model Law does not specifically address the enforcement of emergency arbitrator decisions because the last version of the Model Law was adopted in 2006, when the first emergency arbitrator rules had just been adopted by the ICDR. It will be interesting to see whether domestic courts will interpret provisions modeled on Article 17H of the Model Law as providing them authority to enforce such decisions.

A maturing system

In sum, the presentations and discussions evidenced the significant progress made in the past 30 years in establishing a coherent set of rules for arbitral interim relief. Having arbitral tribunals routinely dealing with interim measures, instead of the parties having to resort to local courts, is a significant development that has undoubtedly strengthened the arbitral system and allowed it to evolve into a more sophisticated and self-standing system of dispute resolution. It is a welcomed development for the users of international arbitration that are getting closer to the ideal of being able to resolve disputes entirely at the international level and avoiding the complexities, biases, and costs associated with having to deal with (often multiple) foreign court systems.

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