First Emergency Arbitrator Proceeding in Mainland China: Reflections on How to conduct an EA Proceeding from Procedural and Substantive Perspectives

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Last year, I was appointed by Beijing Arbitration Commission ("BAC") as the emergency arbitrator in an emergency arbitrator proceeding ("EA proceeding"), the first EA proceeding ever requested by the claimant in mainland China. Since the entire arbitration procedure has recently been concluded, I am delighted to share some of my thoughts on how to conduct an EA proceeding in an arbitration procedure.

I. Case Background

The dispute arose out of an investment agreement between the two applicants which were companies registered in Hong Kong, and the first respondent which was a company registered outside China and the second respondent who was an individual.

II. Reflections on Procedural Issues

1. Application for EA Proceeding (Applicability)

As a threshold issue, the applicability of an EA proceeding is pre-screened and determined by arbitration institutions. The institution will conduct a preliminary review on the existence of an arbitration agreement, whether the parties have opted out of the EA proceeding, and whether the parties have opted for other pre-arbitral procedures (in the case of multi-tiered dispute resolution clauses).

According to Article 63(1) of the Beijing Arbitration Commission Arbitration Rules ("**Rules**"), after the acceptance of a case by the BAC and before the constitution of the arbitral tribunal, any party that wishes to apply for interim measures may submit a written application to the BAC for the appointment of an emergency arbitrator in accordance with the applicable law. BAC shall decide whether or not to approve such application.

Article 63(2) of the Rules provides that where the BAC approves the appointment of an emergency arbitrator, it shall appoint an emergency arbitrator from the Panel of Arbitrators within 2 days after

the parties concerned pay the corresponding fees in accordance with the Schedule set out in Annex 3 to these Rules, and shall notify the parties of such appointment.

The two applicants in this case submitted the Request for EA proceeding on September 6. Having gone through the materials, BAC decided to approve the application and appointed me as the emergency arbitrator on Day 1.

2. Case Management: How to conduct the EA Proceeding in an Effective Manner

Most of the arbitration rules of international arbitration institutions leave large discretion to emergency arbitrators as to the way to run EA proceedings. Article 63(4) of the Rules also prescribes that an emergency arbitrator shall consider the application for interim measures in such manner as he or she deems appropriate, and shall ensure that the parties have a reasonable opportunity to present their cases.

It took altogether 11 days (Day 1 to Day 11) from the transmission of the case files to me until I rendered the EA decision. On the same day (Day 1) of the appointment, I issued the First Procedural Order, setting the manner and procedural timetable of the EA proceeding. In the First Procedural Order, (i) I required the respondents to submit the written statement of defense through email prior to 6 pm on Day 5; (ii) the hearing shall be held at 9 am on Day 6 by way of teleconference; (iii) I gave both parties a “second chance” that if any party wished to submit further statements (such as post-hearing brief) after the hearing, it should do so through email prior to 6 pm on Day 10; (iv) I summarized a “List of Issues” and suggested both parties to submit their statements or opinions based on the List.

Both parties cooperated and followed the procedural timetable. After the hearing on Day 6, the applicant submitted its post hearing brief on Day 8 and the respondent on Day 10. I rendered the EA decision on Day 11. The milestones of the EA proceeding of this case are shown in the below figure:

There are three techniques I used in this EA proceeding to improve efficiency. Firstly, I allowed both parties to submit statements and other documents through email in electronic form, which reduced the time for document transmission. Secondly, by providing the “List of Issues” beforehand, both parties were able to stay on track and focus their arguments on key concerns of this case, which saved me great time and effort to render the decision. Thirdly, considering that the parties and I were at different places, I decided to conduct the hearing by teleconference. During the hearing, both parties were able to fully present their arguments. In order to ensure that both parties have a reasonable opportunity to present their cases, I reiterated at the end of the hearing that each party had a “second chance” to submit further statements after the teleconference pursuant to the timetable set in the First Procedural Order.

It is also important to closely cooperate with the secretary in the EA proceeding. In this case, the secretary of BAC provided effective and strong support which helped to run the proceeding in a more efficient way.

III. Reflections on Substantive Considerations

Since the Rules also leave large discretion to emergency arbitrators as to the substantive criteria in making the decision, I highlighted the following matters after taking into consideration of the general practice in international commercial arbitration and arbitration rules from various arbitration institutions such as ICC, SCC, ACICA and HKIAC: (i) whether the request of arbitration had a reasonable possibility to succeed on the merits; (ii) whether the situation was of imminent urgency that it would cause irreparable damages to the applicants if interim measures were not granted, and such damages would obviously exceed the damages suffered by the respondents if those interim measures were granted; (iii) whether the interim measures requested by the applicant were reasonable and suitable for enforcement.

1. Likelihood of Success

The applicants shall establish *prima facie* that there is a reasonable possibility to succeed on the merits. After giving the respondents opportunity to argue whether there was factual and legal basis for the requests raised by the applicants and evaluating the evidence and arguments presented, I concluded that the applicants had demonstrated a reasonable possibility to succeed on the merits.

2. Urgency of the case

The applicants stated that the respondents were transferring assets in bad faith and should promptly be stopped. I decided that transferring assets to third parties may cause irreparable damages to the applicants that exceeded the damages suffered by the respondents if interim measures were granted, particularly when the applicants in this case had already provided security with the amount equal to that under the interim measures.

3. Reasonableness of interim measures

In general, an applicant in an EA proceeding would request for the following types of interim measures: the applicant may require the respondent (i) to disclose the information of assets; (ii) to maintain the status quo and be restrained from disposing assets; (iii) to cooperate with the enforcement of interim measures and not to commence any lawsuit or similar procedure to deter the enforcement; and (iv) not to instruct, encourage or suggest others to conduct the restricted behaviors.

In considering the reasonableness of the interim measures, it is my opinion that (i) disclosure of general assets can hardly be considered as “urgent” and the applicant should not be able to take advantage of the EA decision to acquire asset information of the respondent for later use; (ii) maintenance of status quo is a common and reasonable interim measure, but should be limited to the assets specifically listed by the applicant; (iii) restriction on the respondent to bring any legal actions is a severe violation to the basic procedural right of the respondent, and the duty of cooperation is neither necessary nor appropriate to be treated as an interim measure; (iv) for the purpose of enforcing the EA decision, it is reasonable to require the respondent not to instruct, encourage or suggest others to conduct the restricted behaviors.

In this case, I rendered the EA decision partially granting the interim measures requested by the applicants that the respondents were restrained from disposing the assets specifically listed by the applicants and shall not instruct, encourage or suggest others to conduct the restricted behaviors. The decision was enforced in Hong Kong High Court.

IV. Conclusion

EA proceeding has been gaining momentum as most arbitration institutions incorporated EA provisions when revising their arbitration rules. Since EA proceeding is a relatively novel procedure in mainland China, I hope the above case could reveal the manner and considerations of an emergency arbitrator when conducting an EA proceeding. An emergency arbitrator may act as the “guardian” to parties prior to the constitution of the arbitral tribunal, defusing conflicts and saving time and costs, but it is also critical to be aware of the limitations of the EA proceeding in the existing legal framework, especially with respect to the enforceability both domestically and internationally.