Court Support for Arbitration In South Africa: Knowing Where You Stand

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In December 2017 South Africa brought into law its first piece of legislation dedicated to international arbitration, the aptly named International Arbitration Act of 2017 (the New Act).

The New Act

The New Act incorporates the provisions of the UNCITRAL Model Law and further aligns the country's national law with the New York Convention. The legislation has been welcomed as a necessary step for South Africa to become the continent's leading arbitral hub. Rather interestingly, in an effort to stimulate the growth of ADR, parties can also now choose to refer their disputes to conciliation using the UNCITRAL Conciliation Rules.

But the New Act does not stop at mere adoption of the UNCITRAL texts and modernisation of the old regime. Ambitious refinements to the Model Law (which is incorporated as Schedule 1 to the New Act), seek to advance certain matters into what many may regard as relatively unchartered waters. One such ambitious development relates to court ordered interim measures.

Interim measures: a new approach

It is widely accepted that the availability of court ordered interim measures in support of arbitration is key. However, the extent of court intervention, supervision or control is often a heated topic of debate and in jurisdictions like South Africa, where court ordered interim measures in support of international arbitration are not supported by a long history of judicial precedent, legislation detailing the powers of the court can be extremely useful.

There appears to be a significant global trend of courts showing deference to the tribunal where possible. The English court, for example, can only provide urgent relief to the extent that the arbitral tribunal (or any emergency arbitrator) has no power, or is unable to act. If the English court does intervene, it will only do so in a manner which causes the least disruption possible to the arbitral process.[fn] *Gerald Metals SA v The Trustees of the Timis Trust and others* [2016] EWHC 2327[/fn]

In South Africa, both tribunal and court ordered interim measures are governed by Article 17 of

Schedule 1 to the New Act. As is well known, the template wording of the Model Law offers a rather vanilla proposal for court ordered interim measures. South Africa, acknowledging that its judiciary has not actively participated in the global development of this area of law, elected to remove some of the ambiguity surrounding the wording of Article 17J by prescribing exactly what the local courts can and cannot do. This move is particularly significant given the wide jurisdiction historically afforded to the local South African High Courts, particularly in relation to all forms of court ordered interim relief.

Article 17J of the New Act details the circumstances under which a court may grant interim measures, but such measures are only available when 1) a tribunal has not yet been appointed and the matter is urgent, or 2) the tribunal is not competent to grant the order, or 3) the urgency of the matter makes it impractical to seek the relief from the tribunal. This restriction of the jurisdiction of the courts may not sound particularly surprising to the international arbitration community but may well be perceived as fairly revolutionary within the local community.

Third parties

Under the legislation that governed international arbitration before the introduction of the New Act, the South African courts enjoyed an extremely wide jurisdiction to intervene (and interfere) in all arbitrations conducted in South Africa. Provided the affected third party fell within the jurisdiction of the court, there was seldom an issue.

The court's jurisdiction in respect of interim measures under the New Act has not yet been considered by the South African courts. It appears that, provided the court holds jurisdiction over an affected third party, interim relief should be available. This would make perfect sense as an arbitrator is normally unable to grant relief which affects the rights of a third party in the absence of consent.

It appears that the English courts are somewhat reluctant to exercise jurisdiction over third parties under Section 44 of the English Arbitration Act in relation to court ordered interim measures. Hong Kong courts appear more comfortable granting interim measures affecting third parties, but have stressed that such measures should not be granted lightly.

The English courts[fn] *DTEK Trading SA v Morozov and another* [2017] EWHC 94 (Comm) at page 640[/fn] have acknowledged that their somewhat narrow approach in relation to court ordered interim measures may leave a "lacuna" in the law. The South African courts should not face the same difficulty under the provisions of the New Act, provided that they are correctly applied. Consider the situation where the interests of a non-arbitrating party are likely to be affected by an interim measure, for example where a bank is involved as either the holder of funds or the issuer of a guarantee. Here court assistance is not only appropriate but required.

South Africa did not incorporate the standard wording of Article 17J of the Model Law which would have provided for local procedural law to apply to an application for an interim measure. This is significant, particularly when considering the obligation of the courts to interpret Article 17J (as adopted) *in conformity with the general principles on which the Law is based* (Article 2A). As a result, technical objections based upon transgressions of the Uniform Rules of Court should not feature in applications for interim measures under the New Act.

You only get one shot

In a move which some on the continent may regard as the boldest under the New Act, Article 17J(3)

prescribes that a decision of the court in relation to any application for an interim measure under Article 17J, shall not be subject to an appeal.

This is not unique, as other jurisdictions including Hong Kong take the same approach. In other jurisdictions, including the English courts, rights of appeal exist but are in practice relatively rarely exercised. The lack of a right of appeal is not particularly shocking in the international arbitration context, given that rights of appeal of arbitral awards themselves are significantly curtailed under the rules of some of the major arbitral institutions (for example, the LCIA and ICC Rules prevent any appeal to the extent allowable under the relevant law). However, clients from some jurisdictions may consider this lack of the right to appeal in respect of interim measures to be a deprivation of a fundamental right.

This provision of the New Act does not appear vulnerable to a constitutional challenge. South African law would be applicable to such a challenge, and although the South African Constitution secures everyone's right of access to courts, it does not expressly secure rights of appeal to higher courts. A party is always entitled to approach the court for interim relief, but under the New Act, that is where the process ends.

Article 17J prescribes that the New Act will apply, *irrespective of whether the juridical seat is in the territory of South Africa*. This means that an application under the New Act may follow in the absence of any contractual reference to South Africa whatsoever.

The position becomes even more intriguing when the rights of a third party likely to be affected by the granting or dismissal of an interim order are considered. Is the New Act intended to deprive an unrelated third party of its right of appeal which it ordinarily would have held, in the absence of an arbitration agreement?

The courts have not yet considered this question but, provided the New Act applies, the court is bound to settle the matter in conformity with general principles of international law. Where the relief is sought *pending or pursuant to* arbitration proceedings, the South African court's decision should not be subject to any appeal.

This may be problematic in certain circumstances. For example, where an applicant applies to court under the New Act seeking to prevent payment by a bank (non-arbitrating party) under a performance guarantee where a fraudulent call on the guarantee is alleged. Is the bank deprived of a right of appeal which would otherwise have been available?

It appears that the answer lies in whether the requested interim measure is in fact a measure *pursuant to or in support of* arbitration. If the requested relief is to apply pending the determination of the dispute, then it would appear to be an application correctly made under the New Act and no appeal will be possible.

On the other hand, if the fraud is truly a fraud committed during the call on the guarantee, only the court can determine this question. Such a determination should therefore not be regarded as being *pursuant to or pending* the arbitration and the normal rules of South African court procedure should apply.

There is no doubt that, despite some local concerns about appeal rights, the New Act is a bold display of support for international arbitration and will provide a significant and helpful measure of certainty for parties who choose to arbitrate in South Africa. The measures aimed at reducing the scope of court interference in arbitral proceedings will be welcomed by the global community, who will not be concerned by the restriction of appeal rights, which should help reduce costs and delay.