Flexibility at the Expense of Certainty? Six Years of the ICC Emergency Arbitrator Procedures

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Background

The ICC Commission on Arbitration has recently published a report on Emergency Arbitrator ("**EA**") Proceedings ("**Report**") that promises to "*offer guidance to users, counsel and EAs to facilitate the use of EA proceedings through increased transparency and predictability*".

The Report analyses the 80 cases in which the ICC EA procedures have been used in the six years from their inception in 2012 through to 2018. It responds to a perceived nervousness among parties and their counsels regarding the use of EA proceedings as opposed to seeking urgent interim/conservatory measures in national courts. This unease itself is perceived to arise from the lack of available information that parties can use to gauge the likely outcome of EA proceedings. Namely, there exists no established body of the judicial authority or other clear guidance to assist parties in understanding what relevant threshold tests should be applied by EAs (as would be available to parties seeking urgent interim relief in national courts, for example). As a result, it has in some cases been difficult for parties and their counsel to know how best to formulate an application, and to assess its likely prospects of success.

However, as this post will go on to consider, the Report's analysis of the outcomes of EA proceedings suggests that EAs themselves may have struggled with the lack of available precedent on which to base their decisions. More precisely, there is little consistency in how these decisions have been arrived at (including, for example, as to fundamentals such as what laws have been applied, which has varied between the *lex contractus,* the *lex arbitri*, general but unspecified "*standards established in international arbitration*", and combinations of the three). The result is that there appears to be no real consensus on what thresholds an application is required to meet in order for a relief to be granted, such that the Report is perhaps unlikely immediately to remove the difficulty parties experience in deciding whether to seek EA relief in ICC arbitrations.

Why Use EA Procedures?

The ICC EA Procedures were introduced in 2012 by Article 29 of the Rules of Arbitration of the ICC ("**ICC Rules**"), with detailed procedures contained in Appendix V (together, "**EA Procedures**"). The

EA Procedures are designed to provide parties to a prospective ICC arbitration with a mechanism to seek urgent relief prior to the constitution of a tribunal to hear the substantive claim.

Whilst court systems supportive of arbitration, such as the courts of England and Wales, are generally well disposed to granting injunctive relief in these circumstances, there are a number of reasons why parties might prefer to seek relief from an EA. For instance, they may prefer to resort to the EA Procedures for confidentiality purposes, because interim relief is not available in national courts (whether because they have contracted out of their rights to approach national courts in the arbitration agreement or otherwise), or because they are seeking a flexible solution to an urgent issue which a national court might otherwise be unable or unwilling to order.

The Key Findings of the ICC Report

One of the Report's key findings is that ICC EA proceedings can be concluded very quickly indeed, with the ICC Secretariat deciding within 24 hours of an application being made whether it is permitted to proceed in all 80 cases (only two of which were rejected at this stage). In the 70 cases in which an order was made, 47% had the order rendered within the 15 days foreseen in the EA Procedures, 46% within 16 to 19 days, and 7% between 20 to 30 days. In the remaining 10 cases no order was made, and this was because either the application was withdrawn or it was deemed that the EA Procedures did not apply.

The relief was granted only in the minority of applications (29%). Whilst the Report concludes that this may not be surprising, with the nature of interim relief meaning that it will be available in only exceptional cases, the success rate undoubtedly compares unfavourably with that of many national court systems. For example, in the English Commercial Court, relief is granted in anti-suit, freezing injunction and security for costs applications in 45.2% of cases, according to data compiled by Solomonic.

What Types of Relief Have Been Applied for?

51 cases referred to in the Report sought an order preserving the status quo pending the constitution of the arbitral tribunal, in the majority of cases justified by the need to guarantee the availability of any final award. Other orders sought (with some EA applications requesting multiple forms of relief) included the reinstatement of individuals in a company, the removal of individuals from board positions or appointments, the organisation of shareholder meetings, the passing of board resolutions, and participation in board meetings. In one case the application requested an order from the EA for a preliminary injunction to preserve the status quo by maintaining the distribution agreement in effect. A further 23 cases sought an order for specific performance under the contract in dispute. 10 applications sought some form of declaratory relief, 8 an interim payment, 7 the transfer of money into an escrow account, and 6 an anti-suit injunction (for example, preventing a party from bringing any legal actions in state courts until a dispute had been decided).

Flexibility at the Expense of Certainty?

The EA Procedures provide that an EA's jurisdiction is confined to granting "*urgent, interim or conservatory measures that cannot await the constitution of an arbitral tribunal*" (Article 29(1) of the ICC Rules). Thus, the main criteria contemplated by the ICC Rules for an EA order to be granted would

appear to be that the relief is "*urgent*" and "*cannot await the constitution of a tribunal*". A guidance note issued for EAs, the ICC Emergency Arbitrator Order Checklist, further provides that in determining these criteria, an EA should consider the admissibility/jurisdiction of the EA application. Beyond this, no substantive guidance as to how the issues of urgency, admissibility and jurisdiction have been or should be applied is available to EAs. The result, as the Report expressly acknowledges, is that there has been a "*far from uniform*" application of these tests.

The result of the ICC's approach appears to be a great deal of confusion among EAs as to what criteria an application needs to meet in order to be successful. Of the 80 applications heard, 40% considered the likelihood of success on the merits, 50% considered the likelihood of irreparable harm (with 50% of those case following a literal interpretation of "*irreparable*" and the other 50% instead considering that the harm should be "*serious and substantial*"). A further 15% of the cases determined that it was necessary for there to be a risk of aggravation of the dispute were the relief not to be granted, and 20% considered a requirement for the application to entail no prejudgment of the merits of the substantive dispute. The balance of equities was a determinative factor in 20% of cases. In determining these issues, EAs variously made reference to general "*international arbitration practice*", the *lex arbitri* and international guidance such as the UNCITRAL Model Law of 2006.

From the above it can be inferred that in bringing an application under the ICC EA Procedures, a party cannot have any certainty as to how threshold criteria for granting interim measures will be applied: the factors that will be taken into account by an EA in making its decisions vary enormously from case to case, and it is difficult to detect a pattern in their reasoning from the Report.

Enforcement

Of the national laws surveyed by the Report, only Hong Kong, Singapore and New Zealand expressly provide for the enforceability of EA decisions. There is currently very limited case law as to whether national courts are empowered to enforce any decisions rendered by an EA, with some considering that EA decisions lack the finality required by the New York Convention. In particular, the decisions are afforded the status of Orders only, to be revisited by the Tribunal once constituted. Accordingly, the present situation on enforcement will render EA proceedings unsuitable for disputes which are particularly acrimonious or where there are reasons to doubt that a respondent will comply with an EA order voluntarily.

What Is Next for the EA Procedures?

In the circumstances, it is perhaps unsurprising that only a very small proportion (1.3%) of ICC cases filed since 2012 have included applications for relief from an EA.

The Report itself is very instructive for parties considering the use of EA Procedures. However, the experience of EA Procedures illustrated is unlikely to provide much encouragement to parties or their counsel to pursue EA proceedings in present circumstances. The Report suggests that such applications will enjoy low prospects of success, with significant uncertainty as to how they will ultimately be decided, and question marks over the enforceability of any order in the absence of party consent. The vagaries of how EAs approach the applications before them also places undue emphasis on the identity of the particular EA, which is wholly outside the control of the parties.

Despite all of the practical difficulties that arise, with ICC cases typically concerning diverse topics involving disparate jurisdictions around the world, which trigger diverse challenges requiring

diverging procedural solutions, there is certainly a genuine need for EA Procedures which can provide a flexible and viable alternative to the courts.

However, in order to make EA Procedures more attractive to parties, it is likely that the ICC will need to take steps to provide EAs and arbitration practitioners with clear guidance as to how the threshold tests of urgency, admissibility and jurisdiction should be considered, perhaps by reference to anonymised decisions of previous EAs. It would also no doubt make ICC EA proceedings more attractive if the ICC Rules were to make provision for genuine *ex parte* applications in limited circumstances, as well as perhaps providing for specific sanctions for parties who breach the terms of EA orders. In the meantime, the international arbitration community should continue to work with national courts to provide for the recognition of the enforceability of such orders. Absent such steps being taken, it would appear unlikely that the use of EA Procedures will increase significantly in the near future.

The ICC Report can be downloaded here.