“Don’t Walk Behind Me, I May Not Lead; Don’t Walk in Front of Me, I May Not Follow “ – Article 29(7) of the ICC Rules and Concurrent Judicial Jurisdiction

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It is a generally accepted rule that while state courts have concurrent jurisdiction to hear and decide motions for interim relief prior to the constitution of an arbitral tribunal, they will only maintain such concurrent jurisdiction in appropriate or exceptional cases following such constitution.

The ICC Rules are unique in the sense that they apply the same rule when dealing with an Emergency Arbitrator (**“EA”**) and impose restrictions on the jurisdiction of state courts following the making of an application for EA, which are the same as those applicable following the constitution of a tribunal.

In this blog post, we analyze how the courts in Israel perceived their own jurisdiction following the making of an EA application and suggest that the ambiguous and inconsistent interpretation and application of this rule should be

taken under careful consideration in any future revisions of the ICC Rules. At the outset, it bears noting that the ICC has recently publicized a revision of the Rules which are due to enter into force in 1 January 2021. This revision does not revise Article 29(7) and the wording of the Article under the 2017 Rules shall remain following the coming into force of the new Rules in 1 January 2021.

The Concurrent Jurisdiction of State Courts under Article 29(7) of the ICC Rules

One of the key features in EA proceedings under the 2017 ICC Rules of Arbitration ("**ICC Rules**") is that found in Article 29(7), which states:

> *"The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat." [Emphasis added]*

Similar language is used in Article 28(2) of the ICC Rules which provides "*Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures*". [Emphasis added] Article 28(2) has been interpreted to suggest that after the tribunal is constituted, judicial relief is permitted only in the event that 'appropriate' circumstances exist and not automatically.

Implementing this feature to EA procedures by the ICC is unique, considering other arbitral institutions and the UNCITRAL Arbitration Rules ("**UNCITRAL Rules**") only provide similar guidelines to that of Article 28(2), i.e., only to interim applications submitted to national courts following the constitution of an arbitral tribunal (see e.g., Article 9.13 of the2020 LCIA Arbitration Rules, Article 30.3 of the SIAC Arbitration Rules, Article 23.9 of the HKIAC Administered Arbitration Rules and Article 26.9 of the UNCITRAL Rules).

The Interpretation of Section 29(7) of the ICC Rules

It is common interpretation and practice that Article 29(7) of the ICC Rules sets out the concurrent jurisdiction of national courts and EA and the non-exclusive nature of the EA (See, Emergency Arbitrator Proceedings – Commission Report, 2019, p. 15 ("**ICC EA Report"**)), an exception to the general principal of exclusivity and judicial non-interference in the arbitral procedure.[fn]Gary B. Born, International Commercial Arbitration (Second Edition, 2014), Volume II: International Arbitral Procedures p.2522- 2523; 2544-2545, §17.04.[/fn]

Article 29(7) was introduced to the ICC Rules due to concerns of members of the ICC Commission on Arbitration and ADR ("**Commission**") that the existence of EA Provisions on its own "*could lead to the adverse consequence of some state courts deciding to deny their own jurisdiction to issue interim or conservative measures*".[fn]Nathalie Voser, "Overview of the Most Important Changes in the Revised ICC Arbitration Rules", ASA Bulletin, Vol. 29, No. 4, 2011, p. 814.[/fn]

Following the amendment of the ICC Rules in 2012, and the introduction of Article 29, the interpretation of the Rules in the Secretariat's Guide to ICC Arbitration[fn]J. Fry, S. Greenberg, F. Mazza, The Secretariat's Guide to ICC Arbitration, ICC Publication 729 (Paris, 2012), p. 310.[/fn] followed the same interpretation suggesting that the "*Emergency Arbitrator Provisions are not intended to be the only means of seeking urgent relief*", but simultaneously noting that "*Article 29(7) slightly qualifies*" this concurrent jurisdiction when the application to the court is made following the EA application, and highlighting that in such circumstances the "*Rules require circumstances that make it 'appropriate' for the party to resort to a state court*".[fn]Ibid, § 3-1106.[/fn]

Although these were the initial concerns and intentions of the drafters of the Rules and the members of the Commission, following the introduction of the EA provisions to the ICC Rules, the Commission and scholars gave little attention to the way in which state courts apply this "concurrent jurisdiction".

In practice, on the occasions where a respondent asserts that by applying to a state court for interim relief the applicant waived the EA jurisdiction and its right to commence arbitration, such "waiver" arguments were rejected by the EA themselves, based, *inter alia*, on the language of Article 29(7) (ICC EA Report, p.

15).

In fact, most arbitration rules also explicitly confirm that applying to national courts for interim relief shall not constitute a waiver or infringement of the arbitration agreement (See e.g., Article 28(2) of the ICC Rules, Article 26(9) of the UNCITRAL Rules, Article 24(3) of the ICDR Rules) and judicial precedent generally arrives at the same conclusion.[fn]Gary B. Born, International Commercial Arbitration (Second Edition, 2014), Volume II: International Arbitral Procedures pp.2549-2551, §17.04.[/fn] However, the mirror image, of the national courts' position towards their "concurrent jurisdiction" alongside EA was rarely examined (ICC EA Report, p. 15).

And thus, although the drafters of Article 29(7) were concerned with courts denying their own jurisdiction, the language of the article did, at least to a certain extent, exactly that, and while the "concurrent jurisdiction" exists **before** making the application for EA, it only partially exists **after** the EA application was filed, and only in "*appropriate circumstances*". The language of Article 29(7) overturned the presumption of jurisdiction – meaning that by default the court should deny jurisdiction unless "appropriate circumstances" persuade it to determine otherwise.

This position is in line with Webster & Buhler's interpretation, namely that the actual effect of Article 29(7) will depend on the applicable law of the state court where a party applies for relief.[fn]T. Webster & M. Buhler, Handbook of ICC Arbitration (Fourth Edition, 2018), p. 501, §29-137.[/fn] An illustration to this approach, deferring the application of the concurrent jurisdiction to the state courts and the applicable law, is that of *Gerald Metals SA v. Timis*, [2016] EWHC 2327 (Ch), where the English court denied jurisdiction, *inter alia*, based on the fact that Gerald Metals previously applied for an EA and was denied by the LCIA.

However, bearing in mind the drafters' concerns, it is interesting to note that the language of Article 29(7) does not address these concerns in a conclusive manner, leaving the concurrent jurisdiction aspect of the EA Provisions to the discretion of different courts in different jurisdictions, rather than to that of the parties and the institutions.

The Position Taken by The Courts in Israel

Earlier this year, a decision by the Tel-Aviv District Court in O.M. (Tel-Aviv) 56844-10-19 **Mer Telecom Ltd. v. Sint Maarten Telephone Company N.V**. (Nevo, 17.3.2020) ("**Mer Telecom Decision**") provided insight on how courts in Israel may view EA applications, and their effect on the jurisdictional level and specifically the concurrent jurisdiction aspect.

In the past, the Supreme Court of Israel determined that when parties authorized an arbitral tribunal to issue interim measures and orders, such tribunal shall have the jurisdiction to decide motions for interim measures instead of a local court (see RCA 9389/06 **Advanced Highway Systems Ltd. v. FTS Formula Telecom Solutions** (Nevo, 14.10.2009)). The court, in turn, will be authorized to give only *ex-parte* or temporary emergency orders, and only prior to the constitution of the Tribunal.[fn]When an *ex-parte* motion is filed or if the petitioner cannot wait until the constitution of the Tribunal or the EA. See also: T. Webster & M. Buhler, Handbook of ICC Arbitration (Fourth Edition, 2018), pp. 501-502.[/fn] However, until of late, the Israeli courts did not directly address the EA Provisions and their interplay with past case-law and precedents.

Earlier this year, the Tel-Aviv District Court had to address these matters in the Mer Telecom Decision, where the court was requested to issue an interim injunction against the payment of a bank guarantee.

In that case, Mer Telecom petitioned the Court to issue an interim injunction against the payment of a bank guarantee until the final disposition of its main claim. Mer Telecom informed the Court that it intends to file for EA under the ICC Rules and that the interim petition and the main claim it filed with the Court were filed as a temporary relief, until such time that the EA or the Tribunal can decide on the merits of the interim measure (The Mer Telecom Decision, ¶¶ 24-25).

Although the Court initially granted Mer Telecom's petition for emergency temporary injunction, it eventually denied the motion for interim injunction, stating that once the arbitration has commenced there was no place for the proceedings in the Israeli Court to continue, thus, denying the motion on jurisdictional grounds. The District Court also reasoned that its conclusion is in line with the Israeli case-law and with the parties' pleadings.

Surprisingly, the Court did not analyze Article 29(7) and did not inquire if the circumstances of the application before it are appropriate circumstances which

justify applying jurisdiction regardless of the EA application, and satisfied itself by noting that the EA application was dismissed. A motion for leave to appeal to the Supreme Court was denied on other grounds on April 4, 2020 in the framework of RCA 2388/20 (Justice Solberg).

Concluding Remarks

It is possible that the Court in the Mer Telecom Decision did not analyze the question of its concurrent jurisdiction as the application itself highlighted that it is only a temporary application pending the Tribunal's decision, but nevertheless, the decision highlights the risks of too wide of a discretion given to national courts. Such wide discretion and the variances between courts in different jurisdictions and legal traditions may lead applicants to "forum shopping", favoring the jurisdictions which will hold a looser approach to the concurrent jurisdiction principle.

Although a "tight" approach to the interpretation of the concurrent jurisdiction principle or the "silent" approach taken by other arbitral institutions and the UNCITRAL Rules may lead to abuse of the EA Provisions, it would be advisable for the arbitral institutions and in particular the ICC, to define in greater detail the appropriate circumstances which will lead to the exclusion of the concurrent jurisdiction of the EA and state courts.

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