Kluwer Arbitration Blog

First aid in arbitration: Emergency Arbitrators to the rescue

Justin D'Agostino (Herbert Smith Freehills) · Tuesday, November 15th, 2011 · Herbert Smith Freehills

In an emergency, swift and effective action is required. Yet in international arbitration proceedings, it can take weeks or months to constitute an arbitral tribunal. What options, then, are open to a party in need of urgent interim relief before an arbitral tribunal has been formed? In many circumstances, applying to the national courts of the relevant jurisdiction will be an unattractive prospect – for all of the reasons the parties chose arbitration in the first instance.

Arbitral institutions have devised a range of different solutions to this problem – from summary arbitral proceedings for interim relief (e.g. NAI) to expedited formation of the arbitral tribunal (e.g. LCIA) – but many have alighted on the use of "emergency arbitrators" to determine applications for interim relief before the arbitral tribunal is constituted (e.g. SCC Rules, SIAC Rules, new ICC Rules). In this blog, we examine some of the practical issues raised by the use of emergency arbitrators, as an increasingly popular tool of (pre-)arbitral procedure.

The first of these is: who to call in an emergency? In order to determine whether a party is entitled to rely on emergency arbitrator procedures, it is necessary to look at how those procedures are incorporated into the applicable arbitral rules and when they are to be invoked.

In contrast to the approach of previous regimes, most modern provisions for emergency arbitrators apply to a dispute automatically, by virtue of the parties selecting the relevant arbitral rules (indeed, the "opt in" nature of the ICC's 1990 Rules for a Pre-Arbitral Referee Procedure is often cited as a reason for their limited use). Typically, where arbitral rules offer emergency arbitrator procedures, parties must therefore expressly "opt out" of those provisions if they do not wish them to apply. The SCC Rules go one step further, by applying the opt out feature in respect of the emergency arbitrator provisions retroactively (i.e. parties arbitrating under the SCC Rules can use the emergency arbitrator procedures even if their arbitration agreement was concluded before those procedures came into effect, on 1 January 2010). By contrast, and in recognition of the dramatic change introduced by the new provisions, the new ICC Rules contain 'transitional provisions' exempting the application of the new Emergency Arbitrator Provisions where the arbitration agreement was concluded before the new Rules come into force (i.e. on 1 January 2012) (Article 29(6)(a) of the new ICC Rules). It is anticipated that this automatic inclusion / opt out formulation will encourage the uptake of emergency arbitrator procedures under the arbitral regimes in which they appear.

A divergence may be seen, however, in the approach of arbitral institutions at the stage at which parties may seek to invoke emergency arbitrator provisions. For example, under the rules of certain

institutions, parties are required to submit a Notice of Arbitration before (or concurrently with) a request for emergency relief (e.g. Schedule 1(1) of the SIAC Rules). Others, in contrast, offer even greater flexibility, allowing a party to apply for interim relief before a Request for Arbitration has been filed (e.g. Appendix V, Article 1(6) of the new ICC Rules). However, in those instances, the party seeking interim relief is typically required to submit a Request for Arbitration within a certain time period after their application for relief, failing which the emergency arbitrator proceedings will be terminated.

Another issue of interest is the impact of emergency proceedings on the concurrent jurisdiction of a competent court or the arbitral tribunal. As for court proceedings, emergency arbitrator procedures are not envisaged to represent an exclusive remedy and, in general, the option of (or indeed submission to) those proceedings does not operate as a waiver of judicial authority over the matter. Indeed, certain arbitral rules expressly recognise the preservation of judicial remedies despite the availability of emergency arbitrator procedures (e.g. Article 29(7) of the new ICC Rules; Article 32(5) of the SCC Rules). However, the provisions of mandatory local law may curtail recourse to the courts where parties have an option to seek relief from another source (such as an emergency arbitrator). For example, under the English Arbitration Act (1996), the English courts will grant orders in support of arbitration "*if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively*" (section 44(5) of the English Arbitration Act). (It is noted, however, that the qualification of "*unable…to act effectively*" may dilute the restrictive effect of this provision on the English courts' jurisdiction as a consequence of emergency arbitrator procedures.)

In respect of the arbitral tribunal, jurisdiction is entirely protected. Arbitral rules are clear that orders or awards of emergency arbitrators do not bind the subsequently-constituted arbitral tribunal, and that those tribunals are empowered to reconsider, modify, terminate or annul the order or award (e.g. Article 29(3) of the new ICC Rules; Schedule 1(7) of the SIAC Rules).

There are, however, important limitations on the interim relief emergency arbitrators are able to grant. For example, since the same principles of jurisdiction apply to emergency arbitrators as to the arbitral tribunal, they are not able to grant interim orders over third parties to the (eventual) arbitral proceedings. This rule is expressly recognised in the new ICC Rules, which state that the Emergency Arbitrator Provisions apply only to signatories to the arbitration agreement or their successors (Article 29(5) of the new ICC Rules). (It is noted that this particular provision also precludes the use of ICC emergency arbitrators in investor-state disputes.) In addition, *ex parte* applications – where the element of surprise is vital to their success – are not suitable for submission to emergency arbitrators (e.g. Mareva or freezing injunctions). This important limitation on the powers of emergency arbitrators partly reflects the centrality to arbitration of the opportunity for each party to present its case, but also the draconian nature of *ex parte* orders, such that they ought to be reserved solely for the national courts.

As a side note, one concern that has been voiced in relation the powers of emergency arbitrators to grant interim relief in arbitral proceedings is the potential damage their orders may cause if wrongly granted against innocent parties. However, arbitral institutions go some way to addressing this concern by giving emergency arbitrators the power to require the applicant to provide "appropriate security" as a pre-condition for the granting of relief (e.g. Appendix V, Article 6(7) of the new ICC Rules).

Assuming that the basic threshold requirements have been met (e.g. standing, urgency, *prima facie* entitlement to the relief sought, threat of irreparable loss), and a party is awarded the relief it seeks, the next key issue that arises is enforcement: how may provisional measures ordered by an emergency arbitrator be enforced and what are the sanctions for non-compliance? The form of the relief granted by an emergency arbitrator varies across arbitral institutions: some require provisional measures to be granted as "orders" (e.g. Article 29(2) of the new ICC Rules), whilst others permit interim "awards" to be rendered (e.g. Schedule 1(6) of the SIAC Rules; Article 32(3) of the SCC Rules). However, questions remain regarding the applicability of national arbitration laws to pre-arbitral procedures and the extent to which courts will enforce orders or awards made by emergency arbitrators. Ultimately, this is likely to turn upon whether emergency arbitrators are deemed to be "arbitrators", for the purposes of arbitration legislation, granting relief in the course of "proceedings". Unfortunately, there is a paucity of case law with which to illuminate this question. However, a purposive approach – which recognises that the primary purpose of arbitration legislation is to respect the parties' agreement to arbitrate their disputes – would appear to lend support in favour of the enforcement of emergency arbitrators' orders and awards.

Separately, claims may lie in breach of contract where parties are required by the governing arbitral rules to give an undertaking to comply with the orders of emergency arbitrators (e.g. Article 29(2) of the new ICC Rules; Schedule 1(9) of the SIAC Rules; Appendix II, Article 9(3) of the SCC Rules). Accordingly, arbitral tribunals are empowered to reflect non-compliance with the orders of emergency arbitrators in the final Award of damages (e.g. Article 29(4) of the new ICC Rules). (Added incentives derive from provisions which allow arbitral tribunals to revisit an emergency arbitrator's decision about the costs of the emergency proceedings.)

In addition (and of greater practical effect than might, at first, be imagined), orders granted by emergency arbitrators are "morally binding" on the parties. Whilst it may be true that parties are less incentivised to comply with the orders of emergency arbitrators (on the basis that those arbitrators are usually prevented from sitting on the arbitral tribunal, and consequently the risk of adverse inferences from non-compliance may be perceived to be lessened), in practice, arbitral institutions report very high levels of voluntary compliance with those orders.

As the rules of arbitral institutions evolve to reflect modern practice and respond to commercial pressures, there appears to be an increasing convergence in approaches to the provision of pre-arbitral emergency relief. Although there may be certain practical limitations on the operation and enforcement of these provisions, the ultimate aim of emergency arbitrator procedures is the same: to increase party autonomy and reduce the role of the courts in arbitral proceedings, taking arbitration one step further to becoming a one-stop shop for the comprehensive and effective resolution of disputes. The proven track record of parties who have deployed these procedures successfully to date is an encouraging sign of the utility of emergency arbitrators and a likely indicator of future trends. Those institutions whose rules are currently silent on the use of emergency arbitrators are bound to follow suit.

Justin D'Agostino and Ula Cartwright-Finch
Herbert Smith

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Tuesday, November 15th, 2011 at 3:44 am and is filed under Arbitration Institutions and Rules, Arbitrators, Efficiency, ICC Arbitration, Jurisdiction of the arbitral tribunal, Pre-arbitral procedure
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.