Kluwer Arbitration Blog

Interlocutory Injunctions in Luxembourg Shareholder Litigation: Are Emergency Arbitration Proceedings Better Suited than Proceedings before the Ordinary Courts?

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Luxembourg is home to many international holding companies and special purpose vehicles. As a consequence, when disputes between shareholders or power struggles within the management arise, the resulting proceedings usually takes place at the level of the Luxembourg entity.

One of the weapons of choice in this type of litigation is the application for interlocutory injunctions which allow a party to get an expedited court order to maintain the status quo or to strengthen its bargaining position. The forum of choice for these interim measures has traditionally been the Luxembourg district court sitting in summary matters (*juge des référés*). Parties would typically request the judge to halt a general meeting deciding on a controversial or critical issue (such as increasing the company's capital to dilute certain shareholders, reshuffling the board of directors, agreeing to a merger, disposal of assets) or block a meeting of the company's board of directors. It would even be possible to suspend the effects of such meetings pending a judgment on the merits of the case.

Noticeably in the past few years, arbitration clauses have become more and more frequent in the shareholder agreements and senior management service contracts and one may be allowed to wonder whether there is an advantage in bringing interlocutory proceedings before the arbitration tribunal or an emergency arbitrator (as the case may be) rather then before the ordinary courts.

Luxembourg case law has seen some hesitation on the question whether the judge siting in summary matters has jurisdiction when parties to a contract had provided for disputes to be submitted to arbitration.

The most recent case law of the Luxembourg court of appeal has held that a contractual provision referring '*all disputes*' arising out of the agreement to arbitration is to be interpreted as to include summary proceedings as well. As a consequence, the national courts will in such cases not have jurisdiction to decide on interim injunctions relating to the dispute.

This case law breaks with the long established position in Luxembourg that required the parties to include a specific provision in their arbitration clause if they wanted to exclude the ordinary courts' jurisdiction for interlocutory proceedings (opt-out mechanism). The Luxembourg courts also

traditionally held that the interlocutory proceedings could no longer be brought before the ordinary courts if the arbitral tribunal had already been appointed. The objective of the courts clearly was to make the ordinary courts as widely available as possible to parties seeking interim measures when such measures would not be readily available from the arbitration tribunal.

The case law as it currently stands seems to bar the traditional fall back solution to the ordinary courts and may therefore expose a party to the risk of not being able to react in due time to a corporate action that is harmful to its interests or those of the company.

However, in practice this risk seems somewhat mitigated as the most frequently used international arbitration rules have in recent years added some form of emergency response to provide relief to the parties prior to the appointment of the arbitration tribunal. Some international rules provide both an emergency arbitrator and an expedited formation of the arbitration tribunal (this is the case for the rules of the Singapore International Arbitration Centre, of the Stockholm Chamber of Commerce, of the Swiss Chambers Arbitration Institution and of the Netherlands Arbitration Institute). Other international rules (such as those of the London Court of International Arbitration, of the Dubai International Arbitration Centre and of the Hong Kong International Arbitration Centre) provide for expedited appointments only, while others solely provide for emergency arbitrators (this is the case for the rules of the International Chamber of Commerce and of the International Centre for Dispute Resolution of the American Arbitration Association).

Anecdotally, the arbitration rules of the Luxembourg Chamber of Commerce do not explicitly provide for either of the above emergency responses (although they seem to infer certain general emergency powers to the president of the arbitration council of the Chamber of Commerce, which have not, to our knowledge, been tested in the context of pre-arbitration relief).

Notwithstanding the existence of emergency provisions under the international arbitration rules, this type of relief suffers a structural weakness in that there remains an uncertainty relating to the enforcement of such interim relief. International arbitration awards would be enforced in Luxembourg pursuant to the New York Convention of 10 June 1958, or, where that Convention would not apply, pursuant to the general rules of the Luxembourg New Civil Procedure Code (in particular its article 1250). We are not aware of a case where Luxembourg courts have had to consider whether an order of an emergency arbitrator could fall within the scope of the New York Convention or the general Luxembourg civil procedure rules and consequently be enforced in Luxembourg.

Another weakness of the emergency provisions available under international arbitration rules is that the relief is only available to the parties to the arbitration agreement and as a result any relief obtained is not opposable to third parties. This point is however of capital importance in shareholder litigation where it is vital that the effects of the interim injunction are opposable to the company to effectively prevent any harmful corporate actions from going forward.

The lesson from the short outline above is (not surprisingly) that particular care should be given to the drafting of the arbitration clause in contracts relating to Luxembourg corporate entities.

It is possible to combine the best of both worlds (i.e. arbitration and ordinary courts) provided some thought is put into the drafting and due consideration is given to possible litigation scenarios affecting the company in particular. Any arbitration clause should specifically provide for the possibility to seek interlocutory injunctions from the Luxembourg courts (opt-in mechanism).

Clauses subjecting “all disputes” solely to arbitration should be avoided.

There are some fail safe mechanisms that can salvage a party from the effects of an ill conceived arbitration clause (but these mechanisms have their own little imperfections):

Luxembourg courts will likely assert overriding jurisdiction in two limited circumstances:
• if a party would otherwise not find an effective forum to obtain relief and as a result suffer a denial of justice;
• to stop a wrongful action (*voie de fait*) from unfolding.

Given that these circumstances are quite exceptional in practice, the burden of proof to the applicant is significant and chances of success on those legal grounds are relatively limited.

Finally, in order to conclude this article with a glimmer of hope, Luxembourg case law has recently held that an arbitration clause is of private nature (as opposed to public order) and as a result the judge will not automatically assert his jurisdiction. This means that the defendant needs to raise the incompetence of the ordinary judge before any defense on the merits of the case (*in limine litis*) if the defendant believes the arbitration clause excludes the ordinary court’s jurisdiction.

As a consequence of this interpretation, even in a case where the parties had agreed to bring ‘all disputes’ before an arbitration tribunal, they could in practice go before the ordinary courts if the defendant does not raise the lack of jurisdiction of such courts.

The draw back of this solution is however that it requires the consent of all parties to the jurisdiction of the ordinary courts (which can be difficult to obtain when the conflict is just in its early phase as is often the case in interim proceedings). Also, under this solution the claimant has essentially the power to shape the proceedings (by making certain demands to the court but omitting others) leaving the defendant only with the option to accept or decline the jurisdiction but not to amend the proceedings.

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