Kluwer Arbitration Blog

Narrowing the powers of the national courts to grant interim measures – A measure too far?

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There appears to be a gradual shift in international arbitration, towards an assumption that parties to an arbitration agreement who are seeking interim relief will look first to the tribunal, rather than to the national courts. This is seen in recent iterations of the institutional rules, such as the 2012 ICC Rules, the 2014 LCIA Rules and the 2013 HKIAC Rules, which allocate broad powers to the tribunal to provide interim relief, limiting the national court's power to do so to only narrow circumstances.

This shift is complemented by the increasing prevalence of emergency arbitrator provisions in the institutional rules (including the 2014 LCIA Rules, the 2012 ICC Rules, the 2010 SCC Rules, the 2012 Swiss Rules, the 2013 SIAC Rules, the 2013 HKIAC Rules and the 2013 ICDR Rules), which allow parties to obtain interim measures within the framework of an arbitration before the tribunal is constituted, or even in some cases before the arbitration has commenced (for example the 2014 LCIA Rules, the 2012 ICC Rules, the 2010 SCC Rules and the 2012 Swiss Rules).

This is undoubtedly a positive development. Where a party wishes to prevent its opponent from dissipating assets or evidence whilst also preserving the confidentiality of the arbitration, or where it has concerns about the ability of the national courts to act sufficiently quickly, or as to the impartiality or competence of the relevant national court, these provisions offer a much needed solution.

However, a consequence of these developments is that the scope of the national courts' supporting role in arbitration proceedings is narrowed, with the associated risk that the national courts' powers to act in support of arbitration may be constrained even in circumstances in which it might be preferable to retain that option of support.

The tribunal's powers under the LCIA and ICC Rules

The 2012 ICC Rules confer broad powers to the tribunal, to "*order any interim or conservatory measure it deems appropriate*", under Article 28(1). Similarly, the 2014 LCIA Rules grant the tribunal wide-ranging powers to grant interim measures, under Article 25.1.

Both the LCIA and ICC Rules preserve the parties' ability to apply to the national courts for interim relief but only in limited circumstances. Under the ICC Rules, the parties may apply to the national courts after the transmission of the file to the tribunal only "*in appropriate circumstances*"

(Article 28.2). Under the LCIA Rules, the parties may do so only "*in exceptional cases*" (Article 25.3). Accordingly, the default position appears to be that, after the tribunal has been constituted, the tribunal will provide interim relief.

Prior to constitution or formation, the ICC Rules and the LCIA Rules allow broader discretion to the parties to apply to the national courts for interim relief. However, it is important to note that, at that time the parties have the alternative option of applying for the appointment of an emergency arbitrator (under Article 29 of the ICC Rules and Article 9B of the LCIA Rules) or, under the LCIA Rules, for the expedited formation of the tribunal (under Article 9A of the LCIA Rules).

Seele Middle East FZE v Drake & Scull International SA Co

The case of *Seele Middle East FZE v Drake & Scull International SA Co* [2013] EWHC 4350 (TCC) raises the question of whether the deference to the arbitral tribunal anticipated in institutional arbitration rules might go too far, to the point that it might become difficult to obtain interim relief from the courts.

In *Drake*, an application for an injunction was made in the English High Court, by a party to an English law governed contract, under which disputes were to be referred to ICC arbitration seated in London. Arbitration proceedings had not yet commenced.

The application was made under Section 44 of the Arbitration Act 1996, which sets out the powers of the English courts exercisable in support of arbitral proceedings seated in England and Wales. The Court determined that the case was one of urgency, which allowed an order for the purpose of preserving evidence or assets under Section 44(3), on an application without notice.

The Court then considered the application of Section 44(5) of the Act, which provides that "*the court shall act only 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*" (emphasis added).

The Court found that, in the circumstances, there was no power for an ICC arbitral tribunal to act effectively, and accepted jurisdiction to order an injunction.

However, the Court added the notable *obiter* comment that "*Although this is a matter where there is arbitration under the ICC Rules, it is not subject to the recent change in those rules in the form of the introduction of an emergency arbitrator to deal with applications. Therefore, there is no power for the time being for an ICC arbitral tribunal to act effectively. Whether an emergency arbitrator would be able to act effectively is not a matter which I therefore need to consider.*"

The clear implication is that, had the 2012 ICC Rules applied, there may have been a basis to determine that a (not yet appointed) emergency arbitrator would have had power to act effectively in the same circumstances. This is especially noteworthy because it is possible that an applicant may choose to seek relief in the courts, instead of exercising its option to appoint an emergency arbitrator, yet might find its application rejected for lack of jurisdiction on the mere basis that such an option is available.

A measure too far?

It will be uncontroversial that there are circumstances in which it might be preferable, if not

actually necessary, to seek the support of the national courts instead of the tribunal or emergency arbitrator. For example:

- Although the tribunal might have the power to issue an order regarding preservation of evidence or security for costs, most of the institutional rules (including the 2012 ICC Rules and the 2014 LCIA Rules) require such applications to be made on notice. Even if notice is not a requirement, a tribunal may be slow to grant relief without giving all parties the opportunity to make representations on the application. In the case of an application for a freezing injunction, or for retention of evidence, it may be preferable to apply to the national courts without notice to the other party, in order to avoid the risk of dissipation of the relevant assets or evidence.
- Speed of action is also relevant. The 2014 ICC Dispute Resolution Statistics note that, in 2014, the time taken for an emergency arbitrator to make his order in ICC proceedings averaged 11.5 days. Although this is undoubtedly fast, it may still be preferable to apply to the national court.
- Similarly, the possibility of swift enforcement may be important. The threat of a peremptory order from a tribunal (to the extent that one is available under the procedural law of the arbitration), may be insufficient to ensure compliance. Although enforcement of a tribunal order might be possible in a national court, this may be too slow to be of practical benefit. Equally, if the tribunal's decision is given in the form of an award rather than an order, it may be enforced like any other award; but this process is likely to be too slow to be of practical benefit on a time sensitive application. Finally, it is particularly notable that it is not clear whether the national courts will enforce an award of an emergency arbitrator (assuming that the emergency arbitrator is entitled under the relevant rules to issue its decision in the form of an award) as a final and binding award under the New York Convention. This will depend on the provisions of the arbitration laws in the relevant country and the approach taken by the national courts in question.
- Costs may also be a relevant consideration. The upfront costs of emergency arbitrator proceedings under the ICC Rules are $40,000, and the fees payable under the LCIA Rules amount to £28,000. This may well compare unfavourably with the costs of an application in the national courts.
- The limits of the tribunal's jurisdiction are also relevant. A tribunal does not have any power to bind third parties; yet this may be necessary – for example – to render an application for a freezing order effective.

If interim applications were to be approached in the way hinted at in *Drake*, parties might be excluded from obtaining relief in the national courts (or at least the English Courts) in circumstances where that is preferable, because a tribunal is – in some shape or form – able to act.

The fact that it is possible to constitute a tribunal at short notice which is, generally speaking, able to act, does not mean that the tribunal is able to act in the way the applicant party wants or needs. Such a narrow interpretation of the words "*has no power or is unable for the time being to act effectively*" raises the risk that a non-existent tribunal might be determined to be able to act even though it is not able to act in the way the applicant wishes. This undermines the applicant's choice not to appoint an emergency arbitrator and instead to seek recourse in the courts.

There is also the possibility, which was not raised in *Drake*, that the requirement for urgency under section 44(3) of the Act might be undermined by the availability of an emergency arbitrator. Might we see a situation in which the courts cannot accept jurisdiction to hear *ex parte* applications, on the basis that the test of urgency cannot be met where the arbitration framework itself provides recourse in cases of urgency?

Some protection against these approaches is provided by Article 9.12 of the LCIA Rules. The option of appointing an emergency arbitrator under Article 9B "*shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the Arbitration Tribunal; and it shall not be treated as an alternative to or substitute for the exercise of such right*".

Nonetheless, this protection may be limited, given that it is the parties' "*right to apply*" which is protected, rather than their right to the alternative form of relief sought. It is not clear whether Article 9.12 is intended to actually prevent the availability of an emergency arbitrator from prejudicing a party's ability to satisfy the requirement that an arbitral tribunal "*has no power or is unable for the time being to act effectively*"; or merely to ensure that parties are free to apply for relief from any of the courts, an emergency arbitrator, or the tribunal following expedited formation, in accordance with the relevant provisions of the Rules and the laws of the seat.

More limited protection is provided in the 2012 ICC Rules by Article 29.7, which states that "*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*". This suggests that, at least when an emergency arbitrator has been appointed – and possibly absent any such appointment – an application to the courts for interim relief may be granted only where it can be shown that an emergency arbitrator "*has no power or is unable for the time being to act effectively*".

Concluding comments

There are clear and undisputed advantages to emergency arbitration provisions and provisions carving out greater scope for an arbitral tribunal to grant interim measures. Undoubtedly, in jurisdictions in which the courts are slow to act, or do not have a well-developed or favourable jurisprudence in supporting arbitrations, it is a positive step to expand the powers of the tribunal as widely as possible, within the confines of what is possible in private proceedings based on consent.

However, *Drake* raises the question of whether there is some risk in limiting the options of the courts when they do in fact have the power and the speed to assist parties to arbitration more effectively than a tribunal, and when an applicant has chosen not to appoint an emergency arbitrator for that reason. It remains to be seen whether such an approach will be adopted by the English courts – but the risk is an issue for consideration when drafting arbitration agreements.

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