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Emergency Arbitration of Construction Disputes – Choose Wisely or End Up Spoilt for Choice

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Arbitration is an increasingly popular form of dispute resolution in the field of construction, particularly for international projects where parties are of different nationalities, and where at least one party is unlikely to be operating on home soil.

However, a commonly cited disadvantage of arbitration as opposed to court litigation is that there may not be sufficient time to constitute a tribunal where urgent relief is required, such as a without notice injunction to prevent the dissipation of assets. Traditionally, in such circumstances, the parties have had to turn to the national courts for assistance. The English Arbitration Act, for example, permits the courts to step in to grant emergency relief "if the case is one of urgency".

To address this draw-back, in recent years, many of the leading arbitral institutions have amended their rules to provide for the appointment of an emergency arbitrator. Such provisions give parties the opportunity to seek urgent and interim relief from an arbitrator who is appointed by the institution in short order. Indeed, mirroring court proceedings, some institutional rules even permit the appointment of an emergency arbitrator before the notice of arbitration has been filed (such as the LCIA and ICC rules).

The perceived advantages of seeking relief from an arbitrator rather than a court are that (i) it is more consistent with the parties' agreement to avoid approaching the national courts, especially if one party has concerns about the neutrality of a particular national court (ii) the key arbitral institutions are able to draw on a large pool of arbitrators and have the facilities to deal with applications on an urgent basis (iii) confining the dispute to arbitration maintains the confidentiality of the proceedings, which may not be the case once a reference has been made to court and (iv) as many jurisdictions prohibit foreign counsel from appearing before the courts, the appointment of an emergency arbitrator will not require the applicant party to instruct additional local counsel to deal with an ancillary court application.

Whilst the key benefit of appointing an emergency arbitrator over seeking relief from the main tribunal (once constituted) would of course be urgency, there is also the potential advantage that the emergency arbitrator is appointed on a one-off basis only, and will not form part of the main tribunal. Therefore, the perceived risk of any prejudgment of the merits that is often associated with seeking interim relief from the main tribunal is eliminated.

The types of relief that could be sought from an emergency arbitrator in a construction dispute are, for example, an award of security for claim, or the preservation of evidence or assets. There have also been cases where emergency arbitrator relief has been sought to prevent a party from calling on a performance bond or to suspend the application of liquidated damages (in circumstances where there is a corresponding contractual right to set-off amounts payable against those liquidated damages).

However, there are a number of limitations on the relief that an emergency arbitrator can grant. In particular, and in contrast to the relief available from court, typically it is not possible for an arbitrator to grant without notice relief – the other party must usually be notified. A party seeking a without notice freezing injunction to prevent the dissipation of assets would likely therefore still need to apply to the courts. Given the consensual nature of arbitration, it would also not be possible to seek from an emergency arbitrator any form of relief which would bind a third party, such as making premises available for inspection, or compelling the attendance of witnesses, as the arbitrator will only have jurisdiction as between the contracting parties.

A further – and overriding – consideration is the extent to which any order given by an emergency arbitrator would actually be enforceable and therefore effective. This is because only final, not interim, arbitral awards are enforceable under the New York Convention. As an award rendered by an emergency arbitrator can be varied or lifted by the main tribunal once constituted, there is an argument that it is not truly final and binding in accordance with Article V.1(e) of the Convention. As the New York Convention does not define an "arbitral award", whether an award rendered by an emergency arbitrator could be recognised and enforced as if it were a court order is dependent on national legislation.

Notably, however, the position has been confirmed in Singapore by virtue of an amendment to the International Arbitration Act, which recognises and provides for the enforceability of orders and directions of emergency arbitrators – see the International Arbitration (Amendment) Act 2012. The Hong Kong Arbitration Ordinance has similarly been amended.

Although some institutions have included provisions which expressly confirm the binding nature of awards rendered by emergency arbitrators, this is unlikely to be sufficient in practice.

The question of whether interim relief granted by an arbitral tribunal would be effective was considered by the English court in the case of *Starlight Shipping v Tai Ping Insurance* against the background of Section 44(5) of the English Arbitration Act, which provides that a court shall only act "*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*." Although the decision in that case was not made in the context of awards granted by emergency arbitrators, the judge held that whilst an arbitral tribunal could act effectively by rendering a final award, this was not the case for an interim award, which would not be enforceable under the New York Convention.

In addition to the question of enforceability, unlike the court, an emergency arbitrator cannot hold a recalcitrant party in contempt for failing to comply with an order or undertaking. The threat of contempt, and the corresponding criminal proceedings, are powerful tools in securing compliance with an order. Therefore, even if an emergency arbitrator were to grant a mandatory injunction requiring remedial works to be carried out, a site to be vacated, or even a freezing injunction, any non-compliance could not ultimately be enforced by the arbitrator in the same way.

The uncertainty regarding enforcement or non-compliance is not to say, however, that the award itself would not be sufficient to cause the recalcitrant party's compliance. Non-compliance with an emergency arbitrator's decision would no doubt influence the main tribunal's perception of that party once the proceedings commence in earnest and could have a corresponding impact on the final award.

Despite some limitations concerning emergency arbitrator relief, the recent English case of *Gerald Metals v Timis* also suggests that there are some circumstances where, if emergency arbitrator relief is available, a party could be precluded from obtaining that relief from court. In that case, it was held that the court's powers should only be exercised either owing to urgent circumstances which could not wait for an emergency arbitrator to be appointed or where the powers of the emergency arbitrator were inadequate. Following this case, parties must give serious thought to whether appropriate relief can be granted by an emergency arbitrator before going directly to the courts.

In the context of international construction projects governed by FIDIC contracts, there is also the question of the role of Dispute Adjudication Boards ("DAB's") in settling disputes and providing relief. As the DAB procedure pre-dates the more recent phenomenon of emergency arbitrators, its interaction with emergency arbitrator relief is uncertain. The role of the DAB is of course distinct from emergency arbitrator relief: the DAB is frequently on-hand throughout the life of the project, and, where this is the case, given its proximity to the issues, its opinion is usually trusted and respected by the parties. Any DAB decision will lead to finality unless a notice of dissatisfaction is served. In contrast, the emergency arbitrator process is always a precursor to arbitration: as above, its award can be varied or lifted by the main tribunal once constituted.

In circumstances where the parties have agreed to mandatory DAB procedure with an optional reference to arbitration, some interesting questions arise concerning the appropriate forum for interim relief. Where there has been a DAB decision followed by a notice of dissatisfaction, when can a party commence emergency arbitration? Would an emergency arbitrator have jurisdiction, or should that relief be directed back to the DAB? Can a party apply to an emergency arbitrator during the 56-day cooling-off period after notice of dissatisfaction for the purposes of amicable settlement contained in clause 20.5 of FIDIC? This may be relevant, for example, if there is a risk of deliberate asset dissipation following the DAB decision (as by that point, the losing party will know that a DAB is against them and might also be worried about its prospects of success before an arbitral tribunal).

For contracts which anticipate the appointment of a DAB but such appointment is not mandatory, can a party proceed directly to emergency arbitration without first approaching the DAB? Although there is no authority on the point, it is likely that an emergency arbitrator would decline to step in and grant relief unless the DAB were unable to act effectively. Where the DAB's role to be on-hand during the life of the project, it would arguably be best-placed to determine interim disputes. Parties may wish to consider such issues when they are drafting their dispute resolution clauses in order to ensure certainty in circumstances where multiple fora could have concurrent jurisdiction over a dispute.

There is no doubt that the availability of relief from a number of different fora is a good thing for construction parties, as it enables them to seek adequate and appropriate protection of their arbitration claims, whether from a court, emergency arbitrator, main arbitral tribunal or in some cases an adjudicator/adjudication board. However, parties in need of relief must ensure that they

are not literally “spoilt for choice”. Now more than ever, they must give careful thought to the type of relief they need and who is best-placed to grant it at that particular time, or else risk wasted applications which are either fruitless or inherently ineffective.

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