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Interim Relief through Emergency Arbitration: An Upcoming Goal or Still an Illusion?

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So called "emergency arbitration" is raising considerable interest among international arbitration practitioners, as the importance of this tool aimed at protecting the parties' rights either during the period between the filing of an arbitration request and the constitution of the arbitral tribunal or in the course of the proceedings, before the award is rendered, is now widely recognised.

Until recently, a party seeking relief on an emergency basis had no choice but to resort to the ordinary courts. In recent years, however, most of the major arbitral institutions have developed procedures and incorporated rules aimed at granting the parties interim protection in circumstances where the time required for rendering an award would cause irreparable harm, either providing for the appointment of emergency arbitrators or empowering already established tribunals to deal with interim measures.

In 2012 the ICC Arbitration Rules introduced the role of the emergency arbitrator, providing that *"a party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal"* may file an application under the Emergency Arbitration Rules set forth in Appendix V (Article 29). Furthermore, Article 28(1) of the ICC Rules provides that *"unless the parties have otherwise agreed … the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate"*.

The ICSID Arbitration Rules provides that *"at any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal"* (Article 39). Similarly, the UNCITRAL Arbitration Rules provides that *"the arbitral tribunal may, at the request of a party, grant interim measures"* (Article 26).

Article 25 of the Arbitration Rules of the London Court of International Arbitration (LCIA) provides that the arbitral tribunal is empowered to order appropriate interim measures. Article 6 of the Arbitration Rules of the International Center for Dispute Resolution (ICDR) provides that a party may apply for emergency relief before the constitution of the arbitral tribunal when urgency reasons exist. Similar provisions are included in the Rules of Arbitration of other primary arbitral institutions such as the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC) and the Stockholm Chamber of Commerce (SCC).

The Arbitration Rules of the Chamber of Arbitration of Milan merely state that *"the Arbitral Tribunal may issue all urgent and provisional measures of protection, also of anticipatory nature,*

that are not barred by mandatory provisions applicable to the proceedings" (Article 22(2)); this practically results in a lack of interim relief if Italian law is applicable to the dispute, as under our domestic procedural rules arbitrators are generally barred from rendering interim and protective measures, unless expressly authorised by specific rules of law.

While only a few sets of arbitration rules (such as the ICC, the ICSID, the ICDR and the SCC Rules) deal with the parties' need to obtain urgent protective measures before the constitution of the tribunal that will deal with the merits of the dispute, most arbitral institutions merely provide for the tribunal's power to give interim measures in the course of proceedings, once the tribunal has been formed. This, given the length of time (sometimes months) that the constitution of a tribunal may take, results in the party seeking relief on an urgency basis being forced to seize ordinary courts, therefore frustrating the function of emergency arbitration.

Besides, despite their growing popularity, emergency arbitration provisions still raise several doubts in terms of effectiveness and efficacy of the protection they are meant to ensure, as uncertainties persist regarding the enforceability of rulings given by emergency arbitrators or by tribunals on an interim basis. The responsibility for enforcing interim measures usually lies with national courts, but this raises issues as much arbitral legislation does not address the enforcement of those measures.

The main concerns have to do with (i) the nature of decisions of emergency arbitrators (whether they are rendered in the form of an "order" or an "award") and (ii) whether such rulings are enforceable under the New York Convention, which only applies to "arbitral awards" also in consideration of their temporary rather than final nature. Although most of the arbitral institutions which provide for emergency arbitration expressly clarify that those rulings are binding on the parties, none provide a precise route for their enforcement in the event of non-compliance.

Different designations are adopted by arbitration rules as to the nature of interim arbitral decisions: while for example the SCC and the ICDR Arbitration Rules empower emergency arbitrators to give decisions in the form of an interim award, the ICC Rules specify that *"the emergency arbitrator's decision shall take the form of an order"* which shall be binding on the parties and which the parties undertake to comply with (Article 29(2)).

However, the ICC Rules remain silent on whether and how such decisions shall be enforceable, nor do they specify whether the emergency arbitrator's order has the same effects as an interim measure rendered by a tribunal under Article 28(1). Finally, Article 29(4) of the ICC Rules allows tribunals to take into consideration (even for the allocation of costs) any non-compliance with an emergency arbitrator's decision.

In such a context, it is still unclear whether an interim ruling made by an arbitrator would be considered enforceable in the same manner as a final award rendered by a tribunal or if the party which fails or refuses to comply with it should instead be considered in breach of contract.

In terms of enforcement, the approach varies from one jurisdiction to another. For example, interim measures (whether in the form of an order or award) are not considered enforceable before the Swedish courts; in contrast, other countries such as Hong Kong have adopted legislation that empowers their national courts to enforce interim measures issued by arbitral tribunals.

In 2003 the Paris Court of Appeal, ruling on a ICC's Pre-Arbitral Referee procedure, reasoned that the Pre-Arbitral Referee order was binding only as a matter of contract deriving from the

arbitration clause which referred requests for interim measures to the Pre-Arbitral Referee procedure (*Societé Nationale del Petroles du Congo v. Total Fina Elf. Congo*, 2003). Thus, it appears that in France an order of a Pre-Arbitral Referee is not enforceable as an award, but must be regarded by the court as having the same effects of a contract.

In Australia the Supreme Court of Queensland, called to examine whether an interim award was capable of recognition and enforcement under the New York Convention, came to a negative conclusion on the basis of the interlocutory, rather than final, nature of the decision (*Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums*, 1995).

Only the US courts seem to have taken a less formalistic approach, finding that interim measures issued by arbitrators are sufficiently final for the purpose of their enforcement, both under the New York Convention and the Federal Arbitration Act. In *Publicis Communications v. true North Communications Inc.* (2000) the US Court of Appeals for the Seventh Circuit dismissed the attempts of the defendant to challenge enforceability of an interim measure and rejected the theoretical distinction between "orders" and "awards". In *Southern Seas Navigation Ltd v. Petroleos Mexicanos of Mexico City* (1985) the District Court for the Southern District of New York observed that an interim award is not "interim" in the sense of being an "intermediate" step but has the purpose to clarify the parties' rights in the "interim" period pending a final decision on the merits.

Given the lack of precedents, there is no well-established guidance as to whether an arbitral interim measure would be recognized and enforceable in Italy. Domestic arbitral legislation provides that a foreign award may be recognized and enforced upon filing an application with the Court of Appeal; then the Chairman of the Court, if the award is formally correct, declares its effectiveness in the Italian jurisdiction, unless (i) the award is deemed to violate public policy or (ii) has determined a dispute which could not be referred to arbitration under Italian law. This second condition particularly gives raise to doubts about the possible recognition and enforcement of such kind of awards in Italy, where emergency measures do fall outside the arbitrators' powers.

A solution may be to adopt a position at an institutional level: for example, in 2012 the Singapore Parliament amended the International Arbitration Act ensuring that orders granted by emergency arbitrators are given the same legal status as regular and final awards rendered by tribunals.

However, although emergency arbitration is becoming more and more essential in the context of international arbitration, its benefits are still undermined by the persisting uncertainty over the nature and enforceability of interim measures issued by arbitrators. Although the overall scenario is quite promising, an international instrument of recognition of interim measures given by arbitrators would help to enhance the effectiveness of this tool, reducing the need of recourse to ordinary courts.

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