Kluwer Arbitration Blog

Fine line? A New Case on Arbitrators' Power to Impose Sanctions

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It is not uncommon in arbitration proceedings for interim measures to be necessary to avoid the relief intended on the merits from being frustrated. Interim measures in support of arbitration can now fortunately be ordered not only by national courts but also by arbitrators in most jurisdictions. In most instances, interim measures granted by arbitral tribunals are usually observed voluntarily by the parties.[1)] But what happens when they are not? Indeed, do arbitrators have any power to compel a party to comply with an interim measure? This is precisely the question that arose in an ICC case in which we were recently involved and that we discuss in this article.

Case summary

The claimant was a construction company that entered into an agreement to refurbish infrastructure with a public entity, which was ultimately the respondent. The contract was terminated by the claimant due to breaches by the respondent. However, the respondent refused to pay the claimant the amounts triggered by termination of the contract and also refused to return the bank guarantee that the claimant had furnished to secure the fulfilment of its obligations while the contract was in force. After the claimant had started the arbitration proceedings, the respondent continued to refuse to return the bank guarantee and, ultimately, called on that guarantee.

As a result, the claimant requested that the arbitral tribunal grant interim relief ordering that the respondent deposit the amount of the bank guarantee into an escrow account. Although the arbitral tribunal granted the request, the respondent did not comply for more than six months. As a result, the claimant requested that a pecuniary sanction be imposed on the respondent for its continued refusal to comply with the arbitral tribunal's order.

In deciding on whether to grant the requested sanction, the arbitral tribunal asked the parties to comment on three key issues: (i) the power of the tribunal to impose coercive economic sanctions under the potentially applicable laws (i.e. law of the seat and law of the respondent's jurisdiction, where the sanction was expected to be enforced); (ii) the criteria for determining the amount of the sanction; and (iii) how the sanction should be paid and to whom. We break down below the response given by the claimant in relation to each of these issues and the arbitral tribunal's conclusions.

Issue 1: Arbitral tribunals' power to impose sanctions

Neither the law of the seat nor the law of the respondent's jurisdiction explicitly establish that arbitral tribunals have the power to impose pecuniary sanctions, but they do not include a prohibition to that effect either. Moreover, the parties in the present case had not made any agreement limiting or confirming the tribunal's power to do so.

In support of its request, the claimant argued that the power to impose pecuniary sanctions on parties is implicit in the powers granted to arbitrators. The claimant relied on a number of authorities,[2)] in particular citing ICC case No. 7895, which concluded that, under the ICC Rules, in the absence of an agreement by the parties to the contrary, the arbitral tribunal has the power to impose sanctions.[3)] The claimant also relied on *Hamstein v Williams*, a US case decided by the Court of Appeals for the Fifth Circuit, which noted that the inherent powers of arbitrators include the power to sanction parties and, therefore, arbitrators do not exceed their authority when imposing sanctions on a party.[4)]

Further, the claimant pointed out that the two potentially relevant laws permitted the imposition of sanctions by judges in civil proceedings and, therefore, sanctions were not alien to those legal systems. The claimant also mentioned that the UNIDROIT Principles on International Commercial Contracts provide in article 7.2.4 that courts shall be able to order the payment of a penalty to force a party to comply with a specific order and indicated that those principles could be considered by the arbitral tribunal pursuant to the terms of reference and the ICC Rules.

The arbitral tribunal concluded that it had power to impose a pecuniary sanction on the respondent in this case considering in particular (i) the authorities and precedents submitted by the claimant; (ii) that neither the parties had explicitly excluded the aforesaid power and no provision had been identified under the law of the seat or the law of the respondent's jurisdiction which excluded that power; and (iii) that the imposition of pecuniary sanctions was in line with public policy in the two relevant jurisdictions given that such sanctions were permitted in civil proceedings.

Issue 2: Quantifying the sanction

The second question raised by the arbitral tribunal was how the amount of the sanction should be determined. The claimant argued that sanctions must afford an incentive for the misbehaving party to comply and, therefore, that the amount should be set at a level that was high enough to encourage that behaviour.

In our case, the claimant requested a sanction that would accrue per day of non-compliance and proposed as a benchmark the amount provided in the contract for delays to the completion of the works (0.1% per day of delay). In particular, the claimant suggested applying that percentage to the amount of the bank guarantee cashed by the respondent and for the sanction to accrue with that amount as a cap.

The arbitral tribunal concluded that the claimant's proposal was reasonable as it imposed sufficient financial pressure on the respondent to make it comply with the order to deposit the amounts in

escrow.

Issue 3: How and to whom?

The third and final issue was how the sanction should be paid and who should be the beneficiary of the pecuniary sanction.

In relation to the latter point, the claimant explained that the general rule in judicial proceedings is for sanctions to be paid to the courts themselves as they are to some extent responsible for protecting the integrity of the judicial system. However, sanctions in arbitration cannot have that purpose and, therefore, as suggested by a number of authorities, the beneficiary should be the party suffering the consequences of the non-compliance (i.e. the claimant).

As for how the sanction should be paid, the claimant proposed that any amount accrued as a sanction be granted in the award and be paid as established by the tribunal in the award.

The tribunal accepted the claimant's proposals on both points.

Conclusion

Despite the pecuniary sanction, the respondent did not comply with the interim measure and the pecuniary sanction thus continued to accrue until the award was rendered. As ruled by the tribunal in its decision on the pecuniary sanction, the award granted the claimant the entire amount accrued as a result of the sanction and added that amount to the payment order contained in the award for the damages suffered due to breach of contract.

To further deepen your knowledge on interim measures in international arbitration, including a summary introduction, important considerations, practical guidance, suggested reading and more, please consult the Wolters Kluwer Practical Insights page, available here.

References

?1 A 2012 survey found that 62% of interim measures granted by arbitral tribunals were observed voluntarily. International Arbitration Survey: Current and Preferred Practices in the Arbitral Process (2012), p. 17.

?2 Alexis Mourre, "*Multas coercitivas y ejecución en especie en arbitraje internacional*", Spain Arbitration Review 10, 2011, p. 25.

?3 See, for example, Final Award in Case 7895 (Extract), ICC International Court of Arbitration Bulletin, Vol. 11. No. 1, 64, 2000.

?4 Hamstein Cumberland Music Group; Howlin Hits Music INC; Hamstein Cumberland Music Co; BH Associates INC, d/b/a Hamstein Music co; Bill Ham v Jerry Lynn Williams and Robert S Farris, 10 May 2013, Nos. 05-51666, pp. 8-9.

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