Kluwer Arbitration Blog

2023 Berlin Dispute Resolution Days: SOS 112 – Crisis and Emergency Management in Arbitration

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Is emergency arbitration's Achilles' heel? Or the most effective route out? In which scenarios are parties better advised to turn to state courts for interim relief? Will commercial courts become the new kids on the block, offering a better bet than (emergency) arbitrators for cross-border disputes?

These were only a few of the questions discussed at the DIS40 Autumn Conference 2023, which took place on 15 September 2023 in Berlin as part of the second edition of the Berlin Dispute Resolution Days (the coverage of the previous edition can be found here and here).

Under the Title "SOS 112" – the German equivalent for the Emergency Line 911 – in-house counsel, legal scholars, litigation PR specialists, and lawyers came together to discuss "how to navigate turbulent waters effectively and efficiently," as summarized in the opening remarks by Evgenia Peiffer (CMS, DIS40 Co-Chair). The current political, social, and economic changes require the arbitration community to be open-minded, flexible, and courageous, stressed Ramona Schardt, the newly appointed Secretary General of the DIS in her welcome remarks. This post provides a description of the discussions held during this event.

The Options for Emergency Management in Arbitration

There will be situations in arbitration where time is of the essence, where the dispute is escalating by the hour and a party is facing irreparable damages if legal measures are not taken immediately.

As summarized by Shreya Aren (Debevoise & Plimpton) in her keynote speech, there are essentially three courses of action available when it comes to emergency situations in arbitration. A party can either seek interim relief before the national courts or before an arbitral tribunal. In contrast to the English Arbitration Act, which empowers state courts only to grant interim relief where an arbitral tribunal has not been fully constituted or is in no capacity to act (Article 44 (2)(e) and (5) of the English Arbitration Act), German arbitration law generally provides for interim measures by the German state courts (§ 1033 of the German Code of Civil Procedure). At the same time, both jurisdictions give arbitral tribunals the power to grant interim relief.

A more recent development in international arbitration is the so-called emergency arbitrator. Quite a few arbitral institutions now offer the services of an emergency arbitrator. The DIS has not yet

followed this trend, in light of the German arbitration law which is, so far, silent on the matter. It is however being discussed, as part of the current reform process of the German arbitration law, whether provisions on an emergency arbitrator should be introduced in Germany as well.

The main upside of the emergency arbitrator is, just like with arbitration in general, the confidentiality of the dispute. The main disadvantage, on the other hand, is the fact that enforcement of the emergency arbitrator's decision under the New York Convention can be difficult. There are a few jurisdictions that have acknowledged enforcement of these decisions, such as Hong Kong (Article 22 B. of the Hong Kong Arbitration Ordinance), Singapore (*see* the most recent case law here), and New Zealand (*see* the recent legislative developments here). Other jurisdictions might be more hesitant on the matter. In practice, most parties do however follow an emergency arbitrator's order voluntarily.

Emergency Management in Arbitration and Clients' Choices

In determining which of these options to deploy in a given scenario, a case-by-case approach should be adopted, stressed Piotr Bytnerowicz (ByArb) in the second keynote of the conference. A number of questions should be considered, including which courts would be competent if measures of interim relief were sought, whether there would be any benefit to *ex parte* proceedings, and what the ultimate objective of the emergency measure would be.

Who is acting as opposing counsel, their strategy, and who is the opposing party (private or state party) should also play a role in choosing the right emergency measure. Yet, one of the key points in selecting the right strategy around emergency measures would be the issue of enforcement: is enforcement needed, is there a chance for voluntary compliance, or will seeking emergency measures in itself have a tactical benefit?

Is Emergency Arbitration's Achilles' Heel?

The first panel focused on whether urgency is arbitration's Achilles' heel. The panel was moderated by two DIS40 Co-Chairs, Evgenia Peiffer and Christian Steger (Latham & Watkins). The panelists were Friederike Schäfer (Zeiler Floyd Zadkovich), Sophia von Dewall (Derains & Gharavi), Bernhard Bell (Tesla), and Jakob Horn (Humboldt University of Berlin).

As explained by Sophia von Dewall, one of the key questions when it comes to deciding whether to agree on emergency arbitration is whether such agreement will lead to the loss of the state court's jurisdiction with regard to interim relief. While in England, Singapore, and the Netherlands, Jakob Horn added, state courts will lose their jurisdiction over interim measures, the UNCITRAL Model Law does not know such subsidiarity.

Friederike Schäfer then observed that it can be quite challenging for arbitral institutions to meet the short deadlines under emergency arbitrator rules. Having acted as an emergency arbitrator before, Sophia von Dewall agreed that time is of the essence. Depending on the applicable rules, an emergency arbitrator generally has only up to one month to render the interim decision. Availability is thus key when it comes to emergency arbitration.

The issue of enforceability, however, was identified as one of emergency arbitration's most significant downsides, especially in the context of *ex parte* decisions. Jakob Horn stressed that the key question is whether an emergency arbitrator's decision constitutes an award within the meaning of the New York Convention. The dominant view is against this since the decision would not be final and binding as required by the Convention. Bernhard Bell stressed that, in practice, at least an emergency arbitrator's decision will be likely to trigger settlement negotiations between the parties.

A Fire Debate: Are Commercial Courts the Better Choice in Emergency Cases?

The conference's second panel was a fire debate under Chatham House Rules, with Julia Klesse (GLNS), Jan Frohloff (SRP Schmitt Reichert Partners), Tanja Stooß (Quinn Emanuel Urquhart & Sullivan), and Alexander Horn (Gibson, Dunn & Crutcher) as debaters as well as Nadja Harraschain (Allen & Overy) and Christian Steger (Latham & Watkins) as moderators.

The panel debated whether German commercial courts constitute a more suitable forum for emergency measures compared to intra-arbitral mechanisms. Commercial courts in Germany may conduct proceedings in English and are staffed by judges particularly qualified in international commercial matters. Legislative efforts to further bolster the competencies and availability of such commercial courts are currently underway.

Key arguments in favour of such courts taking a larger role in case of emergency relief (even if there is an arbitration agreement in place) include better enforcement prospects, lower costs, and the particular competence in commercial matters, paired with an established track record of the German civil courts in responding quickly and efficiently to requests for interim relief. On the other hand, key arguments for arbitration were confidentiality, flexibility, and the fact that – if an arbitration clause is in place – seeking emergency relief in arbitration may be more in line with the parties' intent.

The panelists highlighted that, in any case, the current German legislative efforts on commercial courts do not yet include provisions on emergency measures, a step that could be taken to better link the commercial court system with arbitration for the purposes of interim relief.

Expert Talk: Crisis Management and Dispute Resolution

The debate was followed by a discussion between two Litigation PR Experts, Daria Gladkov (Consilium) and Christopher Hauss (Volkswagen AG), moderated by Evgenia Peiffer.

The experts first discussed the role of a dispute resolution PR expert in contrast to traditional PR experts. Daria Gladkov explained that one needs to be especially aware of the legal context and of the lawyers in charge when it comes to litigation PR. Christopher Hauss added that lawyers generally do not have a big "risk appetite" and that they often have to be convinced to talk to the press. Being accessible, however, is of utmost importance: it creates trust. And trust is an important currency in a PR expert's field of work.

Daria Gladkov stressed that the relationship with journalists is similar to all business relationships.

PR experts and press are usually not working against each other. The press wants to write a well-informed piece and is obliged to report truthfully. This usually contributes to a respectful and trustful collaboration. If the client has a message that should be made public, it is useful to make a press release or give an interview. If no information can be provided, it may make sense in a trustful relationship to have a no-comment and only an off-record conversation to keep in touch with the journalist. This can be valuable also with regard to confidential arbitration proceedings.

Conclusion

Arbitration offers a robust toolset to address difficult situations in tumultuous times. As demonstrated during this DIS40 Autumn Conference, a promising dispute resolution strategy in times of crisis will often require pairing arbitration with extra-arbitral measures, such as seeking interim relief from state courts or a robust and proactive arbitration PR strategy. Undoubtedly, as crises abound, these measures will be tested over the coming years. With flexibility and creativity as arbitration's strengths, surely novel ways to confront emergencies will emerge.

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