Kluwer Arbitration Blog

Sciences Po Law School 6th Brazilian Arbitration Forum: Assistance From National Courts: Wanted or Unwanted?

Sidney Larsen (Intern, International Court of Arbitration – ICC) · Thursday, November 23rd, 2023

On Friday 8 September 2023, the ICC International Court of Arbitration ('ICC Court') hosted a panel on the interaction between arbitration and national courts titled "Arbitration and National Courts – Convergence or Divergence?" at its headquarters in Paris. The event, organized by Pedro Arcoverde (then-ICC Court Managing Counsel and Lecturer at SciencesPo), as part of the 6th Brazilian Arbitration Forum, was moderated by Luiza Saldanha (Associate, Freshfields Bruckhaus Deringer, Paris) and featured participation from Esperanza Barron Baratech (Associate, Latham & Watkins, Paris), Jose Manuel Garcia Represa (Partner, Dechert (Paris) LLP), Daniel Levy (Enyo Law LLP, London), and Samantha Nataf (Member, ICC Court; Partner, De Gaulle Fleurance, Paris).

The panelists shared insights from their own experience as arbitration professionals and approached the issue of national court involvement in arbitration proceedings in three phases: the early stages (including prior to the constitution of the arbitral tribunal); during the arbitration proceedings; and after the issuance of the award, as further analyzed below.

Early Stages

At the early stages of an arbitration, particularly in *ad hoc* cases, national courts can help constitute arbitral tribunals, thus intervening in a 'constructive' manner. Ms. Nataf recalled that French courts are endowed with this power by virtue of articles 1451-1454 of the French Code of Civil Procedure ('Juge d'appui' in *ad hoc* cases) and the panel mentioned an example of a case where an English judge, on the claimant's application, appointed the entire arbitral tribunal after quashing the claimant's appointment, in favor of equality between claimant and the non-participating respondent.

Conversely, the panel observed that national courts can also take 'destructive' action by removing arbitrators. The panel gave one example of an *ad hoc* case where, before a French tribunal, the respondent requested and obtained the annulment of claimant's appointment of a sole arbitrator because the court considered that the method of appointment – giving the parties the option to select a sole arbitrator from a list drafted exclusively by the claimant – was against public policy.

Outside of the appointment or removal of arbitrators, national court intervention may be used

strategically in the early stages of arbitration to obtain interim measures. Within this context, Ms. Barron Baratech highlighted two types of cases where court intervention might be sought: (i) cases where the desired measures are not available before an arbitral tribunal (e.g., relief against a third party, seizure of assets, relief under a related contract outside the jurisdiction of the arbitral tribunal); and (ii) cases where the desired measures are available but for strategic reasons parties wish to go to national courts.

In the latter set of cases, Ms. Barron Baratech delved into several strategic factors that may steer parties towards national courts. First, it depends why a party is seeking the measures (*e.g.*, putting pressure on the other party, triggering discussions, etc.). Second, an important factor to consider is whether the interim measure is equivalent to the relief sought on the merits. For example, there are almost no requests for merits orders once a party has obtained a *référé* from French courts, because the party is no longer incentivized to pursue the case on the merits. However, an order by an ICC emergency arbitrator will trigger a case on the merits (see ICC Arbitration Rules (Art. 1(6), Appendix V)), which might not be the preferred strategy for the party seeking the measures. Third, timing might also affect a party's decision. The timescale in which interim measures can be obtained varies widely between jurisdictions. For example, it would generally take a few weeks for a French court to grant interim measures, whereas an ICC emergency arbitrator will render an order within 15 days. Nevertheless, it must also be considered that an order by an emergency arbitrator may require enforcement proceedings.

Mr. Garcia Represa and Mr. Levy echoed the importance of timing and raised several other significant considerations. On the one hand, confidentiality may weigh in favor of seeking interim measures through emergency arbitration, because even sealed court orders may not provide full confidentiality. On the other hand, if a party is seeking *ex parte* measures, it should go to the courts, as emergency arbitrators are unlikely to grant them.

Finally, Ms. Barron Baratech and Mr. Levy added that emergency arbitrators tend to go more in depth in their orders/interim awards than national court judges, including with respect to the likelihood of success on the merits (a factor often considered by emergency arbitrators). This may give parties a much clearer picture of the potential outcome of the case and can be beneficial to a party's case where it wants to document the bad faith of the other party.

During the arbitration

The panelists then observed that during arbitration proceedings, parties may want the courts' support when they do not have the financial means to proceed to arbitration or when parties are seeking an order against a third party. While these are situations in which national courts have traditionally refused to act, the panelists noted that in certain circumstances, courts are becoming more open to intervention. For example, Ms. Nataf recalled that while French courts typically decline to hold that a lack of funds will allow parties to bypass an arbitration agreement, in the PWC case, the Court of Cassation considered arbitration agreements within the context of consumer contracts to be abusive under EU law. Mr. Levy also noted that the English Law Commission recently proposed an amendment to the Arbitration Act 1996 that would make it explicit that national judges can make orders against third parties in arbitration cases.

In contrast, there are also times when parties may be particularly wary of court intervention. Mr.

Garcia Represa suggested that criminal court intervention during arbitration proceedings is an especially disturbing example of unwanted court interference. The arbitrator in the controversial Sulu case, for example, faces criminal charges for going against a Madrid court's decision to annul a partial award in which he ruled that he had jurisdiction to arbitrate the case. Likewise, in Peru, 14 arbitrators were indicted on corruption charges in 2020 after a whistleblower allegedly admitted to receiving money from parties to an arbitration. According to Mr. Garcia Represa, such criminal court intervention risks undue manipulation by parties to put pressure on arbitrators, particularly in cases involving States.

The panel highlighted anti-arbitration injunctions as another example of unwelcome interference by national courts, using recent Russian cases as an example. In 2021, in the Uraltransmash case, the Supreme Court of Russia held that Russian courts should have exclusive jurisdiction over cases where Russian parties are the subject of sanctions imposed by states in which arbitral proceedings are ongoing and declared that Russian courts could thus issue anti-arbitration injunctions prohibiting claimants from proceeding in such a jurisdiction (as reported here).

Nonetheless, the panelists noted that court intervention can also be used strategically as a counter-measure in situations like these. For example, claimants could seek anti-suit injunctions in the courts of other jurisdictions to enjoin Russian parties from bringing their cases before Russian courts.

After the Issuance of the Award

Turning to court intervention after the issuance of arbitral awards, the panelists raised several questions regarding the ability and willingness of national courts to intervene. Mr. Levy and Ms. Nataf observed differences in the views of French and English courts on corruption in arbitration and the power to investigate evidence. They discussed the Alstom case (reported here), which brought into stark contrast the English court's refusal to re-open an issue that was or could have been raised before the arbitral tribunal and the French court's willingness to consider evidence of corruption.

Mr. Garcia Represa touched on the power that national courts have in cases where the award denies the arbitrator's jurisdiction over the claims and how this differs across European countries. Under the Spanish Arbitration Act, Spanish courts have the power to review awards when jurisdiction has been upheld, but conversely cannot review awards denying jurisdiction. On the contrary, French, English, and Swiss courts will review both awards upholding *and* denying jurisdiction. Through these examples, Mr. Garcia Represa highlighted how, depending on where parties select the seat of arbitration, they may encounter courts that won't entertain the review of certain awards.

Conclusion

While arbitration is often seen as being very separate from national court systems, there are circumstances where these seemingly separate worlds overlap. Through their discussion of the relationship between courts and arbitration at every step of the arbitral process, from before the request for arbitration is made to after the award is rendered, the panelists demonstrated that court

involvement in arbitration cases can be unwanted at times, but also constitutes an important tool in an arbitration professional's strategic toolbox.

Please note that the author is an intern at ICC Dispute Resolution Services at the time of the event and publication of the post. Views are those of the author only and are not intended to reflect those of ICC.
