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Emergency Arbitration in the English Arbitration Bill: A Leap Forward?

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Following the recommendations of the Law Commission of the UK (here, here and here), the English Arbitration Act 1996 (EAA) is presently undergoing a substantial reform phase after nearly 27 years. The Arbitration Bill is now before the House of Lords. As appears from the Arbitration Bill and the Commission's recommendations, the English arbitration law is going to expressly address the aspect of enforcement of the decision issued by an emergency arbitrator for the first time. The Arbitration Bill brings about some major clarifications in this area. With express provisions dealing with emergency arbitration, the amendment is acknowledging explicit recognition given to this notion by the arbitration laws of Singapore and Hong Kong. This post argues that the Arbitration Bill has adopted a progressive approach in dealing with emergency arbitration. The proposed English statutory model is different to those of the other pro-arbitration jurisdictions. The proposal has also demonstrated that adopting a legislative framework may be the best option to ensure effective enforcement of the emergency measure. This post will discuss the recommended changes and the implications of *Gerald Metals SA v Timis* before comparatively scrutinising the amendment proposal in the light of related statutory provisions in other arbitration-friendly countries.

The Proposed Amendment

The EAA does not have its basis in the UNCITRAL Model Law (UML). Yet, it is regarded as one of the most progressive arbitration statutes due to its pro-arbitration spirit. Prior to the present reform attempt, there has been no express reference to emergency arbitration in the EAA. The reason is understandable as the concept first emerged in 2006 through the ICDR Rules (last amended in March 2021), which was long after the enactment of the EAA. However, what remained to be seen was whether the English statute would remain silent on the issue of emergency arbitration as is the case in the US and France, or would it incorporate express provision to deal with this contemporary topic. The Arbitration Bill followed the latter approach, showing the importance of statutory recognition of emergency arbitration. Nevertheless, the execution of the decision in emergency proceedings has not been contentious in arbitration seated in England even in the absence of express provision. The analysis of the proposed amendment will show that the recommended provisions have been drafted cautiously, considering various practical aspects. Also, they tend to offer harmonious coexistence with the other existing provisions of the statute.

According to the Arbitration Bill, a new section 41A shall be inserted after section 41 with the headnote of "Emergency arbitrators." This section shall apply on satisfaction of two conditions. Firstly, the institutional rules which the parties have agreed to be applicable shall have to contain provision for emergency arbitration. Secondly, an emergency arbitrator shall have to be appointed following those rules. Then comes one of the most significant parts of the amendment (41A(2)) which states: "Unless otherwise agreed by the parties, if without showing sufficient cause a party fails to comply with any order or directions of the emergency arbitrator, the emergency arbitrator may make a peremptory order to the same effect, prescribing such time for compliance with it as the emergency arbitrator considers appropriate."

At present, only the tribunal can issue such peremptory orders in case of non-compliance (section 41(5)), meaning that the party would have to wait for the formation of the tribunal and the subsequent order of the tribunal affirming the emergency relief. This had the potential to frustrate the interim measure granted by the emergency arbitrator who in the first place would be appointed to deal with a matter so urgent that cannot await the constitution of the arbitral tribunal. As the proposed amendment is going to enable the emergency arbitrator to issue peremptory order in case of the party's default, the urgent characteristic of the relief is preserved. Therefore, not only the emergency arbitrator will be able to grant provisional measure, but also he/she will have the power to ensure that the order has been complied with. The Arbitration Bill aims to further strengthen the enforcement provision in section 42 by allowing the court to make an order requiring a party to comply with the peremptory order of the emergency arbitrator. If the matter goes to the court in this manner, this will mean that the party against whom the order has been made will have defaulted even before the formal arbitration proceeding has started. Clearly, no party will wish to start an arbitration proceeding with a peremptory order and a court order already issued against it. This will certainly enhance the possibility of voluntary compliance with the emergency measure. Therefore, the Arbitration Bill demonstrates how strong statutory emphasis on execution can progressively remove enforcement ambiguities facilitating party autonomy.

The Implications of *Gerald Metals*

The Law Commission in its First Consultation Paper (September 2022) seriously considered reforming section 44(5) in the light of the potential implications of *Gerald Metals SA v Timis*. Section 44(3) enables the court to order interim measure to preserve evidence or assets in case of urgency. However, section 44(5) provides that the court shall only act if the tribunal or the arbitral institution has no power or is unable to act effectively in that regard. The Law Commission noted that many scholars have opined that *Gerald Metals* has in effect precluded the possibility of seeking urgent relief from the national courts due to section 44(5) when the applicable institutional rules provide provision for emergency arbitration. This is even though the institutional rules themselves recognise the parties' rights to invoke judicial forum in addition to seeking immediate provisional measure from the emergency arbitrator. However, the Law Commission correctly found such scholarly interpretation to be misconceived because *Gerald Metals* was a fact-specific case not laying down any general principle as such. Still, the Law Commission recommended abolition of section 44(5) as being redundant to bring an end to the existing misperception.

The Law Commission in its Final Report (July 2023) rightfully departed from its initial recommendation, thus acknowledging the importance of section 44(5). One of the main objectives of the EAA has been to reduce interference by courts in arbitration. Courts are vested with powers

which are exercisable in support of arbitral proceedings. Courts may require to exercise these powers in exceptional circumstances, e.g., when an urgent interim relief is needed without serving any notice on the other side or to bind a third party. In such circumstances, emergency arbitrator will practically be powerless, and section 44(5) will not act as a bar to take recourse to the national court. Section 44(5) has been defining the relationship between the court and the arbitral tribunal/institution, suggesting when the court may or may not intervene. A practical usefulness of this section cannot be ignored. This is why the Arbitration Bill also proposes no change to section 44(5).

Comparative Analysis

The statutory laws of Singapore, Hong Kong and the UK (presently in the form of an Arbitration Bill) have all expressly addressed emergency arbitration. However, an in-depth analysis reveals that each legislation dealt with the topic distinctly. In Singapore, emergency arbitrator has been included in the definition of 'arbitral tribunal' in section 2(1) of the International Arbitration Act 1994 (amended in 2012). Emergency arbitrator may render his/her decision either in the form of an award or an order, both of which are equally enforceable in the same manner as if they were decisions of the court (sections 12(6), 19). Unlike the Singaporean law, the Hong Kong Arbitration Ordinance (amended in 2013) did not include emergency arbitrator either in the definition of 'arbitral tribunal' or 'arbitrator' in section 2(1). Instead, it introduced Part 3A exclusively dealing with the enforcement of emergency relief. Arguably, the Hong Kong legislation keeps the concept distinct from the arbitral tribunal as emergency arbitrator plays its role before the constitution of the tribunal (section 22A). Furthermore, the Ordinance neither uses the term 'order' nor 'award' while making express reference to 'Emergency Relief.'

The Arbitration Bill does not include emergency arbitrator within the definition of 'arbitral tribunal' or 'arbitrator' (sections 15, 82). Emergency arbitrator means an individual appointed under section 41A(1). The reason for not including 'emergency arbitrator' within the definition of 'arbitrator' is to avoid making the whole statute unnecessarily applicable to emergency arbitrator. For example, the power of the court to remove arbitrator under section 24 is not applicable in relation to emergency arbitrator as the whole process of emergency arbitration is governed by the institutional rules. Whereas both the Singaporean and Hong Kong legislations provide provisions for enforcement by courts, the Arbitration Bill enables both the emergency arbitrator and then the court to enforce the emergency relief. This is particularly where the uniqueness of the proposal lies, making the proposed amendment distinguished. Even though the Arbitration Bill addresses the issue of enforcement succinctly, it is quite comprehensive in its approach.

Conclusion

Emergency arbitration has become an attractive feature of international arbitration in recent years. It allows the parties to obtain interim relief on an urgent basis by invoking the institutional rules without going to the court. However, as the decision of an emergency arbitrator lacks the finality requirement according to the New York Convention, its enforcement is problematic in different jurisdictions. With the gradual development of the notion over the years, pro-arbitration jurisdictions like those of Singapore and Hong Kong adopted express statutory provisions, making

the aspect of enforcement easier and straightforward. According to the proposals put forward by the UK Law Commission, the Arbitration Bill is now before the English Parliament. Though the proposed changes in the EAA in this regard *prima facie* appear to be similar to the approaches adopted by Singapore and Hong Kong, the suggested amendment is more forward-looking and innovative. Undoubtedly, the proposed provisions, if enacted, will certainly strengthen the enforcement mechanism regarding emergency decision in arbitrations seated in England.

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