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PRE-ARBITRAL EMERGENCY MEASURES OF PROTECTION: NEW TOOLS FOR AN OLD PROBLEM

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I. INTRODUCTION

It is common place for a commercial dispute to require, as the first step in the dispute resolution process, some form of interim conservatory relief, e.g., a preliminary injunction to prevent the sale of an asset, a restraining order to seize funds, or an order to preserve crucial evidence.

Arbitration rules typically permit the tribunal to order interim or conservatory relief, but, this is of little use when the tribunal has not yet been constituted. While an application for such relief may typically be made to the courts, court proceedings can be time-consuming and unpredictable. In the international context, parties have often chosen arbitration precisely to avoid being left at the mercy of one party's judiciary.

As such, one of the frequent criticisms of commercial arbitration has been that it does not provide an effective means for obtaining urgent measures of protection at the outset of a case. This concern has motivated various attempts by arbitral institutions to modify their rules to address this concern.

This article, first, provides an overview of some of the traditional procedural mechanisms employed by arbitral institutions to allow for interim relief at the outset of a case. It then analyzes the pre-appointment emergency provisions implemented by four leading international arbitration institutions. Finally, it identifies some of the unresolved issues.

This topic is of particular significance as counsel examine the new amendments to the arbitration rules of the International Chamber of Commerce ("ICC"), which includes a pre-arbitral emergency arbitrator mechanism. Adoption of this mechanism by the ICC may indeed signify that this procedural initiative has now come of age.

II. EARLY REFORMS FOR PRE-ARBITRAL EMERGENCY MEASURES OF PROTECTION

Traditionally, arbitral institutions required parties to table all issues until the arbitrators were appointed and the tribunal was constituted in full. This time-consuming process left the parties without relief until the tribunal was formed unless they were able to obtain relief from the relevant courts.

Over the past twenty years, there have been various attempts to make minor adjustments to the leading arbitration institutions' rules to provide some better options to parties. But these initiatives tended to be limited in scope and effectiveness.

A. LCIA RULES – EXPEDITED FORMATION OF THE TRIBUNAL

In 1998, the London Court of International Arbitration ("LCIA") amended its rules to allow for "expedited formation" of a tribunal.¹ The LCIA may, in its complete discretion, abridge any time limit under the LCIA Rules for formation of the tribunal. The parties must then rely on the tribunal's powers to make interim awards.

While the effect is to permit the LCIA to shorten the process of constituting the tribunal, there is still potential for considerable delay as the LCIA is not authorized to override the right of the parties to nominate party-appointed arbitrators. The LCIA typically shortens the time limit within which the respondent must reply to the arbitration demand, but only rarely is the process significantly expedited.² Having said this, requests for expedited formation have become increasingly common, with 20 in 2010.³

B. ICSID RULES – EXPEDITED BRIEFING

In 2006, the International Centre for the Settlement of Investment Disputes ("ICSID") amended Rule 39 of its Arbitration Rules, to address how and when parties can obtain so-called "*provisional measures*."

Rather than expediting the appointment of the tribunal, the amendments sought to expedite emergency relief by permitting pre-appointment *briefing* of the application for provisional measures.⁴ An application for provisional measures can be brought as early as the registration of the Request for Arbitration. Unless otherwise agreed by the parties, the Secretary-General will fix a timetable for briefing the application. The tribunal, once constituted, must then address the application ahead of any other business (e.g., jurisdictional objections).

¹ See generally P Turner and R Mohtashami, *A Guide to the LCIA Rules* (2010), Article 9.

² The JAMS International Rules provide similar authority to "abridge or curtail any time-limit under these Rules to enable the expedited formation of the Tribunal so as to enable the Tribunal to deal with urgent circumstances that may have arisen" Art. 21.4.

³ See J Berenholtz and J Leach, "The expedited and emergency arbitrator procedures under the SIAC Rules - Six months on, how have they fared?" *International Litigation and Arbitration Alert*, Hogan Lovells, available at <http://www.siac.org.sg/cms/index.php?option=com_content&view=article&id=248:expedited-emergency&catid=56:articles&Itemid=122>

⁴ See generally JA Rueda-Garcia, "Provisional Measures in Investment Arbitration: Recent Experiences in Oil Arbitrations Against the Republic of Ecuador," 6(4) *Transnational Disp Mgt* (2009); S Finizio, E Shenkman and J Mortenson, "Recent Developments in Investor-State Arbitration: Effective Use of Provisional Measures," *European Arb Rev* 15 (2007). For an example of the application of Arbitration Rule 39, see *CEMEX Caracas Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision of 3 March 2010 on the Claimants' Request for Provisional Measures.

The end effect is to allow briefing of the application to run in parallel with the appointment process (the latter of which typically takes several months). As a practical matter, it also puts the tribunal on notice of the challenged behavior and this may indirectly discourage the respondent from continuing the acts from which relief is sought.

C. ICC RULES – PRE-ARBITRAL REFEREE PROCEDURE AND THE 2011 AMENDMENTS TO THE ARBITRATION RULES

The ICC can claim the honor of being the first of the major institutions to make a serious attempt at providing a mechanism for emergency relief prior to the constitution of the tribunal. In 1990, the ICC launched its “Pre-Arbitral Referee Procedure” modeled on the *référé* mechanism available in the French courts.⁵

Briefly, the procedure operates separately from the arbitral rules, allowing the parties to appoint, or have the ICC appoint, a referee empowered to order any measures required as a matter of urgency.⁶ The referee, unless otherwise agreed, has the power to order conservatory measures; order a party to make a payment; order a party to abide by their contractual obligations; and order the preservation of evidence.⁷

This mechanism has been described as “*an excellent idea which thus far has not worked.*”⁸ In its first 15 years, it was invoked only rarely. This lack of pick-up has been attributed to the fact that the parties must incorporate the procedures directly into the arbitration clause or some other written agreement. Despite the ICC’s promotion of the procedures, they did not become widely commercially accepted. Further, while the referee’s orders are “binding” on the parties until the referee or the tribunal decides otherwise,⁹ questions remained about enforceability. At least one court has held that the referee’s orders are *not enforceable*, because they are not “arbitral awards” under the New York Convention.¹⁰

While the Pre-Arbitral Referee Procedure was the forerunner of the more recent attempts to address pre-arbitral emergency relief, it may be about to become obsolete. The ICC has been going through an exhaustive process of reviewing its Arbitration Rules. The

⁵ See generally W Craig, W Park and J Paulsson, *International Chamber of Commerce Arbitration* (3d ed. Oceana 2000) at § 38.03; E Gaillard and J Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999) at § 1321.

⁶ Available online at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_pre_arbitral_english.pdf; See also M Kantor, “The ICC Pre-Arbitral Referee Procedure: Momentum for Expanded Use,” 20(9) *Mealey’s Int Arb Rep* 3 (2005).

⁷ ICC Rules for a Pre-Arbitral Referee Procedure, Art 2.1.

⁸ Craig, Park & Paulsson, *op cit*, at § 38.03.

⁹ ICC Rules for a Pre-Arbitral Referee Procedure, Art 6.3.

¹⁰ See M Kantor, ‘Arbitration Rules Update: Expedited Emergency Relief Under the AAA/ICDR, ICC and LCIA Rules’, 20(9) *Mealey’s Int Arb Rep* 3, 7 (2005); I Meredith and M Birch, The ICC’s Pre-arbitral Referee Procedure: How Valuable is It?, *Cross-Border Quarterly* 49 (Jan/Mar 2008) (referring to *Republic of Congo v. Société Total Fina Elf E&P Congo*, Paris Court of Appeals, 1ere chambre, section C (2003)).

new amended ICC Rules will be released in September 2011 and are expected to come into force in 2012.

The advance publicity suggests that the amended rules will include a new provision empowering the ICC to appoint an emergency arbitrator empowered to consider applications for emergency measures and produce binding interim awards. At the time of writing this article, the amended rules were not yet publicly available.

Given the ICC's pre-eminence in the world of international commercial arbitration and its early experience with the Pre-Arbitral Referee Procedure, the new emergency relief mechanism will be closely watched. Its success will be measured against that of other institutions' analogous procedures, which are discussed in the following section.

III. RECENT REFORMS TO PROVIDE PRE-ARBITRAL EMERGENCY MEASURES OF PROTECTION

In the last five years, at least four major arbitral institutions have adopted more robust mechanisms for dealing with pre-appointment emergency relief. Early statistics show that these mechanisms have been embraced by the international business community.

A. INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)¹¹

In 2006, the ICDR – the international division of the American Arbitration Association – introduced Article 37 of its International Rules to permit expedited emergency relief before an arbitral panel has been appointed. Where an application for pre-arbitral emergency measures is made, the ICDR will appoint an “emergency arbitrator” to consider the application. The emergency arbitrator has the power to order interim awards and emergency relief, including injunctive relief and measures for the protection or conservation of property. Article 37 applies automatically to all parties who entered into an agreement covered by ICDR Rules on or after May 1, 2006.

The application for emergency relief must come *after* the demand for arbitration has been filed but before the panel is appointed. The application must set out the nature of, and reasons for, the requested relief. There is no set format for the applications—submissions have ranged from a 2-page letter to a 60-page formal application with 500 pages of supporting documentation.

On receipt of an Article 37 application, the ICDR administrator shall appoint an emergency arbitrator within one business day of the request. The emergency arbitrator is selected from a confidential panel that is made up of senior members of the global

¹¹ See generally M Gusy, J Hosking and F Schwarz, *A Guide to the ICDR International Arbitration Rules* (OUP, 2011), Chapter 37; G Lemenez and P Quigley, “The ICDR’s Emergency Arbitrator Procedure in Action Part I: A Look at the Empirical Data,” *Disp Res J* 60 (Aug/Oct 2008); G Lemenez and P Quigley, “The ICDR’s Emergency Arbitrator Procedure in Action Part II: Enforcing Emergency Arbitrator Decisions,” *Disp Res J* (Nov 2008/Jan 2009).

arbitration community with at least 15 years of experience. Any challenge to the emergency arbitrator must be made within one business day. The ICDR has the sole authority to consider and rule on challenges. To date, there have been four challenges, resulting in one case of removal. Within two business days of appointment, the arbitrator must establish a schedule for considering the merits. No formal hearing is necessary as long as the parties have a reasonable opportunity to be heard.

The emergency arbitrator retains the power to modify or vacate the interim award for good cause shown. The emergency arbitrator becomes *functus officio* once the tribunal is constituted. Once the tribunal is constituted, it has the power to reconsider, modify, or vacate the interim award.

As of October 2010, Article 37 procedures have been formally invoked on fourteen occasions, resulting in eleven interim awards (of the other cases, one was withdrawn, one settled, and one was pending at the time of inquiry). The average time from filing to issue of the interim order was three weeks.¹²

B. STOCKHOLM CHAMBER OF COMMERCE (SCC)

In 2010, the SCC set up one of the more ambitious mechanisms for handling pre-arbitral relief. Under Appendix II of the SCC's Arbitration Rules, on Claimant's application for emergency relief, the SCC Board has just 24 hours to appoint an emergency arbitrator who then has just five days to issue a decision on the relief requested.¹³ Under this aggressive timeline, the emergency arbitrator may conduct the proceedings as he or she sees fit, but must issue a written and reasoned decision. That award is binding and enforceable, but subject to review by the emergency arbitrator and the tribunal, once constituted.

Unlike the ICDR procedures, the SCC Rules do not require a request for arbitration prior to the request for emergency relief. The SCC considered this unnecessary, "*as it limits the usefulness of the provisions without providing any advantages.*"¹⁴ Further, any interim decision ceases to be binding if arbitration is not commenced within 30 days of the decision or if the dispute is not submitted to a tribunal within 90 days.

The rules state that an emergency arbitrator will not be appointed "*if the SCC manifestly lacks jurisdiction over the dispute.*"¹⁵ Thus, the SCC Board is responsible for making a

¹² M Gusy, J Hosking & F Schwarz, *ibid* at § 37.04.

¹³ The SCC rejected the use of the "one business day" standard because of the "uncertainty inherent in such a definition considering national holiday variations." SCC, Draft New Rules with Notes, Appx II, Art 4, available online at <http://www.sccinstitute.com/filearchive/2/25690/Rules_on_an_Emergency_Arbitrator_on-Interim_Measures_NOTES.pdf>. See J Berenholtz and J Leach, *supra* note 3.

¹⁴ SCC, Draft New Rules with Notes, Appx II, Art 1, available online at <http://www.sccinstitute.com/filearchive/2/25690/Rules_on_an_Emergency_Arbitrator_on-Interim_Measures_NOTES.pdf>

¹⁵ Schedule II, Art. 4.

preliminary determination that jurisdiction exists in that initial 24-hour appointment period.

In 2010 there were four applications for emergency relief—in all but one the relief was denied. In two cases, relief was denied because claimants failed to show irreparable harm. In the third denial, the emergency arbitrator determined that the issue was not ripe and would have to be submitted to the panel, once appointed.¹⁶

In two cases, the emergency arbitrator issued a decision within the required 5-day period. In the other two, the Board granted an extension and the decisions were rendered in 6 and 12 days. The SCC has released abstracts of the four cases.¹⁷

C. SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

Similarly, the SIAC has taken significant steps in increasing the opportunity for pre-arbitral relief. The July 2010 version of the SIAC Rules contains two mechanisms relevant to the need for emergency relief: expedited procedures (Rule 5) and a pre-appointment process for designation of an “*emergency arbitrator*” empowered to give emergency relief (Rule 26 and Schedule 1). Only the latter is discussed here.¹⁸

The SIAC Rules provide a mechanism for emergency interim relief, prior to the formation of an arbitral tribunal. Under the new SIAC procedure, the SIAC Chairman appoints an emergency arbitrator whose sole role is to award any interim relief deemed necessary.¹⁹ The claimant's Notice of Arbitration must be filed either prior to or concurrently with the application for interim relief. Within one business day of the application, the SIAC Chairman must appoint an emergency arbitrator and within two business days of that appointment the emergency arbitrator must set a schedule to consider the application.²⁰ As long as the tribunal is constituted within 90 days of the interim award, the award is binding, but subject to review by the tribunal.²¹

The mechanism is closely modeled on Article 37 of the ICDR Rules. As of February 2011, three applications had been received and accepted.²² In the first case, the application was received by SIAC at 9:30 pm, Singapore time. The Chairman appointed an emergency arbitrator the following day. Within one day, the emergency arbitrator had established a schedule for consideration of the merits. Within one week the parties

¹⁶ See “One Year with Emergency Arbitrators” (Jan 2011), available at <<http://www.sccinstitute.com/?id=&newsid=38812>>.

¹⁷ See J Lundstedt, “SCC Practice: Emergency Arbitrator – Decisions Released 2010”; (Mar 2011), available at <http://www.sccinstitute.com/?id=23696&newsid=39213>.

¹⁸ While the Rule 5 “expedited procedure” is potentially relevant in that it applies not only to disputes of less than \$5 million but also to cases of “*exceptional urgency*”, this latter criterion has yet to be explained by the Chairman or applied.

¹⁹ SIAC Arbitration Rules, Sch 1(2).

²⁰ *Ibid*, (5).

²¹ *Ibid*, (7)–(9).

²² J Berenholtz and J Leach, *supra* note 3.

submitted written submissions and a telephonic hearing was conducted. The following day, the emergency arbitrator issued his award.²³

D. NETHERLANDS ARBITRATION INSTITUTE (NAI)

The NAI also amended its rules to set up Summary Arbitral Procedures in January, 2010.²⁴ Section Four A of the Rules state that, where an “*immediate provisional measure*” is requested, the Administrator has the power to appoint a sole arbitrator who has the discretion to grant such relief. Rather than setting a concrete timeline for appointment, the Administrator is charged with appointing the arbitrator “*as soon as possible.*” The Procedures require a hearing in summary arbitral proceedings with written memorials to be filed only if the arbitrator determines that they are necessary. If the arbitrator determines that the case is not sufficiently urgent or is too complicated to be decided in the summary hearing, she may reject the claim or refer it to the “*arbitration on the merits.*”

While the Rule refers to an expedited “*summary procedure*” this is different from the fast-track arbitrations provided in the SIAC Rules and others. The focus is still on the need for emergency provisional measures. Further, while the Rules specifically state that the “*provisional decision*” is subject to immediate enforcement, it is not binding on any tribunal constituted in the “*arbitration on the merits.*”

IV. ISSUES FOR THE FUTURE

The ICC’s adoption of a mechanism for pre-arbitral emergency measures indicates the international arbitral community’s growing acceptance of this type of relief. Indeed, early results from the ICDR, SCC and SIAC suggest that such reforms will be gladly welcomed by users of international arbitration.

There are, however, several issues that remain unresolved. To pick just some of the more controversial, these include:

- Appointment of the emergency arbitrator: Given the diminished degree of party involvement and the expedited timeframes, what degree of transparency is required? How can institutions ensure there are no conflicts? Who should serve as an emergency arbitrator?
- Enforcement of the emergency measures: There has yet to be serious testing of whether such orders are enforceable under the New York Convention or the UNCITRAL Model Law.
- Interaction with the courts: If a party has the option of seeking emergency provisional relief through the arbitral institution, should this preclude it from separately seeking judicial remedies?

²³ Ibid.

²⁴ NAI Arbitration Rules § 4 (A), Art. 42a-o.

- Standards for granting emergency measures: Analogizing to the growing consensus in the international law world of ICSID preliminary measures, are there similar transnational norms in the context of commercial arbitration?
- Procedural safeguards: Analogizing to civil procedure in courts, how should emergency arbitrators deal with issues like provision of security, notice requirements (including the possibility of *ex parte* applications) and costs awards?

Inevitably, with the major institutions now issuing interim emergency awards, this opens the possibility of more judicial challenges, publication of redacted awards, academic writings and commentary from users. This will in time provide greater clarity about how effective these pre-arbitral emergency relief provisions are in practice and how they measure up against the other procedural options available.

Of course, in parallel with the institutional reforms discussed above, many jurisdictions continue to amend their arbitration laws to provide for a more arbitration-friendly environment. Ultimately, parties may prefer to obtain pre-appointment emergency provisional measures through courts of competent jurisdiction, depending on the circumstances of an individual case. Nevertheless, new rules allowing the parties to obtain such measures through the arbitral process provide a useful additional tool of which every arbitration practitioner should be aware.