

The use of Emergency Arbitrator procedures in the UAE: some practical considerations

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One of the defining features of recent revisions of leading institutional arbitration rules has been the introduction of Emergency Arbitrator procedures.

For example, Clause 9.4 of the revised LCIA Arbitration Rules provides:

Subject always to Article 9.14 below, in the case of emergency at any time prior to the formation or expedited formation of the Arbitral Tribunal (under Articles 5 or 9A), any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal (the "Emergency Arbitrator").

Likewise, Article 29(1) of the ICC Rules provides:

A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal ("Emergency Measures") may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration.

In each case, the Emergency Arbitrator procedure applies unless the parties have agreed to opt out of the Emergency Arbitrator provisions (or in the case of the ICC, the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures. Article 29(6), ICC Rules)). Thus, agreement to the LCIA or the ICC Rules entails party consent to the appointment of an emergency arbitrator who has the power to grant interim or conservatory measures unless the parties specifically opt out.

Use of the Emergency Arbitrator process is restricted. Thus, it may only be invoked where:

- The interim or conservatory measure cannot wait the constitution of an arbitral Tribunal; and
- Application has been made prior to constitution of the arbitral tribunal

The Emergency Arbitrator's decision is to take the form of an order in the case of the ICC or an order or award in the case of the LCIA. However, the ICC Rules provide that the emergency arbitrator's order "*shall not bind the*

arbitral tribunal with respect to any question, issue or dispute determined in the order. Any ICC arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator” (Article 27(3)). Further, the LCIA Rules stipulates that an order or award of LCIA Emergency Arbitrator “*may be confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative*”. (Article 9.11).

The foregoing may have serious implications for the enforcement of emergency arbitrator's orders in the UAE, considering that such measures:

- are “orders” and not “awards” (at least in the case of ICC arbitrations); and
- may be varied by the arbitral tribunal, when appointed.

These characteristics may persuade UAE courts not to enforce the emergency arbitrator's order on the basis that it is not a final award, especially since the UAE civil procedural code only appears to envisage the enforcement of final arbitral awards.

The foregoing potential difficulty is not unique to the UAE; the enforcement of the emergency arbitrator's order may be problematic in other States, as well. The provisions of the New York Convention may not be applicable to the emergency arbitrator's decision as it is provided that it shall take the form of an “order” and will not be an award.

Where the order or award “debtor” does not comply with the emergency arbitrator's order or award, as the case may be, it may be found to have breached the arbitration clause (and the contract of which it forms a part), since the ICC rules provide, as noted above, that “*the parties undertake to comply with any order made by the emergency arbitrator.*” But this will be of little comfort to the “order creditor” if the order is not quickly enforced.

There remains room in such a situation for the non-defaulting party to apply to the UAE courts for the appropriate interim relief. For example, Article 29(7) of the ICC Rules provides:

The emergency arbitrator provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. ... (emphasis added)

Hence, it seems open to the non-defaulting party to pursue judicial relief where the other party fails to comply with the Emergency Arbitrator's order or award, as applicable. However, it is evident that the efficacy of such action will be limited in those circumstances.

On the other hand, UAE local courts have an extensive power to grant interim measures even if they do not have jurisdiction, e.g. if there is an arbitration clause between the parties. Article 22 of the UAE Code of Civil procedure provides that:

The Court shall have jurisdiction to determine preliminary issues and interlocutory applications in the original action within their jurisdiction and shall also have jurisdiction to determine any application connected with such action which the proper course of justice requires that it be heard with it, and they shall likewise have jurisdiction to make orders for expedited and preservative procedures to be carried out in the State notwithstanding that they do not have jurisdiction in the original action. [our emphasis added]

Thus, while that an Emergency Arbitrator has 15 days to issue his order,^[1] paragraph 2 of article 140 of the UAE Civil Procedures Code requires the UAE courts to issue interim relief within 24 hours from the date of making the request for an interim order.^[2] Moreover, unlike institutional rules, emergency relief may be obtained in the Abu Dhabi courts on an *ex parte* basis and it is submitted that the threshold for obtaining such relief may be lower than will apply in the case of institutional emergency arbitrator relief.^[3] In our view, therefore, seeking an interim measure from the UAE courts in relation to a UAE-related arbitration is likely to be much faster than seeking relief from an Emergency Arbitrator.

Furthermore, the enforcement of interim measures granted by an Emergency Arbitrator in the UAE may prove to be problematic. The UAE courts will retain jurisdiction in relation to such measures even if they do not have jurisdiction to review the merits themselves. In this respect, the Federal Supreme Court has commented, as follows:

“Urgent and precautionary decisions that are executed in the State – are decision that fall within the jurisdiction of the State’s courts, notwithstanding the event that the courts do not have jurisdiction to review the main case..”

Moreover, the Dubai Court of Cassation has ruled:

“If the parties did not agree explicitly – whether in the main contract or in an arbitration deed that follows it – that the arbitrators can undertake interim, precautionary or urgent measures – it means – then that their agreement to refer their dispute to arbitration in relation to the main contract does not give the arbitrators the authority or jurisdiction to decide on such procedures or issue. As may be seen, the Dubai Court is silent on the enforcement of such measures under UAE.”

The foregoing raises doubts concerning the efficacy of Article 29(6) of the ICC rules, which provides that:

“6 . The Emergency Arbitrator Provisions shall not apply if:

b) the parties have agreed to opt out of the Emergency Arbitrator Provisions..”

This approach may fail to evidence the explicit prior agreement of the parties that the arbitrator has authority to issue interim orders (which would be achieved if Article 29(6) required the Parties’ express agreement to the application of the Emergency Arbitrator provisions).

The foregoing issues, which we have identified in relation to Emergency Arbitrator orders and awards, will become especially problematic if the counterparty or a third party refuses to abide by the order. Parties thus may be better served by resorting to the national courts from the beginning, rather than the Emergency Arbitrator, to obtain such measures in UAE-related arbitrations, since this may be more effective and avoid unnecessary cost and delay.

In conclusion we suggest that there may be merit to parties, who have consented to institutional arbitration (which permits emergency arbitrator relief) in the UAE, to expressly opt out of such arrangements, at least as they are currently drafted and pending clarification of UAE judicial attitudes to the enforcement of such measures.