Emergency Arbitrators in Investment Treaty Disputes

Kluwer Arbitration Blog
March 10, 2015

Joel Dahlquist Cullborg (Uppsala Universitet, Juridiska Institutionen)

Please refer to this post as: Joel Dahlquist Cullborg, 'Emergency Arbitrators in Investment Treaty Disputes', Kluwer Arbitration Blog, March 10 2015, http://arbitrationblog.kluwerarbitration.com/2015/03/10/emergency-arbitrators-in-investment-treaty-disputes/

Last week, two decisions by emergency arbitrators were made public which had been rendered in separate cases based on investment treaties. Both cases were arbitrated pursuant to the SCC Rules and initiated in 2014 and 2015 respectively; together they likely constitute the first known examples of emergency arbitrators in non-contractual disputes. This blog post will discuss some of the general issues that may arise in such cases, which are likely to occur more frequently in the future.

Emergency arbitrators

Traditionally, parties to an ongoing arbitration could not obtain interim measures before the constitution of the tribunal. As the constitution of an arbitral tribunal could take months, there was a risk that one party would suffer irreparable damage in the meantime. In order to mitigate this risk, and in an attempt to make interim measures more readily available, even before the full tribunal is constituted, several arbitral regimes have recently introduced the possibility to obtain an "emergency arbitrator" (for example ACICA, CANACO, HKIAC, LCIA, NAI, SCAI, SCC and SIAC. For the purposes of investment arbitration, the ICC and SCC Rules are the most relevant: according to an ICC report 18% of BITs refer to ICC arbitration, whereas the SCC Rules are available under 60 BITs and the multilateral ECT. By contrast, emergency arbitration is not available under the ICSID arbitration rules or the UNCITRAL Rules, which together account for most investment treaty arbitrations.

General problems with emergency arbitrators in investment disputes

Whereas the demand for access to emergency arbitration appears to have been primarily growing in the context of commercial arbitration, the ICC Rules and the SCC Rules are frequently applied also to investment treaty disputes. Though the latest versions of the two sets of rules include the possibility to apply for an emergency arbitrator, Art. 29(5) of the ICC Rules excludes emergency arbitration from investment disputes whereas the SCC Rules do not contain any express provisions addressing the availability of emergency arbitrators in such cases. Consequently, at least on its face, interim relief before the constitution of a full SCC tribunal should be equally available to a claimant in a contractual case as to a claimant in a treaty case. There are, however, arguably differences between these two types of cases even when they are arbitrated under the same rules. A few general points, some of which appear to have come up in the two disputes made public last week, illustrate these differences:

Cooling off periods

Many investment treaties contain provisions to the effect that arbitration cannot be initiated before

attempts have been made to solve the dispute in the host state's local courts. It is common for such a provision to contain a time requirement, a so-called "cooling off" clause, before which arbitration can be initiated. Under a plain reading of such provisions, an investor has to file a claim in the domestic court of the respondent and wait for a specified amount of time before requesting arbitration. For obvious reasons, cooling off-periods with similar requirements are rare in international commercial arbitration, where the parties agree directly to arbitration with the express intention of avoiding court litigation altogether. There are also "softer" cooling off clauses, commonly seen in both treaties and contracts, stipulating that the parties must attempt "amicable solutions" before going to arbitration.

A 6-month cooling off period was discussed in one of the two recently disclosed cases. The emergency arbitrator in that case did not regard this cooling off provision as a bar to accessing emergency arbitration. The relevant BIT in that case provides for a 6-month cooling off period between the notice of dispute and the request for arbitration. The investor in the case reportedly put the state on notice on March 31st 2014 but requested – and received – an emergency arbitrator on April 23rd. The 6-month cooling of period did thus not constitute an obstacle to the emergency arbitrator's jurisdiction. The award does not appear to have discussed the matter at any great length; which is understandable given the very short time frame and the necessity to provide reasons for the main issues, i.e. whether there was a *prima facie* case of a treaty breach, whether the claimant faced urgent and imminent harm and whether interim measures would harm the state disproportionately.

The problem will likely arise again, in equally hectic cases where the possibility to thoroughly discuss the matter will be equally restrained by time and circumstance. It is however a fundamental question of treaty interpretation: when the state has agreed to arbitrate under rules that include emergency arbitration and in the same treaty conditioned access to arbitration on a cooling off period, which provision trumps the other? A more detailed analysis would doubtless require a thorough interpretation of the individual treaty in question.

MFN clauses

The availability of emergency arbitrators in investment cases also presents another layer of complexity to the familiar discussion concerning the ability for most favored nation clauses ("MFN") to import procedural provisions from other treaties. There are famous cases and articles disagreeing over the reach of an MFN: can it, for example, be used to replace the dispute resolution provision in one treaty with that of another treaty? Or does it merely operate so as to overcome waiting periods and other admissibility requirements?

These questions are not easily discussed in the abstract. In the absence of a specific case, however, the relationship between emergency arbitration and MFN clauses can at this stage only be touched upon in a general manner. It appears likely that tribunals would find arbitration with the additional possibility of seeking redress from an emergency arbitrator will be considered more "favorable" for a claimant than arbitration without such a feature. Furthermore, in this general discussion, it is likely that the question will be brought up in the context where the investor is either attempting to (i) avoid the situation described above, when there is a cooling off period in the basic treaty or (ii) import access to emergency arbitration to a basic treaty that does not otherwise provide for emergency arbitration (i.e. one that only refers to ICSID and/or UNCITRAL arbitration). It is only a matter of time before these questions are put before tribunals. While it is tempting to discuss them in a general manner, they must of course be judged on the particular facts and treaty language of each individual case.

Temporal application of the arbitration rules

A more overarching question is whether the state should be deemed to have consented to emergency

arbitration. The vast majority of investment treaties, in which the state consents to arbitration, stem from a time where emergency arbitration simply did not exist. The question is made even more relevant especially given the latest editions of the ICC Rules and the SCC Rules which include the possibility of emergency arbitration.

When an investment treaty refers to the UNCITRAL Rules or the ICC Rules without specifying which edition of the rules, this reference is generally interpreted as a presumption for the rules in force at the time of request of arbitration. The ICC Rules however, as mentioned above, expressly exclude emergency arbitration from the scope of emergency arbitration proceedings.

According to the preamble, the 2010 SCC Rules, in which emergency arbitration was introduced, apply the rules in force at the time of the commencement of the arbitration. In practice, this allows for emergency arbitration under the SCC Rules also in cases where the treaty relied upon predates the 2010 version of the Rules. Thus a claimant who initiates arbitration in 2014, and thereby accepts the state's offer to arbitrate, has the right to request an emergency arbitrator to decide on issues pursuant to that treaty. This means that an investment treaty concluded, for example, in the early 1990s may form the basis for an arbitration conducted pursuant to the 2010 SCC Rules. The matter is more than theoretical because it gives the individual claimant the strategic advantage of emergency arbitration, with its speed and element of surprise, if it chooses to request arbitration under the SCC Rules instead of under the ICC Rules or the ICSID regime, for example. In cases where the investor risks imminent harm, the SCC might therefore be a more attractive choice of venue.

The practical relevance of the difference between the SCC Rules and other arbitration rules has furthermore been demonstrated by the recent cases. It is not the intention of this text to discuss whether or not the development is desirable. One cannot help, however, to note that the SCC Rules, which are currently undergoing a revision, might benefit from at least considering the approach of the temporal applicability of the 2010 UNCITRAL Rules, which in this respect make a sensible distinction between arbitrations based on contracts and those based on treaties. Art. 1(2) provides that "The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date." The final sentence clearly alters the presumption in cases of investment arbitrations where the treaty is older than 2010 and the request for arbitration is after 2010.

Sovereign defendants

As hinted at in the reporting making the cases public, some of the general objections voiced by sovereign states in investment arbitrations are arguably more forceful when it comes to emergency arbitration, with its focus on quick and efficient solution of pressing matters. An ICC emergency arbitrator – by way of illustration since such an arbitrator typically will not preside in an investment dispute – shall make an order no later than 15 days after the file has been transferred to him, whereas his SCC equivalent has five days (according to Appendix V, Art. 6(4) and Appendix II, Art. 8(1) respectively). The respondent is likely to be less suited to defend its interest in such a swift manner than is the case for most commercial actors. Consider, for example, the fact that many smaller governments do not have proficient English speakers among their legal staff. It may take days before the notice ends up before the relevant official. Many states are furthermore unlikely to have internal competence to handle such a dispute on its own. Everyone who has ever been involved in a public tender procedure realizes the difficulties involved in procuring external counsel – not to mention able to successfully raise a defense – within days after being notified of the initiation of an emergency arbitration against it. The matter thus raises some fundamental questions of procedural fairness.

Future outlooks

The presence of emergency arbitrators in investment treaty disputes is very much a live issue and something that will likely be seen more in the future. As discussed above, the SCC Rules are so frequently available for investors under existing investment treaties that emergency arbitrators will be requested to a larger extent than previously seen.

The opportunity to obtain interim measure before the constitution of a full tribunal is naturally viewed by investors as an attractive feature. On the other hand, as outlined above, there are several aspects that may be perceived by states as problematic. There has been a lot of discussion about emergency arbitration generally but surprisingly little attention has been devoted to its application in an investment treaty context. This will change now that we have seen two examples of such cases, with more to come. The overarching question, which institutions, scholars, and the wider arbitration community must address, is the following: is emergency arbitration, in its current shape, well suited for investment disputes?