ENFORCEMENT OF INTERIM MEASURES

VIII CONGRESS OF THE COMMERCIAL ARBITRATION CENTER OF THE PORTUGUESE CHAMBER OF COMMERCE AND INDUSTRY

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KING & SPALDING

Overview

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6. … and arbitrators have some policing powers

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Introduction

– Giving arbitrators the power to issue interim measures raises the question of their enforceability

– Voluntary compliance cannot be assumed

– Arbitrators have no *imperium* and limited powers to police compliance with their orders

– If coercive enforcement is necessary, a party has either to directly apply to the courts or the state power needs to step in to enforce the arbitral interim measure

– As arbitral interim measures typically do not contain a final decision, the general rules on the enforcement of final awards do not apply

– A special enforcement regime is therefore necessary

Key legislative requirements

– The courts as gate keepers similar to their role in the recognition and enforcement of final awards

– Explicit power of the courts to grant enforcement of arbitral interim measures

– Established standard for the court's review of the arbitral interim measure in order to provide for legal certainty and predictability

– In modern arbitration legislation, these key legislative requirements are in place but their elaboration evolved only gradually

The development of a suitable legal regime

– In 1985, the UNCITRAL Model Law (ML) provided for an arbitrator's power to grant interim measures but remained silent on the enforcement

– Some milestones regarding enforcement

In 1987, enforcement of arbitral interim measures was first provided for in Art. 183 (2) of the Swiss Private International Law Act:

> "If the party concerned does not voluntarily comply with these [arbitral interim] measures, the arbitral tribunal may request the assistance of the state judge, the judge shall apply his own law."

The development of a suitable legal regime

– Other countries followed Switzerland, e.g. Germany in 1998 (Sec. 1041 CCP):

> "(2) The court may, at the request of a party, permit enforcement of a measure referred to in subsection 1, unless application for a corresponding interim measure has already been made to a court. It may recast such an order if necessary for the purpose of enforcing the measure.

> (3) The court may, upon request, repeal or amend the decision referred to in subsection 2."

– Still no rules on the test a court should apply when permitting enforcement

The development of a suitable legal regime

– In 2006, amendments to the ML provided for a comprehensive regime, enacted in 15 countries

– Differentiation between interim measures – granted *inter partes* – and preliminary orders – granted *ex parte*

  – Interim measures can be recognized and enforced

  – A preliminary order shall not be subject to enforcement by a court

– Art. 17 I ML introduced a standard for the court's review

The development of a suitable legal regime

- An arbitral interim measure is to be recognized and declared enforceable unless a non-enforcement ground applies

- The Art. 36 ML grounds for the non-enforcement of a final award are incorporated by reference

- Additional grounds for non-enforcement are interim-relief specific

  - Non-payment of required security

  - Termination or suspension of interim measure

  - The measure is incompatible with court powers and cannot be reformulated

… and its implementation in Portugal

– Art. 20 et seq. of the Portuguese Voluntary Arbitration Law, No. 63/2011 of 14 December 2011 adopt the 2006 amendments to the ML

– Differences

  – Art. 23 (5) omits the statement that a preliminary order is no award

  – Art. 27 (4) excludes an appeal

How to ensure cross-border enforceability?

– Cross-border enforcement is critical as the measure often needs to take effect outside of the seat of the arbitration but interim measures are not considered subject of the NY Convention

– Leading Australian case (*Resort Condominiums International v. Bolwell* (1993) 118 ALR 655 (Queensland Supreme Court)): Interim arbitration orders are not final and therefore no "arbitral award" within the meaning of the New York Convention

– How to ensure cross-border enforceability?

How to ensure cross-border enforceability?

- Arbitration laws provide for assistance to foreign-seated arbitral tribunals

- Art. 27 (1) of the Portuguese arbitration law, modelled on Art. 17 H (1) ML states:

  > "An interim measure issued by an arbitral Tribunal [ ] shall be enforced [ ] irrespective of the arbitration in which it was issued being seated abroad [ ]."

- Careful checking of arbitration laws at potential enforcement fora is necessary

Not all interim measures need enforcement

Is it critical to enforce the requested interim measure by coercion?

The purpose of the measure informs the answer

- Safeguarding of rights – likely yes

- Putting emphasis on a substantive issue up front with the arbitral tribunal – likely no

- Putting a spotlight on the conduct of the opposing party with the arbitrators – likely no

Policing powers of arbitrators

Even if arbitrators cannot exercise coercion themselves, they can police compliance with their interim measures to some extend:

– Drawing negative inferences, e.g. if evidence is not preserved

– Shifting the *favor iudicis* (who is the bad guy?)

– Burdening the non-compliant party with certain costs of the arbitration

– Levying payment obligations on the non-compliant party provided such power is granted to them

Summary

– Interim measures in the context of an arbitration are a matter of „horses for courses"

– In some situations, a party needs the state courts to obtain effective interim relief, namely if

  – Ex parte orders need coercive enforcement

  – An interim measure should affect a third party

  – Cross-border enforcement is not provided for in the jurisdiction where it must take effect

– Otherwise, a modern framework is in place and parties increasingly tend to make use of it