Emergency arbitrators and the Courts complementary powers to grant interim relief

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Gerald Metals SA V The Trustees of the Timis Trust & others

The English High Court has recently rendered a potentially important decision on the intersection between emergency arbitrator provisions and applications to court for interim relief. The Court determined that it was only entitled to provide interim relief to a party to an arbitration agreement where either an emergency arbitrator or an expeditiously formed tribunal were unable to provide the requested relief.

The Court also held that there was no substantive distinction between the various tests for interim relief in the LCIA Rules and section 44 of the Arbitration Act 1996, suggesting that if the LCIA Court denies an application for interim relief, the Court will too.

The HKIAC Administered Arbitration Rules (2013 edition), SIAC Arbitration Rules (2016), ICC Arbitration Rules (2012), and CIETAC Arbitration Rules (2015) (special provisions for an arbitration administered by the CIETAC HK Arbitration Center) contain similar provisions for emergency arbitrators and applications to court for interim relief. This English decision is likely to be persuasive in Hong Kong and Singapore.

While this decision can be viewed as an attempt by the court to be arbitration-friendly and not allow parties a 'second bite at the cherry' once the LCIA Court has denied an application for interim relief, the judge's comments appear to restrict the court's ability to assist parties to an arbitration by forcing parties to turn first to the LCIA 'emergency provisions'.

In light of this decision, parties may consider whether it would be appropriate to opt-out of emergency arbitrator provisions (see below).

The facts

The claimant, Gerald Metals, applied to the LCIA Court for both an emergency arbitrator (under LCIA Rule 9B) and expedited formation of the arbitral tribunal (under LCIA Rule 9A), on the basis that it needed an urgent interim freezing order. The LCIA Court declined both applications. The claimant then applied to the High Court for the same relief under section 44 of the Arbitration

Act 1996.

The judgment

Leggatt J declined to grant the application on the basis that the court could only provide such relief where the powers of the emergency arbitrator or tribunal were "inadequate, or where the practical ability is lacking to exercise those powers".

He also held that the tests under the LCIA Rules for (a) the appointment of an emergency arbitrator ("in case of emergency") and (b) the expedited formation of an arbitral tribunal ("exceptional urgency") were effectively the same as the test of "urgency" under section 44 of the Arbitration Act 1996, stating that any other interpretation would be "uncommercial and unreasonable". The fact that the LCIA Court had declined the claimant's applications, therefore, made it unlikely that the court would grant them.

Comment

On the one hand this decision can be viewed as an attempt by the court to be arbitration-friendly and not allow parties a 'second bite at the cherry' once the LCIA Court has denied an application for interim relief.

On the other hand, the judge's comments appear potentially to restrict the court's ability to assist parties to an arbitration by forcing parties to turn first to the LCIA 'emergency provisions'.

This is arguably not what the parties will have had in mind when choosing the LCIA Rules which expressly state in LCIA Rule 9.12 that "[the emergency arbitrator provisions] shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the Arbitration Tribunal; and it shall not be treated as an alternative to or substitute for the exercise of such right". (The HKIAC Administered Arbitration Rules has a similar provision: Article 22 of Schedule 4: The Emergency Arbitrator Procedures are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time). The Judge dismissed the relevance of this provision, stating that it was only relevant to the right to apply and not to the substance of the powers. This could be considered an overly restrictive view of this provision and one which may dampen parties' enthusiasm for the emergency arbitrator provisions (as discussed below).

However, it was common ground between the parties that the application of the LCIA 'emergency' provisions would not prevent a party applying for interim relief from the court where a matter is "so urgent" that a party cannot wait for an emergency arbitrator, or where an application needed to be made without notice. While this suggests a continued role for the courts in such a situation, it is not yet clear what situations will be classified as "so urgent" to allow a party to apply straight to court.

Should parties now opt-out of emergency arbitrator provisions?

The short answer is that it will depend on the parties' decisions regarding the seat of the arbitration and the governing law of the contract, as well as the parties' home jurisdictions and the subject matter of the dispute – the right to seek interim relief from the court is often viewed as important for IP related disputes, for example. In circumstances where recourse to the courts is crucial, opting out of the emergency arbitrator provisions may prevent the situation that arose in the present case.

If, however, there is a possibility of a party requiring interim relief in a jurisdiction where the local courts do not have such a concept, such as Indonesia, or from courts where any interim relief will not be granted efficiently, then there may be value in maintaining the option of recourse to an emergency arbitrator.

Next steps

We understand that the judgment is being appealed, although it is not yet known on what grounds.

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