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Rules for Appointing an Emergency Arbitrator Drafting the International Arbitration Clause, Part 3 of 4

From the Experts

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This article is Part 3 of a four-part series on international arbitration.

It has long been the accepted norm in international arbitration that an arbitral tribunal has the jurisdiction to order interim measures relating to the subject matter of the dispute. It also has been long accepted that a party's request for interim measures addressed to a judicial authority at the seat of the arbitration is neither incompatible with, nor a waiver of, the agreement to arbitrate. The 1976 U.N. Commission on International Trade Law (UNCITRAL) Arbitration Rules enshrined this principle, and all the leading arbitral institution rules contain similar, if not identical provisions.

Given the nature of international arbitration, a party often finds itself in a locale where the local courts, for whatever reason, are not a viable option. In those instances, a party is forced to wait until an arbitral tribunal is in place before seeking interim relief. There is often an urgency component, so waiting is often less than satisfactory. Recognizing this dilemma, the International Centre for Dispute Resolution (ICDR) was the first arbitral institution to provide for the appointment of an emergency arbitrator, and other institutions have followed.



This article explores how the choice between *ad hoc* and institutional arbitration affects the ability to obtain emergency relief and the procedure for obtaining that relief.

Ad Hoc Arbitration

A. UNCITRAL Rules

The UNCITRAL Rules, designed to be used for *ad hoc* arbitrations, have no institutional oversight. This

means there is no mechanism for the appointment of an emergency arbitrator before the arbitral tribunal is formed. Forming the tribunal can take a considerable amount of time. Even if the parties are in agreement on the number of arbitrators to be appointed and a claimant designates its arbitrator in its notice of arbitration, a respondent has 30 days in which to designate its arbitrator after receipt of

the notice of arbitration. The two party-appointed arbitrators, in turn, have an additional 30 days to select a chair. If there are any arbitrator challenges, or a party fails to appoint an arbitrator, this process will be further delayed. In short, use of the UNCITRAL Rules means a party has only one avenue for obtaining emergency relief before the formation of the arbitral tribunal—the courts.

Arbitral Institution Arbitration

The ICDR Rules, International Chamber of Commerce (ICC) Rules and London Court of International Arbitration (LCIA) Rules all provide for the appointment of an emergency arbitrator and require the arbitrator to be independent and impartial. While the form of the emergency arbitrator's decision varies, the rules of each institution require the decision to be reasoned, to permit the emergency arbitrator to order the posting of security, and to empower the arbitral tribunal, once constituted, to reconsider, vacate or modify any decision by the emergency arbitrator and to reallocate costs associated with the procedure. Nevertheless, there remain differences among the institutions regarding the procedures and timing for the appointment of an emergency arbitrator and, perhaps most significantly, the cost of the arbitrator's services.

B. ICDR Rules

In 2006, the ICDR Rules added Article 37, entitled "Emergency Measures of Protection," thereby allowing parties to have access to interim measures of protection on an emergency basis. The recent amendment to the ICDR Rules retains this procedure unless the parties agree that it is inapplicable. Since the enactment of the emergency arbitrator procedure, the ICDR has had

over 50 cases in which emergency relief has been requested.

Under the rules, a party seeking emergency relief before the arbitral panel is constituted submits a written notice to the ICDR administrator and to all other parties. Submitted concurrently with, or following the submission of, the notice of arbitration, the Emergency Relief Notice must set forth the relief requested, why it is required on an emergency basis and why the party is entitled to it. Within one day of receipt of the notice, the administrator is required to appoint a single emergency arbitrator. If a party intends to challenge the appointment based on a lack of impartiality or independence, the challenge must be made within one business day of the administrator's communication to the parties of the appointment and the arbitrator's disclosures.

As soon as possible, and not later than two business days after the appointment, the emergency arbitrator is required to establish a schedule for considering the application for emergency relief. All parties are to be provided a reasonable opportunity to be heard and, in recognition of the emergency nature of the proceeding, the hearing need not be in-person. It may be conducted by telephone, video, written submissions or other suitable means.

The emergency arbitrator has the power to order or award any interim or conservatory measures deemed necessary, including injunctive relief and measures for the protection or conservation of property, and the emergency arbitrator is required to set forth the reasons for the decision in either an interim award or an order.

The emergency arbitrator's power to act ceases upon constitution of the tribunal, and the emergency arbitrator is precluded from serving as a member of the tribunal unless the parties agree.

There is no extra charge for use of the emergency arbitrator procedures, and the emergency arbitrator bills hourly.

C. ICC Rules

Following the ICDR's lead, the 2012 ICC Rules also provide for the appointment of an emergency arbitrator. The parties may agree to opt out of this provision, and the provision is not applicable to arbitration agreements concluded before the date the 2012 ICC Rules came into force.

The application for emergency relief may be filed before or after the request for arbitration, and on the basis of the information supplied in the application, the president of the ICC Court determines whether the emergency arbitrator provisions apply. If they do, the secretariat transmits a copy of the application to the responding party. If the president determines that the provisions do not apply, the secretariat informs the parties that the proceedings will not take place. If a request for arbitration is not received within 10 days of the secretariat's receipt of the application, the proceedings are terminated unless the emergency arbitrator determines more time is necessary.

The appointment of the emergency arbitrator is to occur as soon as possible and no later than two days, rather than the one day required by the ICDR Rules. Any challenge to the emergency arbitrator's impartiality and independence must be made within three days upon receipt of the appointment or from the date when the party learns of facts on which the challenge is based. The emergency arbitrator is expressly excluded from acting as an arbitrator in an arbitration relating to the dispute that gave rise to the application, and the rules do not state that this prohibition can be waived.

Like the ICDR Rules, the emergency

arbitrator is to establish a procedural timetable as quickly as possible, and the hearings need not be in person. Unlike the ICDR Rules that provide that the emergency relief can be in the form of an interim award or an order, the ICC Rules specify that any relief is to be in the form of an order be made no later than 15 days from the date the file was transmitted to the arbitrator, although the ICC president may extend this time limit.

Perhaps the most significant difference between the ICDR Rules and the ICC Rules is the potential cost. While under the ICDR Rules the additional cost is limited to the amount billed by the emergency arbitrator on an hourly basis, under the ICC Rules, an applicant must pay \$40,000: \$10,000 for ICC administrative expenses and \$30,000 for the emergency arbitrator's fees and expenses. During the emergency arbitrator proceeding, and based on certain enumerated criteria, the ICC president may even increase the emergency arbitrator's fees or the ICC administrative expenses. Should an applicant fail to pay the increased costs within the time limit fixed by the secretariat, the emergency arbitrator application is considered withdrawn.

D. LCIA Rules

The LCIA Rules also provide for the appointment of an emergency arbitrator and contain an "opt out" provision not unlike the ICC Rules. A party may apply for the appointment of a "temporary sole arbitrator" at any time before the formation of the arbitral tribunal and, similar to the ICDR Rules and the ICC Rules, the application must contain the specific grounds for the emergency relief, supported by documentation. If the application is granted, the emergency arbitrator typically will be appointed by the LCIA Court within three

days of the registrar's receipt of the application. The emergency arbitrator is required to make a reasoned award or order no later than 14 days after being appointed, although the LCIA Court may extend the deadline in exceptional circumstances. The LCIA has a separate application fee for an emergency arbitrator of £8,000 (approximately \$12,000) and an arbitrator's fee of £20,000 (approximately \$30,000). Each of these may be increased by the LCIA Court at any time during the emergency proceeding, if circumstances are deemed to warrant it.

In a case of exceptional urgency, the LCIA Rules also permit a party to apply for the expedited formation of the arbitral tribunal. The LCIA Court is to determine the application as expeditiously as possible. If the application is granted, the LCIA may abridge any time period to which the parties have agreed. Thus, under certain exceptional circumstances, it is possible to seek an expedited formation of the arbitral tribunal in order to address the need for emergency relief directly to the tribunal without the usual delay.

Conclusion

If the client anticipates it may need interim relief should a dispute arise, selection of *ad hoc* arbitration means that until the tribunal is formed, relief can be obtained only in the court. The arbitral institutions afford more flexibility by permitting the appointment of an emergency arbitrator, but the procedure does come with an additional cost. The ICDR's pricing structure of no administrative fee and the emergency arbitrator's hourly billing may be the appropriate approach for a fee-sensitive client who anticipates that interim relief may be necessary. Another client may find the LCIA Rule

permitting a party to apply for the expedited formation of an arbitral tribunal in the case of exceptional urgency to be an attractive alternative to the cost of an emergency arbitrator. What can be gleaned from all the arbitral institution rules, however, is that each has sought to address the resolution of emergency situations.

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