

Emergency Arbitrator and the new Ljubljana Arbitration Rules

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Until now arbitration parties had to apply to state courts for interim relief before the constitution of the arbitral tribunal. The Ljubljana Arbitration Rules provide for a new mechanism by which parties in arbitration proceedings are able to gain urgent interim relief by an emergency arbitrator before the constitution of the arbitral tribunal. Many other international arbitration rules already introduced emergency arbitrator provisions; thus, the new Ljubljana Arbitration Rules are in line with the international developments in this field. In the following the emergency arbitrator provisions of the new Ljubljana Arbitration Rules will be reviewed.

Interim Relief

Disputes and their outcome often depend on the prevention of irreparable harm or the preserving of factual or legal situations before the issue of the final decision.¹ Thus, parties bound by an arbitration agreement are sometimes in the dilemma how to best avoid any harm or to preserve situations before the start of the arbitral proceedings.² Most of the arbitration rules,

including the Ljubljana Arbitration Rules, provide for that parties may gain interim relief before competent judicial authority or, when constituted,³ before the arbitral tribunal. Pursuant to Art 37 (1) of the Ljubljana Arbitration Rules the arbitral tribunal “may grant any interim measure it considers necessary”. However, constitution of the arbitral tribunal can take several weeks or even months and parties cannot gain interim relief in this time from the arbitral tribunal.⁴ Parties may alternatively request for interim relief at a judicial authority. In this regard it has to be kept in mind that parties who agree on arbitration did this with the intention to exclude state courts.⁵

ICC Pre-Arbitral Referee Procedure

Before the introduction of the emergency arbitrator provisions parties of an arbitration agreement always had to seek interim measures at judicial authorities before the constitution of the arbitral tribunal. To avoid

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ment is a Substantial Problem, in: AAA Handbook on International Arbitration & ADR 145, 155 (Carbonneau, T. E., ed., JurisNet, LLC, 2006, New York): “The most pressing requirement for provisional measures may occur during early stages of an arbitration before the tribunal has been appointed or organized.”

1 See Bond, S. R., The Nature of Conservatory and Provisional Measures, in: Conservatory and Provisional Measures in International Arbitration, ICC Publication No 519 (E), Paris 1993, p. 8 et sequitur; Born, G.: International Arbitration: Law and Practice, Kluwer Law International, London 2012, p. 203; Blackaby, N. et al: Redfern and Hunter on International Arbitration, Oxford University Press, New York 2009, at para 6.258.

2 Wagoner, D. E.: Interim Relief in International Arbitration – Enforce-

3 See Born, G., op. cit., 207.

4 See Lye K. C. et al, Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules in: 23 SAclJ 93, at para 3 (2011).

5 See Abascal J. M.: The Art of Interim Measures, in: International Arbitration 2006: Back to Basics?, 751, 757 (ICCA Congress Series No 13, Kluwer Law International BV, Montréal, 2007).

this step, the International Chamber of Commerce (ICC) introduced the ICC Pre-Arbitral Referee Procedure in 1990.⁶ With this mechanism it is possible to gain interim measures from a referee before the constitution of the arbitral tribunal. The parties have to agree on the application of the ICC Pre-Arbitral Referee Procedure (*opt-in*). However, the decision of the referee is not enforceable pursuant to the New York Convention.⁷ Based on the necessity of an *opt-in* agreement⁸ and the non-enforceable decision the ICC Pre-Arbitral Referee Procedure was not used very often so far.⁹

Emergency Arbitrator

Many international arbitration rules implemented emergency arbitrator provisions in the last years.¹⁰ These provisions give, in general,¹¹ the parties the opportunity to apply for interim relief before the constitution of the arbitral tribunal.¹²

For the application of the emergency arbitrator provisions the Ljubljana Arbitration Rules have chosen the *opt-out* solution: the respective provisions are applicable as long as the parties did not agree on their exclusion.¹³

The emergency arbitrator proceedings start once a party requests for urgent interim measures before the constitution of the arbitral tribunal (request for emergency arbitrator proceedings) which cannot wait until the constitution of the arbitral tribunal. In the request the party has to state *inter alia* the demanded interim measure and the reasons for the urgency. The other party will receive the request immediately by the

Secretariat.¹⁴ As a consequence the responding party is very limited in time for preparing the reply (see below for the duration of the emergency arbitration proceedings).¹⁵

However, it has to be taken into account that the accompanying request for arbitration has to be submitted within ten days after the receipt of the request for emergency arbitrator proceedings. In case the request for arbitration is not submitted in time, the emergency arbitration proceedings will be terminated.¹⁶

The appointment procedure for the emergency arbitrator is different to the appointment of the arbitrators of the arbitral tribunal which is generally commanded by the parties (Art 13 – 15 Ljubljana Arbitration Rules). The emergency arbitrator is appointed by the Board of the Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia within 48 hours after receipt of the request for emergency arbitrator proceedings. The parties have no impact regarding the selection procedure. As the proceedings shall be conducted in an expedited way, only one emergency arbitrator is appointed.¹⁷

The provisions regarding arbitrators of the arbitral tribunal are very similar to the ones for emergency arbitrators. The emergency arbitrator shall be impartial and enjoy autonomy as the arbitrators of the arbitral tribunal. In this regard the IBA Guidelines on Conflicts of Interests in International Arbitration shall be taken into account for the assessment of impartiality. It is clear that the parties have to agree on the application of the respective IBA Guidelines. However, the respective IBA Guidelines may be used for interpretation of other rules regarding impartiality as was done in a current decision by the Austrian Supreme Court.¹⁸ Challenge of an emergency arbitrator has to be filed within three days (not 15 days as for arbitrators of

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6 See Hausmaninger, C.: The ICC Rules for a Pre-Arbitral Referee Procedure: A Step Towards Solving the Problem of Provisional Relief, in: International Commercial Arbitration, 7 ICSID Review-Foreign Investment Law Journal 82 (Nr 1, 1992).

7 See Kantor, M.: The ICC Pre-Arbitral Referee Procedure: Momentum for Expanded Use, 20 MEALEY'S Int'l Arb. Rep. 31 (Nr 9, 2005).

8 See Shaughnessy, P.: Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules, 27 J. Int'l Arb. 337, 350 (Nr 4, 2010).

9 See Born, G., op. cit., 210; Blackaby, N. et al, op. cit., at para 6.258.

10 See, e.g., CPR Rules (2007); ICDR Rules (2009); NAI Rules (2010); SIAC Rules (2010); SCC Rules (2010) ACICA Rules (2011); ICC Rules 2012; Swiss Rules (2012).

11 See Bose, R., Meredith, I., Emergency Arbitration Procedures: A Comparative Analysis, 5 Int. A.L.R. 186 (2012).

12 See Born, G., op. cit., 211; Shaughnessy, op. cit., 339.

13 See Art 38 (2) Ljubljana Arbitration Rules; also see Art 29 (6) ICC Rules 2012.

14 See for *ex parte* proceedings Sherwin P. J. W., Rennie D. C.: Interim Relief under International Arbitration Rules and Guidelines: A Comparative Analysis in 20 Am. Rev. Int'l Arb. 317, 329 (2009); Hobeck, P. & Weyhreter M.: Anordnung von vorläufigen oder sichernden Maßnahmen durch Schiedsgerichte in *ex-parte*-Verfahren, SchiedsVZ 2005, 238; Boog, C.: Die Durchsetzung einstweiliger Massnahmen in internationalen Schiedsverfahren, Schulthess Juristische Medien AG, Zürich 2011, at para 905 *et sequitur*.

15 See Shaughnessy, P., op. cit., 340.

16 Annex III, Art 2 (4) Ljubljana Arbitration Rules.

17 Annex III Art 3 (1) Ljubljana Arbitration Rules.

18 Austrian Supreme Court, 17.6.2013, 2 Ob 112/12b.

arbitral tribunals).¹⁹ The emergency arbitrator may not act as an arbitrator in proceedings related to the emergency arbitrator proceedings, unless the parties agreed otherwise.²⁰

In general, the parties agree on the seat of arbitration. In case there is no agreement on this subject, the Board or the arbitral tribunal determine the seat.²¹ Regarding the seat for emergency arbitrator proceedings it shall be, in case the parties did not agree on another seat, Ljubljana. The Board may decide otherwise considering the circumstances of the case.²² Notwithstanding, the law of the seat has to be borne in mind regarding admissibility of such emergency arbitrator proceedings.²³

As the decision of the emergency arbitrator shall be issued within 15 days after submission of the request,²⁴ the emergency arbitrator is relatively free in the conduct of the proceedings. The emergency arbitrator shall take into account “the urgent nature of the proceedings”²⁵. The decision of the emergency arbitrator shall be in the form of an order.²⁶ The interim measure may be modified, suspended, or terminated by the emergency arbitrator. Further, it ceases to be binding if (i) the request for arbitration is not submitted in time and consequently the emergency arbitrator proceedings are terminated, (ii) the challenge of an emergency arbitrator is sustained, (iii) the arbitral tribunal determines so, or (iv) the arbitral proceedings are completed (except otherwise determined).²⁷ The arbitral tribunal is not bound by the interim measure or the reasoning of it.²⁸

As the parties agreed on the Ljubljana Arbitration Rules, they also agreed to comply with the decision

of the emergency arbitrator which is binding for the parties.²⁹ Enforcement of such an order may be sought either pursuant to national state law or the New York Convention (UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards).³⁰ Although most parties voluntarily comply with interim measures, the question of enforceability is very important.³¹ It is questionable whether or not an order by an emergency arbitrator may be enforced pursuant to the New York Convention as it requires that the decision is a final, binding award.³² Nevertheless, parties not complying with the interim measure shall keep the consequences in mind, especially the final award by the arbitral tribunal³³ and other measures by the arbitral tribunal which may lead to an indirect enforcement (e.g., *astreinte*, *order nisi*, etc)³⁴.

The questions with regard to enforceability of emergency arbitrators' orders are whether the emergency arbitrator is an arbitrator,³⁵ whether the decision is an award, and whether the decision is final.³⁶ Regarding the enforceability of interim measures ordered by the arbitral tribunal the decisions of state courts as well as leading commentators vary.³⁷ However, one thing is clear: the name, order or award, which is used for the interim measure, is not decisive for its enforceability.³⁸

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19 Annex III Art 3 (3) Ljubljana Arbitration Rules.

20 Annex III Art 3 (4) Ljubljana Arbitration Rules

21 Art 22 (1) Ljubljana Arbitration Rules.

22 Annex III Art 4 Ljubljana Arbitration Rules.

23 See Shaughnessy, P., op. cit., 342.

24 An extension may be granted on reasoned application by the emergency arbitrator.

25 Annex III Art 5 Ljubljana Arbitration Rules.

26 Annex III Art 6 (1) Ljubljana Arbitration Rules. Schedule 1 (6) SIAC Rules, Art 37(5) ICDR Rules, and Schedule 2 Art 3.3 ACICA Rules provide for that the decision of the emergency arbitrator may be an order or award.

27 Annex III Art 7 (3) Ljubljana Arbitration Rules.

28 Annex III Art 7 (4) Ljubljana Arbitration Rules.

29 Annex III Art 7 (1) Ljubljana Arbitration Rules

30 See Beraudo, J. P.: Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals, 22 J. Int'l Arb. 245 (2005).

31 See Kojović, T.: Court Enforcement of Arbitral Decisions on Provisional Relief – How Finalis Provisional?, 18 J. Int'l Arb. 511 (No. 5, 2001).

32 See Di Pietro, D.: What Constitutes an Arbitral Award under the New York Convention? in: Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice 139, 150 et sequitur (Gaillard, E., Di Pietro, D., ed., CMP Publishing, 2009, London); Czernich, D.: New Yorker Schiedsübereinkommen, LexisNexis, Vienna 2008, Art I NYÜ Rn 1.

33 Blessing, M.: Introduction to Arbitration – Swiss and International Perspectives, in International Arbitration in Switzerland, at para 832 (Berti, S.V. et al. eds., Kluwer Law International, Basel / Den Haag 2000).

34 Boog, C., op. cit., at para 137 et sequitur.

35 See Berger, K. P.: Die Rechtsstellung des Pre-Arbitral Referees, Schieds-VZ 2006, 176; Lye K. C. et al, op. cit., at para 13, 25.

36 See Lye K. C. et al, op. cit., at para 13 et sequitur; Shaughnessy, P., op. cit., 345; Boog, C., op. cit., at para 730 et sequitur.

37 See Born, G., op. cit., 211; Boog, C., op. cit., at para 300 et sequitur.

38 See, e.g., Di Pietro, D., op. cit, 150 et sequitur; Goldstein, M.J.: Interpreting the New York Convention: When Should an Interlocutory Arbitral “Order” Be Treated As an “Award”? in: AAA Handbook on International Arbitration & ADR 177 (Carbonneau, T. E., ed., JurisNet, LLC, 2006, New York).

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As far as known, there is one case in which a US court held that the decision of the emergency arbitrator pursuant to Art 37 ICDR Rules is a “non-final order because the interim order is expressly subject to reconsideration, modification, or *vacatur* by the full tribunal”³⁹. Following the US court, the decision of an emergency arbitrator may not be enforced under the New York Convention due to its lack of finality.⁴⁰ There are, on the other side, also good arguments for the enforceability of such orders.⁴¹ Thus, future state court decisions will determine whether or not emergency arbitrator decisions are enforceable.⁴² Irrespective of its enforceability, it must be kept in mind that parties not complying with interim measures may also face contractual damages.⁴³

The costs for emergency arbitrator proceedings consist of EUR 10,000 emergency arbitrator fees⁴⁴ and EUR 3,000 non-refundable administrative fees⁴⁵.⁴⁶ These costs may be increased or decreased by the Board. If the costs are not paid, the request for emergency arbitrator proceedings is not considered or the proceedings are terminated by the Secretariat. Parties may request that the arbitral tribunal allocates the costs of the emergency arbitrator proceedings in the arbitral award.⁴⁷

Conclusion

The introduction of emergency arbitrator provisions in the new Ljubljana Arbitration Rules was an important and necessary step as urgent interim measures will become more and more important in practice. This is also shown by the number of arbitration rules which implemented such rules in the last years. As a result, arbitration will strengthen its role as an efficient dispute resolution mechanism. Parties are now in the position to gain interim relief by an emergency arbitrator before the constitution of the arbitral tribunal.

All arbitration rules which implemented the emergency arbitrator provisions face the question regarding the enforceability of emergency arbitrator decisions. As the arbitration proceedings start after or parallel to the emergency arbitrator proceedings and parties are not aware of the circumstances in the future arbitration proceedings they will think twice about non-complying or complying with the order. Nevertheless, the implementation as an *opt-out* solution will likely lead to an increasing application for interim measures by emergency arbitrators and thus gain more attention than the ICC Pre-Arbitral Referee Procedure in practice.

39 *Chinmax Medical Systems Inc. v Alere San Diego, Inc.* (formerly known as Biosite Incorporated), Case 3:10-cv-02467 (USDC S.D. Cal. May 27, 2011).

40 Regarding finality see, e.g., Di Pietro, D., *op. cit.*, 150; Kirby, J.: Finality and Arbitral Rules: Saying an Award is final does not necessarily make it so, 29 *J. Int'l Arb.* 119 (2012); Senger-Weiss, E.M.: Enforcing Foreign Arbitration Awards, in: *AAA Handbook on International Arbitration & ADR* 157, 173 (Carbonneau, T. E., ed., JurisNet, LLC, 2006, New York).

41 See Born, G., *op. cit.*, 212.

42 Shaughnessy, P., *op. cit.*, 345.

43 Fry, J., Greenberg, S., Mazza, F.: *The Secretariat's Guide to ICC Arbitration*, ICC Publication No 729 (E), Paris 2012, at para 3-1086.

44 See Appendix V Art 7 (1) ICC Rules: \$ 30,000; Appendix II Art 10 (2) SCC Rules: EUR 12,000; Appendix B Art 1.6 Swiss Rules: CHF 20,000 (“deposit as an advance for the costs of the emergency relief proceedings”).

45 See Appendix V Art 7 (1) ICC Rules: \$ 10,000; Appendix II Art 10 (2) SCC Rules: EUR 3,000; Appendix B Art 1.6 Swiss Rules: CHF 4,500.

46 Annex III Art 8 (2) Ljubljana Arbitration Rules.

47 Annex III Art 8 (6) Ljubljana Arbitration Rules.