Emergency arbitrators and expedited tribunals

The unavailability of emergency relief has often been cited in the past as a drawback of arbitration. **James Doe** and **Robin Wood** of **Herbert Smith Freehills** report that emergency provisions are now available and working well.

KEY POINTS

- Critics of arbitration have pointed to the unavailability of emergency relief
- Arbitral institutions have begun to introduce provisions for emergency arbitration or expedited formation of a tribunal to address these perceived concerns
- The ICC and LCIA have adopted similar emergency arbitration provisions, although the LCIA also offers the option of expedited formation of the tribunal
- Such forms of dispute resolution can provide rapid relief on an interim basis but the test applied for entry is likely to be strict and some types of relief are not available
- The authors have recently represented a client in an ICC emergency arbitration concerning a construction project and were generally impressed with the process

Arbitration is a popular form of dispute resolution in construction, particularly for international projects. In the right circumstances, arbitration can offer significant advantages over litigation, with parties able to choose (or participate in the choosing of) a tribunal composed of people with particular skills or experience, and awards that are kept confidential.

However, a commonly cited disadvantage is that there may not be time to constitute a tribunal where urgent relief is required, such as an injunction to prevent the dissipation of assets. Traditionally, in such circumstances, the parties have had to turn to the national courts for assistance.

Under English law a residual jurisdiction has been preserved at s 44(3) of the *Arbitration Act 1996* (the *AA 1996*) to allow the courts to grant emergency relief:

> 'If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.'

Other jurisdictions with sophisticated arbitration laws have similar provisions. It is, however, clearly less than ideal for parties who have deliberately and thoughtfully chosen to resolve their disputes through arbitration to be required to turn to the courts when they are in need of urgent relief.

Emergency arbitration

The authors recently participated in an emergency arbitration under the ICC Emergency Arbitration Rules relating to a substantial construction project in the MENA region. Such an experience still remains relatively rare, even amongst seasoned arbitration practitioners. The authors found the process to be an effective way of dealing with certain urgent matters, although there are clearly limits to its application. The construction contract was subject to the laws of England and Wales. The claimant sought emergency relief related to the imposition of liquidated damages for delay.

The process was extremely rapid. The claimant issued its application for emergency measures to the ICC, which confirmed within one working day (three calendar days given the intervening weekend) that the emergency arbitration procedure applied. The respondent was notified of the proceedings at the same time (although a copy of application was not received for another two working days), and the emergency arbitrator was appointed within 48 hours.

Despite a request for an extension of time for the respondent's reply because its key witness was on vacation, the emergency arbitrator took a robust approach, requiring that the original timetable be maintained. This required the respondent's reply to be submitted within seven days of being notified of the proceedings and only five days from receipt of the application documentation. A one day hearing took place within eight days of the emergency arbitrator's appointment and only 13 days after the application.

The parties were not required to prepare written skeleton arguments or opening briefs and the hearing itself consisted of oral submissions by both claimant and respondent's counsel. Although witness statements had been submitted by both parties, it was agreed that there would not be any cross-examination of the witnesses.

The emergency arbitrator's order was handed down 7 days after the hearing, a total of 20 days after the claimant's application and within the time limit set out in the ICC Rules.

Such timescales are fast even by comparison to UK statutory adjudication (28 or 42 days under the *Construction Act 1996*) and DAB proceedings (84 days under the FIDIC forms), and are comparable with urgent interim injunction proceedings in the English High Court.

The process ran smoothly and the emergency arbitrator produced a concise and well-reasoned emergency order, including a decision on the allocation of the costs of the emergency proceedings. The emergency arbitration appears (on this occasion at least) to have been effective in resolving the dispute, at least temporarily.

Test for relief in emergency arbitrations

Although the claimant argued that the emergency arbitrator had a broad discretion to award interim relief and was not constrained by either the law of the seat or the substantive law of the contract, the emergency arbitrator determined that the basic test to be applied was that espoused by Ali Yeşilirmak in *Provisional Measures in International Commercial Arbitration*, namely that:

(1) the emergency arbitrator must have prima facie jurisdiction;
(2) the applicant must have a prima facie case on the merits;
(3) there must be a threat of irreparable harm; and
(4) the case must be so urgent that it cannot await the composition of the tribunal.

The issues of jurisdiction and a prima facie case on the merits were not disputed, and so the emergency arbitrator concentrated on the questions of irreparable harm and urgency.

Regarding the test to determine whether irreparable harm would be caused to the claimant, the emergency arbitrator was persuaded by Ali Yeşilirmak's observation that, when considering interim measures, aimed at the preservation or modification of the status quo:

> '… an Arbitral Tribunal should carefully consider contractual and statutory rights of contracting parties; for instance, what risk allocation is envisaged or what rights a party has under the applicable law. Further, an applicant should not be permitted to rely on arguments that are or should have been known by it at the time of entering into arbitration agreement.'

On the facts presented, nothing had happened which was inconsistent with the risk allocation agreed between the parties.

Considering potential causes of irreparable harm, the emergency arbitrator endorsed the definition of dissipation of assets propounded by Gary Born in *International Commercial Arbitration* (Kluwer Law International, 2014 (2nd edn)) that:

> '… a party has begun to, or appears likely to engage in, conduct that goes beyond the ordinary course of business, by attempting to dissipate assets, encumber assets, or grant preferential security to insiders.'

Again, on the facts, no such circumstances existed.

The emergency arbitrator also considered whether a more stringent test applied for an application for security for payment of an award, citing with approval Ali Yeşilirmak's comment:

> 'A security for payment or claim is a kind of advance payment designed to guarantee the payment and/or enforcement of the final award where the applicant proves to be right on the merits of the case in dispute. The power to grant such security generally arises from the broad interpretation of either power given to the Tribunal in regard of interim protection of rights or the arbitration agreement. For the grant of security for payment, the [Applicant] needs to demonstrate that it is highly likely that the award, if it

were rendered in its favour, would not be enforced.'

The emergency arbitrator concluded that, on the facts of this case, the claimant needed to show that it was 'highly unlikely' that the respondent would pay the ultimate award, thereby causing irreparable harm to the claimant. That was a high bar. The emergency arbitrator concluded that it had not been met and rejected the application for emergency relief.

Comparing the ICC and the LCIA approach

Somewhat different approaches have been taken by different arbitral institutions; there is a great deal of common ground between the processes. The similarities are evident from a brief comparison of the emergency arbitration procedures under the 2012 edition of the ICC Rules of Arbitration (the ICC Rules) and the LCIA Arbitration Rules (2014) (the LCIA Rules).

Under both sets of Rules, the applicant makes its application to the relevant institution, but must copy or notify the proposed respondent, thereby precluding applications without notice. If such relief is required, for example applications for a freezing injunction, the parties will still need to look to the courts.

The relevant arbitral institution assesses the merits of the application and, if granted, appoints an emergency arbitrator. Under the ICC Rules the emergency arbitrator's order is due 15 days after the file is transmitted to him (Appendix V, arts 2(1), 5(1) and 6(4), ICC Rules). Timescales are similar under the LCIA Rules with the order due within 14 days of his appointment (art 9B(9.8), LCIA Rules).

Emergency arbitrators under both sets of Rules have substantially the same powers as an arbitral tribunal, albeit their decision will not bind the full arbitral tribunal. One significant difference is that, while the ICC requires the emergency arbitrator to fix and apportion costs, under the LCIA Rules these costs will form part of the arbitration costs – in effect 'costs in the case' (art 9B(9.10), LCIA Rules).

A point to consider is that both sets of Rules anticipate that full arbitration proceedings will be commenced. While this does not preclude the parties from settling or simply deciding to let the emergency arbitrator's order stand, a full arbitration (with all of its implications in terms of costs and inconvenience) is likely to follow an emergency arbitration.

Expedited tribunal

As an alternative to emergency arbitration, the LCIA Rules allow a party, in cases of 'exceptional urgency', to request that the formation of the arbitral tribunal be expedited (art 9A(9.1), LCIA Rules). If such an application is granted, the LCIA court can 'abridge any period of time under the arbitration agreement or other agreement of the parties' (art 9A(9.3), LCIA Rules). An expedited tribunal may not be able to act as quickly as the emergency arbitrator but, if the matter can wait, this route may reduce overall costs and has the advantage of a properly constituted tribunal.

An incomplete solution?

Although the emergency arbitration and expedited tribunal provisions have gone a long way towards addressing the issue of emergency relief in arbitration, there are still some matters (such as without notice applications) which can only be resolved by the courts, and parties may not have a choice between court and emergency arbitration.

In England, it was recently held in ***Gerald Metals SA v Timis [2016] EWHC 2327 (Ch)*** that the English court could not grant a freezing injunction because the LCIA Rules provided for an emergency arbitrator who could grant similar relief. This was based on s 44(5) of the *AA 1996* which provides (by exception to s 44(3)):

'In any case the court shall act only if or to the extent that the Arbitral Tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.'

The court held that s 44(5) of the *AA 1996* effectively makes emergency arbitration an exclusive remedy, and the courts only retain jurisdiction where equivalent relief could not be sought from an expedited tribunal or emergency arbitrator.

Conclusions

Emergency arbitration processes can provide an effective and rapid option for parties who require urgent relief. The authors were generally impressed with the process and can confirm that it offers an effective alternative to court injunction proceedings. However, certain types of relief (most notably applications without notice) must still be sought at court and therefore that remains an important option for parties, even where they have agreed to resolve their disputes through arbitration. **CL**