Emergency arbitration as an effective alternative to litigation in international disputes

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International arbitration offers a sophisticated alternative to the use of courts around the world for dispute resolution. This extends to emergency relief.

This article considers emergency and expedited arbitration in the context of two examples. In summary, international arbitral institutions, their rules and their panel arbitrators increasingly offer swift and effective emergency redress, but there are pitfalls to watch out for.

In the first example, the Swiss Rules of International Arbitration 2012 applied (the procedure was commenced before the latest 2021 edition but there are no material changes for these purposes). After the respondent’s failure to engage substantively with the applicant’s requests in correspondence, the latter issued proceedings for interim relief pursuant to article 43 and article 26 of the Swiss Rules (day 0). A substantive response was received on day three from the respondent. On day four the secretariat of the Swiss Chambers’ Arbitration Institution appointed the sole emergency arbitrator, pursuant to article 43(2) of the Swiss Rules.

There followed a reply to the application from the respondent, on day 10, within six days of the appointment of the emergency arbitrator, responsive submissions by the applicant on day 11, further evidence from the respondent on day 12 and the hearing of the application on day 13. The emergency arbitrator promptly thereafter issued his decision, ordering the respondent to refrain from taking certain action and ordering that the respondent bear all of the emergency arbitrator proceeding costs.

A fortnight later the respondent filed a request for reconsideration of the decision under article 43(8), relying on an argument that the interim relief ordered would lead to catastrophic financial consequences for it. The emergency arbitrator swiftly determined that application against the respondent and ordered it to bear the procedural costs of the reconsideration proceedings.

Technically, that was the end of the emergency arbitration. In practical terms the next stage involved the appointment of a new sole arbitrator who issued directions within a further three weeks and who went on to consider the same substantive claim, now to final injunctive relief, on an expedited basis, with further claims (for restitution and damages) pleaded but to be dealt with, by agreement, only if the claim to an injunction failed. The final hearing on the main claim to injunctive relief was heard within three months of the institution of the emergency arbitration, when the Swiss Rules sole arbitrator considered...
the availability of final injunctive relief under the substantive law of the contract, which was English law (under which the courts’ jurisdiction to order such relief is extremely broad and unconfined to particular circumstances or particular kinds of order). The sole arbitrator shortly afterwards issued an award granting the final injunction.

There is usually a need to take the award of an emergency arbitrator to a national court for enforcement and the court will consider the matter under the arbitration laws of that jurisdiction. As a postscript to the first example, that final award was relied upon for enforcement at first instance and on appeal in a third jurisdiction (in proceedings which were impressively swift on any comparison, with the appellate decision issued within nine days of the first instance proceedings).

The second example relates to an application for the expedited formation of a three-member arbitral tribunal under the rules of the London Court of International Arbitration (LCIA) and, specifically, LCIA article 9A. In common with the first example above, the context was a claim for urgent relief. An application for the appointment of an emergency arbitrator (under article 9B) was initially made but refused by the LCIA Court (without reasons) within two working days. Applications were then made for the expedited formation of the tribunal and directions for an expedited hearing.

In the event, the parties agreed to the expedited formation of the arbitral tribunal. The LCIA Court agreed to this the following day. A three-member tribunal was then constituted within six days (four working days). Within two working days of the appointment of the arbitrators, the tribunal held a hearing by video of the (opposed) application for an expedited hearing and later the same day refused the application. Nonetheless, the chronology demonstrates that the LCIA can move quickly in an appropriate case although to some extent the speed will depend on the respondent’s willingness to cooperate and file responsive submissions.

As to enforcement, LCIA article 9.9 provides that an award of an emergency arbitrator shall take effect as an award under article 26.8 and be final and binding (this is subject to provisions giving the other side opportunities to challenge the final award and for either the emergency arbitrator or the later full tribunal to revoke or vary it; but court decisions on interim relief are also susceptible to later challenge). This will require more testing under international arrangements and commentators have tended to doubt that a national court would enforce any given emergency arbitration decision as an award under the New York Convention.

In the second example, the English seat dictated that the applicant had to have regard to the decision of Mr Justice Leggatt in the English High Court in Gerald Metals SA v Timis (2016) concerning the court’s power to grant urgent relief under section 44(3) of the Arbitration Act 1996. In short, although the English court has power to make urgent orders in support of arbitration proceedings, the test of urgency under section 44(5) of the Arbitration Act will not be met, and the court will not make such an order, if there is time to form an expedited tribunal or appoint an emergency arbitrator which can exercise the necessary powers.

There is, as yet, no certainty that article 9.13 of the LCIA Rules 2020, expressly providing that a party may apply to a competent state court for interim measures, will affect the English court’s approach. In practice, therefore, in English-seated arbitrations a party seeking emergency relief is likely to apply to the relevant arbitral institution first rather than to the English court. This will arise in a wide range of circumstances where a commercial agreement contains an arbitration clause, as the major institutions all now include some form of emergency relief provision in their rules (including, among others, the ICC, SCC, HKIAC and SIAC).

It should be noted that national arbitration laws may also support emergency or fast-tracked procedures in arbitration even where an ad hoc arbitration agreement is used or where relevant rules are silent, such as by section 33 of the UK Arbitration Act 1996 which calls for arbitrators to adopt procedures suitable to the circumstances, including “avoiding unnecessary delay or expense”.

Accordingly, in the first case, the efficacy and genuine cross-border benefits of this relatively uncommon procedure produced swift results for the claimant. In the second, the arbitral institution showed that it could move quickly in deciding applications for the appointment of an emergency arbitrator and expedited formation of a tribunal.

In summary, organisations which are considering court or arbitration at the stage of negotiating contracts should ask themselves whether, in the future of the relationship with their counterparty, there may arise a need for emergency relief and, if so, whether their legal teams can assist with examples of good or bad experiences with different courts and arbitral institutions when it comes to emergency procedures, and to draft accordingly.

In circumstances where a dispute has already arisen, there is no such choice to make and the question is how best to approach emergency relief if there is a binding arbitration clause. In many cases, as international arbitration practitioners increasingly experience, emergency relief procedures are well understood by arbitral institutions, are taken seriously and can lead to swift and effective relief.