ICC Events

17th ICC Miami Conference

10-12 November 2019

ICC's annual Miami conference provides an indispensable update on developments in the region and is the most important gathering for the Latin American arbitration community, attended by over 600 participants representing around 40 countries. The following reports cover the ICC Institute Advanced Level Training Programme and reports of the wide range of panel discussions on latest developments in international arbitration and Latin America. More information on the 18th ICC Miami conference will be communicated in due time (http://iccwbo.org/ICCMIAMI).

Conference, Day One

1. ICC Institute Training - Catch Me If (And While) You Can: How to Navigate Interim Measures in International Arbitration

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Introduction

Yves Derains (Chair of the ICC Institute of World Business Law; Founding Partner, Derains & Gharavi, Paris) inaugurated the ICC Institute of World Business Law Advanced Training stressing the practical importance of interim measures. They are a vital resource in the arsenal of arbitral weapons at the ready to *inter alia* preserve the status quo, safeguard key evidence, induce the other side to negotiate, and even win the case on the merits. Mr Derains further highlighted the mounting popularity of the relatively new emergency arbitrator proceedings.

Three cumulative factors, he noted, must be kept in mind to master the art of interim measures: A sound strategy, practical knowledge to put into action, and an ever-present eye on enforcement. The four panels of the day zoomed in on these factors.

1. Strategic considerations: When and to whom interim measures may be requested

The first panel, on the strategic considerations of interim measures, featured **Fernando Eduardo Serec** (Partner, Tozzini Freire Advogados, Sao Paulo) and **Patricia Sa Moreira de Figueiredo Ferraz** (Counsel, ICC International Court of Arbitration).

As a starting point, Mr Serec focused on the notion of interim measures. While ICC tribunals have an open-ended power to issue any interim measures they 'deem appropriate'[1], the Arbitration Rules do not define interim measures. Under the UNCITRAL Model Law, such measures serve a well-defined purpose: to protect the status quo, assets, evidence or the arbitral process.[2] Under both sets of rules they must be 'temporary'. Their existence is tied to their *raison d'être*, such that they only remain in existence for as long as they serve their purpose.

The questions of *when* and *to whom* interim measures may be requested, Mr Serec went on, are related: the 'to whom' depends on the 'when'. If the interim

1 Article 28(1) : 'Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate'.

2 UNCITRAL Arbitration Rules 2013, Article 26(2): 'An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to: (a) Maintain or restore the status quo pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute.'

measures are requested *before* the constitution of the arbitral tribunal, they may be requested either to an emergency arbitrator or to domestic courts. If they are requested *after* the constitution of the tribunal, they should be requested to such arbitral tribunal—or alternatively, to domestic courts. In short, the timing of the request determines which fora are available.

Finally, Mr Serec referred to an August 2018 decision from the High Court of Hong Kong[3], where the local court confirmed that Hong Kong courts may issue interim measures in support of arbitration even against a person who is not a party to either the arbitration agreement or the arbitration. This illustrates the extraordinary reach that interim measures may have in some instances.

In turn, Ms Ferraz spoke about the ICC Emergency Arbitrator proceedings, regulated in Article 29 and Appendix V of the ICC Rules. Recourse to the Emergency Arbitrator proceedings is possible whenever the urgency is such that the request for interim measures cannot await the constitution of the arbitral tribunal. Parties may resort to these proceedings provided that (i) the ICC arbitration clause was agreed to on or after 1 January 2012, (ii) they did not opt-out of these proceedings, and (iii) they did not agree to apply a different pre-arbitral proceeding. The request for arbitration is to be filed together with, or within ten days of, the application for interim measures. The proceedings are swift: the emergency arbitrator must adhere to a strict timeline and issue a decision within 15 days from receipt of the file.[4]

Between 2012 and 2019, 110 applications for interim measures to emergency arbitrators were filed; many of these urgent applications were made on a Friday evening, a national holiday, or on the eve of end-of-the-year celebrations.

2. Practical considerations: The counsel's perspective

Claudia Benavides (Partner, Baker & McKenzie, Bogota) opened this second panel by addressing the criteria for securing interim measures. Typically, she noted, these criteria are not that specific as interim measures must be tailored to the particular needs of the case. By the same token, these open-ended criteria make it difficult to predict the outcome of an application for interim measures. There are three main criteria:

- The likelihood of success on the merits (*fumus bonis iuris*). A way to give further teeth to this requirement is to focus on the arguments, as opposed to the evidence. If the arguments in support of the interim measures request are reasonable – regardless of the evidence – it is likely th*is element is met*.
- The risk of irreparable damage, where one needs to juxtapose the risk of damage *with* interim measures and *without* interim measures.
- The posting of a bond to compensate the potential damage caused by the interim measures, i.e. an interim measure which is later deprived of its basis because, for instance, the party obtaining the measure loses on the merits.

Ms Benavides then shared some real-life insights. She observed that, often, there is no correlation between the outcome of the request for interim measures and the outcome of the case, given that parties use interim measures as a tactical weapon, e.g. to force the other side to negotiate.

Finally, the focus shifted to the preferred forum where to request interim measures. The live poll among seminar participants showed the following results:[5]

- Before national courts: 51.28%;
- Before arbitral tribunals: 41.02%;
- Before emergency arbitrators: 7.69%.

Factors to consider when making this choice, Ms Benavides concluded, include the nature of the dispute, speed, costs and confidentiality.

María Inés Solá (Legal Counsel, Pan American Energy LLC, USA) shared her experience with interim measures as in-house counsel. At the outset, she warned against the mentality of having automatic recourse to interim measures – just because 'it might help'. It is important to carefully consider the pros and cons of the interim measures requested, and the specific form they should take.

3 Briana Young, *Company A and Others v. Company B and Others* [2018] HKCU 3575, [2018] HKCFI 2240, High Court of Hong Kong, Court of First Instance, HCCT 31/2018, 02 August 2018', A contribution by the ITA Board of Reporters, Kluwer Law International.

4 See further, the ICC Commission Report on **Emergency Arbitrator Proceedings**, which includes inter alia an analysis of the first 80 ICC Emergency Arbitrator cases.

5 Live poll conducted via **https://2go.iccwbo.org/icc-drs-app**.

To ascertain how prevalent interim measures are in international arbitration, and if interim measures have taken root in the ordinary practice of international arbitration, the live poll asked this question: 'How often interim measures were at issue in arbitrations they were involved with over the past five years?' Participants answered that interim measures were at issue:

- 'In some cases': 83.72%;
- 'In most cases': 2.3%;
- 'Never': 13.95%.

Other poll Q&As shed further light on the practice of interim measures. These polls showed that the most frequently requested interim measure is the preservation of the status quo (41.3%); that *ex parte* interim measures are popular in Latin America (45.83% of participants were involved in arbitrations where such a measure was requested in the past five years); and that recourse to national courts to secure evidence in support of arbitration is fairly common (43% of participants have 'sometimes' been involved in this scenario over the past five years).

To conclude, Ms Solá noted that interim measures are not always 'provisional' as their effects sometimes cannot be undone: they may well decide the outcome of the case, evidence of just how crucial they can be.

3. Practical considerations: The arbitrator's perspective

In this third panel, **Elena Gutiérrez García de Cortázar** (Independent Arbitrator, Paris) noted that interim measures entail a lot of responsibility: arbitrators need to make swift decisions on the basis of limited information whilst avoiding the risk of prejudgment. Interim measures were at issue in about 30% of the cases where she sat as arbitrator.

The first question arbitrators must consider, Ms Gutiérrez pointed out, is whether they have the power to issue such interim measures. To find the answer, arbitrators must look at both the *lex arbitri* and the rules of arbitration. While under Article 28 of the ICC Rules, for instance, arbitrators have wide powers to issue 'any' interim measures they 'deem appropriate', she warned that, on some occasions, it makes far more sense to have direct recourse to a national court with the power to enforce the measure requested (e.g. a measure to freeze a bank account).

The focus then shifted to *ex parte* interim measures. The live poll conducted among seminar participants revealed most were in favour of arbitrators having the power to issue *ex parte* interim measures (58.53% in favour; 21.95% in favour only if no national court was available; and 19.51% against). Yet Ms Gutiérrez expressed doubts about *ex parte* interim measures; they are generally *not* successful as *most arbitration* laws typically requires both parties to be heard. She noted that the outcome of the poll would have been "different" before a European audience, who is less attuned to the concept of *ex parte* measures.

As to the criteria to issue interim measures, it is advisable to begin the analysis with the requirement of irreparable damage, as it is the most difficult requirement to meet. Conversely, the likelihood of success on the merits is a low bar to meet and poses an inherent risk of prejudgment. She expressed approval for Judge Posner's formula;[6] the measure should be granted if the damage of denying it is *prima facie* greater.

Finally, if the final award and the interim measures decision reach different conclusions, Ms Gutiérrez recommends including a few paragraphs to explain why the tribunal reached a different conclusion in the final award, making reference for instance to new or additional evidence.

For his part, **Clifford Hendel** (Partner, Hendel IDR, Madrid) shared lessons learned from his recent experience as emergency arbitrator in a dispute between a major sports brand and a sports federation. The dispute arose when the sports federation sought to renegotiate the contract, announcing its intention to look for new bidders. The sports brand promptly commenced emergency arbitrator proceedings. Mr Hendel distilled his experience into four practical points.

1. Emergency interim measures are usually requested under considerable time pressure.
2. Emergency arbitrators suffer from a 'deficit of information' to make a decision. The learning curve is very sharp. Emergency arbitrators are required to assimilate much information in but a few days.
3. Because of the time pressure and the limited information, the burden of proof on the requesting party is 'high' – all the more so if the request is for an *ex parte* measure.
4. As a result of these three factors, about 60% of requests for emergency interim measures are denied.[7]

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6 As Judge Posner puts it, the interim measure should be issued 'only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error . . . exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error'. *American Hospital Supply Co. v. Hospital Products Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986).

7 See e.g. the ICC Commission Report on Emergency Arbitrator Proceedings, (Annex I: Overview of the First 80 ICC EA Applications), p. 41: 'The 80 Applications resulted in 69 EA

4. Compliance, enforcement and related issues

In the fourth and last panel, **Leidylin Contreras** (Deputy Director, Ministry of Foreign Trade, Dominican Republic) explained that interim measures may take one of two forms: an order or an award. Under Article 28 of the ICC Rules, it is for the tribunal to decide. But tribunals may of course consult with the parties first, as they often do on procedural points.

The order vs. award distinction, Ms Contreras noted, has important consequences. Awards, unlike orders, have *res judicata* effect, are subject to a series of procedural formalities – such as ICC scrutiny – and are subject to legal recourse. Crucially, awards have greater potential to be enforced as a matter of both international law – under the New York Convention – and domestic law. Form and enforcement are united.

Yet, Ms Contreras clarified that, in some jurisdictions, interim measures in the form of an award will *not* be enforced at law as they are not considered final. In Singapore, by contrast, domestic courts will treat a tribunal's decision on interim measure as 'final' and thus enforceable.[8] In brief, the order vs. award distinction is not the last word on this matter.

Patricio Grané Labat (Partner, Arnold & Porter, London) posited that, contrary to the received wisdom, there are no fundamental differences among the leading arbitral jurisdictions, from either the common law or civil law traditions, when it comes to the enforcement of provisional measures. In what is a common denominator, the parties or the tribunal will resort to domestic courts to enforce provisional measures, irrespective of whether they are in the form of an order or an award. This ad hoc study included six jurisdictions: England and Wales, the United States, the Netherlands, France, Brazil and Peru.

Arbitral tribunals have an array of procedural tools at their disposal to induce compliance with provisional measures. These tools are necessary because only 62% of provisional measures are voluntarily complied with, a Queen Mary study showed.[9] To induce compliance, tribunals may employ inter alia devices such as sanctions—suspending the proceedings, though this only works against claimants—or an award on costs—allocating costs and fees against the non-complying party.

Finally, Mr Grané warned of the need to educate clients about the importance of complying with interim measures – not least to remain credible before the tribunal.

Concluding remarks

In his closing remarks, **José Manuel García Represa** (Partner, Dechert, Paris) mused that the strategic and practical considerations must be thought out together; they should be conceived of as a single block. But taking an allegorical step back, he added, the question of enforcement should be the starting point of the whole analysis, informing the evaluation of both the strategic and practical considerations.

Orders: 19 Orders rejected the Application for Emergency Measures in whole or in part on grounds of jurisdiction and/or admissibility. Out of the 59 Orders addressing the merits, the EA entirely rejected the requested relief in 36 cases, and partially or fully granted the requested Emergency Measures in 23 cases (the EA fully granted the requested emergency relief in only 8 of those cases).'

8 *PT Perusahaan Gas Negara (Persero TBK) v. CRW Joint Operation* [2015] SGCA 30.

9 '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process', available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf, p. 16.