



The ICDR, a division of the American Arbitration Association, amended its International Arbitration Rules, effective May 1, 2006, to provide for the appointment of an emergency arbitrator to handle requests for interim arbitral relief prior to formation of the arbitral tribunal. This article discusses the rationale for this change in the rules.

EMERGENCY INTERIM RELIEF

Holding the Fort Until the Arbitrators Are Appointed: The New **ICDR** International Emergency Rule

BY BEN H. SHEPPARD JR. AND JOHN M. TOWNSEND

Mr. Sheppard is a "distinguished lecturer" and director of the A.A. White Dispute Resolution Center at the University of Houston Law Center. He was, until his retirement, a partner in the Houston office of Vinson & Elkins L.L.P. and co-chair of the firm's International Dispute Resolution Practice. He chaired the American Arbitration Association task force that drafted the May 2006 revisions to the International Arbitration Rules discussed in this article.

Mr. Townsend is a partner in the Washington office of Hughes Hubbard & Reed LLP and chairs its Arbitration and ADR Group. He is chairman of the Executive Committee of the American Arbitration Association. He also served on the committee that drafted the Optional Rules for Emergency Measures of Protection in the AAA's Commercial Arbitration Rules.

The International Centre for Dispute Resolution (ICDR)¹ has amended its International Arbitration Rules, effective May 1, 2006, to include a new rule providing for the appointment of an emergency arbitrator to take up requests for emergency relief that may be needed prior to the formation of the entire arbitration panel. Allowing a party to obtain such relief from an arbitrator provides an alternative to seeking interim relief through the courts. This article will discuss the reasons for the new rule and its principal features.

The Case for an Emergency Arbitrator Procedure

To place the issue in context, consider two hypothetical cases:

Case 1: Assume a commercial contract between parties from different countries with a broad arbitration clause specifying that all disputes arising from or related to the contract shall be decided by three arbitrators, two of whom will be appointed by each party and the third appointed by the two party-appointed arbitrators within 30 days after the appointment of the second party-appointed arbitrator. Assume further that arbitration has commenced and the entire arbitral tribunal has been appointed. Also assume that one of the parties argues that it needs emergency interim relief.

Why might such relief be needed? One reason might be to restrain a former employee's use of confidential customer lists to solicit company clients, thereby preserving the *status quo* pending arbitration of an employment contract dispute. Another might be to compel the owner of a construction project to make immediate progress payments to the general contractor because, without them, it would be unable to continue performance under the construction contract. Yet another might be to restrain one of the parties from making use of a licensed trademark in a way that the owner of the mark considers highly injurious.

International arbitral tribunals, once formed, have the authority under most major sets of rules to grant interim measures of protection, including injunctive relief or measures for the protection of property. This applies both in arbitrations administered by an arbitral institution² and in *ad hoc* (i.e., non-administered) arbitrations.³ The rules of most domestic arbitration institutions contain similar provisions.⁴

Thus, the party seeking urgent interim relief in our hypothetical could, in the first instance, seek emergency relief directly from the arbitral tribunal without the need to initiate a separate court proceeding to obtain an injunction or other interim relief. Having arbitral interim relief available satisfies the expectation of parties who chose arbitration as the method to resolve disputes that might arise under an international contract, including the expectation that disputes will be

decided in a neutral forum located outside the home countries of the parties.

Case 2: Assume the same facts as in Case 1, except that all the members of the tribunal have not yet been appointed, which could be due to commonplace delays in the selection of tripartite arbitration panels. One party needs urgent emergency interim relief, but there is no tribunal to address this request.

In some cases, the inability to obtain emergency relief could be so serious as to render moot the merits of the dispute that the parties committed to the decision of the arbitrators.

Most international rules permit a party to seek interim measures of protection from a court without prejudicing its rights to arbitrate the merits.⁵ The party needing such relief before the full arbitral tribunal is appointed has generally had no choice up to now but to pursue interim relief in the courts.

However, judicial relief may be unavailable. In some jurisdictions, including several parts of the United States, the courts have held that they lack power to grant interim relief where the underlying dispute is subject to an arbitration agreement.⁶ Some of their reasons are as follows:

- Considering a request for injunctive relief by the courts would potentially interfere with the arbitral tribunal's independent determination of the dispute, because the court would have to consider the merits to some degree in ruling on the request.
- Pursuit of judicial relief would involve a duplication of effort because the arbitral tribunal would ultimately resolve the dispute.
- In international arbitration proceedings, the wording of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)⁷ precludes courts from acting in any capacity except to compel arbitration or confirm a foreign arbitral award, and thus strips the courts of jurisdiction to grant interim relief.

Thus, in jurisdictions that adhere to this view, the party pressing a claim for urgent emergency relief could find itself in limbo. Meanwhile, the account may have been dissipated, the equipment removed from the jurisdiction, the trade secret disclosed, the trademark damaged, or the customers lost. In some cases, the inability to obtain emergency relief could be so serious as to render moot the merits of the dispute that the parties

committed to the decision of the arbitrators.

Moreover, seeking emergency interim relief (say a preliminary injunction) from a court in an international case has a number of disadvantages even when it is available. One is that the court with jurisdiction over the party to be restrained is most likely in that party's home country. Some national courts lack independence and in extreme cases may be suspected of bias or corruption. Furthermore, many court systems have poorly developed procedures and are plagued by docket congestion and delay. Filing proceedings in these courts probably also involves additional expense, such as for the services of local counsel. Obviously, lodging a request for interim relief with a

national court is likely to frustrate the parties' expectation of having their disputes resolved by neutral arbitrators with specialized knowledge or expertise. Another unwelcome side effect is that the dispute may become the subject of undesirable publicity.

In short, the need for emergency relief pending the formation of the arbitral tribunal could become a serious matter for a party to an international arbitration. The inability to turn to a court for emergency relief could put one party at a serious disadvantage with respect to the other and, in an extreme case, could undermine the ability of the arbitral tribunal to later provide effective relief.

Emergency Measures of Protection New Article 37 of the ICDR International Arbitration Rules

1. Unless the parties agree otherwise, the provisions of this Article 37 shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after May 1, 2006.
2. A party in need of emergency relief prior to the constitution of the tribunal shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by e-mail, facsimile transmission, or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.
3. Within one business day of receipt of notice as provided in paragraph 2, the administrator shall appoint a single emergency arbitrator from a special panel of emergency arbitrators designated to rule on emergency applications. Prior to accepting appointment, a prospective emergency arbitrator shall disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.
4. The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceedings by telephone conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Article 15, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Article 37.
5. The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measure may take the form of an interim award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order for good cause shown.
6. The emergency arbitrator shall have no further power to act after the tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.
7. Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.
8. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Article 37 or with the agreement to arbitrate or a waiver of the right to arbitrate. If the administrator is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the administrator shall proceed as in Paragraph 2 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award or order.
9. The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

Earlier Provisions for Emergency Relief

Only two major international arbitral institutions have made emergency relief available prior to the formation of the tribunal. The first to do so was the International Court of Arbitration of the International Chamber of Commerce (ICC), which promulgated Rules for a Pre-Arbitral Referee Procedure in 1990. The referee, once appointed, has broad powers to grant provisional relief, including conservatory and restorative measures that might be urgently needed to prevent damage or irreparable loss prior to the appointment of the arbitral tribunal.

The second to adopt an emergency relief procedure was the American Arbitration Association (AAA). This procedure is contained in the Optional Rules for Emergency Measures of Protection, promulgated in 1999. Although the

the first procedure for pre-arbitral emergency relief in a major arbitral institution's standard international arbitration rules. These rules are available for use whenever parties specify in their agreement that disputes are to be arbitrated under the ICDR International Arbitration Rules. There is no longer any need to expressly refer to or incorporate by reference the AAA's Optional Rules into their arbitration agreement.

Some of the key provisions of Article 37 are:

1. *The emergency procedure is automatically available under Article 37.* Article 37 is an integral part of the International Arbitration Rules, so it will apply to all arbitrations conducted under arbitration clauses or agreements entered on or after May 1, 2006 which specify these rules, unless the parties have expressly excluded the emergency procedure in their agreement. This is

Article 37 establishes the first procedure for pre-arbitral emergency relief that is included in standard international arbitration rules offered by a major arbitral institution.

Optional Rules are a part of the AAA Commercial Arbitration Rules (Sections O-1 through O-8), they can be used in conjunction with any of the AAA arbitration rules. Under the Optional Rules, the AAA, within one business day of notice to the AAA and the other parties, will appoint a single emergency arbitrator to hear a request for interim relief in order to prevent "immediate and irreparable loss or damage," prior to the formation of the tribunal.

Both the ICC and AAA emergency relief procedures apply on an opt-in basis. This means that they apply only if the parties expressly adopted them in their initial arbitration agreement. It makes sense that parties would have to agree to this procedure before a dispute arises because afterward the party against whom emergency relief is sought is unlikely to agree to it.

New International Rule 37, Emergency Measures of Protection

Article 37 of the ICDR International Arbitration Rules is drawn substantially from the AAA's Optional Rules, although there are important differences explained below.

Article 37 provides for the expedited appointment—i.e., within one day of an emergency request—of an arbitrator to conduct accelerated proceedings to take up an emergency application for measures of interim relief prior to the formation of the tribunal. Thus, Article 37 establishes

the most critical difference between Article 37 and the AAA Optional Rules and the ICC Referee Procedure, both of which are "opt-in" procedures that require an express agreement by the parties to adopt them. Of course, whether "emergency relief" is actually ordered will be up to the emergency arbitrator in the particular case.

Because the latter two procedures require an affirmative act, they have not been heavily used.⁸ This is most likely due to the failure to focus on the issue at the time of contracting (or indifference to the issue) rather than a lack of need for the procedure.

In deciding to make emergency rules part of the standard rules, rather than an opt-in procedure (as is the case with the AAA Optional Rules), the AAA was influenced both by the reluctance of some courts to provide interim relief in international disputes that are required to be arbitrated and by the growing acceptance of the proposition that, if parties have agreed to entrust the resolution of their dispute to arbitrators, arbitrators should deal with all requests for relief to the extent they can be authorized to do so.

2. *The date of the parties' agreement to arbitrate determines whether Article 37 applies.* The critical date for automatic application of Article 37 is the date of the arbitration clause or agreement, not the date the arbitration commenced. An arbitration commenced in 2008 under an arbitration clause signed in July 2006 will be subject to the

new procedure; an arbitration commenced in 2008 under a clause signed in 2005 will not be.

3. *Article 37 requires notice of the application to be given to all parties and an opportunity to be heard.* Article 37 requires the party seeking emergency interim relief to certify in its application that all other parties have been notified or give an explanation of the steps taken in good faith to notify them. The emergency arbitrator is required to provide a “reasonable opportunity to all parties to be heard.” This is no different from the AAA’s Optional Rules and Article 16.1 of the International Arbitration Rules, both of which provide that each party has the right to be heard.

Article 37 is different from the proposed “interim relief” amendments to the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law, which would allow an arbitral tribunal (once formed) to grant interim measures of relief on an *ex parte* basis in some circumstances. Article 37 makes no provision for *ex parte* applications for emergency relief.

4. *Article 37 contains disclosure obligations for the emergency arbitrator.* The disclosure obligations of an emergency arbitrator are drawn from Article 7 of the International Arbitration Rules, which require arbitrators to disclose circumstances “likely to give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” This language reflects the 2004 Revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, which requires arbitrators to disclose “relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties.”⁹ Article 37’s disclosure language is not drawn from the AAA Optional Rules, which require disclosure of “circumstances likely ... to affect such arbitrator’s impartiality or independence.” The difference in wording is intended to dispel any notion that emergency arbitrators are subject to different disclosure obligations than arbitrators who will hear the merits of the case.

Article 37 makes clear that disclosures by arbitrator candidates are to be made prior to the

appointment of the emergency arbitrator.

5. *Article 37 contains the international standard for emergency relief.* The emergency arbitrator appointed under Article 37 is vested with the power to order or award any interim measure the emergency arbitrator “deems necessary, including injunctive relief and measures for the protection or conservation of property.” This parallels the standard for interim measures of protection found in Article 21 of the International Arbitration Rules, which in turn reflects the international standard in the UNCITRAL Arbitration Rules (from which the ICDR International Arbitration Rules were drawn). (By contrast the AAA Optional Rules require a showing of “immediate loss or damage,” a standard drawn from domestic proceedings in the United States.)

6. *The emergency arbitrator may issue emergency relief in the form of an award or an order.* The emergency arbitrator is vested by Article 37 with discretion whether to frame a decision granting an application for emergency relief either as an interim award or as an order. This is not the case under the AAA Optional Rules, which mandate granting emergency relief in an “interim award.” The ICC Referee Procedure is also different. It specifies that the relief shall take the form of an “order.”

An interim award granting emergency relief in an international case should be enforceable in judicial proceedings commenced under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, embodying the emergency relief in an award



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New Article 37 of the ICDR International Arbitration Rules provides a mechanism for an arbitrating party to obtain needed provisional relief prior to the appointment of the tribunal in order to preserve the status quo.

would also permit the opposing party to commence judicial proceedings to vacate or nullify the award.

An interim award would be the best approach in cases where the party that is the target of the preliminary injunction would be expected to ignore the emergency arbitrator's decision. There may be situations in which it would be more appropriate to grant emergency relief in an arbitral order. Article 37 gives the emergency arbitrator the flexibility to make this determination on a case-by-case basis. The emergency arbitrator is required to give reasons for granting the requested relief in either case.

7. *Article 37 gives the emergency arbitrator authority to rule on his or her own jurisdiction.* Like arbitrators appointed under Article 15 of the International Arbitration Rules, emergency arbitrators are expressly vested with the authority to resolve any disputes over their jurisdiction, including the applicability of Article 37. This could be important in cases where the parties are disputing the effective date of the arbitration agreement contained in an exchange of proposals, or the scope of the arbitration clause.

8. *Article 37 allows for reconsideration or modification of the emergency award or order.* The emergency arbitrator may modify or vacate the interim award or order granting emergency relief, but only for "good cause shown." The emergency arbitrator's order or interim award is not intended to prejudge the merits of the case, or to bind the tribunal whose members remain to be appointed. Furthermore, once constituted, the full tribunal may, for any reason it deems appropriate, reconsider, modify, or vacate an interim award or order of emergency relief made by an emergency arbitrator.

9. *The emergency arbitrator may serve on the tribunal.* Article 37 provides that after the full tribunal has been constituted the emergency arbitrator has no further power to act unless he or she is appointed to the tribunal. However, the parties must agree to this. This same rule is found in the AAA Optional Rules and for good reason. While most parties probably will prefer to start with a fresh slate of arbitrators, there may be cases where the parties wish to retain on the tribunal an emergency arbitrator who developed substantial knowledge about the case and inspired their confidence. Whether an emergency arbitrator is baggage best left behind or a valuable asset to be carried forward is a judgment best left to the parties in the exercise of their autonomy over the proceeding.

10. *Article 37 preserves the right to pursue interim relief in court.* By express provision, a request for

interim relief addressed to a judicial authority is not incompatible with Article 37 or with the agreement to arbitrate. Thus, it does not constitute a waiver of the right to arbitrate.¹⁰ A party who wishes to press claims for judicial relief in a national court, notwithstanding the potential disadvantages of doing so, is free to do so without prejudicing its rights to arbitrate.

Conclusion

Whether Article 37 will pass the ultimate test of acceptance by users of the International Arbitration Rules remains to be seen. We are willing to go on record and say that we would be surprised if parties routinely opt out of the new article.

The new article makes the ICDR the first major international arbitration provider, through its International Arbitration Rules, to allow parties the fullest possible range of arbitral remedies, including emergency relief before the tribunal is appointed. The new provision addresses the gap that has long troubled users of arbitration between the time an arbitration proceeding is commenced and the time the arbitrators are appointed. We hope and expect that this new rule will be welcomed by the international arbitration community. ■

ENDNOTES

¹ The International Centre for Dispute Resolution (ICDR) is a division of the American Arbitration Association. The ICDR International Rules are sometimes referred to as the AAA International Arbitration Rules.

² E.g., ICDR International Arbitration Rules, art. 21; International Chamber of Commerce (ICC) Rules of Arbitration, art. 25; Arbitration Rules of the London Court of International Arbitration (LCIA), art. 25.

³ For example, Article 26 of Arbitration Rules of the U.N. Commission on International Trade Law (UNCITRAL), or Rule 13 of the CPR Rules for Non-Administered Arbitration of International Disputes.

⁴ For example, see Rule R-34 of the AAA Commercial Arbitration Rules.

⁵ This is true of the ICDR, the ICC, the LCIA, the UNCITRAL and CPR rules, among others.

⁶ E.g., *McCreary Tire & Rubber Co., v. CEAT S.p.A.*, 501 F.2d 1032 (3rd Cir. 1974); *Merrill Lynch, Pierce Fenner & Smith v McCollum*, 666 S.W.2d 604 (Tex. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.), cert. denied, 469 U.S. 1127 (1985). New York state courts were under a similar limitation imposed by the New York Court of Appeals decision in *Cooper v. Ateliers de la Motobecane, S.A.*, 442 N.E.2d 1239 (N.Y. 1982). But in 2005 the New York legislature amended New York's Civil Practice Law and Rules, allowing courts to provide interim relief in support of an international arbitration. See N.Y.C.P.L.R. § 7502(c).

⁷ Reproduced following 9 U.S.C. § 201.

⁸ The ICC's Referee Procedure has been invoked only seven times since 1990. The AAA's Optional Rules have been invoked very rarely.

⁹ See Canon IIA(2) of the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes.

¹⁰ ICDR International Arbitration Rules, arts. 21.3 & 37.8.