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by Eunice Chan Swee En, Drew & Napier LLC

The potential ramifications on a party’s right to challenge an award made in a consolidated proceeding should inform a party’s decision to adopt institutional rules or national arbitration laws that allow for consolidation. Ensuring as a preliminary matter that the mechanism for consolidation and any waiver provisions in the institutional rules or national arbitration laws adopted accords with the parties’ intent would avoid any unintended waiver of any grounds to set aside and/or challenge the enforcement of an award made in the consolidated proceedings.

The nature of a consolidation decision and its ramifications on a party’s right to challenge the tribunal’s jurisdiction

A consolidation decision may be characterised as purely administrative or jurisdictional in the sense that the consolidation decision creates the jurisdiction of the tribunal of the consolidated proceedings. The characterisation of the nature of a consolidation decision is important as it may have ramifications on a party’s right to challenge the jurisdiction of the tribunal of the consolidated proceedings.

It may be said that the consolidation decision by an arbitral institution under institutional rules (such as Article 10 of the 2017 ICC Rules, Article 28.1 2013 of the HKIAC Rules and Article 15 of the 2017 SCC Rules) which allow such consolidation may be regarded as administrative in nature. There are two common features of such a consolidation decision. First, there is no requirement for reasons to be given (for example, see Article 8 of the 2014 ICDR Rules and Rule 40.1 of the 2016 SIAC Rules). Secondly, there is no stipulated avenue for a party to challenge an institution’s decision to consolidate proceedings. The institution’s decision on consolidation is final.

An institution’s decision to consolidate proceedings may be distinguished from an award or a ruling on jurisdiction. Unlike the institution’s decision to consolidate proceedings, the latter typically contains reasons and may be set aside under the law of the seat of the arbitration and/or challenged at the enforcement stage. Thus, the institution’s decision to consolidate, being administrative in nature, does not preclude a tribunal of the consolidated proceeding from making a determination on the validity of the consolidation in a ruling on its own jurisdiction. The 2016 SIAC Rules appear to adopt this view.

SIAC Rule 8.4 and Rule 8.9 clarify that the consolidation provisions (as with the joinder provisions in Rule 7.4 and Rule 7.10) in the SIAC Rules set out the procedural mechanism for consolidation. The SIAC Rules do not create the jurisdiction of the tribunal in respect of the consolidated proceedings. The tribunal of the consolidated proceedings retains kompetenz-kompetenz to decide on its own jurisdiction, including any challenge to its jurisdiction on the basis of the institution’s decision to consolidate.

In contrast, there are institutions that appear to treat the consolidation decision as jurisdictional in nature. Article 28.8 of the 2013 HKIAC Rules states that “parties waive any objection, on the basis of HKIAC’s decision to consolidate, to the validity and/or enforcement of any award made by the arbitral tribunal in the consolidated proceedings, in so far as such waiver can validly be made”. The underlying premise of this waiver provision appears to be that the tribunal of the consolidated proceedings has valid jurisdiction to make an award pursuant to the institution’s decision to consolidate proceedings.

However, having regard to the fundamental principle in international arbitration that the tribunal has kompetenz-
The agreement to consolidate and its ramifications on a party’s right to challenge the award

Consolidation of proceedings contrary to parties’ consent negates party autonomy and would jeopardise the enforceability of an award made by the tribunal of the consolidated proceedings. However, even where parties have consented to apply institutional rules or national arbitration laws which allow for the consolidation of proceedings, such agreement may have ramifications on the grounds available to a party to challenge an award made by the tribunal of the consolidated proceedings. Three potential ramifications are discussed below.

First, by agreeing to adopt institutional rules that grant the institution the power to decide to consolidate proceedings, parties may be deemed to have waived their right to challenge an award made by the tribunal of the consolidated proceedings on the basis that the composition of the tribunal was not in accordance with the parties’ agreement under institutional rules. Examples of these rules include Art 4 of the SRIA Rules and SIAC Rule 8.12. Parties’ agreement to adopt such rules may curtail a party’s right to set aside an arbitral award in some jurisdictions: see Article 1522 French Code of Civil Procedure and Noble China Inc v Lei (1998) 42 O.R. (3d) 69; 42 B.L.R. (2d) 262.

Secondly, by agreeing to adopt arbitral institutional rules that grant the institution the power to decide to consolidate proceedings, parties may be deemed to have waived their right to designate an arbitrator.

Even if the institutional rules do not contain such a waiver provision, it would be prudent for parties to expressly reserve their rights to challenge any award made by the tribunal of the consolidated proceedings on the basis of the initial decision to consolidate. In Karaha Bodas v Pertamina (No 2) [2003] 4 HKC 488, the Hong Kong Court observed (at [29] and [36]) that the fact that the defendant had made no challenge to the decision on consolidation (and appointment of arbitrators) to the supervisory court and had remained silent until the enforcement stage “may be construed as a waiver, if indeed there had been an irregularity”.

This view might be regarded as procedurally inefficient because a party objecting to the consolidation is effectively given a second bite at the apple. However, it upholds the fundamental principle in international arbitration that the tribunal of the consolidated proceedings has competence to rule on its own jurisdiction. It further acknowledges the fact that the initial decision-maker (institution or tribunal) may not have been in the best position to make a decision on consolidation at an early stage of the proceedings because there might have been insufficient information available at that time.

kompetenz to rule on its own jurisdiction, the better view is that the initial decision by the arbitral institution to consolidate should be regarded as administrative in nature, and should not purport to create the jurisdiction of the tribunal of the consolidated proceedings. After all, the initial decision to consolidate does not bear the hallmarks of a jurisdictional ruling or award (i.e. containing reasons and subject to challenge). The tribunal of the consolidated proceedings should retain the competence to rule on its own jurisdiction, including any challenge to its jurisdiction on the basis of the initial decision to consolidate.
Article 34(2)(a)(iv) of the Model Law and Article V(1)(d) of the New York Convention.

Thirdly, parties may have agreed to apply the law of the seat of the arbitration which allows the national court to order consolidation of arbitrations (for example, the Hong Kong Arbitration Ordinance). Such agreement may affect a party’s right to challenge the award made by the tribunal of the consolidated proceedings. For instance, where the consolidation decision is made by the court of the seat of the arbitration in accordance with the law of the seat, it would be difficult for a party to challenge an award made by the tribunal of the consolidated proceedings on the basis that the arbitral procedure and/or constitution of the tribunal was “not in accordance with the law of the country where the arbitration took place” (i.e. the law of the seat) under Article 34(2)(a)(iv) of the Model Law and Article V(1)(d) of the New York Convention.

**Concluding remarks**

Fidelity to efficiency in international arbitration demands that multi-contract disputes should be consolidated before a single arbitral tribunal. Consolidation reduces time and costs of resolving the dispute and prevents inconsistent or duplicative decisions on related claims and factual issues. However, before agreeing to consolidation, parties should be forewarned of the potential ramifications on their rights to challenge the jurisdiction of the tribunal of the consolidated proceedings and/or an award made in the consolidated proceedings.
Indonesia: Enforceability of Foreign Anti-Suit Injunctions under Indonesian Law

by Turangga Harlin, MacalloHarlin Advocates

There have been a number of occasions in Indonesia where domestic court proceedings and foreign arbitration proceedings related to the same matter were carried out in parallel. In some of those occasions, the arbitral tribunal, upon the claimant’s request, issued an anti-suit injunction in respect of the Indonesian court proceedings brought by the respondent. In *Astro Nusantara International B.V. et al. (Astro) v. PT Ayunda Prima Mitra et al. (Ayunda) [2010 and 2012]*, the Indonesian Supreme Court refused to recognise and enforce a foreign anti-suit injunction issued by a tribunal constituted under the Singapore International Arbitration Centre (SIAC) Rules. This article will discuss the Supreme Court’s reasoning behind the decision and at the same time, attempt to identify whether there are actually grounds to recognise and enforce a foreign anti-suit injunction in Indonesia.

**Anti-Suit Injunction under Arbitration Law**

Indonesia is a signatory to the New York Convention, which was ratified through Presidential Decree No. 34 of 1981. As a follow-up to the ratification, the Indonesian Supreme Court issued Regulation No. 1 of 1990 on Enforcement of International Arbitration Awards (Supreme Court Regulation). In 1999, the Indonesian government enacted the Arbitration Law, which provisions on the enforcement of foreign arbitral awards are more or less similar to the Supreme Court Regulation.

An anti-suit injunction is a procedural order (as opposed to an order on the merits of the case), issued by a court or arbitral tribunal upon the applicant’s request, to prevent the opposing party from commencing or continuing proceedings in another jurisdiction or forum.

While the Arbitration Law is silent on issues related to the issuance of anti-suit injunctions (or foreign anti-suit injunctions) to prevent opposing parties from commencing or continuing court proceedings, the law recognises certain procedural orders for various purposes. Article 32 of the Arbitration Law provides that, at the request of one of the parties, a tribunal may make a provisional award or other interlocutory decision on how to organise the examination of the dispute, including passing a procedural order for attachment of security, deposit of goods with third parties, and sale of perishable goods. It is worth noting, however, that practically speaking, there had been no known cases of the Indonesian National Board of Arbitration (BANI) issuing a security attachment order.

**Supreme Court’s Position on the Enforceability of Foreign Anti-Suit Injunctions**

In *Astro v. Ayunda*, the Indonesian Supreme Court upheld the Chairman of the Central Jakarta District Court’s refusal to recognise and enforce an SIAC award on the basis that the award contained an anti-suit injunction. According to the Supreme Court: (1) the anti-suit injunction amounted to interference in an ongoing Indonesian judicial process, and hence it violated the state sovereignty of the Republic of Indonesia; (2) it violated Indonesian public order; and (3) it did not fall within the commercial sector, rather it fell within the field of procedural law.

The dispute between Astro and Ayunda originally concerned a failed joint venture under a Subscription and Shareholders Agreement (SSA). Pursuant to the arbitration clause in the SSA which provided for SIAC arbitration, Astro commenced arbitration against Ayunda. However, prior to
the commencement of the arbitration, Ayunda filed a case against Astro at the South Jakarta District Court. During the arbitral proceedings, Ayunda raised a jurisdictional objection contesting the Tribunal's jurisdiction. The Tribunal issued an award dismissing Ayunda’s jurisdictional challenge, and granted an anti-suit injunction prohibiting Ayunda from continuing its court proceedings against Astro in Indonesia because the subject matter of the dispute fell within the arbitration clause set out in the SSA. The anti-suit injunction also prohibited Ayunda from taking any further legal action so far as the SSA is concerned, unless it is brought before arbitration under the SSA.

Interference in an Ongoing Indonesian Judicial Process

In arriving at its conclusion on this issue, the Supreme Court appeared to have considered that the anti-suit injunction was addressed to the South Jakarta District Court vis-à-vis the panel of judges who presided over Ayunda’s case against Astro. Thus, the Supreme Court was of the view that the anti-suit injunction amounted to interference in an ongoing Indonesian judicial process, and that it violated the state sovereignty of the Republic of Indonesia.

In reality, the anti-suit injunction was issued to order Ayunda (and not the South Jakarta District Court) to discontinue its case before the court because Ayunda was bound by the arbitration clause set out in the SSA. In fact, under the Indonesian Civil Procedural Law, Ayunda as the plaintiff always has the right to discontinue the case by withdrawing its statement of claim and the civil courts are not empowered to preclude a plaintiff from withdrawing its case.

The Supreme Court’s treatment of the anti-suit injunction as an order against the Indonesian court also appears to be questionable since it is commonly accepted that, in the arbitration context, a tribunal only has jurisdiction over the disputing parties who are bound by the arbitration agreement on which the tribunal was constituted. Arbitration is a creature of contract, and hence the tribunal has no power to issue an order against a third party, let alone against a foreign court. Indonesian Arbitration Law has a similar concept whereby the authority of a tribunal to render an award or order derives from the parties’ arbitration agreement, meaning that the tribunal can only address its awards or orders to those who are bound by the arbitration agreement. Thus, saying that the anti-suit injunction (actually addressed to Ayunda) amounts to a form of intervention in the Indonesian court or judicial process is debatable.

1 If Astro had submitted its statement of defence, Ayunda’s withdrawal could only be made with Astro’s consent. Given that Astro had commenced the arbitral proceedings against Ayunda at SIAC, it is likely Astro would have consented to Ayunda’s withdrawal.

2 Article 4(1) of the Arbitration Law essentially provides that if the parties have agreed that disputes between them are to be resolved through arbitration and have granted such authority, the arbitrators have the authority to determine in their awards the rights and obligations of the parties.
Violation of Indonesian Public Order

There is no precise or clear definition of public order or matters which are deemed to be contrary to public order. The Arbitration Law is silent on the meaning of public order. Article 4(2) of Regulation of the Supreme Court No. 1 of 1990 broadly describes public order as “*the fundamental principles of the Indonesian legal system and social system in Indonesia*”. In other words, public order is an open-ended concept.

“*Fundamental principles of the Indonesian legal system*” can be found in various pieces of Indonesian legislation. In the arbitration context, one should look at the Arbitration Law to discern the fundamental principles under Indonesian law. One of the most essential articles in the Arbitration Law is Article 11(1) which provides that “the existence of a written arbitration agreement eliminates the rights of the parties to submit the resolution of their disputes or differences of opinion contained in the contract to the District Court”. Article 11(2) goes further by saying that “the District Court must reject and must not interfere in any dispute settlement which has been agreed to be done through arbitration”.

It is therefore arguable that the anti-suit injunction is in line with Article 11(1) of the Arbitration Law based on which Ayunda has no right to submit any dispute under the SSA to the Indonesian courts. The anti-suit injunction is also not in contravention of Article 11(2) because, under this provision, the South Jakarta District Court has no jurisdiction to hear any dispute arising out of the SSA. One may fairly say that the anti-suit injunction essentially supports the enforcement of Article 11 of the Arbitration Law. Some may argue further that the anti-suit injunction was instead meant to maintain public order by preventing the risk of conflicting decisions on the same matter. In this context, leading scholars have opined that the notion of a court’s jurisdiction is a matter of public order. This is the reason why under the Indonesian Civil Procedural Law, civil court judges are, by their office, obliged not to take jurisdiction over a case where the parties are bound by an arbitration agreement. This means that, even if no party raises a jurisdictional objection, the judge must dismiss the case.

“Commerciality” Principle

Despite the fact that the dispute between Astro and Ayunda arose out of a contractual relationship under the SSA, the Indonesian Supreme Court
ruled that the content of the SIAC award does not fall within the commercial sector, rather it falls within the field of procedural law since the award contains the anti-suit injunction.

The question that arises is what needs to fall within the commercial sector: the subject matter of the dispute, the legal relationship between disputing parties, or the orders set out in the foreign arbitral awards?

The Arbitration Law specifically refers to the term “disputes” when setting out the rules of arbitrability. Article 5 provides that “disputes that can be settled by arbitration are those in the commercial sector and the merits of which concern rights that are fully controlled by disputing parties”. This provision underpins Article 66(b) of the Arbitration Law which states that Indonesia will only recognise and enforce international arbitration awards which fall within the scope of commercial law. The Elucidation of Article 66(b) elaborates on the meaning of the “the scope of commercial law”, i.e. “activities” in the field of commerce, banking, finance, investment, industry, and intellectual property rights. Further, the Presidential Decree on the ratification of the New York Convention provides that Indonesia will apply the New York Convention only to differences arising out of “legal relationships” which are considered to be commercial under Indonesian law.

Given those provisions, the “commerciality” principle appears to concern the nature of the dispute or legal relationship between disputing parties, rather than the orders set out in foreign arbitral awards, let alone the procedural orders. Leading scholars have opined that the existence of procedural orders in a foreign arbitral award cannot in any way negate the commercial nature of the award so long as the dispute based on which the award is issued arises from a commercial arrangement. Thus, applying the “commerciality” test to a procedural order such as a foreign anti-suit injunction is perplexing.

**Conclusion**

In view of the foregoing discussion, it appears that the nature of the anti-suit injunction issued in *Astro v. Ayunda* is consistent with Articles 11 and 32 of the Arbitration Law.

The real issue here is perhaps about the “actual” enforcement of the anti-suit injunction, i.e. how to procure Ayunda to withdraw its case before the Indonesian court. The same problem in fact arises in Indonesian court cases where the court passes an order for specific performance (say to perform the agreed service) as opposed to an order for monetary damages. It is generally difficult to execute the former if the losing party refuses to voluntarily comply with the order, especially because there is no clear sanction for not obeying a civil court order. In contrast, Indonesian courts can execute an order for monetary damages by seizing and auctioning off the losing party’s assets before eventually handing over the proceeds to the winning party. It is common for Indonesian litigants who seek a court order for specific performance to also request a “dwangsom” (order for monetary penalty) at the same time. If the request for dwangsom is granted by the court, the losing party will be required to pay a penalty of an amount determined by the court for each day of delay in complying with the order for specific performance. If the losing party continues refusing to perform the required act, the court can execute the dwangsom as an order for monetary damages. This will put certain pressure on the losing party to comply with the order for specific performance.

Given the above, it may be worth considering seeking an anti-suit injunction accompanied by a monetary penalty that is payable if the party against whom the injunction is issued (such as Ayunda) refuses or fails to comply with the injunction. Having said that, one needs to be very cautious about asking for an anti-suit injunction if enforcement is intended in Indonesia as Indonesian courts may not only choose to refuse to recognise the anti-suit injunction, but also the entire award as in *Astro v. Ayunda* (although like other civil law countries, Indonesia does not follow the rule of binding precedent).
Is Online Dispute Resolution The Future of Alternative Dispute Resolution?

by Derric Yeoh, Schellenberg Wittmer (Singapore)

The tech revolution has been underway for some time now but has only recently come to the forefront of the general public’s consciousness from the explosion in attention to bitcoin. The progress of technology has allowed it to creep into the domain of alternative dispute resolution. There is now online mediation, online arbitration, and even arbitration utilising the same blockchain technology as cryptocurrencies: blockchain arbitration. These forms of alternative dispute resolution, known as “online dispute resolution”, are increasingly making their presence felt.

**Online mediation**

An online mediation is usually commenced when an email is sent to the parties informing them of the basic information of the online mediation. Meetings are then conducted virtually in “chat rooms” where the mediator can communicate separately with each party or simultaneously with both parties. There is usually one chat room for joint sessions, one for caucuses or “breakout rooms”, and another for filing and storing documents. This can also be conducted through emails.

Asynchronous online mediation has been shown to be the most popular form of online mediation as it allows parties flexibility and faster resolution of the matter compared to offline mediation, which may see a mediation be put off to a distant date because of the parties’ conflicting schedules. It would also allow parties time to fashion their response, as one’s immediate response at a mediation is not always one’s best response. Other benefits include savings in cost, time and convenience. For example, just last month, the Singapore State Courts’ Community Justice and Tribunals System launched its “e-Mediation” to help those with neighbourly disputes save time and money as they no longer need to go to the courts to file their documents.

However, the downside to online mediation is that it dilutes some of the key features of mediation, which is the human relational aspect of mediation. Online mediation may not effectively capture the various needs, interests, motivations and emotions of the parties involved. The use of emails to convey messages instead of face to face dialogue may also embolden parties to make inflammatory comments which may not occur if they were in the same room with a mediator (a phenomenon that one can easily observe from social media). The effectiveness of communication at the mediation is also highly dependent on the parties’ literary skills in expressing themselves over email. The largely asynchronous nature of online mediation may also be detrimental to the mediation process, as it breaks the momentum that a long and uninterrupted mediation session can bring.

**Online arbitration**

Online arbitration can be defined as an arbitration in which all aspects of the proceedings are conducted online. Online arbitrations can have hearings through the use of video conferencing, but most online arbitrations simply require parties to upload their evidential documents, respond to questions from the arbitrator and they will receive a decision from the arbitrator. Online arbitration shares many similar advantages as online mediation, such as lower costs and greater flexibility due to their asynchronous nature. The disadvantage of online arbitration not having face-to-face interactions is also less significant as arbitrations rely less on the parties’ interactions but more on evidentiary written submissions.

Online arbitrations are widely used for internet domain name
disputes and these can be legally binding or non-binding in nature. Internet domain name disputes are usually governed by the Internet Corporation for Assigned Names and Numbers’ (ICANN) Uniform Domain Name Dispute Resolution Policy (UDRP). The World Intellectual Property Organization (WIPO) is one of the UDRP dispute resolution service providers administering the UDRP Administrative Procedure for domain name disputes and is responsible for appointing panellists to determine the dispute. The decisions made under the UDRP Administrative Procedure are non-binding but they are nevertheless highly effective. This is because while these decisions are not binding on parties, it is binding on the domain name provider, who will then effect the changes as determined by the panellists. While the parties have recourse to litigation if they are unsatisfied with the decision, this is rarely done as the expensive and time-consuming cross-border litigation is unlikely to be justified by the value of the domain name.

Online arbitrations over domain name disputes can also be legally binding. The HKIAC administered Hong Kong Domain Name Dispute Resolution Policy (HKDRP) takes a more direct approach in effecting the panel’s decision. Article 4 of the HKDRP states that the parties are required to submit to a mandatory arbitration proceeding which is governed by the Hong Kong Arbitration Ordinance. The award rendered is therefore not subject to appeal in any court and is considered as an arbitration award rendered in Hong Kong for the purpose of enforcement under the New York Convention.

Online arbitration is also used in business to resolve consumer disputes. However it is generally unpopular not because it is a poor medium for dispute resolution, but because consumers view such arbitration agreements as denying them access to justice through the courts and in particular, to class action suits which would offer more compensation.
Smart contracts and blockchain arbitration

All of the aforementioned forms of online dispute resolution have been around for some time, but there is a new form of online dispute resolution which is currently being developed: blockchain arbitration. Blockchain arbitration has been developed as the dispute resolution mechanism of choice for disputes arising from smart contracts. Some knowledge of blockchain technology and smart contracts is required to understand blockchain arbitration.

The blockchain is essentially an incorruptible digital ledger of transactions that can be programmed to record not only financial transactions, but almost anything that is of value for record. While originally devised for cryptocurrencies, there are many potential uses for the technology. The blockchain database is not stored in any single location but is instead spread across many times over a network of millions of computers simultaneously. The blockchain ledger containing the information has been touted to be incorruptible, because to alter any information on it would require the hacker to have the processing capability to overpower the entire network of millions of computers.

What has arisen from blockchain technology are smart contracts. Unlike regular contracts, smart contracts are not written in natural languages such as English or French, but entirely in code. Another point of difference is that, like a program, smart contracts automatically execute or enforce obligations. For example, in a simple contract to sell an item, the smart contract could be coded in such a way that once payment is received, it would automatically transfer the ownership of the item to the buyer.

Blockchain arbitration has in turn been developed in order to service the dispute resolution needs that may ensue from smart contracts. It is unlikely in the previous scenario of a simple buy and sell smart contract that any disputes would occur. However, disputes can come about from more complex contracts which may involve some element of misunderstanding in the transaction. This is where blockchain arbitration comes in. There are currently several models of blockchain arbitration being developed, such as CodeLegit and Kleros. CodeLegit has even drafted a set of Blockchain Arbitration Rules and envisions an Appointing Authority (it is unclear whether it will be an arbitral institution) which will appoint an arbitrator who may be a jurist or a blockchain technician. Communication would be done by email and there might even be an oral hearing over video conference should the arbitrator call for it. This is in essence quite similar to online arbitration.

Kleros on the other hand represents a different system of blockchain arbitration, in which the developers appear to be creating an entire quasi-judicial system, with a general court, followed by two tiers of sub-court divisions e.g. transport division and then air transport division. A rather complex process then occurs where “jurors” who volunteer at these Kleros court divisions would be selected by random number generation. It has also worked into place an appeal system and even bribe resistance system for the jurors.

All of these are fascinating developments in the virtual world, but what does this mean for arbitration practitioners? Despite several tech enthusiasts’ claim that blockchain arbitration is the future of dispute resolution, there are still several fundamental issues preventing blockchain arbitration from replacing traditional arbitration.

First, as a smart contract is entirely in code, some national legislations may not recognise it as a valid contract because it does not fulfil formality...
What cannot be denied is that with improved technology and automation, less complex disputes work will be claimed by online dispute resolution services.

There may also be discrepancies when translating complex contracts into smart contract codes.

Secondly, while smart contract disputes will benefit from arbitration because of its flexibility and its relative ease in cross-border enforcement of awards, there are some difficulties with the arbitral clause in smart contracts. It is not clear whether the smart contract containing the arbitral clause (which is in code) will fulfill the requirement set out in Article 2 paragraph 2 of the New York Convention which requires that the arbitral clause be in writing. However, this problem can be overcome by interpreting Article 2 paragraph 2 according to the doctrine of functional equivalence as stated at paragraph 16 of the UNCITRAL Model Law on Electronic Commerce 1996. Such an interpretation is supported by part two of the New York Convention, which contains UNCITRAL’s recommendation to interpret the “in writing” requirement non-exhaustively. Smart contracts can also be tethered to a written agreement setting out the seat of arbitration, governing law and arbitral rules, which would ensure that the “in writing” requirement is complied with. This would also remove any uncertainties about choice of law or the lex arbitri in the blockchain arbitration.

A problem specific to Kleros-type blockchain arbitration is that it only allows its “jurors” to make a decision based on the transaction evidence on the blockchain, and not hear any arguments from the disputing parties. The resulting arbitral award may be refused recognition and enforcement under Article V(1)(b) of the New York Convention for not giving the party the opportunity to present its case. It may require a significant revamp in Kleros’ blockchain arbitration model in order to adapt it to the New York Convention.

Technology for lawyers: Beware the Ides of March?

Complex and high value disputes will remain the province of traditional alternative dispute resolution. However, with traditional arbitration increasingly incorporating modern technology into its proceedings, the distinction between online arbitration and traditional arbitration is becoming less clear. What cannot be denied is that with improved technology and automation, less complex disputes work will be claimed by online dispute resolution services. It is therefore imperative that lawyers continue to improve themselves and keep abreast of the latest legal and technological developments to avoid falling by the wayside in the wake of technology’s relentless march. It may require a significant revamp in Kleros’ blockchain arbitration model in order to adapt it to the New York Convention.
Emergency Arbitrator Relief: A Practical Guide
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Overview

Under most major arbitral rules, including those of the KCAB, parties may apply for emergency interim relief even prior to the constitution of the main tribunal. The application is heard by an emergency arbitrator (EA), who is specially appointed for this purpose.

In our experience, the EA procedure is a powerful legal and strategic tool when employed correctly, and certainly an option which should be considered in appropriate cases. However, statistics and anecdotal evidence suggest that the procedure may be underused, possibly due to lack of familiarity with the procedure or other concerns.¹

This article therefore seeks to provide a practical guide to the EA procedure. It (i) surveys the availability of the procedure and the applicable standards for relief; (ii) compares the EA relief with court-granted interim relief and considers the relevant factors in choosing between the remedies (for example, orders for specific performance) may not be available in the relevant courts.

The EA procedure now forms part of most major arbitral rules, including the KCAB, SIAC, HKIAC, LCIA, ICC, SCC, ICDR, ACICA and SCIA rules. Typical features of the EA procedure are as follows. The details of these features vary across different rules:

- Applications for emergency relief may be made concurrently with or following the submission of the Notice of Arbitration/Request for Arbitration, before the constitution of the main tribunal.² The ICC Rules allow for the application for emergency relief to be filed before the filing of the Request for Arbitration, but the EA proceedings may be terminated by the ICC President if a Request for Arbitration is not received by the Secretariat within 10 days of its receipt of the EA application, unless the

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¹ For example, the 2015 Queen Mary International Arbitration Survey: Improvements and Innovations in International Arbitration found that only a minority of respondents (around 34%) had experience with the EA procedure. Further, 46% of respondents responded that they would look to domestic courts for urgent relief before the constitution of the main tribunal, versus 29% who responded that they would opt for an EA. Nonetheless, the overwhelming majority of 93% were in favour of the inclusion of the EA procedure in institutional rules.

² See, for example, Appendix 3, Article 1.1 of the 2016 KCAB International Arbitration Rules.
EA determines that a longer period of time is necessary (Appendix V, Article 1.6 of the 2017 ICC Rules).

- Upon receiving the application, the institution appoints an EA within two or three days of receipt of the application.\(^3\) SIAC, ACICA and SCC specify shorter timeframes of 1 day, 1 business day and 24 hours respectively (Schedule 1, paragraph 3 of the 2016 SIAC Rules/Schedule 1, Article 2 of the 2016 ACICA Rules /Appendix II, Article 4 of the 2017 SCC Rules).

- Typically, the EA must render a decision within around two weeks of his appointment, unless the institution grants an extension.\(^4\) SCC and ACICA provide for shorter periods of five days and five business days respectively (Appendix II, Article 8 of the 2017 SCC Rules/Schedule 1, Article 3 of the 2016 ACICA Rules).

- The main tribunal, once constituted, may confirm, vary or revoke the EA’s decision.\(^5\) Most rules also provide that the EA’s decision ceases to be binding if the main tribunal is not constituted within a prescribed period (typically around 3 months).\(^6\)

### Standards for granting EA relief

Most institutional rules are notably silent on the applicable standards for granting EA relief, and there is no universally applicable test. The rules typically grant a wide discretion to EAs, circumscribed only by the broad concept of appropriateness (KCAB), urgency (ICC, HKIAC) or necessity (SIAC).

However, in practice, EAs find the standards applicable to the main tribunal when granting interim measures instructive, and do not significantly depart from them.\(^7\) For example, many tribunals refer to Article 17A of the 2006 UNCITRAL Model Law as persuasive authority.\(^8\)

We consider below the three key factors EAs typically require, based on our experience with the EA procedure as counsel and publicly available information on EA decisions:\(^9\): (i) urgency/irreparable harm; (ii) proportionality/balance of convenience; and (iii) likelihood of success on the merits.

#### 1. Urgency/irreparable harm

The interconnected requirements of urgency and irreparable harm are often considered together by EAs. In essence, the applicant must demonstrate that urgent interim measures are necessary to avoid

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\(^3\) See, for example, Appendix 3, Article 2.4 of the 2016 KCAB International Arbitration Rules, which provides that the Secretariat shall endeavour to appoint an EA within two business days from its receipt of the application for Emergency Measures.

\(^4\) See, for example, Appendix 3, Article 3.4 of the 2016 KCAB International Arbitration Rules, which provides that the EA shall make a decision on an application for Emergency Measures within 15 days from his or her appointment, subject to the Secretariat’s power to extend the time limit if all parties agree or other exceptional circumstances exist, such as when the case is complex.

\(^5\) See, for example, Appendix 3, Article 4.2 of the 2016 KCAB International Arbitration Rules.

\(^6\) See, for example, Appendix 3, Article 3.6 of the 2016 KCAB International Arbitration Rules.

\(^7\) The 2016 ACICA Rules, the only major arbitral rules to date which specifically set out the criteria for granting EA relief, adopt the same standards for EA relief and for interim measures of the main tribunal (namely, irreparable harm, balance of convenience and likelihood of success on the merits).

\(^8\) This accords with our experience as counsel, as well as several EA decisions referred to in the SCC Practice Note on Emergency Arbitrator Decisions Rendered 2015-2016, for example Case No. EA 2016/150. Article 17A(1) (Conditions for granting interim measures) of the 2006 UNCITRAL Model Law provides that the applicant of interim measures must satisfy the arbitral tribunal that: (a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination. These provisions are mirrored in section 18-2 of the Korean Arbitration Act 2016.

\(^9\) In preparing the article, we have referred to the summary of EA decisions published by the SCC (The Arbitration Institute of the Stockholm Chamber of Commerce) in the SCC Practice Note on Emergency Arbitrator Decisions Rendered 2015-2016 and the SCC Practice: Emergency Arbitrator Decision between 1 January 2010 and 31 December 2013.
irreparable harm.

In the EA context, the requirement of urgency means that the applicant must demonstrate why it cannot await the constitution of the main tribunal, which may take a few months. In one case, we acted as counsel for a Korean company which supplied certain components for incorporation into the counterparty’s products. A dispute arose between the parties regarding the counterparty’s obligations under the supply contract and our client refused to continue supplying the components. The counterparty brought an EA application requesting an order that our client continue to supply the components. We successfully resisted the application by showing that the urgency requirement was not met because the counterparty had enough components from previous shipments such that, even in the worst case scenario, the supply would not run out before the main tribunal was constituted.

As to the requirement of irreparable harm, EAs typically consider whether the harm may be adequately compensated by way of damages. Whilst the possibility of monetary compensation does not necessarily eliminate the possibility of EA relief, EAs typically require an additional aggravating factor over and above financial harm. For example, irreparable harm was found to exist where the absence of relief would leave the applicant with insufficient cash flows to continue its operations (eg, SCC Case No. EA 2015/002) or where there was a reason to assume that the respondent was actively undertaking measures to dissipate or otherwise make its assets unavailable for enforcement (eg, SCC EA 070/2011). In contrast, EA relief was denied where the EA found that the applicant would suffer substantial (but not irreparable) harm and, given the size and reputation of the respondent’s parent company, even a substantial award would most likely be honored by the respondent, and if not honored then successfully enforced against the respondent (SCC Case No. EA 010/2012).

We have successfully met the urgency and irreparable harm requirements in a number of EA applications for anti-suit injunctions where, in breach of the arbitration agreement, the counterparties took steps to bring proceedings in local courts or a different dispute resolution forum. In one case, the counterparty had unsuccessfully attempted to secure anti-arbitration injunctions from the local courts. The EAs in these cases found that referring the dispute to another forum in breach of the arbitration agreement would cause irreparable damage to the arbitration process itself.

2. Proportionality/balance of convenience

In deciding whether to grant relief, EAs typically balance the potential harm the applicant is likely to suffer if the interim relief is not granted against the harm to the respondent that would result if the interim relief were granted and the respondent eventually prevailed, and consider whether the former substantially outweighs the latter. As one SCC EA summarised, "if the negative impact of the requested relief is disproportionate to its benefit, then either the request must be declined or the relief redesigned to reduce the burden on the subject party" (see SCC Case No. EA 2016/046).

In one of our matters as counsel, we acted for a joint venture which engaged a construction company (the respondent) for the supply of certain infrastructure. Our client terminated the construction agreement for a number of
reasons, including that the respondent had entered into a creditors’ voluntary arrangement, and called on the on-demand refund guarantees advanced by a Korean bank. The respondent commenced proceedings before the Korean courts to injunct the bank from paying the on-demand guarantee and we started the EA proceedings to stop the respondent from continuing with the Korean proceedings. The EA ruled in our client’s favour, finding that the harm which would be suffered by our client in being denied the right to call on the on-demand guarantees and consequently having to enforce damages “in a queue” behind the respondent’s prioritised creditors in insolvency would far outweigh the prospect of hardship on the part of the respondent in the reverse scenario (ie, if the respondent were to eventually prevail and be faced with enforcing damages against our client).

In practice, this balancing exercise means that EAs may be hesitant to grant relief if the respondent offers some undertaking or security which may be inferior to the relief requested but which still addresses the applicant’s concerns to an extent. This would obviously depend on the facts of the case and the nature of the undertaking or security offered.

EAs may also grant the request in part so as to limit the harm to the respondent. It should also be noted that institutional rules typically grant EAs the power to order security for costs to protect against damage caused by wrongly granted EA relief (see, for example, Article 32.2 of the 2016 KCAB International Arbitration Rules, which applies to EAs by virtue of Article 3 of Appendix 3).

3. Likelihood of success on the merits

EAs typically require the applicant to demonstrate a degree of likelihood of success on the merits. If there is little or no chance that the applicant would ultimately succeed on the merits, it would serve little purpose and be inequitable for the EA relief to be granted. However, neither the EA’s decision nor its reasoning concerning the merits of the case would be binding on the main tribunal.

In practice, this requirement has been couched in different ways by different EAs: some EAs have referred to a "prima facie" standard, whereas others have adopted what appears to be a somewhat stricter standard of "reasonable prospect of success". There is, however, a general consensus that the standard of review to be undertaken by an EA must be of a preliminary nature and should fall short of the standard of review required of the main tribunal.

Given the limited submissions and evidence that would be available at the time of an EA application, it may be difficult to satisfy this requirement if, at a high level, both parties' cases appear finely balanced. In practice, both the applicant and the EA would have to be wary of unmeritorious challenges which may be raised by the respondent to thwart the application.

Choosing between the EA relief and the court relief

Relationship between the EA relief and the court relief

The national courts generally enjoy concurrent jurisdiction with the EAs in granting interim relief pending constitution of the main tribunal. Similarly, institutional rules do not bar parties from seeking interim relief from national courts. However, some national laws require that the courts consider whether an effective remedy could be provided in the arbitral proceedings, and the availability of the EA procedure may limit the parties’ recourse to the courts.

\[10\] Such undertaking or security may also be relevant to the EA’s assessment of the urgency/irreparable harm requirement considered above.
It should also be noted that institutional rules typically grant EAs the power to order security for costs to protect against damage caused by wrongly granted EA relief.

For example, section 44(5) of the English Arbitration Act provides that the court shall act "only if or to the extent that the arbitral tribunal, 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". In Gerald Metals SA v Timis [2016] EWHC 2327, the English High Court confirmed that the effect of section 44(5) is that the courts will only have the power to grant urgent relief in support of arbitral proceedings where effective relief cannot be granted in a timely manner in the arbitration (for example, because there is insufficient time and the application needs to be made ex parte). In assessing whether this is the case, the courts will take into account both the EA procedure (Article 9B of the 2014 LCIA Rules) and the procedure for expedited formation of the arbitral tribunal in cases of "exceptional urgency" (Article 9A of the 2014 LCIA Rules).

Similarly, section 12A(6) of the Singapore International Arbitration Act provides that the court may order interim measures "only if and to the extent that" the arbitral tribunal (which is defined in section 2(1) of the Act to include an EA) has no power or is unable for the time being to act effectively. The equivalent provisions do not exist in the Korean Arbitration Act or the Hong Kong Arbitration Ordinance.

Whilst the above provision will likely cause some concerns about availability of court-granted interim relief in England and Singapore related matters, it appears likely that the national courts would step in and exercise their powers in cases where the difference between the EA relief and the court relief is sufficiently material and where the EA is unable to provide an effective remedy (for example, as recognised in the Gerald Metals case, where an ex parte application is required). The parties should carefully consider the position under the relevant jurisdiction(s) from the outset so as to obtain a comprehensive and realistic picture of their available options.

Practical considerations in choosing between the EA relief and the court relief

When both EA relief and court relief are viable options, the parties should choose between the two options by carefully considering various factors, including the following. The relative importance of each factor will vary depending on facts of the case (including, in particular, the characteristics of the relevant national courts) and individual party's needs.

- Confidentiality: Whilst confidentiality is considered to be one of the main advantages of arbitration, proceedings before the courts are normally public.

- Timing: As discussed above, the EA procedure typically takes about two weeks under most institutional rules. This timeframe may not be quick enough in certain cases. In contrast, national courts in a number of jurisdictions offer relief within a matter of days, or even on the same day as the application. One potential way in which this gap between the EA relief and the court relief may be narrowed is through "interim-interim" relief, which is considered in more detail below.

- Need to bind third parties: Given the consensual nature of arbitration, EA relief may only bind the parties to
the arbitration, and any measure directed to a third party may only be sought before the national courts (for example, in the case of a freezing injunction against a third party bank).

- **Ex parte**: An *ex parte* application, or an application for relief without notice to the counterparty, is not available under most institutional rules. One exception is the 2012 SCIA Rules, Article 26(3) of which permits *ex parte* relief to be granted by way of a preliminary order in exceptional circumstances, provided that the notice is given no later than the preliminary order and that the respondent is granted an opportunity to be heard immediately thereafter. The parties will therefore have to resort to national courts if notice to the counterparty will defeat the remedy. Many national courts offer *ex parte* applications for interim relief if certain requirements are met (for example, if it is urgent and necessary for preserving evidence and/or assets).

- **Costs**: The costs of bringing the relevant application should also be considered and compared, including the administrative fees for the different fora and the legal fees required. However, it should be noted that resorting to national courts for interim relief may not entirely obviate the need to incur costs for arbitration, as the validity of the court relief is often made conditional upon commencement of arbitral proceedings within a certain timeframe.

- **Enforceability/consequences of non-compliance**: Whilst court-ordered interim measures are directly enforceable, the enforceability of EA decisions is uncertain in many jurisdictions. Further, whilst a breach of court-ordered interim measures would have serious repercussions (potentially amounting to contempt of court), the consequences for non-compliance with EA decisions are less concrete. Local law advice should be sought at an early stage to clarify the prospects of enforcement in the relevant jurisdictions.

**Topical issues relating to limitations of the EA procedure**

The EA procedure, whilst providing an important alternative to national courts, is not without its limitations. We consider here some topical issues relating to the two main drawbacks of the EA procedure: enforceability and timing.

**Enforceability of EA relief**

As mentioned, enforceability of EA decisions is uncertain in most jurisdictions. The two exceptions to this general position are Singapore and Hong Kong. In 2012 and 2013 respectively, Singapore and Hong Kong made legislative amendments to expressly provide for the enforceability of EA decisions. The Hong Kong approach is wider of the two, and recognises the enforceability of both Hong Kong and foreign EA decisions pursuant to section 22B(1) of the Hong Kong Arbitration Ordinance, which provides that "[a]ny emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave..."
of the Court”. In comparison, Singapore amended the definition of "arbitral tribunal" in section 2(1) of the Singapore International Arbitration Act to include an EA, thereby broadening the scope of the "orders and directions" enforceable pursuant to section 12(6) of the Act to include EA decisions. Unlike the Hong Kong provision, however, section 12(6) of the Singapore International Arbitration Act does not specifically provide for the enforceability of foreign (ie, not Singapore-seated) EA decisions.

According to the 2015 Queen Mary International Arbitration Survey: Improvements and Innovations in International Arbitration, 79% of respondents pointed to concerns about the enforceability of EA decisions as one of the most significant factors impacting their choice between national courts and the EA procedure. Further, a substantial majority of respondents (78%) were in favour of decisions rendered by EAs being enforceable in the same way as arbitral awards. It remains to be seen whether other jurisdictions would follow the approach adopted by Singapore and Hong Kong.

In practice, the best deterrent of non-compliance appears to be the parties’ perception that non-compliance may adversely affect the main tribunal’s opinion of the party. Parties would not wish for their non-compliance with the EA decision to impact the main tribunal's decision as to costs and/or even, indirectly, the merits of the dispute. Further, normally, arbitral rules expressly require parties to comply with EA decisions. Non-compliance therefore amounts to a breach of the applicable arbitration rules. For example, Article 3.5 of Appendix 3 of the 2016 KCAB International Arbitration Rules provides that the parties are bound by, and shall carry out, the emergency measures ordered by the EA.

Anecdotal evidence suggests that the degree of voluntary compliance is relatively high, but clearly far from absolute. In our experience, some but not all counterparties voluntarily complied with the EA decisions, and, in some cases, we were forced to bring enforcement proceedings before the counterparties eventually complied. However, even in cases of non-compliance, the EA decisions in our favour were instrumental in enabling us to reach a favourable settlement or obtain costs awards from the main tribunals who took a poor view of the counterparties’ non-compliance. The EA relief may therefore provide a strategic advantage even where there are concerns about enforceability.

Interim-interim relief
As discussed above, sometimes the parties have no choice but to resort to national courts for interim relief because the relief is required with extreme urgency (ie, within a matter of days).

A potential way in which this "timing gap" between the EA relief and the court relief may be addressed is through the "interim-interim" relief, or interim relief granted pending the final decision of the EA. Only two major arbitration rules expressly address the possibility of such preliminary order, namely the 2016 SIAC Rules and the 2012 SCIA Rules.

Schedule 1, paragraph 8 of the 2016 SIAC Rules provides that "[t]he Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary, including preliminary orders that may be made pending any hearing, telephone or video conference or written submissions by the parties" [emphasis added]. As long as the counterparty is notified of the EA application (as required under Schedule 1, paragraph 1), the EA has a discretion to order preliminary relief without giving the counterparty the opportunity to make submissions.

As discussed above, the 2012 SCIA Rules go further and provide that a preliminary order may be made ex parte, or without notice to the parties (Article 26.3), but such power is subject to a number of

Interim-interim relief
conditions: (i) there must be exceptional circumstances; (ii) notice to the counterparty must be given at the latest together with the preliminary order; and (iii) the respondent must be granted an opportunity to be heard immediately thereafter.

However, even with respect to other institutional rules which are silent on the issue, it is arguable that the EAs should have the power to order such "interim-interim" relief, and some commentators have suggested that such measures are "conceivable" under institutional rules which are silent on the issue. The arguments in support include the following: (i) there is no express prohibition of such preliminary relief in the rules and the EAs enjoy a wide procedural discretion; (ii) in some cases, the eventual EA relief may have no or little practical value without such preliminary relief; and (iii) different safeguards are available to control the potential adverse effects to the counterparty, including the EA’s power to order security and modify or invalidate its previous decision. The main hurdle to the availability of the "interim-interim" relief is its potential conflict with the requirement under most institutional rules that the EAs give both parties a reasonable opportunity to present their case. Where time permits, the applicant of such preliminary relief may wish to suggest a mechanism which provides the responding party at least some opportunity to present its case.

It remains to be seen whether the parties, the EAs, and the arbitral institutions will embrace the wider availability of the "interim-interim" relief, and further reduce the discrepancy between the EA relief and the court relief.

**Conclusion**

The EA procedure can be an invaluable tool to parties in need of urgent interim relief, and sometimes the only avenue of redress available. Further, a favourable EA decision may provide a strategic advantage in the settlement discussions and/or the main arbitral proceedings.

This article has given an over view of the EA procedure under the different institutional rules, the applicable standard of relief, the factors to be considered in choosing between the EA relief and the court relief, and some ways in which the limitations of the procedure have been addressed.

Whilst the limitations of the EA procedure may mean recourse to national courts is sometimes the preferable option, it is hoped that improvements in the enforceability of EA decisions and the wider availability of "interim-interim" relief will enhance the usefulness of the procedure and narrow the gap between EA relief and court relief.

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