Parties rarely want to be engaged in an international dispute. People and companies want to get on with their business and not have to tussle with one another. Litigation or arbitration, by all means, is a harrowing experience. Personal passions apart, being involved in an international arbitration is rarely a matter of joy, except to counsel. Obtaining relief quickly is the key factor.

Securing final favourable relief, however, requires time. A party may have pressing concerns that need to be addressed immediately. These are, most often, measures required to protect the interest of a party, such as misuse of intellectual property or confidential information, protection against some action by a third party, being able to sell a property, obtaining information urgently, and so on. These are commonly referred to as interim relief – i.e., relief granted in the interim before or while a main claim is being adjudicated.

When in court, such interim relief is sought for, and granted by, the court. In an arbitration, most institutional rules prescribe that an arbitral tribunal has the power to grant such interim relief. For instance, the rules of the Singapore International Arbitration Centre (SIAC), SIAC Rules 2013, state specifically (in rule 26.1) that an arbitral tribunal may, at the request of a party “issue an order or an award granting an injunction or any other interim relief it deems appropriate”.

The issue is compounded when there is no arbitral tribunal in place, since it may take a significant amount of time to set up a tribunal, depending on the requirements of a particular arbitration agreement or the institutional rules. In such cases, parties can normally approach a court to request interim measures for protection. The UNCITRAL Model Law on international commercial arbitration recognises and provides for this (in article 9) and countries such as Singapore that have adopted the Model Law provide similar provisions in their legislation, namely section 12A of the Singapore International Arbitration Act.
Emergency arbitrators

It may not, however, always be the ideal option to approach a court. A party may be unfamiliar with local procedure. It may not wish to have its dispute in the public domain and in the newspapers. With this in mind, after an initial foray in 1999, the ICDR (AAA) introduced a set of provisions titled ‘Emergency Measures of Protection’. In 2010, the SCC introduced similar provisions.

SIAC emergency arbitrators

In July 2010, SIAC became the first international arbitral institution based in Asia to introduce provisions that permitted a party to seek the appointment of an arbitrator specifically to deal with requests for urgent interim relief. That arbitrator was designated an ‘emergency arbitrator’. The ICC and Swiss Chamber of Commerce followed suit in 2012.

The provisions are contained in Schedule 1 of the SIAC Rules and are complemented by an earlier rule that provides that a request for interim relief from a judicial authority is not incompatible with the rules.

The SIAC rules require a party to make an application for the appointment of an emergency arbitrator either concurrent with or following the filing of a notice of arbitration. The President of the SIAC Court of Arbitration decides shortly thereafter, typically in a matter of hours, if the application is to be accepted, and if so, proceeds to appoint an emergency arbitrator from the SIAC panel of arbitrators. The Rules require that this appointment be made within one business day, and further that, once appointed, the emergency arbitrator set out a schedule for consideration of the application within two business days. Parties are generally in a scurry and timelines are tight. These appointments are not for the laidback.

An SIAC emergency arbitrator enjoys the same powers as a normal arbitral tribunal; including the power to determine his own jurisdiction, to award interim relief in his discretion and to apportion costs (subject to review by a tribunal). Unless parties agree, an emergency arbitrator cannot form part of the main tribunal. The order or award of an emergency arbitrator ceases to have effect if a tribunal is not constituted within 90 days.
Examples from SIAC

Thirty-four applications have been filed with SIAC since the inception of these provisions, with two ongoing applications at the time of writing. Cases have come from different sectors and involved several nationalities.

A classic example is that of an Indian claimant who sought an injunction restraining a respondent from calling upon performance bank guarantees provided under a contract for provision of dredging services at a port in India. Within 24 hours a Singaporean arbitrator had been appointed as emergency arbitrator and a further 24 hours later, a schedule was established to deal with the application. A telephone hearing was conducted. The bank guarantees were called upon in the meantime and the emergency arbitrator issued an interim order directing the respondent to deposit the proceeds it had received from the guarantees with the bank to the claimant’s credit. He also directed that the amount was not to be drawn upon until final determination by the tribunal.

Tests

The test applied was one of a ‘real probability’ of success and, having found that the claimant had a credible claim in the arbitration, the emergency arbitrator found an injunctive order appropriate. Soon after, the parties settled the case and withdrew the main arbitration.

Since American Cyanamid (1975), different tests have been propounded for the granting of interim relief. The existence of a prima facie case, a strong case for trial, the possibility of irreparable or irreversible damage to one party, all coupled with the balance of convenience, are factors that courts have often used. Similarly, SIAC emergency arbitrators have used the real probability test or a good arguable case test in granting or denying interim relief in addition to considering the element of whether irreparable harm is likely to be caused if interim relief were not granted.

Requests and timelines

SIAC emergency arbitrators have been requested for many varied orders, including, among others: (i) restraining a BVI company from breaching a confidentiality agreement by filing litigations in multiple jurisdictions; (ii) to permit an Indonesian claimant to sell a shipment of coal that had not been accepted by a Chinese respondent buyer and was deteriorating at a Chinese port over the Chinese new year; (iii) to...
preserve the status quo of a Dutch claimant as exclusive distributor of a respondent’s products; (iv) to permit a BVI company unimpeded access to inspect a property development in Vietnam where the respondent was effecting alterations to properties to remedy defects; (v) a Mareva injunction against a Bruneian national from disposing shares and dissipating assets; (vi) a freezing order against Indian respondents from transferring assets and to disclose financial records and statements to an international financial institution; (vii) and orders against a shipyard which had been contracted for steelworks and maintenance works, from interfering with the safe departure of a vessel. The average time for an interim order from the receipt of an application has been a mere 2.5 days. The average time for an award after having heard parties on the request has been 8.5 days and has been as short as 1 day.

The enforceability of awards or orders by emergency arbitrators in Singapore is provided for by legislative amendments introduced in 2012. Parties in the 21 completed cases at SIAC have either complied with such orders or have settled disputes soon thereafter.

Costs

The costs of these proceedings at SIAC have been facilitative. A fixed fee of SGD 5,000 (USD 3,945) is charged by SIAC for its administrative costs. The emergency arbitrator’s fees are determined by the Registrar while being subject to a cap computed at 20 percent of a sole arbitrator’s fee cap derived from the SIAC arbitrator’s ad valorem schedule of fees as also to a minimum amount of SGD 20,000 subject to the Registrar’s discretion.

India

Interestingly, 85 out of 259 new cases filed at SIAC in 2013, and 9 out of 34 emergency arbitrator applications, involved Indian parties. Of particular interest in the Indian context is that these provisions have found greater resonance given the greater frequency of urgent interim relief applications in Indian courts – BALCO (2012), which prospectively excludes the powers of Indian courts to grant interim relief in relation to foreign seated arbitrations, and recent judicial endorsements of the SIAC emergency arbitrator provisions by the Madras and Bombay High Courts.