

Quick Step: Emergency Arbitration v DAB

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In 2012, the ICC Rules of Arbitration introduced “Emergency Arbitration”, a procedure that parties may follow to seek urgent interim relief before the constitution of an arbitral tribunal. These provisions will remain unchanged in the new ICC Rules of Arbitration which will come into force in 2017. In 2015, 24 applications for Emergency Arbitration were received by the ICC, of which 10 were filed prior to commencement of arbitration¹.

In this article we consider whether Emergency Arbitration is inconsistent with the Dispute Adjudication Board in the FIDIC Red Book 1999.

Traditionally, parties to an arbitration agreement seeking urgent interim relief had to refer to the courts. Although this remains an available option, it has some disadvantages. For example:

- the parties will be seeking urgent interim relief in a public forum despite choosing arbitration, a confidential procedure, to resolve their dispute; and
- there is some authority to suggest that the application to the court may, in certain circumstances, be construed as a waiver of the arbitration agreement².

The Emergency Arbitration (EA) procedure was therefore introduced into the ICC Rules of Arbitration in 2012 in order to aid parties to an arbitration agreement, who are seeking urgent interim measures, where they cannot wait for the constitution of an arbitral tribunal³.

One of the most controversial issues is the applicability of the EA provisions where parties have agreed to other pre-arbitral dispute resolution procedures such as adjudication or mediation.

The ICC Rules of Arbitration provide that the EA provisions “shall not apply if ... the parties have agreed to another pre-arbitral procedure that

provides for the granting of conservatory, interim or similar measures.”⁴. Therefore, if the parties have agreed to any pre-arbitral procedure and that procedure provides for the granting of conservatory, interim or similar measures, the parties will be deemed to have impliedly “opted-out” of the EA procedure. This provision does not extend to cover competent courts or state bodies ordering interim or conservatory measures⁵.

The implied “opt-out” provision was incorporated following concerns raised by FIDIC representatives that parties to a contract based on FIDIC have, under Sub-Clause 20.4, agreed to refer the grant of interim or conservatory measures to dispute adjudication, and should not be permitted to escape their contractual obligations by skipping the dispute adjudication procedure in favour of EA⁶. In addition, there were concerns that referring a request for interim measures to EA would undermine the powers vested in the Dispute Adjudication Board under FIDIC⁷.

FIDIC Adjudication Procedure

Sub-Clause 20.4 of FIDIC Red Book 1999 provides that the parties may refer their dispute to a Dispute Adjudication Board (DAB). The DAB has 84 days to make a decision. Clause 5(g) of the Procedural Rules annexed to the General Conditions of the Contract provides that the DAB has the power to “...decide upon any provisional relief such as interim or conservatory measures...”.

According to the ICC Rules of Arbitration, the parties would therefore be prevented from referring a dispute to the EA prior to the decision of a DAB. However, this may not always be the case.

Buhler and Webster in *the Handbook of ICC Arbitration*⁸ state:

“For the President to exclude the application of the EAP [Emergency Arbitration Procedure], it would seem necessary that a DAB is already in place when an application is filed under art.29.”

This statement suggests that when a DAB is not in place, either as a result of the parties' failure to appoint DAB member(s) or otherwise, the EA procedure would not be excluded.

The Procedural Rules, annexed to the General Conditions of Contract which empower the DAB to order interim measures, are not automatically incorporated into the contract between the parties⁹. According to the first paragraph of Clause 2 of the General Conditions to the Dispute Adjudication Agreement (DAA), the DAA will only take effect when it has been signed by the Employer, the Contractor and each of the DAB members. Where the parties and the DAB members sign the DAA, the Procedural Rules will be incorporated into the DAA under Clause 4(e) of the General Conditions to the DAA and the parties may therefore be prevented from referring to EA. However, the parties may refuse to sign the DAA. In such circumstances, there would be no DAB in place. As the DAA is the source of DAB's authority¹⁰, there would be no power vested in the DAB to order interim or conservatory measures and consequently the parties may be able to refer to EA.

To avoid any doubt and uncertainty, the parties to a FIDIC contract may choose to amend the standard form. If parties wish to refer to EA without the need to go through a DAB first, they may delete the provision empowering the DAB to grant interim or conservatory measures from the Procedural Rules annexed to the General Conditions of Contract. Accordingly, there would then be no pre-arbitral procedure empowered to grant urgent interim relief and the parties may refer directly to EA.

Depending upon the specific circumstances of the case, referring to EA instead of DAB may, or may not, be advantageous for the parties in terms of cost and duration.

Costs

EA

A party who wishes to refer to EA must pay US\$40,000 prior to commencement of the EA. This amount includes the ICC administrative expenses and the Emergency Arbitrator's fees and expenses. The President of the ICC retains power to

increase this fee considering the nature of the case and amount of work performed by the Emergency Arbitrator¹¹. The amount that would be refundable where the EA is terminated prior to the making of an order, shall be determined by the President. However, the ICC's administrative expenses (US\$5,000) would be non-refundable in all cases¹². The party wishing to recover the costs incurred as a result of an EA, may bring a claim for such costs before the arbitral tribunal or before the Emergency Arbitrator¹³.

It is of interest to note that the relatively high costs for the application to EA has not restricted this procedure to high value cases. The value of the first ten cases that were referred to the ICC EA ranged from US\$500,000 to US\$54 million¹⁴.

DAB

Unlike the ICC EA procedure, there are no fixed costs set for the DAB to consider and decide on an application for granting urgent interim measures. The lack of certainty could in itself be a disadvantage for the parties. The costs involved in simple cases, which would normally be resolved within 10-12 days, may vary between US\$30,000 for a single member DAB and US\$90,000 for a three person DAB. These costs are usually borne equally between the parties¹⁵.

Duration

EA

A party who wishes to refer to EA shall submit an application to the ICC Secretariat. The President of the Court of the ICC would consider, based on the information provided in the application, whether the conditions set forth under articles 29(5) and 29(6) of the ICC Rules of Arbitration are satisfied. If the President decides that those conditions are satisfied, the President would appoint an Emergency Arbitrator within a short period of time, normally within two days from the date the application was received by the ICC Secretariat¹⁶. The Emergency Arbitrator would make a decision within 15 days of the day on which the file was referred to him/her¹⁷. The Emergency Arbitrator is free to make a decision on the documents only, without the need for a hearing¹⁸.

DAB

The party seeking urgent interim relief must apply to the DAB in writing for such relief. The DAB would have 84 days to issue a decision. The parties would then have 28 days to issue a Notice of Dissatisfaction. If either of the parties issues such notice, the parties must attempt to settle their dispute amicably within 56 days, failing which they may be able to refer to arbitration. This process is clearly too long for requesting urgent relief.

Request for Arbitration

If the parties remove the provision empowering the DAB to grant interim or conservatory measures, the DAB will no longer be able to consider or decide upon any application for interim or conservatory measures and the parties will be able to refer their request for urgent interim relief to EA. However, the parties must refer their disputes on other issues to DAB and, as a result, may face another obstacle.

If the parties refer their dispute to the DAB, the process may take up to 196 days (28 days for the appointment of DAB, 84 days for the decision, 28 days for either party to issue a Notice of Dissatisfaction in regards to the DAB's decision and 56 days for amicable settlement). However, the ICC Rules of Arbitration provide that the Request for Arbitration must be filed within 10 days from the day on which the application for EA was made¹⁹. Considering that the DAB procedure is a pre-requisite to arbitration, the parties may fail to satisfy this requirement.

This issue was considered in one of the first cases referred to EA²⁰. In this case, the contract between the parties included a provision that the parties shall refer to arbitration, only if they failed to settle their dispute using the ICC ADR Rules within 60 days of the Request for ADR. The ICC ADR Rules do not empower a "Neutral"²¹ to grant interim or conservatory measures. The Applicant in this case filed the application for EA on the same day that it served a Request for ADR. The Respondent argued that the parties were not committed to arbitration at that point and accordingly objected to the jurisdiction of the Emergency Arbitrator. The Respondent also argued that the Applicant could

not serve its Request for Arbitration within 10 days as required under the ICC Arbitration Rules, Appendix V (Emergency Arbitrator Rules), Article 1(6). The Emergency Arbitrator rejected the Respondent's argument and upheld its jurisdiction. He held that in allowing the Respondent's argument, the Applicant would suffer deprivation of the right to the relief at the time it was most needed. He also distinguished between arbitration and EA procedures and held that they are two separate proceedings and the parties need not wait 60 days before referring to EA. Using his powers under the ICC Arbitration Rules, Appendix V, Article 1(6), the Emergency Arbitrator extended the time limit during which the parties had to file a Request for Arbitration until after the parties had referred to ICC ADR.

Conclusion

In conclusion, under the ICC Rules of Arbitration, parties to a FIDIC Red Book 1999 may not be able to refer to EA for urgent interim relief where the DAB is empowered to award interim and conservatory measures. It is the author's view that, whilst this is acceptable where a DAB is in place and can render decisions quickly, it cannot be reasonable where a DAB is not in place because, in such circumstances, relief might not be obtained with sufficient urgency. On the other hand, if a DAB is not in place due to the fault of a specific party, that party ought not to be entitled to benefit from its own wrong.

Considering that this matter is not yet clear, parties may need to reconsider the powers conferred on the DAB in the Procedural Rules or consider reverting to the courts for the grant of interim measures.

¹ 2015 ICC Dispute Resolution Statistics. According to the 2014 ICC Dispute Resolution Statistics, the number of applications filed in 2014 were 6.

² Carlevaris, K and Feris, J.R., *Running in the ICC Emergency Arbitrator Rules: The First Ten Cases* (2014) International Chamber of Commerce. In the US case of *Gray Holdco Inc v Cassady Civil Action No.09-1519, 2010 US Dist. LEXIS 65055 (W.D Pa. June 30, 2010)*, the arbitration agreement provided that seeking interim relief from the courts, before the

arbitration award has been rendered, would not be inconsistent with the arbitration provision. However, the court held that a no-waiver clause would not “*provide a shield against finding of a waiver*”. Note however, that where applicable, Article 29(7) of the ICC Rules of Arbitration specifically provides that application to the courts is not deemed to waive or infringe the arbitration agreement.

³ Note that this procedure may not be suitable for requesting *ex parte* reliefs or third party orders.

⁴ ICC Rules of Arbitration, Article 29(6)(c).

⁵ Boog, C., Commentary on the ICC Rules, Article 29, Chapter 4, Part II (2012).

⁶ Voser, N. and Boog, C., *ICC Emergency Arbitrator Proceedings: An Overview* (2011) AND Schutze, R.A., *Institutional Arbitration: A Commentary* (2013).

⁷ Boog, C., Commentary on the ICC Rules, Article 29, Chapter 4, Part II, 2012.

⁸ Webster, T. and Buhler, M., *Handbook of ICC Arbitration*, Third Edition, 2014, Sweet & Maxwell.

⁹ Boog, C., Commentary on the ICC Rules, Article 29, Chapter 4, Part II, 2012.

¹⁰ *Peterborough City Council v Enterprise Managed Services Limited* [[2014] EWHC 3193 (TCC). You can also see Dedezade, T., “Can a party ignore FIDIC’s DAB process and refers its dispute directly to arbitration?” (2014).

¹¹ ICC Rules of Arbitration, Appendix V, Article 7(1) and (2).

¹² ICC Rules of Arbitration, Appendix V, Article 7(5).

¹³ Article 29: Introduction to Emergency Arbitrator Proceedings.

¹⁴ Carlevaris, A., and Feris, J., *Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*, 2015, ICC International Court of Arbitration Bulletin 25 AND Jones, D., *Emergency Arbitrators and Interim Relief in International Commercial Arbitration*, 2015, *International Arbitration Under Review*.

¹⁵ Grout, N., *Guideline Costs of Dispute Adjudication Board Under FIDIC Contracts*, 2014, *Dispute Boards MENA Blog*.

¹⁶ ICC Rules of Arbitration, Appendix V, Article 2(1).

¹⁷ ICC Rules of Arbitration, Appendix V, Article 6(4). This time limit may be extended by the President of ICC.

¹⁸ Jones, D., *Emergency Arbitrators and Interim Relief in International Commercial Arbitration*, 2015, ICC.

¹⁹ ICC Rules of Arbitration, Appendix V, Article 1(6).

²⁰ This was mentioned by Carlevaris & Feris in their article titled “*Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*”(2014), *International Chamber of Commerce*.

²¹ Third party facilitating amicable settlement between parties.



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