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Institute of
Arbitrators

CI Arb

Practice Guideline 1: Guidelines for Arbitrators on how to approach an application for Provisional or Interim Relief

1. Introduction

1.1 A constant theme of modern arbitration practice, rules and legislation is the increased power given to arbitrators to make orders for preliminary and interim relief. This guideline seeks to set out the limits of those powers and provide guidance to arbitrators on how to use this authority.

1.2 Section 39 English Arbitration Act 1996

1.2.1 Section 39 of the English Arbitration Act 1996 gave arbitrators a new power that they did not previously possess in English law. It allows arbitrators to order on a provisional basis any relief that they would have power to grant in a final award such as the payment of money or transfer of property and interim payments on account of the costs of the arbitration. We are not concerned here with directions in relation to the preservation or disclosure of evidence or other matters of procedure. Those issues are dealt with by Sections 34-38 and discussed in other guidelines. Section 39 also does not relate to the arbitrator's power, provided for by Section 47, to make awards on different issues, although the arbitrator may wish to use the power under that section to issue his or her decision in the form of an interim award.

1.2.2 Unusually, under English law, the arbitrator may only grant provisional or interim relief if the parties have expressly agreed that the power should be available. Such agreement of the parties may be in the original arbitration agreement, the rules chosen by the parties or subsequent written agreement between the parties.

1.2.3 In determining issues of provisional relief, arbitrators are in general not bound by law or precedent governing when a court will grant such relief.

2. Arbitration Rules

2.1 Article 28(1) of the ICC rules (2012 version) gives the tribunal wide discretion as to the ordering of interim measures:

“Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim ... measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.”

2.2 Article 25(1)(c) of the LCIA rules reads similarly:

“The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:

(c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.”

2.3 Article 26 of the UNCITRAL Rules states that the tribunal may at a party’s request, grant interim measures. It reads:

“3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall 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.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings."

3. Provisional Relief

3.1 Introduction

3.1.1. A provisional order is one which does not finally determine the rights of either party. Arbitrators are only empowered to order on a provisional basis any relief which they would have power to grant in a final award. Such orders are appropriate where one of the parties to the reference requires immediate assistance or where the circumstances of the case demand that the arbitrators take action in order to protect or preserve the interests of one of the parties or the subject matter of the proceedings. An order by way of provisional relief can be amended subsequently should the arbitrators deem it necessary.

3.1.2 Section 39 of the English Arbitration Act 1996

3.1.2.1 Section 39 gives two examples of provisional relief namely "payment of money or the disposition of property...." and "interim payment on account of the costs of the arbitrator". This is not an exhaustive list. Further examples of what arbitrators may be asked to order on a provisional basis pending final determination of the dispute, are:

(a) an order that one of the parties refrain from doing something;

(b) an order that one of the parties continue to do something.

3.1.3 Article 26 of the UNCITRAL Rules defines an interim measure in a similar but more detailed way as

“any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.”

3.1.4 In international arbitrations, where recourse to a court may be required to enforce such an order, the applicant party may seek the relief in the form of a partial award rather than a provisional order. The advantage of a partial award is that it may be enforceable under the local law, the law of a foreign country or the New York Convention. A partial award granting such relief will only be appropriate where there is certainty that the claimant or counter-claimant will recover an equivalent sum of money, or that the property concerned will have to be dealt with in a particular way. The disadvantage of using a partial award is that the approval processes for issuing the award as stipulated by the ICC Rules have to be followed.

3.1.5 It is for the arbitrators to decide, for any particular application, in the light of such representations as the parties may make, whether to grant the relief at all. If it is to be granted they must decide whether this should be done by way of a reasoned or unreasoned order or a reasoned award. If the relief sought will be a final determination of the party's rights on any issue, thereby disposing of that issue completely, the arbitrators must issue an award in accordance with the formalities for doing so.

3.2 Types of provisional relief

3.2.1 Applications for provisional relief are essentially of two types:

1. for monetary compensation; and
2. for any other type of provisional relief.

Effectively, under 2, the arbitrator is entitled to make an order freezing one party's assets but only if the parties have agreed to him having such powers or to the application of rules or a legal system allowing for such orders: *Kastner v. Jason* [2004] EWCA Civ 1599.

3.3 General principles applicable to the granting of all types of interim relief

3.3.1 The arbitrators must ascertain whether they have been given the power by the parties to make an order for provisional relief.

3.3.2 Such applications should only be granted if the arbitrators consider it to be fair and just in all the circumstances and with due regard to commercial commonsense.

3.3.3 By granting provisional relief an injustice could be caused to the other party. Accordingly arbitrators should exercise their discretion with due care and diligence. Although an order made on a provisional basis will, in theory, be reversible and be the subject of compensation at a later stage, arbitrators should keep in mind that by the time a final award is made the party seeking the provisional order may have insufficient assets to honour the part of the award reversing the original order and, further, that a provisional order could compel a party affected by it to abandon the arbitration, thereby resulting in injustice.

3.3.4 The usual procedural fairness obligations apply to applications for provisional relief. Accordingly, arbitrators should give both parties a fair opportunity to put their cases on whether the matter is suitable for provisional relief and whether the actual relief sought is appropriate. In cases of urgency, it may be necessary for the tribunal only to hear one side. This is acceptable so long as the respondent is given a reasonable chance to seek the lifting of the relevant order within a reasonably brief period of time.

3.4 Matters to consider when deciding whether to make an order for granting provisional monetary compensation

3.4.1 When deciding to order a respondent to make an interim payment (or other form of provisional monetary compensation) arbitrators should bear in mind (a) that the purpose of

this power is to mitigate the hardship or prejudice which may be occasioned during the interval between the commencement of the arbitration and its ultimate conclusion but (b) that an interim payment order will not be truly "provisional" if the party who obtained the order is subsequently unsuccessful in the arbitration and is then unable to repay the sum covered by the interim order or cannot be forced to do so in enforcement proceedings.

3.4.2 Arbitrators should therefore consider the following:

(a) Is there sufficient hardship or prejudice to justify making an order for provisional monetary compensation?

(b) If so, how can the rights of the respondent best be protected?

3.4.3 In some cases it may be possible to preserve the rights of the respondent by requiring the claimant (including a counter-claimant) to furnish a bank or other third party guarantee securing that the provisional amount is repaid if it, or part of it, ultimately proves not to be payable.

3.4.4 In all cases, and particularly where no security is ordered, arbitrators should be satisfied, before making an order for provisional monetary compensation, that if the matter goes to a final award, the claimant (or counter-claimant) applicant will at least probably obtain damages against the respondent or some other relevant monetary relief: Article 26(3)(b) UNCITRAL Rules. They should also be satisfied that an order for provisional monetary compensation is for no more than the minimum sum that the applicant is likely to recover in the arbitration. The arbitrators may have to weigh the strength of the applicant's case alongside the likely hardship to each party of making or not making the order. The tribunal should be careful not to make orders against parties who may have valid objections to his jurisdiction unless persuaded that they are clearly not valid.

3.5 Matters to consider when deciding whether to make an order granting any other type of provisional relief

3.5.1. Arbitrators should be certain that the circumstances of the case and the grounds supporting the granting of provisional relief outweigh the grounds favouring denial of the relief: Article 26(3)(b) UNCITRAL Rules.

3.5.2. Arbitrators should always consider whether the provisional relief is unnecessary on the basis that damages at the end of the case will be a sufficient remedy if the claimant or

counter-claimant is found to be in the right and whether an undertaking to pay damages, from the party seeking the provisional relief to compensate for any damage done in the event of it proving unjustified (usually referred to as a “cross-undertaking”), is adequate to balance out the prejudicial effects on the respondent of any proposed order.

3.5.3. Arbitrators may wish to consider the relative financial position of the parties to ensure that one party will not be substantially disadvantaged if the order causes the arbitration to be abandoned: Article 26(2)(b) UNCITRAL Rules. In this respect the financial hardship endured by all the parties affected will have to be considered.

3.6 The effect of an order on the proceedings

3.6.1 As section 39(3) of the English Arbitration Act makes clear but which is implicit in the other rules and statutes considered here, an interim order under the section is subject to the tribunal’s final adjudication. The tribunal’s final award, on the merits or as to costs, must take into account any such order. The arbitrator must proceed to decide all the points in the case, only adjusting the final award(s) to take into account the effect of the earlier orders where appropriate. A provisional conclusion by the arbitral tribunal does not bind it.

If the arbitrator subsequently decides that the measure or preliminary order should not have been granted, he or she may award any costs or damages caused and do so at any point in the proceedings.

The guidelines are inevitably something of a permanent work in progress. We would welcome it if you could send any suggestions for updating, improvements and corrections to nmcnamee@ciarb.org. Thank you in advance.

30 October 2011