

The Use Of Emergency Arbitrator Procedures In The Oil And Gas Sector



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Prior to moving to Dubai, James was an associate in Ashurst's Melbourne office where we worked on a number of high profile matters including the Bell Group litigation, Australia's longest running litigation, and the ANZ bank fees class action, Australia's largest consumer class action.

Introduction

The number of emergency arbitrations, a fairly recent development in the field of international arbitration, is on the rise. The concept of emergency arbitration is an attractive one for participants in the oil and gas sector (where interim remedies are often required). However, whilst the emergency arbitration system has, in certain cases, proven to work well, there remain issues, particularly regarding the enforceability of emergency arbitration awards.

What is an emergency arbitration?

An emergency arbitration is one in which an arbitrator is appointed to deal with requests for urgent interim relief before the Tribunal is constituted. Emergency arbitrator provisions have been introduced into a number of the major arbitration rules (such as the International Chamber of Commerce (the "ICC") and the London Court of International Arbitration (the "LCIA")) as a means for parties to apply for interim relief without having to go to a national court, or having to wait until the main Tribunal is appointed.

There are currently no emergency arbitration provisions in the rules of any UAE arbitration institute. However, in the short term the rules of the DIFC-LCIA Arbitration Centre are to be updated to bring them in line with the current LCIA Rules (which provide for emergency arbitration). In addition, it is common for participants in the oil and gas sector in the UAE to consent to institutional arbitration (which permits emergency arbitrator relief) whilst also agreeing to Dubai or Abu Dhabi as the seat of their arbitration.

When is it available and what are its features?

Under the LCIA and ICC Rules, a party in need of emergency interim relief prior to the constitution of the main Tribunal can apply for such relief. The emergency arbitration provisions in the LCIA Rules came into force on 1 October 2014 and apply to contracts entered into from this date. The ICC Rules containing emergency arbitration provisions have been in force since 1 January 2012 and apply to contracts entered into from this date.

Under the LCIA Rules, the application for emergency arbitration can be made at the same time as or after the filing of the Request for Arbitration. The ICC Rules provide that an application for emergency arbitration can be made prior to the filing of the Request for Arbitration, however, the Request for Arbitration must be filed within 10 days, otherwise the emergency arbitration proceedings shall be terminated.

If the emergency arbitrator application is accepted the ICC aims to appoint an emergency arbitrator within two days of the application whereas the LCIA aims to appoint the emergency arbitrator within

three days of the application. The emergency arbitrator will then, in as short a time as possible, establish a procedural timetable for the emergency arbitrator proceedings.

From then, the emergency arbitrator will proceed to hear and decide the matter. Timelines can vary, but the LCIA Rules provide that the emergency arbitrator must decide the claim for relief as soon as possible and no later than 14 days after their appointment. The ICC Rules require the emergency arbitrator to decide the claim no later than 15 days from the date on which the file was transmitted to them. An emergency arbitrator can usually order any interim relief necessary, including interim injunctions and asset freezing orders.

Is emergency arbitration suitable for disputes arising in the energy sector?

International arbitration is the most preferred form of dispute resolution for cross-border disputes, including in the oil and gas sector. Oil and gas companies favour international arbitration because it enables them to select arbitrators with specialist sector knowledge, allows claims to be private and provides and has significant advantages over litigation when it comes to enforceability and finality.

Oil and gas disputes often give rise to the need for interim relief. It is a dynamic industry, and exploration and supply contracts are often time and price sensitive (particularly in the current economic climate). This means that there is sometimes a need for interim measures, before an arbitral tribunal is constituted, in order to deal with certain emergency situations (e.g. the interruption of oil and gas supplies, the withdrawal or seizure of a concession by the state, release of interim payments, the interpretation of pre-emption provisions in joint operating agreements etc.).

When considering whether to commence emergency arbitration proceedings, parties should be aware of the factors set out below.

Factors for parties to consider prior to commencing emergency arbitration proceedings

Notice to other party

Most arbitral institutions require applications for an emergency arbitrator to be made on notice to the other party. This might defeat the purpose of seeking the interim measure. Where, for example, interim relief is sought to prevent the dissipation of assets, notification to a respondent of the application may encourage the respondent to transfer the assets out of reach. National courts, including in the UAE, usually permit applications to be made without notice, where there is a particular urgency or need to obtain an award without the other party being made aware.

Power to sanction non-compliant parties

An emergency arbitration award does not have the same "bite" as a court-ordered interim measure. While courts can impose criminal penalties for breaching an interim order, an emergency arbitrator has no such power.

Enforceability of ruling issued by an emergency arbitrator

There remain doubts as to the enforceability of rulings issued by an emergency arbitrator via the available court processes, especially whether or not these can be considered "final and binding" and therefore enforceable under the New York Convention.

The enforceability of emergency arbitration awards or orders has not been tested in the UAE Courts. However, there is the possibility that the UAE Courts may be persuaded not to enforce such orders or awards on the basis that they are not final awards, especially as the UAE civil procedural code only appears to envisage the enforcement of final arbitral awards.

This issue is not unique to the UAE and enforcement of emergency arbitration awards generally is untested. However, there are examples of jurisdictions taking steps to ensure the enforceability of emergency arbitration awards. For example, Singapore and Hong Kong have specifically amended their legislation to clarify that emergency arbitration awards are enforceable.

In respect of case law, last year, the Pecherskyi District Court of Kyiv (Ukraine) upheld an application to enforce an emergency arbitration award rendered under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce on the basis that the award should be enforced under the New York Convention (case No 757/5777/15-П, 8 June 2015). The emergency arbitration award had ordered Ukraine to refrain from imposing increased royalties on Poltava Petroleum's gas production. There is no reason why, in principle, the UAE Courts could not also determine that an emergency arbitrator's award is enforceable.

Ability to obtain interim relief from the national court

UAE Courts have jurisdiction to order interim relief even if they do not have jurisdiction over the underlying dispute. Therefore, they will have jurisdiction to order interim relief in support of both domestic and foreign arbitrations. The forms of interim relief that can be granted by the UAE Courts are limited. However, the UAE Courts can grant interim relief in the form of an attachment of assets if the court is satisfied that the claimant has a valid claim and that there is a risk that, unless the relief is granted, the defendant will not pay the sums owed or will dissipate its assets.

Time for obtaining a decision from an emergency arbitrator

Arbitrator availability is a potential difficulty encountered by parties and institutions looking to appoint an emergency arbitrator. Arbitrators need to confirm that they have no conflicts very quickly and are in a position to clear their desks to focus on the urgent application. This is not an issue generally faced by the Courts. For example, the UAE Courts will typically consider an application for an attachment of assets within 24 hours.

Practical Considerations

The issues above limit the circumstances in which emergency arbitration can be used. Our view is that parties in the oil and gas sector in the UAE should therefore, for the time being, only consider applying for emergency arbitration where:

- there is no possibility of applying to the national court for the interim relief in question, or the only available national court for granting the relevant relief has a reputation for partiality or inefficiency;
- confidentiality is particularly important to the parties: confidentiality is maintained in an arbitration, but lost when the issues are canvassed in open court; and/or
- it appears likely that the opposing party will not frustrate the purpose of the interim relief (for example, by dissipating its assets upon receiving notice of the application) and is likely to comply voluntarily with any emergency arbitration award.

The latter point means that emergency arbitration might be suitable for interim relief in the context of an on-going contractual relationship: for example, applications for continuation of performance under oil and gas supply contracts, or for release of interim payments under construction contracts.

Parties should also consider whether it would be better to wait for the main tribunal to be appointed, if the circumstances permit, rather than apply for emergency arbitration. This means the issues are presented to arbitrators who will ultimately decide the dispute, instead of to an emergency arbitrator who has no further involvement after issuing a ruling on the application for interim relief. The time taken to appoint the main tribunal can be reduced if a sole arbitrator is appointed, or if the relevant rules permit expedited formation of the tribunal.



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