Interim Relief in International Arbitration

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1. I will address in this short paper what standards and guidelines should be applied in determining interim relief in international arbitrations and whether there is any difference between the standards a tribunal and a national court might apply to this determination.

2. The rise in the number of Emergency Arbitrator applications shows the popularity of the mechanism and, underpinning this, and need for and importance of interim relief in arbitration.

3. First, I will address the question of what test a tribunal should apply to the determination of interim relief.
4. The 1985 edition of the Model Law provides, at Article 17, that a tribunal may “unless otherwise agreed by the parties”, order interim relief at the request of a party. There is no prescription of what this relief may encompass save that it is as “the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute”. The 1985 edition of the Model Law does not prescribe the test a tribunal should apply in determining whether to grant this relief.

5. It is therefore open to the tribunal, in jurisdictions where the 1985 Model Law applies, to determine the test it should apply, subject of course to any prescription of national law in that jurisdiction. In Singapore, for example, the International Arbitration Act reinforces, in section 12, that the tribunal has the power to order interim relief, but also does not lay not any test for this.

6. So the first question that an arbitrator in this situation has to address, when faced with an application for interim relief, is what test should he or she apply, to the determine whether interim relief should be granted.

7. One possibility is to apply the test for interim relief used by courts of the seat of arbitration, for litigation in that court. However, where the seat is chosen as a neutral international venue and the dispute otherwise has no connection with the seat, one has to ask oneself whether the parties, in opting for
international arbitration, should be bound by the test applied by the local courts in that seat, for litigation in that court. I sat as an Emergency Arbitrator in Singapore for the determination of an application for interim relief. One party was from Germany, the other India. It concerned a project in India and the governing law was either Swiss or Indian law. Seen in that context, the test applied by the Singapore courts to the determination of interim relief in litigation in that court did not jump out as the most obvious choice.

8. One other choice is to look to the governing law that is to apply to the substance of the dispute, and to apply the test for interim relief used by the courts of that country. However, where, as is often the case, a governing law is chosen not for its connection to the parties, or to the subject matter of the dispute, but as a neutral law for transnational transactions, one has to ask again whether the parties should be bound by the test applied by the local courts in that country of the governing law for litigation in that court. Particularly so, if the parties had chosen not to arbitrate in that country but in another jurisdiction.

9. If the law applied by the courts of the seat or of the governing law should not apply, what options are we left with? Gary Born, in his book, International Commercial Arbitration, argues for the application of transnational standards for the determination of interim relief in international arbitration. Where are these standards to be found? Born suggests they may be found in the
determinations made by other arbitrators in international cases. As amorphous as this may sound initially, I think there is much to recommend this.

10. Parties choose international arbitration as a transnational means of resolving disputes arising out of transnational transactions. They often choose a neutral governing law that may have no connection with the parties, or the subject matter of the dispute. They often choose a neutral seat that again may have no connection with the parties, the subject matter of the dispute or the governing law. Viewed in this context, there is much to recommend a transnational approach to the test for determination of interim relief, rather than the application of standards used by the law of the seat or of the governing law, for litigation in those courts.

11. So, how do we define this transnational test? There is wide acceptance internationally that the test has three principal elements:

a. Whether the claimant has a prima facie case on the merits.

b. Whether there is an urgent need for interim relief.
c. Whether the claimant will suffer serious or irreparable harm if the emergency relief is not granted.

12. This formulation of the test finds support in a document that is the product of transnational deliberation – the 2006 edition of the Model Law. Article 17A of the 2006 Model Law provides that a party requesting interim relief must satisfy the tribunal that:

a. It will suffer harm not adequately reparable by an award of damages and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is sought.

b. There is a reasonable possibility that the requesting party will succeed on the merits of the claim.

13. Let me focus on one aspect of the test for now – the issue of “irreparable harm”. What is “irreparable harm”? Some commentators have opined that “irreparable harm” is one that cannot be compensated by a monetary award. In one case that I had to deal with as arbitrator, this element of the test became a particular issue of contention.
14. The case concerned the injunction of a call on a bond. The applicant for interim relief sought an interim injunction on the call of a bond against the beneficiary of the bond. So, on its face, the applicant could be compensated by an award for the return of the amount of the bond if the injunction was not granted.

15. The beneficiary of the bond, against whom the injunction was sought, was in India. To get around the hurdle of "irreparable harm", the applicant argued there was a real risk the Indian courts, the likely place of enforcement of any award for the applicant to recover money paid out under the bond, may not enforce the award or that enforcement would be subject to unreasonable lengthy delay. So, the applicant specifically asked me to make a finding that the Indian courts would not enforce a New York convention award or that the enforcement process in India would be subject to unreasonable delays. This was not an easy decision to make.

16. Fortunately, I was able to avoid having to deliberate such a finding by determining that "irreparable harm" need not always be one that cannot be reversed or compensated by a monetary award. I found that tribunals need not set the bar for "irreparable harm" that high.

17. In considering the issue a tribunal should balance the harm to be suffered by the claimant – if the emergency relief is not granted – with the harm the
respondent may suffer – if it is. Where the respondent will suffer no or minimal prejudice if the relief is granted, it may be appropriate to grant emergency relief to maintain the status quo, even if the harm the claimant may suffer is not irreversible or may be compensated by a monetary award.

18. In the case before me, so long as the bond remained valid, the respondent would suffer minimal harm with respect to the amount covered by the bond. After considering the balance of interests between the parties, I granted the injunction but on condition that the applicant:

   d. Extended the validity of the bond to ensure that it remained valid; and

   e. Provided a written undertaking to indemnify the respondent’s losses flowing from the order should the respondent ultimately be found to be entitled to make the call on the bond.

19. I raised this as an example to illustrate the point that the adoption of a transnational standard for determination of interim relief gives the tribunal the flexibility to determine interim relief to suit the subject-matter of the dispute as may be appropriate. This is what the 1985 Model Law mandates.
20. Let me now turn the second issue I would like to address – whether the test and outcome of an application for interim relief may be different depending on whether it is heard by an arbitrator or the court.

21. Courts will apply their own procedure to applications for interim relief. This is recognized in Article 17J of the 2006 amendments to the Model Law, which provides that a “court shall exercise such power in accordance with its own procedures”, although it does also add, "in consideration of the specific features of international arbitration.”

22. I have already made the point that arbitral tribunals should not bound by court procedure and should have the latitude to apply other, and perhaps less parochial and more transnational standards to the determination of interim relief.

23. Courts may also have considerations that a tribunal may not. An example of this would be the decision of the Singapore Court of Appeal in a recent dispute between the Maldives Airport Company, owned by the Maldives government, and GMR, an Indian company that held a concession to operate the airport at Male. The dispute was subject to arbitration under the UNCITRAL Rules. The UNCITRAL Rules do not incorporate Emergency
The arbitration was seated in Singapore. GMR, the claimant in the arbitration, applied to the Singapore Court for interim relief in aid of arbitration. The High Court granted the interim relief – an injunction. The Court of Appeal set it aside on appeal.

24. The Court of Appeal judgment’s was detailed and thorough covering a myriad of issues including:

a. Whether the Singapore court had the power to grant interim relief;

b. Whether State Immunity applied; and

c. Whether the Act of State doctrine applied.

25. Many pages of the judgment addressed whether the injunction sought – i.e. to prevent the Maldives from taking back control and possession of the Male airport pending the determination of the arbitration – involved the preservation of evidence or assets. This was relevant to jurisdiction because under Section 12A(4) of the Singapore International Arbitration Act, the court only had the power to make an order “necessary for the purpose of preserving evidence or assets” in aid of an arbitration. The Court of Appeal decided that
the term “asset” included contractual rights but had some concern as to what contractual rights the injunction would actually preserve. In the end the Court found jurisdiction on the basis that GMR had an interest in the lease on the site.

26. Having found jurisdiction, the Court applied the well-known balance of convenience test laid down in the American Cyanamid case in deciding whether the injunction should be granted. The Court decided the injunction should not have been granted.

27. The Court found the balance of convenience was not in GMR’s favour. The Court found that GMR could be adequately compensated in damages. The Court also found that practical problems argued against the grant of the injunction – these were: the breadth of the injunction, the impact of the injunction on the actions of Maldivian government authorities, and that the injunction would require an unacceptable degree of supervision in a foreign land.

28. Two aspects of the decision stand out to me for the purposes of my topic:

a. First, the application of the balance of convenience test; and
b. As part of the balance of convenience test, the consideration whether the injunction would require an unacceptable degree of supervision in a foreign land.

29. While the Court was bound to follow the balance of convenience test by its precedents, in my view, a tribunal need not have applied that test. That is the test used in the courts. Arbitrators have more latitude to decide what test to apply. A tribunal may decide to adopt a more transnational and less parochial approach.

30. I also query if the degree of supervision in a foreign land would have weighed on a tribunal to the same degree that it did the court. International tribunals, while seated in a particular jurisdiction, by their nature deal with cross border issues and, in my view, need not be constrained by the more parochial view point that a court must take.

31. Further, a tribunal’s approach to enforcement of its orders or awards is necessarily different from that of a court. A tribunal cannot enforce its own awards. Enforcement remains the province of courts in the jurisdiction in which enforcement is to take place. If the decision on interim relief was issued as an award, and was recognized as one, then enforcement would be
available under the New York Convention. Further, the 2006 amendments to the Model Law, and certain national legislation, provide for the enforcement of interim relief ordered by a tribunal even if not in the form of an award. A tribunal would be justified to take a different view on cross-border enforcement on this basis.

32. I use the GMR case to illustrate the point that there can be substantive differences in the approach a court and a tribunal may take on interim measures in arbitrations.

33. Where parties to an arbitration have an option other than the court when urgent interim relief is required before the constitution of the main tribunal, such as recourse to an Emergency Arbitrator, they do need to consider carefully and strategically in each case whether they would be better off applying to the court or to an Emergency Arbitrator. The tests used, standards applied, and outcome may be different depending on the forum.

34. I have one final point to make on this topic. Article 17J of the 2006 the Model Law provides that a “court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.”
35. The 2006 amendments to the Model Law do not apply in Singapore. I wonder, if they did, in what way, if any, the Court of Appeal, may have tailored the test it applied to take into “consideration the specific features of international arbitration”.

36. In my view, Article 17J of the 2006 Model Law calls for a measure of convergence of the test that a court may apply, compared with what a tribunal may apply. I suggest that is a good thing, particularly for Singapore which aims to position itself as preferred neutral venue for international arbitration. Just as international arbitrators should seek to devise transnational standards to suit the transnational nature of the disputes before them, courts when hearing applications in support of international arbitration, should adopt tests that take into “consideration the specific features of international arbitration” even if this requires deviation from the accepted test that may apply to the litigation of disputes in those courts.

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