APPLEBY

THE SIGNIFICANCE OF INTERIM MEASURES IN INTERNATIONAL ARBITRATION

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27 March 2017

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INTERNATIONAL ARBITRATION IN CONTEXT
COURTS V ARBITRATION

Why Arbitration ?

- **Arbitration is private and ousts the jurisdiction of national courts**: *"party autonomy is the ultimate power determining the form, structure, system and other details of the arbitration"* as it entitles parties to exclude the intervention of the courts for dispute resolution and select the arbitrators, contrary to the court system in which the Judiciary determines the judges who will compose the bench. Furthermore, the forum is ousted since the place of arbitration will not be the *"home ground"* of the parties.

- **Confidential:** confidentiality of arbitral proceedings means that the arbitrator and the parties are prohibited from disclosing the fact of the arbitration, the issue of the award, the proceedings and documents submitted during the entire process, whether during or after the arbitral proceedings are completed.

- **Finality of rights and obligations of the parties**: arbitration resolves disputes finally, which means that parties have accepted that arbitration is the unique form of dispute resolution and they also agree to accept and give effect to the arbitral award without recourse to appeals against awards before the courts.

- **Easy enforcement**: the decision of the arbitral tribunal is easily enforceable against the losing party not only in the place where the award has been delivered but also internationally, applying international treaties such as the New York Convention. Furthermore, at enforcement, there is no review of the decision of the arbitrators and how they reached their conclusion.

- **Interim Measures**: Courts with a common law origin possess powers to grant equitable relief as of right for urgent matters. However, these powers cannot be assumed to be conferred to an arbitral Tribunal because it discharges a quasi-judicial function. Therefore, without express provisions, the arbitrator lacks authority to grant these.

SIGNIFICANCE OF INTERIM MEASURES

- Interim measures are considered to be central to the international arbitration process because the fundamental role that they play lies at the heart of the success of the arbitral process.
- Paradoxically, they remain discretionary temporary measures that are granted in limited circumstances *"for the purpose of protecting a party from damage during the course of the arbitral process"*.
- They are mostly granted before the start of the main action between the parties.
- As stated by the Court of Justice of the European Union, interim measures are *"intended preserve a factual or legal situation so as to safeguard rights the recognition of which is sought from the court having jurisdiction as to the substance of the case"*.
- Being mostly conservatory in nature, *"[t]he effect of such measures is to distribute the risk for the duration of the main action between the parties, shifting it from the party applying for the interim measures to the other party*.
- The contribution of interim measures to the success of the arbitral process is further enhanced by the fact that a party is entitled to apply to a national court for an interim measure while the arbitral process is on-going.

- Thus, in international arbitration, an interim measure may be applied for both with the Tribunal and a national court. This concurrent jurisdiction has, in fact, been *"well-recognised and is essential to the efficacy of the arbitral process".*

- In brief, interim measures guard against the real risk that an arbitral award remains academic in the sense that *"by the time the final relief is to be granted irreparable and non-compensatory harm may occur"* so much so that the party who was awarded the interim relief continues to suffer *"irreparable"* and *"serious"* injury.

- When put into the context of international businesses that include states' interests, the repercussions undoubtedly affect the level of international trade. For instance, when applied to the more topical issue of trade in novel telephone technology and their intellectual property, the absence of an interim measure can lead to consequences that bring astronomical monetary and proprietary losses in their wake.

- The crucial role that they play in adding to the success of the arbitral process is clear when one looks at several arbitral statutes and a US judgment.

- The scope of their functions and importance is aptly captured by Article 17 of the Model Law:

> *"2) An interim measure is 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 to 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."*

- As it has been rightly observed, *"interim or conservatory measures …/… are an important remedy and tool in international litigation and arbitration*.

INTERIM MEASURES

TYPES OF INTERIM MEASURES GRANTED BY ARBITRAL TRIBUNALS

- There are 5 types of interim relief granted by Tribunals:
  - measures to preserve evidence;
  - measures to regulate and stabilise relations between the parties during the proceedings;
  - measures to secure the enforcement of the award;
  - measures to provide security for costs; and
  - orders for interim payments.

CRITERIA FOR AWARD OF INTERIM MEASURES

- A successful application for interim relief raises two issues:
  - First, the substantive conditions to be satisfied;
  - Secondly, the procedure to be followed before Tribunals.

- Arbitral statutes do not provide much guidance. This lends the view that Tribunals are entitled to order interim measures that they *"deem appropriate"* or *"necessary"* in the circumstances.

Substantive Issues

- No exhaustive list of criteria.
- However, Tribunals are known to require evidence of 3 factors with the possibility of a 4th factor:
  - Serious or Irreparable Harm
  - Urgency
  - No Prejudgment of the Merits
  - Claimant to establish *prima facie* case on the merits

Procedural Issues

- There are 3 crucial considerations for a Tribunal[1] namely: Comparative International Commercial Arbitration – Lew, Mistelis & Kroll

  - the relief must be requested by the party;
  - the Tribunal must have jurisdiction over the parties; and
  - the Tribunal must ensure that the parties' right to be heard is respected

SUBSTANTIVE ISSUES	
Serious or Irreparable Harm	*'irreparable'* is understood to connote economic harm and not given a literal meaning and *"it must take account of the fact that it may not always be possible to compensate for actual losses suffered or sullied business reputation through damages."*
Urgency	The guiding principle is that *"the Arbitral Tribunal agrees that the criterion of urgency is satisfied when … a question cannot await the outcome of the award on the merits."* (*Burlington Resources Inc. v Republic of Ecuador, Procedural Order No. 1 ICSID case No. ARB/08/5)*
No Prejudgment of the Merits	Tribunals have not taken any consistent approach on this criterion which however is understood to mean that measures that are granted must not cover what a party is requesting in the main proceedings. (*ICC case no 8113, 11(1) ICC Bulletin 65 (2000) 67*)
Claimant to establish *prima facie* case on the merits	Tribunals make an *"appreciation, although on a provisional basis, of the respective arguments of the parties"* (i.e. probability of prevailing on its claim) *- Article 17A(1)(b) UNCITRAL Model Law, 2006 Revision* *- Partial Award in ICC Case (Unidentified in Schwartz, The Practices and Experience of the ICC Court, in ICC, Conservatory and Provisional Measures in International Arbitration 45,60 (1993)*

PROCEDURAL ISSUES	
The Relief Must be Requested by a Party	This follows the rule that it is a party that triggers the mechanism for interim orders but there is a recognised exception under the ICSID Arbitration Rules that authorises a Tribunal to recommend orders *proprio motu* Rule 39(3) ICSID
The Tribunal must have jurisdiction over the parties	This means that the Tribunal must have jurisdiction in the main case failing which it lacks jurisdiction to entertain an application for interim relief (*Bandel, Einstweiliger im Schiedsveerfahren, 86 et seq*)
The Tribunal must ensure that the Parties' right to be heard is respected	This is a controversial area because it constitutes a departure from the principle before national courts that interim measures are made *ex parte*. The requirement for a Tribunal to hear all parties under these circumstances is expressly captured in the ICSID Rules that declare that *"[a tribunal should] only recommend provisional measures, or modify or revoke its recommendations, after giving each party the opportunity to be heard."*

Conclusion

In deciding whether to grant the interim relief being requested:

- Tribunals will invariably consider the provisional prayer in the light of the relative injury that each party will suffer;

- Tribunals will consider the circumstances of every case since every application displays unique features to ascertain which combination of the substantive and procedural conditions will suffice to award the interim relief sought.

By way of example, the preservation *status quo* or ordering the performance of a contract is expected to require strong evidence of serious injury, agency and a *prima facie* case.

A contrario, the preservation of evidence is not expected to call for the same level of evidence.

Judicial Enforceability of Interim Measures

- This is not a settled issue.
- There are 2 schools of thought on the question:
  - **FIRST, THE CONSERVATIVE STANDPOINT**

    Some jurisdictions have taken the view that interim measures are not enforceable because they are provisional in nature.

    Thus, for want of finality *"an interlocutory order which may be rescinded, suspended, varied or reopened by the tribunal which pronounced it is not 'final' and binding on the parties.*
  - **SECOND, THE DUALISTIC NON-CONSERVATIVE APPROACH**

    Other jurisdictions have taken a dualistic, less conservative approach (e.g. the USA)

    - First, a provisional measure has the effect of finality in respect of the actual application for provisional measure as it disposes of the application.
    - Secondly, provisional measures are fundamental to the arbitral process as a whole.

- The dicta of the Supreme Court of the United States is noteworthy:

  "[I]f an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made"

  (Southern Seas Nav. Ltd v Petroleos Mexicanos of Mexico City, 606 F. Supp. 692)

- The solution – legislative framework v no legislative framework

  Legislative Framework

  To avoid uncertainties some arbitral statutes have expressly provided for the judicial enforcement of provisional measures issued by Tribunals

  e.g. MODEL Law, the United Kingdom, Singapore, India and Switzerland

  Article 17H(1) of the 2006 Revised Model Law makes enforceability mandatory: *"[a]n interim measure issued by an arbitral tribunal shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court …/… irrespective of the country in which it was issued."*

No Legislative Framework

Other countries have refrained from enacting specialised legislation. They have chosen to leave *"enforcement of such measures to general statutory provisions regarding arbitral awards."*

Conclusion

In the wake of the increasing amount of disputes referred to international arbitration, it is highly desirable that interim measures should be capable of being enforced as a matter of law subject to any public policy considerations that may arise.

Failure to do so would defeat the very essence of arbitration as interim orders granted by a Tribunal are meant to be complied with and conversely they should be enforceable *per* se.

APPROACH OF SUPREME COURT ON INTERIM MEASURES

- The International Arbitration Act 2008

Definition of International Arbitration – section 2

Designated Judges – section 42(1)

Subject to subsection (l)(A), for the purposes of any application or transfer to the Supreme Court under this Act or of any other matter arising out of an arbitration subject to this Act before the Supreme Court, the Court shall be constituted by a panel of 3 Designated Judges, composed of such Designated Judges as the Chief Justice may determine.

Interim Measures – section 6

6(1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the Supreme Court or a Court in a foreign state an interim measure of protection in support of arbitration and for the Court to grant such a measure.

(2) An application to the Supreme Court under subsection (1) shall be made and determined in accordance with section 23.

Cases

Demonstrate the pro-arbitration approach of our Supreme Court

- *Mauritius Commercial Bank Ltd v UBS AG Singapore Branch and anor* 2015 SCJ 307 (**UBS AG**) – obligation under section 5 IAA to transfer to another bench of Supreme Court

- *Barnwell Enterprises Ltd and anor v ECP Africa FII Investments LLC* 2013 SCJ 327 (**Barnwell**) - provided clarity on fundamental principles underpinning applications arising under the IAA & its powers in relation to applications for interim measures

- *Mall of Mont Choisy Limited v Pick N' Pay Retailers (Proprietary) Limited & Ors 2015 SCJ 10* (**Mall of Mont Choisy**)

UBS AG

- The Supreme Court re-affirmed its pro-arbitration approach when it granted an application by UBS AG to stay proceedings pending the determination of a dispute by an adjudicating court under section 5 of the IAA.
- The case concerned a claim for damages that The Mauritius Commercial Bank Ltd (**MCB**) lodged before the Supreme Court against UBS AG, Singapore Branch (**UBS Singapore**) and UBS for breach of contract. The basis of the claim was a side letter dated 31 July 2012 that the MCB had entered into with UBS Singapore (**Side Letter**).
- As a result of its obligations under the Side Letter, the MCB extended an amount of USD$20 million to UBS Singapore. In so doing, it became one of the lenders for a secured loan that was extended to a Mauritian borrower under a Facility Agreement dated 16 August 2012 (**Facility Agreement**). The amount of the loan under the Facility Agreement was USD$100 million (**Loan**). Furthermore, over and above the Mauritian borrower, the MCB, UBS Singapore and UBS were parties to the Facility Agreement.
- Sometime after its entry into the Side Letter, it came to the knowledge of the MCB that UBS Singapore had reduced its commitment in the Loan to the amount of USD$15 million without informing the MCB. The MCB took the view that its commitment to the Loan should also be reduced to USD$15 million in order to be "equal to" the commitment of UBS Singapore under the terms of the Side Letter. UBS Singapore refused to accede to MCB's request hence the claim for damages before the Supreme Court.
- UBS refused to submit to the jurisdiction of the Supreme Court. It argued that the Supreme Court lacked jurisdiction to entertain the dispute between the parties because of an arbitration clause under the Facility Agreement.
- UBS argued that under the arbitration clause, all disputes arising between the parties to the Facility Agreement 'out of or in connection with the Facility Agreement' should be resolved by arbitration. This therefore meant that the present dispute could only be resolved by arbitration as it was a dispute that arose between the parties to the Facility Agreement and the Side Letter had a connection to the Facility Agreement.

- UBS therefore requested an order to be granted under section 5 of the IAA by which the Supreme Court should forthwith transfer the present claim for damages to another bench of the Supreme Court constituted in the terms prescribed by section 5 of the IAA.

Supreme Court Decision

- In granting the order under section 5 of the IAA, the Supreme Court set aside the arguments of the MCB that the Side Letter bound only the MCB and UBS Singapore and was meant to remain confidential between the MCB and UBS Singapore. Furthermore, since the Side Letter pre-dated the Facility Agreement it was independent of the latter. Accordingly, the arbitration clause could not be said to apply to the Side Letter as the parties to the Side Letter could not be said to have contemplated that disputes arising thereunder should be resolved by arbitration.
- The Supreme Court held that the position taken by the parties made it clear that the issue to be determined turned on the application of the arbitral clause to the dispute between the parties. Accordingly, applying the terms of section 5 of the IAA, the Supreme Court in the present case was bound to refer forthwith the dispute to another bench of the Supreme Court provided the condition under section 5 of the IAA was satisfied.
- Section 5 of the IAA casts an obligation on a party which requests a transfer to do so *'not later than when submitting his first statement on the substance of the dispute'*. In this regard the Supreme Court was satisfied that UBS had met this criterion as it had refused to submit to the jurisdiction of the Supreme Court from the start of the proceedings.
- Having determined that UBS had satisfied the substantive criterion under section of the IAA, the Supreme Court applied its mind to the procedural aspect of transfers under section 5 of the IAA.
- The Supreme Court considered Rule 13(1) & (2) of the Supreme Court (International Arbitration Claims) Rules 2013 (**Rules**) by which a party requesting a transfer should do so by way of affidavit and supporting documents and, following which the Supreme Court was bound to stay the on-going proceedings.

- The Supreme Court was satisfied that UBS had submitted its request for referral by way of an affidavit. It therefore followed that it was bound to stay the proceedings in the UBS AG case.

Commercial Impact of the Supreme Court Decision

- The decision of the Supreme Court in UBS AG case reflects the strong commitment of the Supreme Court to support international arbitration and apply the spirit of the IAA.
- In so doing, the Supreme Court brings a significant contribution to furthering the ambition of the Mauritian Government to position Mauritius as the preferred forum for international arbitration within the Africa-Asian region, in respect of which the launch of the LCIA-MIAC Arbitration Centre as a joint project of the Mauritian Government and the London Court of International Arbitration in 2011 was the hallmark of this ambitious project.

Barnwell

- Barnwell concerned an urgent application for an interim order under the International Arbitration Act 2008 (**IAA**).
- The interim order prayed for sought to prevent the Respondent and the Co-Respondent from exercising their rights under a share pledge agreement to which they were parties and pending the outcome of on-going arbitral proceedings before the London Court of International Arbitration (**LCIA**).
- The Supreme Court granted the interim order and confirmed the fundamental principles underpinning applications arising under the IAA. These are set out below:
  - First, interim orders are issued as a measure of protection to support existing or contemplated arbitration proceedings but not disrupt them;
  - Secondly, applications for interim measures are determined in accordance with section 23 of the IAA having regard to specific features of international arbitration.

- The Supreme Court further held that its powers in relation to applications for interim measures varied according to the urgency of the applications namely:

  - its **powers for urgent applications are wider** so much so that it will entertain ex parte applications and can award such order as it deems necessary in the circumstances. However the circumstances must be such that the arbitral tribunal is not in a position or has no power to act effectively for the time being; and

  - the exercise of its powers for **applications that are not urgent demands that two conditions are satisfied**. First, the party to arbitral proceedings has served notice both to the arbitral Tribunal and the other party. Secondly, notice has been served with leave of the arbitral Tribunal.

- *Barnwell* confirms the composition of the Supreme Court for applications under the IA including urgent applications. These are heard by the Supreme Court composed of three judges forming part of the 'Designated Judges' under the IAA.

- *Barnwell* addresses the perception that the IAA has expressly curtailed what has always been revered as an almost sacrosanct feature of the powers of the Judge in Chambers in our legal system namely, the inherent powers of the Judge sitting in Chambers to hear all *ex parte* and urgent applications. The standpoint taken by the Supreme Court vis-à-vis this aspect of its jurisdiction in matters of international arbitration therefore resets matters in their proper perspective and authoritatively.

Mall of Mont Choisy

- In *Mall of Mont Choisy*, the Supreme Court re-affirmed its pro-arbitration approach and brought clarity on referrals under the IAA
- The case concerned a challenge by the defendants to the jurisdiction of the Commercial Division of the Supreme Court (Commercial Division) on the basis of (1) an arbitration clause in the rental agreement entered into by the parties and (2) the Mauritian Civil Code. However, reliance on the Mauritius Civil Code was subsequently dropped in favour of section 5 of the IAA.
- Section 5(1) of the IAA casts an obligation on a Court" (as defined thereunder) to automatically transfer an action of which it has been seized to the Supreme Court provided the party who requests the transfer does so *"not later than when submitting his first statement on the substance of the dispute"*. Furthermore, under rules 13(1) and (2) of the Supreme Court (International Arbitration Claims) Rules 2013 (Rules), an application for transfer under section 5(1) of the IAA must be made either by an affidavit or a written statement which in turn is supported by written evidence and any other supporting documents.
- Once the Supreme Court is in receipt of the transferred action from the Court", it must refer the parties to arbitration pursuant to section 5(2) of the IAA. However, it is entitled to decline the referral to arbitration if a party shows, on a prima facie basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed.
- The *Mall of Mont Choisy case* is consistent with the pro-arbitration approach of the Supreme Court in earlier cases. The Commercial Division exercised its discretion and granted the application for transfer even though the application did not meet the requirements of the Rules. However, the Supreme Court warned when it referred the matter to arbitration, that while it was minded to condone the procedural defect in the application for transfer before the Court", it would be less lenient vis-à-vis such irregularities in the future.

- Importantly, in *Mall of Mont Choisy*, the Supreme Court addressed the issue that arises when the validity of an arbitration agreement is challenged under section 5(2) of the IAA. It reviewed both the travaux préparatoires to the IAA and foreign approaches to the question and took the view that it was the intention of the legislator that a non-interventionist judicial approach be taken. The latter, which is also known as the prima facie threshold', aims at preventing delaying tactics and follows the principle of competence-competence' by which arbitrators are entitled to be the first to rule on their own jurisdiction.

- In this regard, the Supreme Court confirmed that the test to be satisfied when deciding the issue of referral was whether *"there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed."* Also, it fully endorsed the travaux préparatoires by which the *prima facie* threshold, referred at section 5(2) of the IAA as a "very strong probability", is a very high one. Furthermore, the Supreme Court adopted the principles laid down by the Canadian Supreme Court in *Dell Computer Corporation v Union des Consommateurs and Olivier Dumoulin* (2007) 2 SCR 80 that the test is likely to be satisfied when the challenge is based on law. However, when the challenge is based on factual issues or a combination of factual and legal issues, then the matter was fit for a referral to arbitration.

- Applied to the *Mall of Mont Choisy* scenario, the Supreme Court took the view that this was a fit case for referral as it was a factual issue for the arbitrator to determine whether the signature of a sole director alone was sufficient to bind the plaintiff to the arbitration agreement.

ANY QUESTIONS?

THANK YOU