WORKING TOGETHER ON MULTI-JURISDICTIONAL MATTERS

SELECTING THE RIGHT FORUM FOR INTERIM MEASURES IN INTERNATIONAL DISPUTES

DOMITILLE BAIZEAU

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Topical issue (1)

Interim measures in international disputes:

Presentation and discussion on the approaches of the courts in different jurisdictions to the granting of urgent interim measures where the dispute on the merits is subject to international arbitration:
• criteria for urgent measures before the court,
• choice between the courts and tribunals,
• impact of a court’s refusal on an arbitral tribunal, etc.
Dispute over the sale and purchase of shares in a JV company registered in England and jointly owned by A (Isle of Man registered company) and B (Swiss registered company).

The JVA is governed by English law, and contains a dispute resolution clause which provides for ICC Arbitration, three arbitrators, Geneva seat.
A and B are in dispute over B’s right to dispose, without A’s consent (which A will not grant), of all or part of its shares to C (a US company) and/or A’s own right to acquire such shares.

A and B have been in negotiations for weeks. One day, A finds out that B intends imminently to enter into an SPA with C for the transfer of B’s shares to C, or to close a transaction that has already been entered into with C.

What can A do? What should A do?
1. File for arbitration and seek an urgent order for interim relief from the Arbitral Tribunal? If so, what test will apply?

2. Apply for emergency measures before an emergency arbitrator? If so, what test will apply?

3. Seek injunctive relief from the competent state Courts? And if so, which Courts? And which test will apply?

What are the pros and cons of each option?
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1. Commence ICC arbitration and apply for interim measure

Possible ? Swiss law, ICC Rules
Standard criteria

PROS
• Launches the dispute resolution process on the merits
• Puts pressure on B
• Confidential
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1. Commence ICC arbitration and apply for interim measure

CONS

• Not available immediately (unless expedited formation of AT available e.g. LCIA Rules)
• Forces A to present its full case on the merits quickly
• Not possible to seek ex parte order (ICC v Swiss Rules)
• Measure not directly enforceable
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2. Apply for emergency measure before an emergency arbitrator

• Possible? Swiss law, ICC Rules
• Criteria: typically:
  1. Irreparable harm
  2. Balance of convenience
  3. Prima facie entitlement to the relief sought
• Key: show measure cannot wait for constitution of AT
2. Apply for emergency measure before an emergency arbitrator

PROS

• Fast
• Gives more time to A to prepare its Request for Arbitration on the merits
• Puts pressure on B who would have little time to respond
• Confidential
• Voluntary compliance?
62% of arbitral tribunal-ordered interim measures are complied with

- Highest rate: North America and Western Europe (68%)
- Lowest rate: Eastern Europe (39%)

Parties seek court enforcement of only 10% of tribunal-ordered measures
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2. Apply for emergency measure before an emergency arbitrator

CONS

• Fast enough?
• No surprise effect of ex parte order (ICC Rules vs Swiss Rules)
• Measure not directly enforceable
• Costs?
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Some statistics

Source: 2012 Queen Mary International Arbitration Survey

Chart 17: Should arbitrators in certain circumstances have the power to order interim measures *ex parte*? Private practitioners v. arbitrators v. in-house counsel perspectives:

- **Yes**
  - Private practitioners: 57%
  - Arbitrators: 40%
  - In-house counsel: 35%

- **No**
  - Private practitioners: 52%
  - Arbitrators: 39%
  - In-house counsel: 56%

- **Unsure**
  - Private practitioners: 4%
  - Arbitrators: 9%
  - In-house counsel: 9%
3. Apply for injunctive relief before State courts

- Which courts? Swiss (where measure will be enforced) / English?

- Which criteria for an ex parte order:
  - under Swiss law (as the *lex fori*) including rules of evidence
  - But impact of *lex causae*
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3. Apply for injunctive relief before State courts

- Strict approach under Swiss law

- Ex parte orders requires prima facie evidence of:
  1. Valid cause of action on the merits: legal right violated or imminently to be violated
  2. Risk of imminent harm: violation causing or threatening to cause not easily reparable harm
  3. Proportionality/balance of interest
  4. For ex parte: special urgency (or real risk of frustration of measure)
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3. Apply for injunctive relief before State courts

- Security may be ordered but exceptional, usually in inter partes proceedings
- Liability for damages if measure lifted and loss suffered by B

PROS:
- Fast: same day
- Immediately enforceable
- May suffice to warn C not to proceed even if measure lifted in inter partes proceedings
- More time to prepare case on merits
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3. Apply for injunctive relief before State courts

CONS

• Risk of adverse decision then followed by AT even if not necessarily res judicata effect
• Lack of confidentiality
• Costs (in particular if appeals)
• Not a neutral forum?

Conclusion: a combination?