BCLP. Client Intelligent

Insights

MIND THE GAP: EX PARTE APPLICATIONS TO THE COURT AN UNWELCOME LACUNA IN THE NEW LCIA RULES

Sep 15, 2020

On 11 August 2020, the LCIA published the first update to its Arbitration Rules since 2014. The 2020 Rules are not a wholesale rewrite of the 2014 Rules, but rather a set of amendments designed to address gaps in the 2014 Rules, and to ensure the Rules remain up to date and fit for purpose in an increasingly virtual era of arbitration.

The most notable updates are the addition of new provisions concerning expedited proceedings and early determination, at Articles 14 and 22.1(viii), the broadening of the LCIA Court and the tribunal's powers to consolidate arbitrations arising out of the same transaction, and a new provision at clause 1.2 to allow a claimant wishing to commence more than one arbitration to serve a composite request.

This last provision addresses a lacuna in the 2014 Rules in relation to claims arising in multi-contract arbitrations, something that was highlighted in the decision in *A v B* [2017] EWHC 3417 (Comm). However, there is another lacuna in the 2014 Rules that is not addressed in the updates and that is in respect of a party's ability to seek urgent interim relief from a court on an *ex parte* basis after arbitral proceedings have been initiated.

The problem in practice

It is not uncommon that, during the course of an arbitration, a party may need to obtain urgent interim measures from a court, such as freezing orders, search orders or passport orders, where an element of surprise is required in order to make the order effective. This usually means that an application has to be made to the court on an *ex parte* basis, to avoid alerting the counterparty to the protective measures requested, and thereby giving them an opportunity to expedite the dissipation.

It is in this scenario that a problem may arise in arbitrations under the LCIA Rules due to a provision that, depending on the interpretation of the relevant rule, may prevent applications to the court for interim relief being made on an *ex parte* basis.

Applications for interim relief under the 2014 LCIA Rules

Article 25 of the 2014 LCIA Rules reserves the right to grant interim relief to the primary jurisdiction of the tribunal. Under Article 25.1, this is expressed as a broad power to grant interim or conservatory measures, and should be the first port of call if interim measures are required.

However, the LCIA Rules expressly preserve the right of the parties to apply to the courts for interim measures after the constitution of the tribunal. Article 25.3 of the LCIA Rules provides that the power under Article 25.1 shall not prejudice any party's right to apply to a state court "*for interim or conservatory measures to similar effect*" once the tribunal is formed, "*in exceptional cases and with the Arbitral Tribunal's authorisation*" [emphasis added].

Article 25.3 imposes two requirements: an application can only be made to a state court (i) in exceptional cases; and (ii) with the Arbitral Tribunal's authorisation. It is the second requirement – the need for the tribunal's authorisation – that can create an issue. In common with most institutional rules, and with established good practice in international arbitration, Article 13.4 of the LCIA Rules expressly prohibits any *ex parte* communications with the tribunal. The question that arises from the interaction of Articles 13.4 and 25.3 is: does someone who wants to seek urgent, *ex parte* injunctive relief against asset dissipation or something similar first need to obtain the Tribunal's permission in on-notice proceedings?

A party with a need to seek interim relief in order to address an issue of asset dissipation or the like will, quite naturally, want to take urgent initial action on an *ex parte* basis. Doing otherwise would risk hastening, rather than preventing, the asset dissipation in question. And yet on one reading, Article 25.3 would appear to require that party to do precisely that, namely to warn the dissipating party that an action to seek injunctive relief is about to be launched. Specifically, if the requirement in Article 25.3 to seek the Tribunal's permission should be read to require that permission to be obtained first, the essential value of injunctive relief is brought to an end. This would seem to be an absurd outcome, one that could, for some parties, dramatically undercut the value of LCIA arbitration. However, there is a strong argument that the wording of Article 25.3 does indeed require a party to go on notice to the Tribunal to seek permission to go to a state court to seek *ex parte* relief, no matter the invidious position it would create.

To make sense of the situation, it is possible to read Article 25.3 as being wide enough as to permit the applicant to seek permission from the Tribunal on a retrospective basis. This would allow it to go to the relevant state court first in order to obtain the necessary relief on a truly *ex parte* basis, and then to go to the Tribunal to seek permission. The strength of this argument lies in three factors: the silence of Article 25.3 on the question of the stage at which such permission must be obtained; the preservation of the Arbitral Tribunal's power of policing the disputants' use of ancillary litigation; and the broader good sense in maintaining the parties' ability to obtain valuable injunctive relief. However, the wording of Article 25.3 remains ambiguous on the point.

Position under the 2020 Rules

This ambiguity is a point that the LCIA could have addressed when updating the rules but has not done so.

Minor amendments have been made so that Article 25.3 now explicitly tethers the right to apply to a state court "*for interim or conservatory measures that the Arbitral Tribunal would have power to order under Article 25.1*". However, Article 25.3 retains the two caveats which applied under the 2014 Rules, namely after the formation of the tribunal, an application can only be made to a state court (i) in exceptional cases; and (ii) with the Arbitral Tribunal's authorisation. There is no indication as to whether or not retrospective authorisation can be sought from the tribunal for an *ex parte* application to the court.

Conclusion

The inability to make such applications on an *ex parte* applications would be a significant limitation on the right to seek relief from the courts. Given its significance, it is surprising that the LCIA has not taken this opportunity to make the position clear either way: either by expressly stating that *ex parte* applications to the court are not permitted after the constitution of the tribunal; or by making it clear that retrospective authorisation can be sought for such applications.

As things stand, an unwelcome lacuna remains within the LCIA Rules. It is possible that the question will end up being addressed by the courts. Until then, practitioners would be advised to seek any interim measures before the formation of the tribunal if at all possible, in order to avoid such problems arising. Even better, contracting parties could include wording in their arbitration agreements to make it clear that they agree that the permission required by Article 25.3 can be sought retrospectively.

This post first appeared on the Practical Law Arbitration Blog on 10 September 2020.

RELATED CAPABILITIES

- International Arbitration

MEET THE TEAM

George Burn

Co-Author, London

george.burn@bclplaw.com
+44 (0) 20 3400 2615

Siobhan Abraham

Co-Author, London

siobhan.abraham@bclplaw.com
+44 (0) 20 3400 3442
