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HOW THE ARBITRAL PROCESS AFFECTS THE AVAILABILITY AND EFFECTIVENESS OF MONETARY AND NON-MONETARY RELIEF

by Julien Faucheux

I. INTRODUCTION

From June 14 to 16, 2023, the Institute for Transitional Arbitration (ITA) hosted its 35th Annual Workshop and Meeting in Austin, Texas. This edition of the ITA's annual workshop explored various aspects of the enforcement mechanisms available in international arbitration, focusing on how the system of international arbitration gives effect to the legal rights of the parties by granting effective and enforceable remedies.

This article discusses the panel entitled "How the Arbitral Process Affects the Availability and Effectiveness of Monetary and Non-Monetary Relief." There, it was discussed the need for an efficient and swift arbitration process in awarding non-monetary remedies, the tools available to practitioners to speed up the arbitration process (summary judgment, expedited proceedings etc.) and their limitations, and the role of provisional relief in awarding non-monetary damages as final relief.

The panel was moderated by Thomas Voisin, of Quinn Emanuel Urquhart & Sullivan in Paris. The speakers consisted of Roberto J. Aguirre Luzi, of King & Spalding LLP in Houston, Stephen P. Anway, of Squire Patton Boggs in New York/Washington, D.C, Caline Mouawad, of Chaffetz Lindsey in New York, and Anne Veronique Schlaepfer, of White & Case LLP in Geneva, who shared their opinion in the subject predicated upon their expertise and experience.

II. HOW TO EXPEDIATE THE ARBITRAL PROCESS

A major challenge to the availability and effectiveness of monetary and non-monetary relief is the amount of time and cost for an arbitral tribunal to reach its final decision. The average duration of an arbitration administered by the International Centre for Dispute Resolution (ICDR) is 15.4 months, whereas an arbitration administered by the International Chamber of Commerce (ICC) in 2020 had and

average duration of 26 months.[1]

Stephen Anway proposed incorporating fast track arbitration clauses into contracts as one of the internal tools available for arbitrators to expediate the duration of tribunals. Fast track arbitration is an expedited procedure that imposes strict deadlines and procedures on the parties.[2] Unlike normal arbitration tribunals where the parties can choose the arbitrators, fast track arbitration cases are usually decided by a sole arbitrator.[3] Normally, fast track arbitration atomically applies when the claim is below a certain threshold.[4] For example, pursuant to the 2021 ICC Arbitration Rules, for any claims under $3 million, fast track arbitration rules atomically apply.[5] However, similar to other arbitration tribunals, in the ICC, parties can incorporate fast track arbitration for claims above the monetary threshold if they both agree.[6]

One major benefit of fast-track arbitration is that it expedites the arbitral process. Additionally, fast track arbitration is normally less expensive, and it is beneficial to the parties when the dispute involves a claim where the need for a decision outweighs the parties' desire to argue on the merits. However, as alluded by Stephen Anway, one of the challenges in enforcing fast track arbitration clauses are complaints from parties that the tribunal deadlines in fast-track arbitration violate their due process rights. Although, there are instances where concerns about due process are well-founded, he explains that the international arbitration community should give less defense to certain claims. The claims include cases where the tribunals take up to 7-8 years or where a party wants to submit memorials with unnecessary meticulous

[1] *See The Duration of Arbitration*, ACERIS LAW LLC, AUG. 8, 2022, https://www.acerislaw.com/the-duration-of-arbitration/.

[2] *Id.*

[3] *See Using fast track arbitration for resolving commercial disputes*, NORTON ROSE FULLBRIGHT, MAR. 2018, https://www.nortonrosefulbright.com/de-de/wissen/publications/981af4b9/using-fast-track-arbitration-for-resolving-commercial-disputes.

[4] *Id.*

[5] ICC Rules of Arbitration (2021), Appendix VI, art. 2.

[6] *Using fast track arbitration for resolving commercial disputes*, NORTON ROSE FULLBRIGHT, MAR. 2018, https://www.nortonrosefulbright.com/de-de/wissen/publications/981af4b9/using-fast-track-arbitration-for-resolving-commercial-disputes.

details. Complaints about due process violations can frustrate the process of expediating an arbitral tribunal by increasing the likelihood of a party challenging the decision.[7] There is a high probability that a decision rendered under fast-track arbitration rules will be challenged, thus adding time to the dispute.[8] Furthermore, fast track arbitration is very demanding for the parties and may require legal counsels to be retained on a full-time basis which could lead to higher legal fees for the parties.[9] All of these factors potentially undermine the purpose of fast track arbitration, which is to save the parties time and cost.

When asked about how to make the process of obtaining monetary and non-monetary relief more effective, Caline Mouawad discussed tribunal constitution and arbitration timetables as considerations to expediate and streamline the process. Several institutions have implemented measures to reduce the duration of tribunals.[10] Under the ICC rules, decisions are required to be made under 6 months from the last signature.[11] The London Court of International Arbitration (LCIA) provides that a decision should be made as soon as is reasonably possible from the date of the last submission.[12] In addition to institutionalized rules, arbitration institutions also have power to influence arbitrators to render decisions sooner.[13] Since arbitrators often look to institutions for retention, they have an incentive to render decisions in a timely manner.[14] Furthermore, some institutions such as the ICC can sanction arbitrators for late awards, in the form of late fees.[15]

The benefits of these institutional rules are clear, save the parties time and the

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Victoria Clark, *Time Limits for Awards: the danger of deadlines*, PRACTICAL LAW ARB. BLOG, AUG. 3, 2016, http://arbitrationblog.practicallaw.com/time-limits-for-awards-the-danger-of-deadlines/.

[11] *Id.*

[12] *Id.*

[13] Nathaniel Lai, *Time Limits: Help or Hinderance?* HK45 BLOG, Apr. 16, 2020, https://www.hkiac.org/content/time-limits-help-or-hindrance.

[14] *Id.*

[15] *Id.*

cost of arbitration. However, these limitations make the arbitral process susceptible to abuse from parties. Unlike a domestic court, an arbitral tribunal derive their jurisdiction from the parties' agreement to arbitrate.[16] Once the agreed-upon timeline lapses, the arbitrator no longer has jurisdiction over the parties.[17] If both parties consent, then the timeline for rendering an award can be amended.[18] However, if one party refuses to extend the deadline and repeatably delays the process to ensure that the arbitrator does not make a decision within the original time frame, then the jurisdiction of the arbitrator has expired and an award cannot be rendered.[19] Another challenge associated with institutional rules to expediate the arbitral process was described by Thomas Voisin during the panel discussion. He mentioned how institutionalizing arbitral rules may conflict with the flexible nature provided by arbitration. Unlike a court, an arbitral tribunal is not bound by the same constraints, which makes it a more viable forum for some parties seeking flexibility.

III. INTERIM MEASURES AND COURT-ORDERED ENFORCEMENTS

Anne Véronique Schlaepfer was asked whether a court or an arbitration tribunal is better equipped to grant interim measures. On one hand, she discussed how arbitral tribunals have more flexibility in granting measures and do not have the same pleading requirements that many courts have. However, in some instances, a court is a better option for the parties because it has powers that an arbitral tribunal does not. Anne Véronique Schlaepfer discussed the example of a bond to illustrate how in some instances, a court would be a better option since it has the power to attach the bond.

Although an arbitrator can issue a decision on granting interim relief, they have no coercive power in the country with the seat of arbitration, or even powers in other countries.[20] Therefore, parties sometimes have no option but to go to court for

[16] CLARK, *supra* note 10.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Martin Davies, *Court-Ordered Interim Measures in Aid of International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 299 (2006).

interim relief, or to ask a court to enforce an interim measure granted by an arbitral tribunal.[21] However, many nations have differing rules on enforcing interim measures.[22] Under British law, the English Arbitration Act of 1996 grants courts wide discretion in enforcing interim measures from arbitral tribunals.[23] However, section 44(s) of the English Arbitration Act of 1996 provides that a court can exercise it's power only when the arbitral tribunal "has no power or is unable for the time being to act effectively."[24] In the United States, legal opinion on enforcing interim measures by arbitral tribunals is fragmented.[25] The closest legislation that addresses the question is 28 U.S.C. § 1782, which allows for discovery in aid of proceedings before foreign courts. However, there is split consensus in federal circuit courts on whether § 1782 applies to international arbitral tribunals.[26] Where the arbitral tribunal and the court where interim relief is requested is in the European Union, then a court may enforce an interim measure in support of an arbitration by referring to its own law.[27]

In 2018, 62% of interim measures granted by an arbitral tribunal were adhered to without enforcement from a court.[28] However, because there are scenarios where a court intervention is necessary, the lack of international uniformity in rules about a court's ability to enforce interim measures creates incentives for forum shopping.[29] Forum shopping normally results in large disputes about choice of law and jurisdiction that can be time-consuming and expensive for the parties.[30] These factors are contrary to the essence of arbitration because parties normally agree to

[21] *Id.*

[22] *See* Stephen Benz, *Strengthening Interim Measures in International Arbitration*, 50 GEO. J. INT'L L. 143 (2018)

[23] DAVIES, *supra* note 20, at 168-170

[24] BENZ, *supra* note 22, at 14.

[25] *Id.*

[26] *Id.*

[27] Case C-391/95, Van Uden Maritime v. Kommanditgesellschaft in Firma Deco-Line and Another, 1998 E.C.R. I-7091.

[28] BENZ, *supra* note 22, at 8.

[29] *Id.* at 14.

[30] *Id.*

arbitrate instead of litigating in a national court to save time and money, as well as to avoid legal questions about choice of law.[31]

IV. AN INVESTOR'S OPTION: MONETARY OR NON-PECUNIARY DAMAGES

Under Article 54(1) of the ICSID Convention,[32] a tribunal has the power to enforce non-pecuniary relief as a final judgement on the parties.[33] In the context of investor-state arbitration, an investor is risk adverse, and will normally seek monetary damages as it would provide adequate relief, and they would not want to continue a contract with a state that breached treaty obligations.[34] However, as Roberto Aguirre Luzi discussed, there are instances where an investor would benefit from seeking non-pecuniary relief. For instance, he mentioned how in cases where the investor does not want to jeopardize a relationship with the state early on, then the investor may want to seek non-pecuniary relief. Another scenario where non-pecuniary relief would be more suitable is when seeking monetary damages would leave the investor with no relief.[35]

In *Rompetrol v. Romania*,[36] the investor brought a case for monetary damages against the Romanian government for an investigation of the company that allegedly included arrest, detention, travel-ban, and wiretapping of key company executives.[37] Although the court found that Romania violated the Fair and Equitable Treatment (FET) standard,[38] no damages were awarded to Rompetrol because they never showed that the violation caused economic loss.[39] Here, a narrowly drafted injunction would have been a better option for the claimant because it would have left them with a

[31] *Id.*

[32] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, art. 54(1), 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159.

[33] *Id.*

[34] Patrick J. Rodriguez, *International Contractualism Revisited: Non-Pecuniary Remedies under the Fair and Equitable Treatment Standard*, 18 CHI. J. INT'L L. 673 (2018)

[35] *Id.* at 695.

[36] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award (May 6, 2013).

[37] *Id.* at ¶¶ 50, 54(c); RODRIGUEZ, *supra* note 34 at 695.

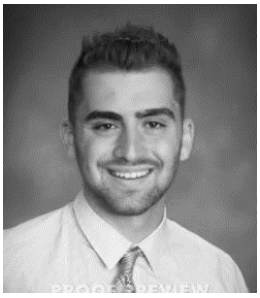
[38] *Rompetrol*, ¶ 279.

[39] *Rompetrol*, ¶¶ 288, 293; RODRIGUEZ, *supra* note 34 at 695.

viable remedy.[40] There are also instances where non-pecuniary measures are better for states. States have an interest in foreign investment and often, their national interest would be better served through a non-pecuniary measure such as an injunction to ensure a continued relationship between them and the investor.[41]

V. CONCLUSION

The topics and suggestions discussed by the panel are only a few of many that may impact international arbitration in 2024. All the topics centered around common issues in the arbitral process, such as high costs, long procedures, and issues regarding enforceability of non-monetary measures. Towards the end of the panel, Anne Véronique Schlaepfer addressed a key point, of whether the arbitration community should focus on fixing the rules to improve the effectiveness of obtaining monetary and non-monetary relief, or work with the existing ones. Any solution or effort discussed in the panel will ultimately have an impact on this concern. While there may be some measures to improve the effectiveness of the arbitral process, it is possible that with new developments, the arbitration community might discover that certain rules will need to be adjusted.



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[40] RODRIGUEZ, *supra* note 34 at 695.

[41] *Id.*

INSTITUTE FOR TRANSNATIONAL ARBITRATION
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The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

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