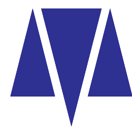

The Israeli Institute of Commercial Arbitration

INTERNATIONAL NEWSLETTER OF THE ISRAELI INSTITUTE OF COMMERCIAL ARBITRATION

MARCH 2017

The Israeli Institute of Commercial Arbitration

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INTERNATIONAL NEWSLETTER

Honorable Justice of the Supreme Court (Ret.), Ayala Procaccia, President

Gila Rabinovich, Adv. Managing Director

Opening Remarks by the President of The Israeli Institute of Commercial Arbitration (Ret.) Justice Ayala Procaccia

In Memory of the late Prof. Yaacov Ne'eman

We cannot publish this issue of the ***Israeli Institute of Commercial Arbitration's International Newsletter*** without referring to the passing of our dear friend, Prof. Yaakov Ne'eman, who left us a short time ago.

Yaacov was an exceptional figure in our human scenery, and has left a deep mark in the various activities with which he was involved. He excelled in the academic area with singular specialization in tax issues; He founded, with other partners, the ***Herzog, Fox, Neeman Law Firm***, recognized as one of the leading law firms in Israel; He operated extensively within the public and political arena, serving in senior positions in various governments, among others as Minister of Finance and Minister of Justice. His contribution to each of these areas was outstanding and highly significant. This distinction was due mostly to his unique multifaceted personality, combined by talent, intellectual capacity and knowledge of "*Talmid Chacham.*" But above all, he maintained the wisdom of the heart, compassion and human grace. These qualities reflect upon his rare ability to reconcile between extreme contradicting viewpoints of people and groups, always looking for the golden path that may draw closer divided factions.

We will miss Yaacov Ne'eman's singular contribution to our torn and fragmented world, yearning for a moderate, balanced and humane leading hand.

I myself have lost a dear friend with whom I shared a longstanding friendship since our joint studies at the Hebrew University Law School. This friendship was marked by mutual respect and affection.

The absence of Yaakov Ne'eman will be felt not only by his close family circle and close friends, but by the public at large. We shall search for consolation in all the good Yaacov left behind, and shall try to pursue his path, searching for the unifying forces that bring people and ideas closer, distancing division and alienation between them.

His memory shall be preserved in our hearts.

Prof. Yaacov Ne'eman
1939-2017

The Israeli Institute of Commercial Arbitration

International Newsletter of the Israeli Institute of Commercial Arbitration

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The Israeli Institute of Commercial Arbitration

Editor's Note

Following the highly successful Inaugural Edition of the *International Newsletter* of the Israeli Institute of Commercial Arbitration, which featured an article on China by Baker & McKenzie, we are honored that this edition includes two articles contributed by other leading international firms — Fried, Frank, Harris, Shriver & Jacobson and Latham & Watkins.

New York and London are the focus of the articles contributed by those two law firms. London continues to be the most important city in the field of international arbitration. As a close second, New York is arguably one of the jurisdictions most open to assisting parties to foreign arbitrations.

For these reasons, this edition of our International Newsletter focuses on these two cities.

We continue to welcome your comments on our international newsletter.

Eric Sherby,

Editor

Arbitration In London: Developments Past and Future

By Sophie J. Lamb[1] and
Hanna Roos[2]

***Editor's Note**: Latham & Watkins is a leading international law firm that has offices in New York City, London, England, and many other major metropolitan areas.*

Introduction

London has been a global centre for international arbitration for many years. The reasons for this include the prevalent choice of English law to govern many international contracts, a clear and modern national arbitration law, arbitration friendly and non-interventionist courts, the reputation of London's arbitrators and legal advisers, and the standing of the London Court of International Arbitration (the "LCIA").

London's popularity has endured even in the face of an increasingly globalised market for international arbitration. Regional and national arbitration centres are on the rise, and those in Asia in particular are showing great momentum. Similarly, Stockholm and Finland have commended themselves as alternative arbitration centres for contracting parties in that region and indeed beyond. As a result, there is healthy competition among the world's arbitral institutions, each seeking to distinguish itself through, for example, innovative rules which seek to increase the efficiency and reduce the cost of arbitral proceedings. All good news for users of arbitration who are choosing a greater variety of jurisdictions when designating the legal seat of their arbitrations, a further sign of globalisation (or regionalisation).

London as a seat for international arbitration

London has long enjoyed a reputation as one of the most popular and trusted arbitral seats in the world. According to the Queen Mary University of London arbitration survey, London has been the most popular arbitral seat since 2006. Key reasons cited are:

- reputation of and previous experiences with the seat;
- popularity of English law as the governing law of the underlying contract;
- neutrality and impartiality of the local legal system;
- quality of the national arbitration law; and
- demonstrable track record for enforcing agreements to arbitrate and arbitral awards.

London is currently both the most used and the most preferred seat, despite the rise of Singapore and Hong Kong as popular regional choices.[3]

National arbitration law

The English Arbitration Act 1996 (the "Act") celebrates its 20th anniversary last year. It is a tried-and-tested framework for international arbitration, and part of a long series of UK arbitration acts intended to enhance the competitiveness of the arbitration industry in England and Wales. The Act is generally perceived as a very successful piece of legislation which sets out the law in clear and accessible terms, bestows wide party and tribunal autonomy and limits the involvement of national courts.

The English Act allows parties to appeal questions of English law to the courts. That right can be waived by contract, for example, by selecting institutional arbitration with rules (e.g. the LCIA rules discussed below) that exclude the possibility of an appeal on a point of law.

English courts

The supportive but non-interventionist court system is key to the success of arbitration in London. Legislation prior to the Act permitted more expansive court intervention, and a major purpose of the Act was to reduce drastically the extent of this practice (*Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43).

Studies suggest that the majority of challenges to arbitral awards *fail*.[4] This statistic should be of particular interest to Israeli companies, because Israeli law adopted (we are informed) an appellate option less than a decade ago.

The English courts also take a pragmatic approach to appeals on frivolous grounds which often result in the challenging party being ordered to pay security for costs and ultimately costs on an indemnity basis (see e.g. *U&M Mining Zambia Ltd v Konkola Copper Mines Plc* [2014] EWHC 3250 and *Pochin Construction Ltd v Liberty Property (G.P.) Ltd*. [2014] EWHC 2919).

The courts' support for arbitration is evident, for instance, in the courts' readiness to issue anti-suit injunctions in support of arbitration. UK courts will intervene to restrain proceedings brought in breach of an arbitration agreement, even where no arbitral proceedings are contemplated (*Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* 2013 UKSC 35).[5]

The LCIA and other institutional arbitrations in London

The LCIA is the pre-eminent London based arbitral institution. It has been ranked the second most popular institution in the world for the past 10 years, the Paris-based International Chamber of Commerce (the "ICC") in the top spot. Users value its high quality and efficient administration, its neutrality and the strength of its global brand (being key attractions of popular institutions). Israeli parties similarly recommend the LCIA strongly.[6]

The LCIA has had a decade of growth: its annual case work referrals have expanded by more than 200% over the past decade.

The LCIA has traditionally attracted disputes particularly from the energy, construction, insurance and shipping sectors, as well as shareholder and joint venture disputes. The sector coverage appears to have become more diverse, now extending to healthcare and pharmaceuticals, retail and consumer products, mining, culture, media and sports.[7]

The LCIA launched new rules in 2014. These introduce new provisions such as an emergency arbitrator procedure. This route allows a party to apply for emergency relief, such as an asset-freezing order, if an urgent need arises before a tribunal has been or can be appointed. Similar provisions under the ICC and SIAC rules have also proved to be very popular. The new rules also contain measures to promote greater efficiency and flexibility in the process. For example, they (a) require arbitrator candidates to provide a statement as to readiness and ability to devote enough time to the arbitration, (b) encourage electronic submissions, (c) permit hearings via telephone or video conference, and (d) require the tribunal to make its final award as soon reasonably possible following the last submission from the parties (similarly to the IICA rules which also impose a time limit on rendering an award).

The latest LCIA rules are the first institutional rules explicitly to address the conduct of the parties' legal representatives. The Annex to the 2014 Rules lays down certain guidelines for "good and equal conduct" by legal representatives. The guidelines are expressed in quite high-level terms. Legal representatives may not "unfairly … obstruct the arbitration", "knowingly make any false statement to the Arbitral Tribunal", "knowingly procure or assist in the preparation of or rely upon any false evidence …", "knowingly conceal … any document (or part thereof) which is ordered to be produced…"…", or deliberately initiate any unilateral contact with any arbitrator.

By being included in the LCIA Rules, these guidelines form part of the parties' arbitration agreement, and responsibility for compliance lies with the parties. Time will tell whether tribunals are willing to sanction conduct beyond simply an order for costs and instead look, for example, to exclude counsel or even refer them to their professional bodies.

The LCIA has recently also taken a lead in introducing greater diversity and inclusivity in international arbitration, focusing in particular on the gender, age and cultural/national diversity of its tribunal candidates. The LCIA is (together with the authors' law firm Latham & Watkins) amongst the over 1,200 institutions who have signed the Equal Representation in Arbitration pledge. This is a 2015 London initiative in which members of the arbitration community pledge to take action to correct the under-representation of women on arbitral tribunals.

The majority of challenges to arbitral awards are rejected

Many arbitrations are also conducted in England under non-LCIA rules. For example, last year the ICC registered 801 new cases seated in 56 countries. Approximately 7% of these were seated in London, making it the most popular seat for ICC arbitrations after Paris.[8]

Commodity and maritime arbitration in London

London remains the centre of dispute resolution for many commodities including certain metals, grain, coffee, oils, seeds, fats, cocoa, sugar, nuts and cotton, as well as maritime arbitration. London remains popular for example due to its pool of trade specialists who sit as arbitrators. Specialist centres include the London Metal Exchange (the "LME"), the London Maritime Arbitrators Association (the "LMAA") and the Sugar Association of London (the "SAL"). Trade arbitrations are generally run by trade specialists rather than lawyers, and are perceived as cheap and efficient.

Confidentiality and transparency

In the UK, there has recently been focus on the need for greater transparency at least in cases involving state interests. Discussions on this issue have refocused attention on the appropriate balance between, on the one hand, confidentiality insofar as valuable to the parties, and transparency, development of the law and good governance on the other. This movement may also have consequences for the system of commercial arbitration. The English Act is silent on confidentiality, but English case law establishes an *implied duty of confidentiality* in arbitration, subject to a handful of exceptions such as public interest.

Certainly procedural transparency appears to be on the increase in commercial arbitration. The LCIA has published abstracts of its rulings in response to arbitrator challenges in order to share learning with the arbitration community on the parameters of arbitrator independence and impartiality. The ICC practice has also changed so that the names of arbitrators and certain other details are now made public even in commercial cases, to enhance the transparency of its arbitration proceedings.

Contingency fee arrangements

Contingency fee arrangements make the payment of lawyers' fees and expenses conditional on the outcome of the dispute, and offer a way for the client and its legal representatives to share the costs of the dispute. Contingency arrangements were formerly largely prohibited in the UK. The rules were relaxed in April 2013. The current position is that the payment of lawyers' fees and expenses can be made conditional on success in litigation and arbitration. This is similar to the US and Israel which generally permit the recovery of reasonable third party funder fees, although such funding remains rare in Israel.

The English courts have acknowledged that contingency fee arrangements can be used in arbitration (see e.g. most recently *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 where the courts upheld an arbitrator's award ordering the losing respondent to pay the claimant's third party fees, amounting to 35% of the total recovery). With the rise of sophisticated third party funders, the use of these arrangements is thought to be on the rise.

Brexit

The United Kingdom may exit the European Union in the next few years following a popular referendum in June last year. Some have wondered whether Brexit, if it indeed happens, will impact on London's standing as an arbitral centre. The answer is no.

The reasons for London's reputation as one of the most popular and trusted arbitral seats have never depended on membership of the EU. As discussed above, the most important features of an arbitral seat include respect for the rule of law; clear, comprehensive and modern domestic arbitration legislation; and a highly respected and experienced judiciary and local lawyers. London has all of these important qualities and none of these will be impacted by Brexit. None requires membership of the EU.

For international arbitration, it is the New York Convention that is our most important legal infrastructure. That global treaty, which governs the recognition and enforcement of arbitral awards in over 150 countries, does not depend on membership of the EU. Awards rendered in London will continue to be enforceable in other New York Convention jurisdictions, including in the EU Member States, regardless of Brexit. The key European instrument on jurisdiction and enforcement issues in civil and commercial matters, the Brussels Regulation, does not apply to commercial arbitration awards. Arbitration agreements concluded pre-Brexit providing for arbitration in London will, therefore, continue to be binding and enforceable.

Conclusion

London remains a leading centre for arbitration through a combination of its strong rule of law, successful national arbitration law, arbitration friendly and non-interventionist courts, the reputation of London's legal community and the standing of the LCIA. Looking ahead, London, and elsewhere, will need to further embrace measures designed to improve the cost and efficiency of the arbitral process and be ready to engage with a desire for greater transparency even in commercial cases.

End Notes

[1] Sophie J. Lamb is a partner in the London office of Latham & Watkins where she leads the International Arbitration Practice. Ms. Lamb is an expert in the field of international commercial and investment arbitration and an accomplished courtroom advocate. Her practice focuses on international arbitration, public international law, complex litigation in the English and overseas courts, and business and human rights counselling. She also sits as an arbitrator including in disputes involving states and state entities.

[2] Hanna Roos is an associate in the London office of Latham & Watkins and its Litigation & Trial Department. Ms. Roos is a Solicitor Advocate in the Higher courts of England and Wales, and she has represented a broad range of clients, including states and large corporations in high-value international arbitrations and litigations.

[3] See the *2006 Corporate Attitudes and Practices*, *2010 Choices in International Arbitration* and *2015 Improvements and Innovations in International Arbitration* reports here.

[4] Wolfson and Charlwood, Challenges to Arbitration Awards, in *Arbitration in England, with chapters on Scotland and Ireland*, Greenaway, Fullelove, et al. (ed) (2013).

[5] Ms Lamb appeared as junior counsel to the appellant before the UK Supreme Court.

[6] Sherby & Co., Advs. *Analysis of Survey 2013*, available at http://www.sherby.co.il/pdf/2013-Analysis.pdf, 2-3.

[7] The LCIA director General's/Registrar's reports are available here.

[8] 2015 ICC Dispute Resolution Statistics, in the ICC Dispute Resolution Bulletin 2016 No. 1.

When The Arbitration Is In Israel, But The Money Is In New York

By Elliot E. Polebaum[1] and
Katherine A. Raimondo[2]

Editor's Note*: Fried, Frank, Harris, Shriver & Jacobson is a leading international law firm that has offices in New York City, London, England, and other major metropolitan areas. Few law firms, if any, can boast the number of alumni residing in Israel as Fried, Frank.*

Introduction

A potential Israeli claimant in an international arbitration always faces the risk that, even if it is ultimately successful on the merits of its claim, it will be unable to recover the damages awarded due to the award debtor's lack of reachable assets. This risk is particularly acute when the debtor's assets are located outside of Israel. However, when the award debtor is in New York State and/or its property is located in New York, the claimant may be able to take advantage of section 7502(c) of the New York Civil Practice Laws and Rules ("Section 7502(c)"), which allows a New York court to grant provisional orders of attachment and preliminary injunctions in aid of an international arbitration.[3]

Section 7502(c) Generally

Section 7502(c) provides that a New York court may consider an application

> . . . for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.

Thus Section 7502(c) provides for the issuance of two types of relief – a preliminary injunction and an order of attachment. (They are sometimes referred to below as "7502 Relief.") Relief under Section 7502(c) is available *regardless* of where the arbitration takes place.

However, a New York court must have sufficient *jurisdictional* grounds to hear an application under Section 7502(c). In general, if the New York court has personal jurisdiction over the respondent/defendant, the court may issue preliminary relief *regardless* of the location of the property that is the subject of the application. Among other things, the non-territorial limitation means that, for example, if a New York court has personal jurisdiction over a defendant that has a bank account in London, the New York court may issue an order of attachment with respect to that bank account. (Even if the New York court were to be without jurisdiction over the UK bank, any disposition by the defendant of the funds in the UK account in contravention of that order would constitute a contempt of court.)

Under U.S. law, a New York court will generally have jurisdiction over a respondent that (i) is incorporated in New York; (ii) has its principal place of business in New York; or (iii) has sufficient contacts with New York that are related to the claims in the arbitration.

If the New York court does not have personal jurisdiction over the respondent but the *property* in question is *located* in New York, then a New York court might nonetheless be authorized to grant 7502 Relief.

A good example of the potency of Section 7502(c) when assets are in New York is the case of *Sojitz Corp. v. Prithvi Information Solutions Ltd.*, 921 N.Y.S.2d 14 (N.Y. App. Div. 1st Dep't 2011), which involved a contract dispute between a Japanese seller of telecommunications equipment and an Indian purchaser. The contract provided for disputes to be resolved by arbitration in Singapore. The Indian purchaser delayed making payments on the equipment that it received, and it allegedly admitted to the seller that it was having cash flow problems and wanted to use its money for "other things." As a result, the Japanese seller commenced a proceeding under New York's Section 7502(c), seeking an order of attachment on a debt that a third-party company, based in New York, owed to the Indian purchaser. The seller argued that, because it would take time for the arbitral panel in Singapore to be constituted, and because, in the meantime, the Indian defendant might dissipate its assets, it would be appropriate for the New York court to grant an order of attachment before the commencement of the arbitration.

The 30-day clock is a significant advantage over what Israeli applicants would expect

The New York court agreed – even though it did not have personal jurisdiction over the Indian purchaser, given that the purchaser was not licensed to do business in New York, maintained no property or bank account in New York, and had no employees in New York. The New York court found that, because the attachment was strictly for "security purposes" in the context of a foreign arbitration, the lack of jurisdictional connections was irrelevant.

The *Sojitz* case demonstrates how powerful a tool Section 7502(c) can be for an Israeli claimant in an international arbitration.

Possibility of Obtaining Relief Under Section 7502(c) Even *Before* Commencing the Arbitration

As noted above, Section 7502(c) applies to both pending arbitrations as well as arbitrations that "[are] to be commenced" in the near future. The statute provides that, if an attachment order or injunctive relief is granted with respect to an arbitration that has *not yet* been commenced, the claimant must commence the arbitration within thirty (30) days of the granting of the attachment order or the injunction – otherwise the order or injunction "shall be null and void," and costs, including reasonable attorneys' fees, will be awarded to the respondent.

The thirty-day clock is significant for Israeli participants in international arbitrations. We are informed that, under Israeli law, if a claimant obtains an *ex parte* order of attachment yet fails to file its statement of claim within *seven days* of the grant of that order, the order of attachment *expires*. Contrast that time period to New York law – the thirty-day clock for commencement under CPLR § 7502(c) is significantly longer (more pro-claimant) than the comparable authorization that Israeli courts have under Israeli law. Because under New York law, the pre-commencement period is *thirty* days, an Israeli applicant in New York would have *four times* the amount of time that it would have under Israeli law to use the existence of the order of attachment as a tool to persuade the defendant/respondent to settle the case.

Moreover, a New York court may expand or contract the thirty-day period for good cause. At least one New York court has held that Section 7502(c) confers the discretion to expand the thirty-day period even if a request for such relief comes *after* the thirty days have expired. In that case, *Sierra USA Communications, Inc. v. International Telephone &*

Satellite Corp., 824 N.Y.S.2d 560 (N.Y. Sup. Ct. 2006), the court found that an extension of the thirty-day period was warranted where the applicant had refrained from commencing arbitration within the original 30-day time period primarily because it was engaged in *settlement* discussions with the defendant.

Thus, the possibility of obtaining an injunction or an order of attachment of assets under Section 7502(c) can be a very powerful tool.

Additional Procedural Issues

An application for relief under Section 7502(c) may be sought in both federal and state courts in New York. (Although the differences between federal court and state court are beyond the scope of this article, suffice it to say that generally *non*-American litigants prefer federal court over state court.) Both in state court and federal court, an application under Section 7502(c) is commenced by filing a petition or application that generally outlines the underlying facts and the relief sought.[4] The application will usually be supported by one or more witness affidavits and exhibits, and a memorandum of law to address legal issues. Relief may be obtained on an *ex parte* basis and/or on an expedited timeline if the claimant demonstrates that relief is needed on an urgent basis. However, even if a claimant obtains an *ex parte* order, the respondent will thereafter have the opportunity to present argument and evidence contesting the requested relief.

A claimant seeking an order of attachment or a preliminary injunction will be required to provide an "undertaking," in an amount determined by the court, which serves as security if the defendant/respondent prevails in the arbitration and suffers damage as a result of the attachment or injunction. Undertakings in the range of 5%-10% of the amount sought to be attached or enjoined are common.

Standard for Obtaining Relief

Under the standard set forth in Section 7502(c), a claimant must show that the arbitration award that it is seeking "may be rendered ineffectual" without provisional relief. (We are informed that this is similar to the *hachbadah* standard for an order of attachment under Israeli law.) In the attachment context, New York courts have found this standard to be satisfied where a claimant provided evidence, in one case, that a respondent corporation was no longer actively functioning, had resigned its seat on the New York Stock Exchange, and was liquidating and transferring assets. In another case, the "may be rendered ineffectual" standard was found to be satisfied when an individual respondent historically failed to pay creditors, had stated an intention to remove assets from New York, and was the sole shareholder of the corporate respondent, an insolvent shell corporation.

These cases suggest that, when there are multiple pieces of circumstantial evidence indicating that an award would be rendered ineffectual, there is reason to believe that a court would conclude that the standard under Section 7502(c) for preliminary relief has been met.

In contrast, requests for attachment before New York courts have *failed* where, in one case, the respondent's assets were far greater than the amount sought in arbitration, and, in another case, the respondent's debts and other obligations were guaranteed by several nonparty entities.

When the attachment of property in New York is for "security purposes," other jurisdictional connections are irrelevant

In the context of applications for a preliminary injunction, New York courts have interpreted the "rendered ineffectual" standard to require injunctive relief where, in one case, a claimant demonstrated that an injunction was necessary to halt foreclosure on a real property interest that would have rendered the respondent insolvent and, in another case, a claimant provided evidence that the respondent intended to immediately transfer shares over which the claimant asserted ownership. Requests for injunctive relief have failed in one case where a claimant requested the restraint of certain funds but failed to establish that the subject matter of the action concerned those funds,[5] and in another case where the application was made by the respondent in the arbitration, rather than the claimant, and the respondent had not made any demand for an award in the arbitral forum.

In addition to meeting the "rendered ineffectual" standard, a claimant must satisfy certain other criteria depending upon whether the claimant seeks an order of attachment or a preliminary injunction under Section 7502(c). To obtain an order of attachment, a claimant must also show: (i) there is a cause of action against the respondent; (ii) it is probable that the claimant will succeed on the merits; and (iii) the amount demanded from the respondent exceeds all counterclaims known to the claimant. (We are informed that this standard is very similar to that under Israeli law for obtaining an order of attachment.) To satisfy the probability of success standard, a claimant must provide sufficient details relating to the

underlying dispute to allow the court to make an assessment of the merits of the claimant's arguments. The New York court will not (obviously) usurp the role of the arbitral tribunal, but it will need some evidence that the claimant has a valid claim before restraining the respondent's assets.

In order to obtain a preliminary injunction, a claimant must meet the same probability of success standard (in addition to the "rendered ineffectual" standard). The claimant also must demonstrate: (i) a danger of *irreparable* injury if the application for preliminary injunction were to be denied and (ii) a balance of equities favoring claimant. Irreparable injury is harm suffered by the claimant for which money damages are an insufficient remedy. Regarding the balance of equities consideration, in general, if the claimant merely seeks to maintain the status quo, and has made a satisfactory showing that the arbitration award may be rendered ineffectual without relief, a court is likely to find that the balance of the equities weighs in the claimant's favor. Yet if the requested injunctive relief would *alter* the status quo and grant some form of the ultimate relief requested, the claimant will be required to show that extraordinary circumstances warrant the requested relief.

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Companies involved in IICA arbitrations may wish to consider the relief available under Section 7502(c) if the case is against a New York-based party or a party with assets that can be traced to New York. Although an applicant will need to meet a reasonably high standard to obtain an order of attachment or preliminary injunction under Section 7502(c), in cases where there is a justifiable concern about the dissipation of assets, or other concerns warranting injunctive relief, the remedies available in New York courts can help to ensure the ultimate effectiveness of an international arbitration award.

End Notes

[1] Elliot Polebaum leads Fried Frank's international arbitration practice and divides his time between the firm's Washington, D.C. and Paris/London offices. He also frequently sits as arbitrator in international disputes.

[2] Until August 2016, Katherine Raimondo was a litigation associate in Fried Frank's Washington, D.C. office and a member of the firm's international arbitration practice group. She is now an attorney in the U.S. Department of Justice.

[3] While this article focuses on CPLR § 7502(c), practitioners should also be aware that certain provisions of New York and U.S. (federal) law may allow parties to obtain discovery to aid in identifying a potential award debtor's assets in advance of any arbitration award. Pursuant to CPLR § 3102 (c), parties may obtain "disclosure to aid in bringing an action, to preserve information or to aid in arbitration" before an action is commenced. While no New York court has definitively ruled that CPLR § 3102(c) applies to proceedings outside of the United States, there is some case law suggesting that the provision is not limited to New York-based actions. Similarly, 28 U.S.C. § 1782 permits federal courts to order discovery "for use in a proceeding in a foreign or international tribunal." The scope of 28 U.S.C. § 1782 is unclear at this time and requires resolution by the U.S. Supreme Court, but a majority of U.S. courts have held that the statute cannot be used in aid of private arbitration proceedings, and some courts have held that it cannot be used in aid of pre-judgment attachment proceedings.

[4] A party may also want to invoke Section 7502(c) in connection with a motion to compel arbitration if litigation has already been filed against it in a New York court. In that situation, the requesting party need not institute two separate proceedings; it need only file a motion seeking both to compel arbitration and to obtain relief under Section 7502(c).

[5] Under New York law, a preliminary injunction is only available in relation to an act in violation of the claimant's rights respecting the subject of the action.

Emergency Arbitration — What Israeli Lawyers Need To Know

By Eric S. Sherby[1]

Over the past decade and a half, there has been a surge in the number of the arbitral institutions that have adopted rules for the appointment of "emergency arbitrators." An emergency arbitrator is essentially one who is appointed by an arbitral institute solely for the purpose of adjudicating a motion (application) for "emergency" relief – such as a temporary injunction or an attachment (freezing) of assets – in advance of the adjudication of the main claim before that arbitral institution.

The purpose of this article is *not* to argue in favor or against the use of an emergency arbitrator. At the outset, it should be noted that, when the Israeli Institute of Commercial Arbitration was drafting its International Rules (approximately ten years ago), we were aware of the trend among the arbitral institutions to enact rules for the appointment of emergency arbitrators. But we decided *against* doing so.[2]

Regardless of whether one is in favor of the emergency arbitration option, the reality is that many arbitral institutions throughout the world, including the International Chamber of Commerce (the "**ICC**"), have adopted such rules. And, of course, arbitration is increasingly chosen as the dispute resolution mechanism in international agreements to which Israeli companies are parties. Therefore any Israeli lawyer – whether in-house or in a private firm – who is involved in the drafting of an international agreement needs to be aware of several issues arising from the possibility that his/her corporate client might be involved in a dispute as to which a request for the appointment of an emergency arbitrator could be made.

Court Option Still Exists: First, the rules of virtually every arbitral institution that provide for the appointment of an emergency arbitrator also provide expressly that such option is *not* meant to derogate from the right of a party to apply to a court for emergency relief. In other words, a party (or future party) to an arbitration under the auspices of such an institute may – notwithstanding the emergency arbitrator option – apply for "emergency" relief from a *court* that has jurisdiction over the adverse party.

The Rules Apply as a Default: Although some arbitral institutions had (in the 1990s) made the availability of emergency relief contingent upon the parties' expressly "opting in," that era is gone. Today virtually all of the institutions' rules apply prospectively. In other words, the emergency arbitrator option applies to arbitration agreements that are entered into after the date on which the rules came into effect, and there is no requirement for the parties to "opt in."

Timing/(Speed) No Ex Parte Relief: One of the main selling points of the emergency arbitrator option is speed. In this context, some institutional rules require (a) the appointment of an emergency arbitrator in a matter of days (after filing the motion), and/or (b) the rendering of the arbitrator's decision on the motion within a short time period (such as 14 or 15 days).

At least in theory, these short deadlines make the emergency arbitrator option a good alternative to national courts – because it is common for courts to take much longer to render decisions on emergency applications. In Israel this is especially the case during the courts' summer recess.

Yet the issue of timing is closely related to another feature that is common to rules for emergency arbitrators – that ***no*** such arbitrator will be appointed on an *ex parte* basis. Virtually every institution that provides for the appointment of an emergency arbitrator requires that it be done *after* hearing from the party adverse to the moving party.

This is not a minor drawback. In any case in which a party seeking emergency relief is concerned that its adversary is dissipating or likely to dissipate assets, the last thing that the moving party wants is to provide notice of its request for an order of attachment – because giving notice is likely to increase the speed with which the assets will be dissipated.

As a result of the notice issue, any comparison between the timing of an emergency arbitrator proceeding and the timing of a possible court proceeding needs to take into consideration the differences in the availability of relief. Whereas litigation in court could result in the grant of an *ex parte* order – which is often a powerful tool at the disposal of the applicant – an *ex parte* order could almost never be granted by an emergency arbitrator.

Costs: Both international litigation and international arbitration are costly endeavors, and the expense is even greater when emergency relief is sought – whether in court or in arbitration. Here is a sampling of the cost structures for emergency arbitration under the rules of some well-known international arbitral institutions:

a) Under the rules of the ICC, the party seeking appointment of an emergency arbitrator will generally be required to pay a flat fee of $40,000 ($10,000 as the ICC's administrative fee, plus $30,000 as the fee of the emergency arbitrator). At the end of the emergency arbitrator proceedings, the arbitrator may decide that the respondent should bear the costs.

b) The costs under the rules of the World Intellectual Property Organization are (i) an administrative fee of $2,500 plus (ii) an initial deposit of $10,000. The emergency arbitrator will charge based on an hourly rate of between $300 and $600, with his/her fee capped at $20,000.

c) The costs under the rules of the London Court of International Arbitration are comprised of (a) an administrative (application) fee, in the amount of £8,000 and (b) an emergency arbitrator's fee of £20,000. The arbitrator's fee is not based on an hourly rate, and the LCIA has the discretion to increase the fee.

Enforceability: Whether an order issued by an emergency arbitrator would be enforceable in another country is a major issue. The enforcement internationally of arbitral awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the "New York Convention"). Although the New York Convention does not use the term "final award," it is commonly understood that finality is an element of the term "award" as used in the Convention. In this context, it is worth noting that Article V.1 of the Convention sets forth various grounds

under which a court may refuse to recognize and enforce an award from another contracting nation. One of those grounds is as follows:

> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Few court decisions have dealt directly with the issue of the enforceability internationally of an award given by an emergency arbitrator, but one case from a federal court in California is particularly illuminating. In *Chinmax Medical Systems v. Alere San Diego, Inc*., 2011 U.S. Dist. LEXIS 57889 (S.D. Cal 2011), the issue was whether an emergency interim award pursuant to Article 37 of the American Arbitration Association's International Dispute Resolution Procedures constituted a final award. The *Chinmax* court observed that Article 37, regarding emergency measures, includes the following provision:

> Once the tribunal has been constituted, the tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator.

The court concluded that the substance of Article 37 leads to the conclusion that the interim order issued by the emergency arbitrator was *not* a final one. 2011 U.S. Dist. LEXIS 57889 at **14-15.[3]

The logic of the *Chinmax* case seems compelling, and it is likely that other courts, when faced with arbitral institution rules similar to Article 37, will conclude that an order issued by an emergency arbitrator is not a final one. To the extent that recognition and enforcement are sought in the international context, the *Chinmax* analysis would result in *denial* of recognition under the New York Convention.

Notwithstanding both the paucity of case law and the risk of non-recognition internationally, many American and Western European arbitration specialists favor the use of emergency arbitrators. Why? At least in part because *anecdotal* (non-scientific) evidence indicates that parties to cases before emergency arbitrators tend to carry out the orders issued by such arbitrators – without there being a need to seek enforcement in court.

Eventually there will be e*mpirical* evidence concerning the extent of "voluntary" compliance with orders issued by emergency arbitrators – but that stage is probably several years down the road.

Conclusion: The decision to agree – at the contracting stage – to arbitrate under an emergency arbitration "regime" is not a simple one. The decision entails taking into consideration issues of costs, timing, and the likely venue in which enforcement of any arbitral award might be sought. As is the case with almost all contractual provisions, it would be a *mistake* to assume that "one size fits all."

End Notes

[1] **www.sherby.co.il**

[2] There were two reasons for the IICA's decision against adopting a mechanism for the appointment of an emergency arbitrator: (a) our concern (which remains) that an "award" issued by an emergency arbitrator might not be enforceable internationally (*see* below), and (b) our belief that the Israeli judicial system generally provides adequate temporary (emergency) relief in support of arbitration.

[3] Two years later, in *Yahoo! Inc. v. Microsoft Corp*., 983 F. Supp. 310 (S.D.N.Y. 2014), a federal court in New York addressed the enforceability of an award issued by an emergency arbitrator and found that such award was fully enforceable under the Federal Arbitration Act. But *Yahoo!* involved two *American* corporations, and although the arbitrator's order required the losing party to take action outside the United States, the taking of such action did not require that the award be recognized/enforced by any non-American court. (Once the arbitral award was confirmed by the American court, any noncompliance could be brought before that court.)

Therefore, *Yahoo!* is probably of little relevance internationally.

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The Israeli Institute of Commercial Arbitration

84 Hahashmonaim St. Tel Aviv 6713203
Tel: 03-5631052, 03-5631086, Fax: 03-6242751