

Using Article 37 of the International Arbitration Rules: Obtaining Emergency Relief

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Article 37 of the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR, the international division of the American Arbitration Association (AAA)), contains an emergency relief procedure that represents significant progress in the field of international arbitration. Before its introduction, whether the arbitration was administered by the AAA or another international arbitral institution of similar standing, a party requiring emergency relief prior to the appointment of the tribunal had little option

Practitioners who have actually taken advantage of Article 37 to obtain emergency relief prior to the appointment of the arbitral panel discuss how the rule works and offer practical insights from their experience.

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but to approach a national court for a preliminary injunction, measures for the preservation of property, or an order placing certain property in escrow, or other form of preliminary relief. Going to court for this purpose may be very undesirable for a whole raft of reasons, including the need to make difficult choices over the appropriate forum and the inevitable publicity inherent in preliminary relief proceedings.

The authors used Article 37 with great success to obtain emergency relief for a client pending the appointment of an arbitral panel. They have written this practice-oriented article for others who might need to quickly obtain this kind of relief.

Background of Rule

The AAA is the first prominent international arbitration provider to include procedures for emergency relief prior to the formation of a full arbitral tribunal into standard international arbitration rules. Article 37 came into force on May 1, 2006.

The AAA was also among the first arbitral institutions to address the issue of pre-tribunal provisional relief. In 1999 the Association crafted Optional Rules for Emergency Measures of Protection (AAA Optional Emergency Rules). These rules were published with the ABA Commercial Arbitration Rules, which are used for arbitration proceedings in the United States between U.S. parties, and were designed to be elected in writing as an optional add-on to those rules.

In fact, the Optional Emergency Rules also could be expressly adopted in writing by parties who were arbitrating under the ICDR International Rules because parties always have the right to alter or add to AAA Rules. But the AAA did not widely publicize this to international practitioners. So, from the practitioner's point of view, emergency relief seemed unavailable prior to the constitution of the arbitral tribunal.

This situation changed with the addition of Article 37. Not only did pre-tribunal emergency relief become an option, it became automatically available to all parties to arbitration clauses or agreements entered into on or after May 1, 2006. As a result, parties do not need to specifically address the issue of pre-tribunal relief in their arbitration agreement.

This emergency mechanism is of great benefit to a party who wishes to preserve the status quo

in a case until a substantive hearing on the merits can take place. Various types of emergency relief can be obtained from an emergency arbitrator who will be appointed by the AAA, pending the appointment of the arbitral panel.

With Article 37, the ICDR took a bolder step than other institutions with respect to emergency relief. The International Chamber of Commerce Court of International Arbitration, for example, offers a "Pre-Arbitral Referee Procedure," but this procedure must be expressly referenced in the parties' arbitration clause. The London Court of International Arbitration provides for "expedited formation" of the arbitral tribunal. However, when emergency relief is urgently required, any delay associated with convening the tribunal would effectively enable the wrongdoer to thwart the other party.

Applicability of Article 37

The first issue to be resolved is the availability of Article 37 relief to your client. The reason is that, unless the parties agree otherwise, Article 37 applies automatically only to arbitration clauses or agreements entered into on or

after May 1, 2006.

However, even if the contract in question was entered into prior to that date, the parties could agree in writing that Article 37 should apply. Of course, an adversary does not have to agree to this. (Fortunately, that did not happen in our case, which involved a pre-May 1, 2006, arbitration clause.) Because it could be more difficult to reach agreement on the use of Article 37 after a dispute arises, it may be prudent to review your clients' older arbitration agreements in order to consider whether to try to amend them to incorporate Article 37 by agreement with the other party.

First Steps in Applying for Emergency Relief

Prior to initiating the emergency procedure, we found it useful to discuss the logistics with an ICDR vice president or supervisor. This ensured that the AAA was in a position to move immediately to appoint an emergency arbitrator upon the lodging of a Notice of Arbitration.

Filing this notice is an implicit condition precedent to a party filing an application for emergency relief. The form prescribed for the Notice of Arbitration is in Article 2(3) of the ICDR Rules. The reason for the notice is that

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Rule 37 emergency relief cannot be provided before an arbitration proceeding is begun. So in a case that has not yet been submitted to the AAA for arbitration, no party would be eligible for emergency relief.

The corollary to filing the Notice of Arbitration is the payment to the ICDR of its initial arbitration filing fee¹ and a further case service fee² when the case proceeds to its first procedural hearing on the emergency application. The applicant should be prepared for a further potential outlay in the form of security for costs. Indeed, Article 37(7)(g) says any award or order of emergency relief may be conditioned on the provision of such security.

The ICDR is sensitive to the need to appoint an emergency arbitrator as quickly as possible and therefore encourages the parties to provide basic details of the case (i.e., the parties' nationalities, the nature of the dispute, and the law of the contract, if applicable) by telephone in advance of formal filing.

Application for Emergency Relief

Article 37(b) of the ICDR Rules contains the requirements for the emergency application. It provides that the party in need of emergency relief shall notify the administrator and all other parties in writing of the nature of the relief sought and the reasons for which it is sought on an emergency basis. There is no prescribed form for the application.

Generally speaking, the ICDR does not take a prescriptive approach to the format of the supporting evidence in arbitration and Article 37 is no exception. The article itself says nothing about the type or form of evidence to be filed in support of the emergency application. Therefore, the applicant may file whatever documentation it considers appropriate to support its application. It is possible that the emergency arbitrator, once appointed, would insist that supporting evidence take the form of a sworn affidavit or witness statement.

On a practical note, the ICDR expresses a preference for documents to be filed in hard copy at its Broadway address in New York. However, given the urgency prompting an emergency application, parties may elect to put their documents into pdf files and file them via email. If the Notice of Arbitration is filed through the portal on the ICDR's website, called AAA Webfile, documents in any format may be uploaded to accompany the Notice.

Appointment of Emergency Arbitrator

It may be useful to include in the letter accompanying the emergency application the law gov-

erning the arbitration and the parties' agreement, as this may assist in the selection of an appropriately qualified emergency arbitrator.

The ICDR will take into account the nationality of the parties and the law governing the contract, among other factors. But the overriding criterion in selecting an emergency arbitrator will be availability. This is because the AAA commits to appointing an emergency arbitrator within one business day (in some cases, within 24 hours) of the submission of the emergency application.³

The emergency arbitrator is appointed from the ICDR's special panel, which the ICDR states is made up of only prominent experts in the field of international arbitration. Each is said to have a minimum of 15 years' experience in their specialist field and/or that of dispute resolution. However, the emergency panel list is not made available to the public.

Rule 37(3) requires a candidate for the position of emergency arbitrator to disclose to the case administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. Thus, an emergency arbitrator can be appointed only if he or she has indicated to the ICDR case administrator that there are no conflicts of interest with either party.

In order for the arbitrator candidate to be able to do this, the parties must provide to the ICDR, within 24 hours of the lodging of the Notice of Arbitration, a list of all "interested parties" in the case. This includes all subsidiaries and related entities, and also witnesses, consultants and legal advisors.

Then, under Article 37(4), within two business days of appointment, the emergency arbitrator candidate must confirm that there are no conflict issues with any of these entities or persons and schedule a hearing. Then, the ICDR case administrator will give the parties notice of the appointment. Any challenge to the emergency arbitrator must be made within one business day of that notice.

The Hearing

Article 37(4) provides that, as soon as possible but no later than two business days after appointment, the emergency arbitrator must establish a schedule for consideration of the emergency application. In most cases this will entail a hearing, which may be held in person, via telephone or on the basis of written submissions. Increasingly, videoconferencing is used where the parties are a considerable distance apart.

Whether the first hearing is substantive will depend largely on whether the respondent has filed a response to the emergency application. It

is possible that the respondent will not have had time to do this.⁴

If that is the case, the hearing will be limited to procedural issues (for example, directions for the filing of responses and other submissions, dates for further hearings, and any instruction on the relevant law that the emergency arbitrator may require. The first hearing is likely to be followed by an "order" from the emergency arbitrator setting out the directions given and any issues resolved at the hearing.

Hearing on Procedures

Rule 37 has no provisions concerning the procedure to be followed at the hearing. The procedures will be determined by the emergency arbitrator, bearing in mind the rights of the parties to be heard. It may be appropriate for witnesses to be called, although it will be up to the emergency arbitrator as to whether they may be cross-examined.

The emergency arbitrator may take the Continental approach to examining witnesses. Under that approach, the arbitrator, on his or her own motion, or on the application from a party, may put any question to the witness that will help to clarify or amplify the evidence. It is unlikely that an emergency arbitrator would object to having witnesses assist with the explanation of technical issues or the factual background to the dispute.

If the hearing is conducted using videoconference technology, it may be useful to have a record of the hearing so that a transcript can be produced. The party wishing to have a transcript must obtain the other parties' consent.

An emergency arbitrator, after making a decision on the emergency application, may be inclined to obtain the agreement of the parties on the wording of the

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order. If the emergency arbitrator circulates a draft order at the hearing, the applicant may wish to have available appropriate "IT" facilities so that the order can be amended and new versions circulated among the parties while the hearing is in progress.

Costs

Article 37(9) provides: "The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator [...], subject to the power of the tribunal to determine finally the apportionment of such costs." This provision makes no distinction between the costs of the application itself (for example, the filing fee and arbitrator compensation) and legal fees. To a large extent, the issue of costs for the emergency hearing is likely to be governed by the arbitration clause between the parties, which may, for example, provide that the arbitrator is not empowered to award costs in respect of legal fees.

The emergency arbitrator may make a decision on costs at the conclusion of the hearing. Alternatively,

it may be appropriate for the emergency arbitrator to reserve the question of costs until after the parties have had the opportunity, following the hearing on the merits, to file submissions on this matter.

Conclusion

Parties who chose to incorporate the ICDR International Arbitration Rules into their arbitration agreements now have access to rapid and efficiently administered pre-tribunal relief even where their arbitration clause does not specifically address the issue. ■

ENDNOTES

¹ Ranging from \$750 (for claims not exceeding \$10,000) to \$10,000 (for claims not exceeding \$10,000,000). Above \$10,000,000, filing fees are proportional to the value of the claim but are capped at \$65,000.

² Ranging from \$200 to \$6,000.

³ Article 37(3) of the Rules: "Within one business day of receipt of notice as provided in paragraph 2, the administrator shall appoint a single emergency arbitrator from a special panel of emergency arbitrators designated to rule on emergency applications [...]."

⁴ There is no requirement in the rules to lodge reply evidence before the hearing.

