

Study on legal issues concerning emergency arbitrator system in international commercial arbitration

Zhang Xiaochen

Department of law, School of Public Administration, China University of Mining and Technology, Xuzhou, Jiangsu, China

Keywords: international commercial arbitration; temporary actions; emergency arbitrator system

Abstract: With the increasing number of disputes in the field of international commerce, application of the emergency arbitrator system to commercial arbitration has aroused attention of different countries. In this paper, comparatively analyzing the current applicable rules in the international field and combining the application status of China's emergency arbitrator system in order to examine the way of improvements about this system in China. Moreover, we also put forward some suggestions about expanding the scope of arbitral tribunals' rights, enhancing its use value, and endowing them with the right of autonomous jurisdiction.

1. Overview of emergency arbitrator system

The emergency arbitrator system refers to a system through which the involved party can apply to the arbitration institution for temporary preservation in the case of the emergency before the constitution of the arbitration tribunal to safeguard the legitimate rights and interests of the involved party as much as possible. According to the definition, the emergency arbitrator system is also known as the emergency arbitral tribunal system. As the country-to-country economic exchange becomes increasingly frequent, this system has been recognized and adopted by more and more national and international regulations. Nevertheless, this system, due to its short development period and lack of unified regulations, calls for further exploration and improvement.

1.1 Discussion on basic issues concerning emergency arbitrator system

1.1.1 Application procedure of emergency arbitrator system

As to the application of the emergency arbitrator system, various arbitration institutions have followed the Opt-Out rule, which means that, if the involved parties have reached an agreement on arbitration rules in signing the arbitration agreement, then the emergency arbitrator system included in the arbitration rules is, of course, applicable. Only when involved parties reach an agreement on exclusion of this procedure will the involved parties be free from the restriction of the emergency arbitrator system. According to the application procedure, efficient handling of the dispute and safeguarding of the involved parties' legitimate rights and interests constitute the fundamental objective. In the process of launching the special procedure of the emergency arbitral tribunal, justified and reasonable procedural conditions are required, which is also an important research issued discussed in this paper.

First of all, the conditions to institute the economic arbitration procedure should be clarified. To be specific, before the constitution of the arbitral tribunal, the involved party can apply for the launch of the emergency arbitration procedure. According to Subparagraph 4 of Article 23 of "HKIAC Administered Arbitration Rules", "When deciding a party's request for an interim measure under Article 23.2, the arbitral tribunal shall take into account the circumstances of the case. Relevant factors may include, but are not limited to: (a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) there is a reasonable possibility that the requesting party will succeed party will succeed on the merits of the claim. The determination on this possibility shall not affect

the discretion of the arbitral tribunal in making any subsequent determination..” For example, Article 21 of “Arbitration Rules of the China (Shanghai) Pilot Free Trade Zone” and Attachment 2 of “SCC Arbitration Rules” should both adopt the applicant’s guarantee as the prerequisite, Besides, the economic arbitral tribunal procedure should be instituted by one involved party, while the arbitral tribunal itself has no right to lodge the procedure.

Second, the emergency arbitration should be requested after or upon the arbitration notice, but before the constitution of the arbitral tribunal. The applicant shall submit the written application and make the pre-payment. The arbitral tribunal will determine the basic facts of the case, and decide whether this system applies within a certain period of time. Meanwhile, the sole-judge trial system will be adopted to designate the emergency arbitrators. After all the above steps are completed, a written summary of the case can be submitted to the emergency arbitrator for trial.

Finally, after the emergency arbitrator clarifies the dispute content and confirms the application rules, a decision, verdict or order shall be made within the prescribed limit of time. For example, according to “HKIAC Administered Arbitration Rules”, “Any decision, order or award of the emergency arbitrator on the Emergency Decision shall be made within 15 days from the date on which HKIAC transmitted the case file to the emergency arbitrator. “ Therefore, the emergency arbitrator system ensures efficient solution of the dispute through application, trial and decision-making.

1.1.2 Validity of decision made by emergency arbitral tribunal

With the ending of the emergency arbitration procedure and the adoption of temporary actions as the time node, the decision made by the emergency arbitrator is immediately binding on all involved parties. However, the emergency decision is not a final decision on the dispute in that the arbitral tribunal should still be organized for trial of the case. In other words, the emergency decision made by the arbitral tribunal is no longer valid at the final verdict. Besides, upon the application of either of the involved parties on justifiable reasons, the arbitral tribunal can alter, suspend or terminate the emergency decision and its temporary actions. Therefore, the decision made by the emergency arbitral tribunal is immediately binding on the involved parties, but is not binding on the arbitral tribunal, which can modify or revokes the decision under certain conditions.

1.1.3 Analysis of emergency arbitrator’s rights and obligations

1.1.3.1 Analysis of arbitrator’s rights

(1) Right to issue temporary actions

Subparagraph 5 of Article 37 of “Rules of Arbitration of the United States” (2014) stipulates that the arbitrator shall have the right to adopt temporary or protective actions which are deemed thereby as necessary, including the ban and property protection or preservation. The temporary actions can be issued in the form of temporary verdict or decision. No matter in which form the temporary actions are issued, the emergency arbitrator shall illustrate the reasons. The emergency arbitrator shall modify or cancel the temporary verdict or decision on justifiable reasons. Subparagraph 12 of Schedule 4 of “HKIAC Administered Arbitration Rules” (2013) regulates, “Any decision, order or award of the emergency arbitrator on the Emergency Decision shall be made within 15 days from the date on which HKIAC transmitted the case file to the emergency arbitrator. “ According to Subparagraph 4 of Article 21 of “Arbitration Rules of the China (Shanghai) Pilot Free Trade Zone”, the emergency arbitral tribunal shall make a decision on the application for temporary actions according to Article 22 HEREUNDER.”

It can be seen that all the above terms have stipulated on the right of the emergency arbitrator to issue temporary actions. As the most important right of the emergency arbitrator, this right guarantees a larger right of discretion. Since all the above regulations are not elaborate enough, the emergency arbitrator should accommodate to both efficiency and fairness in the process of arbitration.

(2) Right to require the involved party to provide guarantee

As mentioned above, many arbitration rules endow the arbitrator with the right to require the

involved party to provide guarantee. In order to prevent the involved party from postponing, and the occurrence of the negative consequences that the applicant's rights and interests are damaged by the unreasonable emergency arbitration procedure, the arbitrator has the right to require the involved party to provide guarantee, which can not only protect the interests of one involved party from being damaged before arbitration, but also ensure applicants to be more prudential in applying for the emergency arbitration procedure.

However, all the provisions requiring the involved party's provision of guarantee are described using the term such as "can" rather than "shall". Therefore, the provision of guarantee is not compulsory, and this might narrow down the scope of the arbitration order which can be protected by provision of guarantee.

1.1.3.2 Analysis of arbitrator's obligations

The arbitrator has the obligation of disclosure in the emergency arbitration procedure. Similar to the ordinary arbitrator, the emergency arbitrator shall disclose relevant situations to the arbitration institution before acceptance of designation so as to ensure fairness of the arbitration procedure. For example, Subparagraph 3 of Article 37 of "Rules of Arbitration of the United States" (2014), the emergency arbitrator shall take the initiative to disclose to the arbitration administrator any circumstances which might arouse justifiable suspicion about justice or independence of the arbitrator. When the involved party asks for the emergency arbitrator's avoidance, the request shall be raised within the designated limit of time. The emergency arbitrator procedure, if finding himself obviously lacking the right of administration after the investigation of the arbitration institution, shall not designate the emergency arbitrator and put an end to the emergency arbitration procedure.

1.2 Comparative analysis of extraterritorial regulations on emergency arbitrator

As an innovation of the arbitration procedure, the emergency arbitrator system is regulated differently by different arbitration rules. Appendix V of "Rules of Arbitration of the International Chamber of Commerce" stipulates on the emergency arbitrator rules, including "Application for Emergency Measures", "Appointment of the Emergency Arbitrator; Transmission of the File", "Challenge of an Emergency Arbitrator", "Place of the Emergency Arbitrator Proceedings", "Proceedings", "Order", "Costs of the Emergency Arbitrator Proceedings", and "General Rules". The above "Emergency Arbitrator Rules" have been widely recognized as the most comprehensive and usually goes through the whole process of the emergency arbitration. In addition to this, rules such as the "International Arbitration Rules" and "SCC Arbitration Rules" have not mentioned the emergency arbitrator system, but just mentions the preservation rules and application of the emergency arbitrator system to material objects. Or their compilation logic is similar to that of "Rules of Arbitration of the International Chamber of Commerce" to regulate on the emergency arbitrator system in the appendix or seek innovation of the system. For example, many rules have taken the involved party's provision of guarantee as a basis for institution of the emergency arbitration procedure. Despite of that, the specific regulations and operational details about the emergency arbitrator system still entails further exploration and improvement.

2. Analysis and practice of emergency arbitrator system

2.1 Analysis of emergency arbitrator system

2.1.1 Superiority of emergency arbitrator system

As a temporary, efficient and convenient temporary measure, the emergency arbitrator system has its own characteristics of applicability and advantage, which is mainly reflected in the following three aspects.

First, provision of efficient and convenient temporary relief. According to the above regulation of "HKIAC Administered Arbitration Rules", "Any decision, order or award of the emergency arbitrator on the Emergency Decision shall be made within 15 days from the date on which HKIAC transmitted the case file to the emergency arbitrator." Compared with other procedures accepting

dispute settlement, the emergency arbitrator system is efficient in time, which can prevent the postponement from causing unnecessary losses to the involved party's interests. Second, controllability and fairness of temporary arbitration procedures. Due to different regulations of various countries on temporary relief, relief measures adopted before the involved party's application for temporary actions to different countries before arbitration are different. The emergency arbitration addresses the dilemma that requiring temporary relief is the only method for the involved party to protect his legitimate rights and interests before the constitution of the arbitral tribunal. The unification of applicable rules ensures the outcomes to be fairer and more predictable. Last but not least, the large scope of right of the emergency arbitrator enables the arbitrator to make full use of his right of discretion to decide the application and more flexibly safeguard the procedural interests of the involved party.

2.1.2 Defects of emergency arbitrator system for the time being

As an emerging procedural rule, the emergency arbitrator system, compared with previous procedures, has many advantages, but this does not mean that the emergency arbitrator system has no defects. Due to a short development history and lack of sufficient practice, the applicability of the system to practical cases calls for further experimentation.

First, the standard to launch the emergency arbitrator system has not yet been clarified. In other words, the law has not yet stipulated on "what emergency is". Though a majority of rules adopt "emergency" as the standard to start the procedure, the regulation is not detailed enough, and specifies no review standards and reference systems. Therefore, whether to initiate the emergency arbitrator system relies on the arbitrator's right of discretion to a large extent. As a result, the phenomena of too strict or loose restrictions on the application occur now and then. Second, the defect with the emergency arbitrator's right. As mentioned above, the extensiveness of the emergency arbitrator's right is an advantage of the emergency arbitrator system, but the extensive rights are not equal to rights without limitations. At present, regulations on the arbitrator's right are still lacking. Meanwhile, the decision made by the emergency arbitrator is not compulsory and usually relies on the willingness of the involved party to perform or not. Therefore, "the performability of the emergency arbitrator's order is, without doubt, an issue requiring immediate solution."

2.2 Relationship between emergency arbitrator system and court

To start with, the focus should be on discussing whether the validity of the arbitration agreement made by the emergency arbitrator under China's legislation background is equal to the validity of the arbitration agreement made by the domestic arbitration institution. This can prevent the people's court from investigating the validity of the arbitration agreement in the arbitration procedure. Based on China's arbitration judicial review principle of "active support and limited supervision", the answer to the above question is affirmative. Therefore, according to the above conclusion, the conflict and contradiction between the arbitration right and the trial right can be effectively avoided. Meanwhile, the emergency arbitrator can give full play to his administration right of the validity of the arbitration agreement.

However, in the implementation process of the emergency arbitrator system, the scope of right of the arbitral tribunal and the court still has defects. First, China's current legal system contains the temporary relief measures before the constitution of the arbitral tribunal, which is actually the pre-litigation preservation system prescribed by Article 81 and Article 101 of the "Civil Procedural Law of the People's Republic of China". Nevertheless, this right is exclusive to the court, and the arbitration institution has no right to make an emergency decision. Second, if the involved party does not take the initiative to perform the decision made by the emergency arbitral tribunal, the decision made by the emergency arbitrator cannot be compulsorily enforced on the involved party, which still requires the help of the court. In other words, China's legislation has not yet endowed the arbitration institution with due rights, thus causing these problems waiting for immediate solution.

Then, how the relationship between the court and the arbitral tribunal should be handled in the judicial practice has become an issue of common concern. Take the shareholders' dispute in a

Sino-foreign joint venture arbitrated by the “Singapore International Arbitration Center” (SIAC) and which Zhonglun Law Firm defended for the foreign side. The two sides each stick to his argument on whether to have the case judged by the court or the arbitral tribunal. The Chinese side rejected the revocation of the appeal to dissolution of the joint venture for reasons that the two sides have not yet finished all prepositive procedures, and that the appeal to dissolution of the company is a right given by the “Company Law of the People’s Republic of China” to the joint venture, which is out of the restriction of the joint venture contract. However, the litigation representative of the foreign side listed four reasons, including Tianjin People’s Court’s immature decision of affairs which shall be tried by the arbitral tribunal, dissolution of the joint venture leading to difficulty in gaining documents related to arbitration dispute, dissolution of the joint venture impeding the arbitral tribunal’s accurate evaluation of the losses caused by breach of contract, and dissolution of the joint venture potentially resulting in invalidity of the relief measures of the arbitral tribunal. Based on these four reasons, the foreign side required the SIAC emergency arbitrator to issue the temporary order, requiring the applicant to revoke the appeal to the Tianjin People’s Court for dissolution of the joint venture under the condition that the bank guarantee is provided.

The above dispute reflected the numerous contradictions between the court and the arbitral tribunal. It was in essence an issue about whether company litigation or contract arbitration should be adopted due to different legal relationships involved in the contract arbitration and appeal to dissolution of the company. In fact, the two aspects are correlated and are not contradictory to each other by absolute terms. However, the law has not stipulated on their handling order. Thus, chaotic application usually happens. For example, one side might apply for continuous performance of the joint venture contract, but the joint venture might have been approved by the court to get dissolved. Meanwhile, the court and the arbitral tribunal will both investigate into the dispute among shareholders. Zhong Lun Law Firm defending for the foreign side made necessary coordination according to practical situations, formulated dispute settlement strategies, and applied for the emergency arbitrator and temporary measures. All this effectively prevented the dissolution of company approved by the court from increasing the difficulty for liquidation of the company losses.

In judicial practice, even if the contract dispute settlement clause is not explicitly included in the company deadlock dispute as Article 25(The joint venture contract in the shareholder dispute arbitration of Sino-foreign joint venture company (Singapore International Arbitration Center Arbitration) case handled by Sino-Lun Law Firm on behalf of foreign shareholders stipulates in Treaty 25:

25.1 Friendly Negotiation In the event of voting deadlock, dispute, dispute or claim relating to the existence, breach, termination or validity of this contract or the articles of association or the articles of association of the company (collectively referred to as “dispute”), the parties shall immediately submit the dispute to the CEO of Party B and the General Manager of Party A, who shall do their utmost to resolve the dispute through friendly negotiation. If the Chief Executive Officer of Party B and the General Manager of Party A fail to resolve their disputes within 30 days, both parties shall submit the disputes to the Chairman of Party A and Party B immediately after the expiration of 30 days, and they shall try their best to resolve the disputes through friendly negotiation.

25.2 Arbitration If a dispute is not settled by friendly negotiation within 45 days after the first written offer of friendly consultation by one party as stipulated in Article 25.1, either party may submit the dispute for arbitration in accordance with the rules of the Singapore International Arbitration Centre.) of the joint venture contract in this case, the arbitration clause usually submits all the disputes related to the contract to arbitration, so it seems that the applicant still has the possibility of successfully applying for an emergency arbitrator to promulgate interim measures.

3. Analysis of development status of China’s emergency arbitrator system

3.1 Development status of emergency arbitrator system

In order to protect the legitimate rights and interests of involved parties before the constitution of

the arbitral tribunal, several major international arbitration institutions on commercial affairs have subsequently amended their arbitration rules and introduced the emergency arbitrator system. As to domestic arbitration institutions on commercial affairs, the “Arbitration Rules of the China (Shanghai) Pilot Free Trade Zone” (2014) published by the Shanghai International Economic and Trade Arbitration Commission spearheaded in introducing the emergency arbitrator system. Following that, other domestic arbitration institutions on commercial affairs also regulated on the emergency arbitrator and the procedure of temporary measures taken by the emergency arbitrator. For example, the “China International Economic and Trade Arbitration Commission Arbitration Rules” (2015) and “Beijing Arbitration Commission Arbitration Rules” (2016) have both allowed the emergency arbitrator to provide emergency measures for the involved party before the constitution of the arbitral tribunal. Moreover, the emergency arbitral tribunal can require maintenance of the status, prevention of damage, property preservation and evidence preservation in the form of intermediate ruling and order. Take the GKML case, the first case using the emergency arbitrator system, for example. It suggested that there are three factors influencing whether the emergency arbitrator procedure can be smoothly launched. First, the applicant and the arbitration institution learn and judge the local legal environment of the place of property preservation based on their practice accumulation. Second, the arbitration institution should have adequate information and channel to immediately finish the delivery procedure, and safeguard the right of the involved party to state the facts of the case. Third, the arbitration institution should identify the suitable candidates for the emergency arbitral tribunal, and assist them in finishing information disclosure. In the current stage, China’s emergency arbitration system is more like one that is derived from incomplete temporary measures, which is not specified in the “Civil Procedural Law of the People’s Republic of China” and the “Arbitration Law of the People’s Republic of China”. Thus, further improvement and deepening are required.

3.2 Analysis of necessity to improve emergency arbitrator system

3.2.1 Low arbitration efficiency resulted from restrictions on emergency arbitral tribunal’s rights

The high handling efficiency gives the arbitral tribunal a major edge over the court. However, in the implementation process of the system, the arbitral tribunal’s working efficiency is not given into full play. Below are major causes and influences. First, the two sides of an international commercial arbitration case come from different countries. While signing the contract, they tend to agree on the law governing the dispute arising from the contract. Therefore, if the court intervenes too much in the implementation of temporary measures, the autonomy of the will of the involved party might be infringed. Second, with the increasing frequency of commercial exchange in the current international community, international commercial disputes have kept on popping up. The Chinese judges are known for their huge workload. If the large number of cases concerning adoption of the temporary measures is still to be judged by the court, the efficiency of arbitration will be impaired and, worse still, the involved parties’ legitimate rights and interests might be damaged.

3.2.2 Poor implementation outcomes of emergency arbitration system

Neither “Arbitration Law of the People’s Republic of China” nor the “Civil Procedural Law of the People’s Republic of China” have stipulated on setting up the emergency arbitral tribunal. In other words, the involved party cannot require the constitution of the emergency arbitral tribunal according to China’s legal requirements, unless the law of the place of the case is not considered upon the constitution of the emergency arbitral tribunal, as long as the arbitration rule offers relevant regulation. Otherwise, the emergency arbitral tribunal is unlikely to set up in China. Though the principle says that no banning on something means that something is implementable, it might cause chaos of the judge system of the court and the arbitral tribunal, thus resulting in losses of both property and material resources.

3.2.3 Lack of the right of autonomy and jurisdiction for emergency arbitral tribunal

A prerequisite for whether the arbitral tribunal decides to adopt the temporary measures or not is that the arbitration institution should have the jurisdiction right of the case. “Arbitration Rules of the China (Shanghai) Pilot Free Trade Zone” and “Beijing Arbitration Commission Arbitration Rules” (2014) have neither endowed the emergency arbitral tribunal with the right of autonomy and jurisdiction. Assume that the involved party raises a dissent about the jurisdiction right of an arbitration institution, the emergency arbitral tribunal should theoretically stop investigating and waiting for the ruling made by the arbitration committee on the dissent about the jurisdiction right. However, this is possibly not a favorable phenomenon, because the involved party can make use of showing dissent about the jurisdiction right to postpone the implementation of temporary arbitration measures.

To sum up, restrictions on emergency arbitrator’s rights have been mainly attributable to the low arbitration efficiency in China. The implementation effects of the emergency arbitrator system are not satisfactory, due to lack of the emergency arbitrator’s right of autonomy and jurisdiction. All this necessitates further improvement of the emergency arbitrator system in China so as to upgrade its application efficiency.

4. Suggestions for improvement of China’s emergency arbitrator system

4.1 Expanding the scope of arbitral tribunal’s rights

While introducing the emergency arbitrator system to China, the court can maintain its right to issue temporary actions before the constitution of the arbitral tribunal, thus forming a “dual-track” system of the arbitration institution and the court. Meanwhile, through exclusive implementation of temporary measures, monitoring of the emergency decision made by the arbitration institution can be realized. A clearer scope of rights should be stipulated for emergency arbitral tribunal to distinguish from the rights of the court, and to avoid overlapping of the rights with the court. Moreover, the emergency arbitral tribunal should be endowed with the right to restrict the third party so as to promote the implementation of the arbitration decision and efficiently reduce the waste of judicial resources caused by first arbitration and then litigation.

4.2 Improving practicality of emergency arbitrator system in China

Since Chinese laws have not specified on applications of the emergency arbitral tribunal system, relevant regulations of “Rules of Arbitration of the International Chamber of Commerce” can be a good reference. If the appointment of the emergency arbitrators has not yet been completed upon the constitution of the arbitral tribunal, no emergency arbitrators will be appointed anymore. If the emergency arbitrator has been appointed but not yet finished the issuance of the temporary measures, the arbitrator can still maintain this right. To be specific, China’s arbitration rules should specify the applications of the emergency arbitrator system. Second, the talent team construction should be enhanced. Third, more guidance should be provided for application of this system. All the above measures can effectively avoid repeated investigation of the temporary measures and ensure efficient operation of the arbitration procedure.

4.3 Endowing emergency arbitral tribunal with the right of autonomy and jurisdiction

Only when the right of autonomy and jurisdiction is established for the emergency arbitral tribunal can the involved party’s use of the right to show dissent about the jurisdiction right for the purpose of postponing the arbitration procedure be avoided. Only in this way can the arbitration efficiency be improved. Then, the regulation that the emergency arbitral tribunal should stop investigating and waiting for the arbitration committee’s ruling on the dissent about the jurisdiction right can more efficiently prevent the one party from delaying the litigation procedure and also accelerate the resolution of the dispute.

References

- [1] Xue D. Y. A preliminary exploration of the emergency arbitral tribunal system in international commercial arbitration [D]. Shanghai: East China University of Political Science and Law, 2015.
- [2] “Applications of HKIAC Emergency Arbitrator Procedure-Jia Yueting vs. Hengda Arbitration Case”. Retrieved from <http://www.jinciwei.cn/f447658.html>.
- [3] “My Opinions on Emergency Arbitration System”. Retrieved from http://www.sohu.com/a/287790586_120051855
- [4] “Content, Defects and Countermeasures of Emergency Arbitral Tribunal System”. Retrieved from <http://www.lunwenstudy.com/guojisf/94304.html>.
- [5] Ding D. Research into emergency arbitral tribunal system of free trade zone [J]. Shanghai: East China University of Political Science and Law, 2015.
- [6] Mao H. B. Research into the temporary measure system in international commercial arbitration under the framework of free trade pilot zone [J]. Arbitration Study, 37.