ADR Institute of Canada Inc.

ADR Perspectives
Perspectives PRD

September 2015 / *septembre 2015*

Urgent Interim Measures

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The new "Urgent Interim Measures" sections of the ADRIC Arbitration Rules provide a quick and effective way to obtain interim relief. This article looks at the new Rules and at some of the challenges for parties and arbitrators. It provides some practical tips for both applicants and respondents, to make the Rules work for them.

One of the interesting features of the ADRIC Arbitration Rules is the new provision for "Urgent Interim Measures".

A party may apply to the Institute for Urgent Interim Measures either before a tribunal has been appointed, or if the appointment has been challenged. This means a party can get urgent relief even if a procedural wrangle has delayed the arbitration.

The applicant must provide a statement of the interim measures it is seeking and the reasons why they cannot wait for the tribunal to be constituted. The application can be made on notice to the other parties, or if the circumstances warrant, it can even be made without notice.

The Institute will appoint an interim arbitrator as soon as possible, normally within two days of receiving the application.

The interim arbitrator must set the procedure for the urgent interim measures application as quickly as possible, again normally within two days of being appointed. He or she must conduct the proceedings to take the nature and urgency of the application into account.

The interim arbitrator must decide the application within 15 days (unless the parties agree to, or the interim arbitrator orders, another time limit). This gives the interim arbitrator an explicit mandate to hear and determine the application quickly.

The interim arbitrator has the discretion to grant any interim relief he or she considers appropriate, taking into account the need for the requested relief, the urgency, and the effect on the parties of granting or refusing the relief. This includes the power to grant interim interim relief until a formal decision is made on the application for Urgent Interim Measures.

An interim arbitrator's order does not bind the tribunal on the issues decided in the order. The tribunal may modify, terminate or annul an interim arbitrator's order. The parties may also pursue further claims related to the Urgent Interim Measures application, including recovery of costs and claims related to compliance or non-compliance with an order.

Case Study

The author was appointed interim arbitrator in an application for Urgent Interim Measures earlier this year. It was a commercial dispute, flowing from the termination of a contract, which involved performance of the contract and payment of outstanding invoices. The application for Urgent Interim Measures related to a demand for delivery of property that the applicant claimed belonged to it under the terms of the contract.

The application was resolved within 15 days from the date of appointment. There is no doubt that this aggressive schedule was hard on the parties and their counsel. It was also a challenge for the arbitrator, who had to review the material to prepare for a hearing and render a decision very quickly.

The evidence included affidavits and exhibits from both sides, with significant detail about all of the issues in dispute, not just those relating to interim relief. In many other such applications, the equities claimed on both sides will necessarily include some of these broader issues.

At a half-day hearing each side had the opportunity to cross examine the other on their affidavits. Each side also submitted briefs of their legal arguments and presented oral argument. The order was delivered three days later.

The schedule was roughly this:

Day 1 – arbitrator appointed

Day 2 – conference call with counsel to set schedule

Day 6 – response to application and respondent's affidavits due (over a weekend)

Day 8 – reply affidavits due

Day 11 – factum due from each party

Day 12 – hearing

Day 15 – Order made

Practice Tips

Appointing an interim arbitrator in two days is a challenge. The Institute must propose names, check availability, clear conflicts and deliver the application materials very quickly. Parties should be prepared to respond quickly, especially if there is a challenge to a proposed arbitrator.

The 15-day deadline in the Rule is very aggressive. In many cases, one of the parties (most likely the respondent) will argue for extra time. In some cases, both sides may want more time. But the wording of the Rule is mandatory. The decision must be made within that time unless the parties agree otherwise or the arbitrator decides more time is needed. Extensions can be granted, but the Rule implies that they should not be automatic and should be as short as possible.

Counsel should focus on the key issues involved in the application for urgent measures – which facts are in dispute and which are not; what evidence do the parties need to put in front of the arbitrator and how; what are the legal issues and key cases that apply.

Focus on the merits of why the relief requested should or should not be granted. Do not waste time or energy on technical or procedural issues.

Give the arbitrator a clear and concise picture of the case for and against the relief sought. Do not confuse the issues with irrelevant or unimportant facts or arguments.

Nothing in the interim order is final. Each party can ask the interim arbitrator for a further order, if they wish. And they can raise any of the issues again with the tribunal. This would seem to make it appealing for parties to seek Urgent Interim Measures where appropriate. They have very little to lose. If the relief sought is denied, the applicant can still seek the same relief from the arbitration tribunal. If relief is granted, it may effectively end the arbitration or at least take those issues off the table. On the other hand, the respondent can seek to have the order modified or annulled and can seek further redress from the tribunal if it disagrees with the decision of the interim arbitrator.

Michael Erdle is the principal of Practical Resolutions Inc. where he focuses on facilitation, mediation and arbitration of a wide range of disputes relating to business and professional partnerships, technology and intellectual property. More information can be found at www.practicalresolutions.ca.