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Issuing Interim Measures in Arbitration in the Kingdom of Saudi Arabia

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Abstract

An interim measure is, broadly speaking, a remedy or a relief that is aimed at safeguarding the rights of parties to a dispute pending its final resolution. The paper aims to provide a clarification to the Arbitration law in Saudi Arabia focusing mainly on the issue of the issuing of interim measures in arbitration by identifying the process stages under the Saudi Arbitration Law 2012. This paper discusses the issuing of interim measure in international arbitration in the Kingdom of Saudi Arabia through identification of laws, process and procedure in the issuance of interim measures in arbitration proceedings. Two major research strategies are adopted in this study, which are, qualitative and analysis based on exploratory approach for process of issuing interim measures in arbitration. Data were collected from libraries and published reports as well as interviews conducted with judges and arbitrators in Saudi Arabia. This paper challenges the argument of issuing interim measures by showing the process and the mechanism used in Saudi Arabia. The researchers explored the missing issues of the law related to the issue of interim measures in international arbitration in the kingdom of Saudi Arabia as well as the standards of issuing the interim measures.

Keywords: arbitration, interim measure, standards and requirements, power of granting

1. Introduction

The interim measures which are also known as the "preliminary injunctions", "provisional measures", or "emergency/ interim reliefs" or "conservatory measures" are temporary remedies. Since all have the same meaning, the function of each would also be similar, that is, to avoid unfair action before the final arbitral award is given (Margaret, 2008).Today, the parties of international business transactions often prefer arbitration as the dispute resolution method and seek interim measures as a speedy and effective remedy upon the arise of any dispute. Arbitration is a convenient method to resolve disputes because international business transactions have distinct features in comparison to domestic transactions(Atlıhan, 2012).

Saudi Arabia has drafted a new arbitration law in 2012 which added the term of issuing interim measures that had not existed in the previous Saudi arbitration Act 1993. The new Arbitration Act2012 inserts this term in one of the main articles of the Act. However, there are still some ambiguous points which confuse the parties of arbitration in seeking interim measures, for instance, in determining/identifying which competent body (i.e. High Court or Arbitral Tribunal) that is in power to issue the interim measures in arbitration since the parties to arbitration have a right to ask both bodies for interim measures. Moreover, Saudi Arbitration Act 2012 is silent on certain issues such as the standards and requirements that should be attached with the application for interim measures. In seeking to shed some light on these issues, the authors referred to both literature on the topic or in particular on the issue of interim measures and the survey which was conducted in Saudi Arabia through interview with the judges and arbitrators.

2. The purpose of issuing interim measures

An interim measure is, broadly speaking, a remedy or a relief that is aimed at safeguarding the rights of parties to a dispute pending its final resolution(Yesilirmak, 2005). Thus, the fundamental characteristic of interim measures is that they are temporary in nature(Thomas, Webster& Buhler, 2014).Interim measures may include everything from preserving evidence to seizure of assets. However, categories of interim measures are not limited; as new problems arise, new ways of dealing with them will need to be devised(Lawrence W. Newman, 2004). Notwithstanding this broad variety, parties are well advised to consider very carefully whether or not the type of interim relief they want to obtain, may be ordered by the arbitral tribunal according to the law which the governed law will be applied on the mechanism to obtain any measure.

3. The power of granting interim measures

The crucial question pertaining to interim relief in arbitration is with regard to who issues the interim measures of relief, whether the courts, the arbitrators or both. The relationship between the Court and Tribunal, the arbitrator/s competence to grant interim relief and the enforcement of arbitrator-granted interim measures of relief. Interim relief in arbitration is an interface between private dispute settlement and the ordinary court. It is one of these aspects of arbitration procedure that cannot escape court interference. The arbitrator has no power to enforce his orders. Additionally, as the effectiveness of an interim measure of protection depends, in the end, on its enforceability, court support may be needed (Schaefer, 1998). Arbitral tribunals usually have powers to order interim orders of protection (Lew, Mistelis & Kröll, 2003).Examples of orders which may be ordered include measures to preserve evidence and regulate the relationship of parties during proceedings. Measures may also be taken for the payment of money or for security for costs. The purpose of such measures is generally to preserve the rights of the parties and the subject matter in dispute pending the determination of the substantive matter. This is to ensure that the final order of the tribunal will be capable of being enforced and to prevent foisting a state of helplessness on the tribunal(Reisman, Craig, Park& Paulsson, 1997). Interim measures need to always be issued by the court if the tribunal itself has not been established. Also, interim measures may need to be ordered by the court for several other reasons. For example, the New York Convention requires the finality of the arbitration award for the sake of enforcement in member states.

Apart from that, interim measures are not final awards. Therefore, it is better to seek a court decision here in order to enforce it in foreign states. Furthermore, during arbitration proceedings, the court may be requested to issue provisional measures orders. In addition, in some states' arbitration rules, the tribunals in UAE cannot issue interim measures orders. Instead, such measures must be sought through the state court (Masadeh, 2013).

In the kingdom of Saudi Arabia, the Saudi arbitration law 2012 confines the term issuing interim measures in article 22 and 23 in which article 22 provides that the competent court, before starting arbitration proceedings may upon a request from a party to arbitration, issue an order of interim measure and duration of the arbitration proceedings, while arbitration tribunal shall request the court for an order of interim measures (Saudi Arbitration Act 2012, Art. 22.1). Explicitly, the Act is clear in the point of granting interim measures that it is only given to the court unless the parties to arbitration agreed to grant the power to the Tribunal to issue a necessary measures based on their request and may request the seeking party to provide sufficient financial guarantee for the execution of such proceeding., however, the Tribunal`s order will be voluntary enforced by the parties to this order is issued. In addition, in Art 22.(3) also stipulates that the Tribunal shall ask a competent agent for assistance, such as calling a witness or an expert, ordering the submission of a document or a copy thereof (Saudi Arbitration Act 2012, art. 22.3). However, in Article 23, the drafter expressly states that upon the request of either party, arbitration tribunal shall, order either party to take, as it deems fit, any provisional or precautionary measures required by the nature of the dispute.

Having said that, it would suffice to note that the Saudi arbitration Act 2012 tries to not avoid the interference of the court in arbitration proceeding by expressly giving the power to the court to issue the interim measures prior to and during the arbitration proceeding and granting power to the tribunal to issue such measures during the arbitration proceeding/process based on the arbitration agreement. Thus, the parties to arbitration must mention in their arbitration agreement the right of the tribunal to issue interim measures in order to avoid the interference of the competent court in the issuance of interim measures during the arbitration process/proceeding. However, either party is free to recourse to the competent court even through the arbitration agreement states that the tribunal have a right to grant interim measures during the arbitration. Therefore, the problem here causes confusion to the seeking party with regard to which body to recourse to request such measure; the competent court or tribunal being the Tribunal order is considered as voluntary enforced by the defendant, otherwise, the seeking party will recourse to the Competent Court or the execution department to enforce it.

On the other hand, the Act is silent in terms of where a party applies in the High Court for any interim measure and an arbitral tribunal has already ruled out on any matter which is relevant to the application or vice-versa. The question that arises here: How will each body treat the finding of other body's decision regarding the application? In other words, is it acceptable to apply for another body with the same application?

Additionally, the drafter fails to add the types of measures that shall be issued before commencing the arbitration proceedings and during the arbitration. However, the authors have succeeded in conducting some interviews with the judges and arbitrators in Saudi Arabia to discover these measures that can be issued in arbitration either before or during the arbitration. Indeed, the answers from both groups of respondents so far, were similar to each other although a few respondents from the arbitrator's side did not respond completely as required by the question. Upon request from one of the parties to arbitration before commencing the arbitration proceedings, the high court shall issue the following measures: -

- securing the amount in dispute;
- the preservation, interim custody or sale of any property which is the subject-matter of the dispute;
- the preservation, interim custody or sale of any property which is the subject-matter of the dispute;

- prevent the defendant from running any business and seize on his/her assets so that the defendant could not enter into any business either alone or as a partner.

On the other hand, with respect to the measures during the arbitration proceedings and upon request from the Tribunal, the high court shall: -

- seizure on the defendant's assets;
- sell the defendant's asset if it would get spoliation;
- seizure on the defendant's bank account;
- provide security of the cost;
- prevent the defendant from travelling out of the country.

Based on the above results, it shows that the measures are available for the court and the tribunal regardless the need to refer to the court. These measures are so far general measures and most countries including Malaysia adopt them based on the UNCITRAL Model Law.

Apart from that, based on the interview, there was inconsistency with the respondents' answers between the arbitrators and judges with regard to the question on the respondent's opinion on which authority should be in power to issue interim measures. Based on the judges' view, most prefer to have the power granted to them to be side by side and co-operating with the arbitrators in doing their job. However, two judges said that interim measures should be issued by Competent Court being have the power to enforce its order than Tribunal even though the parties to arbitration agreed to grant the power to the Tribunal, the order should be certified by the Competent Court to ensure the order is not contrary to the public policy and shari`a rules. However, the arbitrators were holding a different view; most said that if the judges have the power to issue interim measures, it will break the principle of the independence of the arbitrator in arbitration proceeding and also the principle of party autonomy in which the parties to arbitration has the right to choose their arbitration proceedings' rules and term. In addition, since the parties to arbitration selected or assigned the arbitrator to handle their case independently, it means that the parties would be away from the ordinary courts and the public. Furthermore, another respondent said that the power of issuing interim measures must be given to the arbitrator not the judges as arbitrator/sis more familiar with the merits of the case which allows the decision of interim measure to be given rapidly and wisely. If the seeking party applies to the court, it may take more time compared to applying to the tribunal because the judge will have a look into the merits of dispute in order to make the decision and it takes time being has many other cases to handle. Moreover, another arbitrator stated that, "It is not incompatible with the arbitration for a party to request, prior to or during the arbitration proceedings, from a court an interim measure of relief and for a court to grant such measure." However, the parties may request certain measures before the competent court and prior to initiating the arbitration proceedings for the parties to save their rights during the arbitration such as to freeze other party's assets or bank accounts but again, after initiating the arbitration proceeding, the seeking party must refer to the arbitrator/sin order to certify sure measure being that the court's role in arbitration is done when the arbitration proceeding gets started. Finally, one arbitrator rationally responded to the question by saying that the seeking party must request to the arbitrator/s for interim measure and wait till the arbitrator responded. If the request was approved for issuance of interim measure, the seeking party can go and proceed with the enforcement department. If the request was refused, the party has a right to request the competent court to issue the same measure which was requested from the arbitrator/s. Thus, in this approach, the principle of arbitrator independence will be preserved by them being granted the priority to handle the entire dispute without interference from ordinary court. So, the authors would agree with the last arbitrator's view with respect to both bodies in doing their job.

4. The standards and requirements to issue the interim measures

Interim relief is critical in any form of dispute resolution. Parties must have the option to seek interim measures, such as preliminary injunctions and attachments, where their adversaries threaten to take action that cannot be undone by after the potential damage occurred. Parties in international arbitrations are of no exception. For those parties, the institutional arbitration rules that they choose will have a determinative impact on whether they will be able to obtain meaningful interim relief (Sherwin & Rennie, 2009). Therefore, the applicant should have strong reasons in order to obtain the required interim measures.

The parties to arbitration are free to apply for any available measures that exist in the law that was selected to rule their arbitration. However, not every party succeeded in getting the approval for his/her request because the seeking party must convince the authority either the competent court or the Tribunal with the request, such as showing the potential damage that might be happening. Therefore, there should somehow be standards to accept the order of measure. However, these standards are not different and yet, they are not similar from court to court and from tribunal to tribunal. In other words, the standards are not consistent globally as shown in each legal system of arbitration law in which, all are silent in terms of the standards or the basis to obtain the order of the interim measure. So, each court and tribunal has its own view to accept the required order of measures. For example, in proving the likelihood of success on the merits and irreparable harm, other legal systems may require showings of exigent circumstances or probable cause(Lowry, 2004).

It is suggested for the countries to amend their National Arbitration Acts in terms of this issue in order to facilitate the obtaining of the order of interim measures, in particular, to make it easy for the decision maker, either for the competent court or the arbitrator. For example, UNCITRAL Model Law adopts the approach of, "an applicant should be required to demonstrate that it is possible (not probable) that it will prevail on the merits and that it will suffer irreparable harm if the relief is not granted"(Ferguson, 2003).

In general, the granting of arbitral interim measures revolves around requirements of i) jurisdiction, ii) *prima facie* case or probability of success on the merits, iii) urgency, iv) irreparable or serious harm to the requesting party, v) proportionality, and vi) no prejudgment of the merits. Depending on the nature of the requested type of measure, different standards might apply. Thus, the substantive standards required to grant interim measures should be analyzed in light of the intended measure(Born, 2009).

In Saudi Arabia, the Saudi Arbitration Act 2012 is silent on the issue of standards to obtain or grant interim measure either by the competent court or the arbitral tribunal. However, one of the interview questions was concerned on these standards and basis to obtain or grant the order of interim measure. The respondents from both sides, the judges and the arbitrators, have different answers which prove that there are no standards and bases pertaining to this issue and all are based on the view of the judge or arbitrator. In other words, the burden on the seeking party is to convince the authority either the court or the tribunal on the seriousness of the order. So, one of the judges says that the seeking party must provide the court with the amount in case if the order was not in compliance with the condition of the case or the other party gets hurt from applying the required measure or the other party succeeds in showing the bad faith of the seeking party. In view of the arbitrator, the arbitrator may simply ask for the security of cost for the same reason of the court. In addition, arbitrator should provide the tribunal with the documents or letter to show the seriousness of the measure or even the witness of the condition of the measure order if so needed. In the same view, other arbitrator says that the seeking party shall support his request with documents and evidence to prove the reality of the measure order.

Having said that, it would suffice to note that Saudi Arabia has problem in the basis and standards of granting interim measures either by the competent court or thetribunal because as shown above, granting interim measures is based on the requested body's view and since people from each body has different views and opinions, there would be no standard in issuing interim measures. Thus, the authors would suggest Saudi Arabia to follow the article17's approach of UNCITRAL Model law in issuing interim measures in order to unify

the standard and basis for issuing interim measures.

5. Conclusion

The availability of interim measures and its standards and basis in arbitration is subject to several varying approaches under different national laws and arbitration rules and is therefore uncertain. In addition, there is a question with regard to which authority in power to grant interim measures, whether the competent court or the tribunal. It would be suggested for the parties to arbitration to expressly mention in their arbitration agreement to obtain their interim measures from the arbitral tribunal, unless, (1) the tribunal is not in a position to grant them effectively be the Saudi Arbitration Act 2012, or (2) the parties have agreed to obtain interim measures from the courts rather than from the tribunal. With respect of Saudi Arabia, it fails to preserve the term of party autonomy in giving the power solely to the competent court in granting the interim measures rather than giving it to the tribunal by leaving the right to the parties to arbitration to give the tribunal such power which the disputants may not this issue cross their mind to stipulate it in their arbitration agreement. Nevertheless, the court will still have same power at the same time which cannot be avoided by the arbitration agreement if the parties agree on that.

The authors recommend Saudi Arabia to follow the opinion of arbitrator`s view who says that the power of granting interim measures must first be given to the tribunal and if the tribunal refuses to accept to issue it, the seeking party may recourse to the competent court with the same application but the competent court should take the tribunal's decision in consideration in making its decision. Furthermore, it is suggested that Saudi Arabia follows the rule of UNCITRAL Model Law in article 17 with respect to the approach of the standard in granting interim measures.

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