The Emergency and its Arbitrator – Efficient or Illusion?

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Emergency Arbitrators – Just a Fad?

- Emergency arbitrators appeared on the scene with remarkable swiftness:
  - First provision – ICDR Rules 2006.
  - By 2016, emergency arbitrator provisions existed in Rules of many institutions, including the LCIA, SCC, ICC, SIAC, HKIAC and Swiss Chambers Arbitration Institution.
  - Given the suddenness of this development, one might ask whether this is just a “fad” or is it a new feature of arbitration that is here to stay. The numbers suggest this new mechanism is permanent.

Emergency Arbitrators – Extent of Use

Institution	Number of Emergency Arbitrator Applications
ICDR	75 – since 2006
ICC	61 – since 2012
SIAC	57 – since 2010
SCC	27 – since 2010
HKIAC	8 – since 2013
Swiss Rules	7 – since 2012
LCIA	2 – since 2014

Presentation – Principal Topics

- Context: How do emergency arbitrators fit in the historical evolution of international arbitration?

- Mechanics: How do emergency arbitrators operate?

- Enforcement: What is the status of emergency arbitrator rulings when it comes to enforcement?

EMERGENCY ARBITRATORS - CONTEXT

Emergency Arbitrators – Context

- Emergency arbitrators should be seen as part of broader trend of steadily expanding interim relief in international arbitration over past 40 years.

- If we go back to the 1970s, many jurisdictions barred arbitrators from issuing interim measures:

  – *E.g.*, in Europe: Germany, Austria, Switzerland, Italy, Spain, and Greece.

Emergency Arbitrators – Context

- This reflected a widespread belief that courts were better suited to issue interim measures:
  - By ruling on interim relief, an arbitrator might prejudice his or her view of the case's merits
  - Interim relief believed effective only if it could be enforced; courts alone had coercive powers.

Emergency Arbitrators – Context

- Gradually, a different view emerged, recognizing that tribunals may actually possess *advantages* in handling requests for interim measures:
  - Parties already chose arbitrators to resolve their basic dispute and likely prefer that they resolve interim measures as well (*e.g.*, neutral venue, preferred language, knowledge of applicable law).
  - Arbitrators may be more familiar with facts of the dispute.
  - Even in some court systems, the same judge handles interim measures and the merits without a problem.

Emergency Arbitrators – Context

- Today, almost all States permit arbitral interim measures.
  - Modern trend was launched in 1976 by UNCITRAL Arbitration Rules expressly confirming power of arbitrators to issue interim measures and noting that recourse to courts was not inconsistent with agreement to arbitrate.

Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

UNCITRAL Arbitration Rules 1976, Art. 26

Emergency Arbitrators – Context

- Nevertheless, parties still sought interim measures from arbitrators surprisingly infrequently:
  - *E.g.*, from 1977 to 1992, only 25 requests for interim measures were submitted in all ICC arbitrations
  - Some practitioners attributed this to the difficulty of enforcing interim measures as "awards" under the New York Convention
  - Dedicated enforcement regime thus proposed in 1998

Emergency Arbitrators – Context

- UNCITRAL's Work on Enforceability of Interim Measures

  — 2000: Beginning of new project with express purpose of authorizing national court enforcement of arbitral interim measures.

  — Comprehensive regime, developed and incorporated into revised Model Law (2006), went far beyond court enforcement to address arbitral tribunals' own powers.

Emergency Arbitrators - Context

- UNCITRAL concluded it was not just enforcement that inhibited tribunals' issuance of interim relief:
  - Likely principal reason was that arbitrators and parties were in doubt as to the extent of the tribunal's powers
  - UNCITRAL thus promulgated detailed guidance on:
    - (a) what measures can be granted, and
    - (b) under what conditions they can be granted

Emergency Arbitrators - Context

- UNCITRAL Guidance
  - What types of interim measures can arbitrators grant?

> 2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
>
> *(a)* Maintain or restore the status quo pending determination of the dispute;
>
> *(b)* Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
>
> *(c)* Provide a means of preserving assets out of which a subsequent award may be satisfied; or
>
> *(d)* Preserve evidence that may be relevant and material to the resolution of the dispute.

UNCITRAL Arbitration Rules 2010, Art. 26(2)

Emergency Arbitrators - Context

- UNCITRAL Guidance
  - Under what conditions can such measures be granted?

> 3. The party requesting an interim measure under paragraphs 2 *(a)* to *(c)* shall satisfy the arbitral tribunal that:
>
> *(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 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.

UNCITRAL Arbitration Rules 2010, Art. 26(3)

Emergency Arbitrators - Context

- UNCITRAL believed it was important that arbitral interim measures be enforceable.
  - Authorization for courts to enforce provisional measures regardless of where Tribunal was seated:

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

UNCITRAL Model Law on International Commercial Arbitration (2006), Art. 17 H.

Emergency Arbitrators – Context

- Impact of UNCITRAL revisions:
  - Anecdotal evidence suggests number of interim measures requests in international arbitration has significantly increased, now that the standards are clear.
  - Guidance from the Model Law / Arbitratino Rules on interim measures is now cited in many other contexts, including by emergency arbitrators.

Emergency Arbitrators – Context

- Nonetheless, strengthening the availability of arbitral interim measures did not solve the problem of how to get relief before an arbitration starts:

  — Parties traditionally had little choice but to go to courts

  — Emergency arbitrators now fill this gap, allowing parties to avoid going to court when seeking pre-arbitration relief.

EMERGENCY ARBITRATORS - MECHANICS

Emergency Arbitrators – Mechanics

- How do emergency arbitrator provisions work?
  - Application must come from signatory to arbitration agreement.
  - Strict time limit on appointment of emergency arbitrator and issuance of decision.
    - SCC – decision required within **5 days** of appointment.
    - ICC – decision required within **15 days** of appointment.
    - Exception – ICDR Rules do not contain time limit for issuance of decision.

Emergency Arbitrators – Mechanics

- How do emergency arbitrator provisions work?
  - Many institutions require request for emergency arbitrator to be linked with a Request for Arbitration:
    - Request for emergency arbitrator must often be filed "**concurrent with or following**" a Request for Arbitration, but prior to constitution of the tribunal (*e.g.* ICDR, SIAC, HKIAC).
    - ICC allows Request for Arbitration to be filed **up to 10 days after** request for emergency arbitrator.
    - SCC rules do not require a link with a Request for Arbitration.

Emergency Arbitrators – Mechanics

- How do emergency arbitrator provisions work?
  - Interim relief granted by emergency arbitrator can be rescinded by the tribunal in the arbitration.
  - Costs consist principally of a flat fee to be paid up front by requesting party.
    - SCC: US$ 23,400 (€ 20,000)
    - ICC: US$ 40,000
    - ICDR: No specific filing fee – emergency arbitrator's expenses covered by parties
  - Emergency arbitrator provisions typically provide little guidance as to available relief.
    - *E.g.* "The order shall be made in writing and shall state the reasons upon which it is based." (ICC Rules, Schedule V, Art. 6(3)).

Emergency Arbitrators – Mechanics

- Variations among emergency arbitrator regimes:
  - **LCIA**:
    - Alternative of expedited tribunal formation– much older mechanism which still remains popular according to recent data.
  - **ICC**:
    - Bars applications naming non-signatories to arbitration agreements as parties to emergency arbitrator proceedings.
    - Limits emergency arbitrator decisions to taking the form of "orders" as opposed to "awards".
      - Compare, e.g., HKIAC Rules, Schedule 4, Art. 12 – "Any decision, order **or award** of the Emergency Arbitrator […] shall be made within fifteen days…"
  - **ICDR**:
    - No express time limit for the issuance of an emergency arbitrator decision.
    - No specified application fee must be paid by applicant.

Emergency Arbitrators – Mechanics

- Do these provisions operate successfully?
  - In first two years of ICC experience, all State respondents participated.
    - *But see* Ukraine's objections in *JKX Oil & Gas* case
  - Application for emergency arbitrator does not guarantee relief.
  - Wide range of potential forms of relief, from anti-suit injunctions to orders to continue payment.
  - Early data suggests that emergency arbitrator rulings are often left undisturbed by tribunals and may precipitate settlement

EMERGENCY ARBITRATORS - ENFORCEMENT

Emergency Arbitrators - Enforcement

- Most parties appear to voluntarily comply with emergency arbitrator rulings.

- However, parties seem to care about the enforceability of emergency arbitrator decisions. What are the prospects?
  - Emergency arbitrator decisions unlikely to be treated as "awards" under the New York Convention.
  - Article 17H of UNCITRAL Model Law (2006) applies only to interim measures "issued by arbitral tribunals," so applicability unclear.
  - Hong Kong and Singapore have enacted statutes governing enforcement of decisions issued by emergency arbitrators.

Emergency Arbitrators - Enforcement

- Santens / Kudrna (2017) conducted a global study of enforcement of emergency arbitrator provisions:
  - Public information about fewer than 10 decisions.
  - Some interim awards/ orders enforced in particular circumstances, *e.g.* in Democratic Republic of the Congo and United States.
  - Most famously, *JKX* award enforced in Ukraine.
    - Believed to be first instance of emergency arbitrator decision enforced against a State.