# EMERGENCY ARBITRATORS AND EMERGENCY RELIEF

## A PARTY REPRESENTATIVE'S PERSPECTIVE

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**EMERGENCY ARBITRATORS AND EMERGENCY RELIEF – A PARTY REPRESENTATIVE'S PERSPECTIVE**

Emergency relief seems to be the weakest link in the commencement of the international arbitration process despite the fact that in many international commercial disputes, it is a much-needed security. Arbitration proceedings ordinarily have the capacity to meet the needs of the parties except where urgent interim measures are required before the arbitral tribunal is constituted or even before a request for arbitration is filed. In many instances, the traditional judicial system has been more efficient in granting urgent relief and has produced the desired result.

Many arbitral institutions in a bid to bridge this gap have now put in place rules to provide emergency relief to parties before the constitution of the arbitral tribunal.

The International Centre for Dispute Resolution blazed the trail in 2006, followed by the Arbitration Institute of the Stockholm Chamber of Commerce in 2010. Other institutions such as the Singapore International Arbitration Centre, the Swiss Chambers of Commerce, the ICC International Court of Arbitration and the London Court of International Arbitration followed[1].
The rules are in place and available to parties. Are these rules practical? We will look at

(a) How responsive institutions are when a party claims an emergency need for relief.
(b) How well the rules work to ensure that the parties are heard and
(c) How effective the outcomes are when measures are granted.

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[1] *ICDR International Dispute Resolution Procedures (including Mediation and Arbitration Rules) Amended and effective June1, 2014; Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules 2010; Singapore International Arbitration Rules 2013; Swiss Rules of International Arbitration June 2012; ICC Rules of Arbitration 2012; London Court of International Arbitration Rules October 2014*

## Responsiveness of Institutions

How responsive and how quickly do the institutions start the process once an application is received seeking emergency interim relief?

*ICC*

The ICC International Court of Arbitration has a designated email address[2] for submissions of applications for emergency relief. The secretariat reacts quickly to applications and applications are quickly notified to the management of the Secretariat and the President of the International Court of Arbitration.

The President has the responsibility of deciding whether the Emergency Arbitrator Provisions will apply to the application. Appointments are usually made within two (2) days of the receipt of the application for relief[3]. Available statistics show that in all applications filed, this decision was made within 48 hours and in most cases in less than 24 hours.

*ICDR*

The International Centre for Dispute Resolution rules provide that the Administrator of the Secretariat appoints an emergency arbitrator within one (1) business day of the receipt of the application for emergency relief[4].

*SCC*

The Arbitration Institute of the Stockholm Chamber of Commerce rules provide in Article 4, Appendix 2 for an appointment of an emergency arbitrator by the Board within 24 hours of the receipt of the application for emergency relief[5]

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[2] *emergencyarbitrator@iccwbo.org - see (http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/emergency-arbitrator/)*
[3] *Appendix V Article 2 (1)*
[4] *Article 6(2)*
[5] *Appendix 11, Article 4(1)*

*SIAC*

The Singapore International Arbitration Centre Rules provide for the appointment of an emergency arbitrator within one (1) business day of the receipt of the application[6].

*SRIA*

The Swiss Chambers of Commerce Arbitration Rules do not specify a time frame for the appointment of an emergency arbitrator. An emergency arbitrator is to be appointed as soon as possible after the receipt of the application for relief[7].

*LCIA*

The London Court of International Arbitration Rules provide that an emergency arbitrator would be appointed within three (3) days of the receipt of the application or as soon as possible thereafter[8].

It would seem that the institutions are quite responsive when parties make applications for emergency relief. However, once the application is made, how effective are the rules?

## Effectiveness of the Emergency Arbitrator Provisions.

The rules of the institutions that have provided for emergency arbitrators are materially similar and we will examine the ICC rules with input of statistics from other institutions.

The Emergency Arbitrator Provisions of the ICC International Court of Arbitration apply only to the parties who are signatories to the arbitration agreement relied upon or the successors of those parties[9]. In the event that interim relief is required against a third party, the applicant would still need to

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[6] *Schedule 1 Rule 2*
[7] *Article 43 (2)*
[8] *Article 9B (9.6)*
[9] *Article 29 (5)*

fall back on the national courts. An example would be an attempt to freeze funds held by one of the parties in a bank, which is not a party to the arbitration. However, a decision that the application is inadmissible because one of the parties is not a signatory to the relevant arbitration agreement is without prejudice to the identification of the parties to the subsequent arbitration proceedings.

The provisions would not apply if the arbitration agreement was concluded before the 1st of January 2012 (although parties may opt-in), or parties have opted out of the Emergency Arbitrator Provisions or parties have agreed to a different pre-arbitral procedure, which provides for the grant of conservatory, interim or similar measures[10].

The application cannot be made exparte and must be on notice to the other party[11]. In instances where catching the other party by surprise is vital, such as where a freezing injunction or a mareva injunction is sought, the provisions are really not of much use.

The application can be filed before a request for arbitration has been filed. Once an application for emergency relief has been filed, and there is no request for arbitration filed, the request for arbitration must be submitted within ten (10) days of the submission of the application for emergency relief. The time may however be extended by the emergency arbitrator[12].

As of the 31st of May 2014, only ten (10) applications had been filed under the Emergency Arbitrator Provisions of the ICC Rules. Of the ten (10), two (2) were inadmissible; four (4) were dismissed, while four (4) were granted, some partially.

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[10] *Article 29 (6)*
[11] *Appendix V Article 1 (5)*
[12] *Article 29 (1); Appendix V Article 1(6)*

The amounts in dispute ranged between USD 500,000 (Five Hundred Thousand Dollars) and USD 54,000,000 (Fifty Four Million Dollars Only). In spite of the fixed up-front fee of USD40, 000 (Forty Thousand Dollars)[13], the use of the procedure has not been restricted to extremely high value cases.

One (1) of the ten (10) applications was made in a multi contract case involving four (4) related contracts containing different but compatible arbitration agreements.

One (1) of the ten (10) applications was filed in an ongoing arbitration and was considered and held to be admissible and the emergency arbitrator proceedings set in motion. In one (1) application, the applicant submitted and requested an exparte order. The secretariat however notified the respondent of the filing of the application after informing the applicant of its intention to do so. Three (3) of the ten (10) arbitrations were terminated by the parties before the constitution of the arbitral tribunal and one (1) shortly after the constitution of the tribunal. It may be reasonable to speculate that the results of the emergency arbitrator proceedings had some bearing on the decision to terminate the arbitration proceedings[14].

Between the years 2010 – 2013, there were a total of Seven Hundred and Seventy Six (776) arbitration proceedings filed in the Arbitration Institute of the Stockholm Chamber of Commerce. Out of these, there were a total of nine (9) emergency arbitrator cases. In two (2) of these cases, the respondents gave undertakings that rendered the order of an emergency arbitrator unnecessary, while relief was only granted in two (2) other cases.

The Singapore International Arbitration Centre had thirty-four (34) applications for emergency relief between 1st of July 2010 when the rules came into force and 6th of March 2014. Twelve (12) of the applications were granted. (Four (4) by

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*[13] Appendix V Article 7 (1)*
*[14] Carlevaris and Feris: ICC International Court of Arbitration Bulletin Volume 25 Number 1- 2014*

consent of the parties and two (2) were granted in part). Eleven (11) of the applications were rejected while the rest were withdrawn or were pending as of the date under reference.

The procedure has been used in situations, which include but are not limited to those cases where equivalent relief may not have been available from a national court.

Measures sought fell into four (4) categories

- **Measures to secure enforcement of the award**. Orders requiring the respondent not to jeopardize during the course of the arbitration the funds necessary to fulfill the payment obligations under the parties contract. Requests for sums of money to be placed in escrow in order to ensure that the funds are available to satisfy the Award. A mareva injunction against a respondent restraining the disposal of shares and the dissipation of assets. A freezing order restraining the respondents from transferring assets and granting an order for the disclosure of financial records and statements
- **Measures to preserve the status quo**. Orders not to call a bank guarantee pending the completion of the arbitration proceedings and the issuance of an Award. Orders to refrain from the transfer of equity and the selling of corporate assets. Orders to permit the sale of a coal shipment deteriorating at a Chinese port over the Chinese New Year because the buyer had not accepted it. Orders to preserve the position of the Claimant as the exclusive distributor of respondents' products.
- **Anti –suit injunctions**. Orders to refrain from initiating action in National Courts or to discontinue actions already instituted. An order restraining a respondent from breaching a confidentiality agreement by filing suits in multiple jurisdictions.
- **Interim payments**. Orders to make immediate payment subject to the right to seek reimbursement after the arbitration proceedings are concluded and Award issued.

The fact that the arbitral tribunal has been constituted does not stop the emergency arbitrator from issuing an order[15]. Within fifteen (15) days of receiving the file, the emergency arbitrator must issue his order[16].

The parties can challenge the appointment of an emergency arbitrator. A challenge must be filed within three (3) days of the party challenging receiving notice that the appointment has been made or becoming aware of facts and circumstances grounding the challenge, if that date is later[17]. A challenge to the appointment however does not suspend the proceedings. The challenge can still be decided even after the emergency arbitrator has given his order.

A difficulty arises with multi tiered arbitration dispute resolution clauses. These are clauses that provide for resolution of disputes by either negotiation or mediation or both before a final resort to arbitration of the dispute cannot be settled.

In one case, an objection was raised that as the time interval required between the different processes had not yet lapsed, there could not be a committal by the parties to the arbitration process. As a result, no jurisdiction rested in the emergency arbitrator and the ten (10) day mandatory rule for the filing of a request for arbitration could not be complied with without triggering a breach of the terms of the arbitration agreement. The objection was dismissed and the Emergency Arbitrator retained jurisdiction. He held that to uphold the objection would deprive the parties of the ability to obtain emergency relief when they needed it the most, which was after the dispute had arisen, but before the constitution of the arbitral tribunal. This scenario led to the publication of new model clauses in the 2014 ICC Mediation Rules which parties are enjoined to adopt bearing in mind that they may wish to have recourse to the Emergency Arbitrator Provisions and the timing of such recourse.

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[15] *Appendix V Article 2(2)*
[16] *Appendix V Article 6(4)*
[17] *Appendix V Article 3 (1)*

Another difficulty that has arisen is the issue of concurrent state court and emergency arbitrator proceedings. There have been challenges based on contractual clauses stating that the parties accepted the jurisdiction of national courts for the purposes of obtaining conservatory and interim relief. These objections were dismissed however on the grounds that the agreement to opt out of the emergency arbitrator provisions must be explicit and unambiguous. Emergency arbitration procedures are not envisaged to represent an exclusive remedy and the option of or submission to those proceedings does not operate as a waiver of judicial authority over the matter. However, the provisions of mandatory local law may reduce recourse to the courts since the parties have an option to seek relief from another source.

It is noted that the emergency arbitration provisions do not set down any substantive standards other than the urgency of the measures requested. There seems from the available statistics to be a leaning towards international arbitration practice, which involve considerations such as a prima facie case for the measures requested, and the risk of irreparable harm rather than the relevant national law standards. What weight should an emergency arbitrator give to decisions made by a national court especially in cases where earlier applications had been made to the national court?

## Are Orders made effective in practice?

The Emergency Arbitrator Provisions of the ICC Arbitration Rules differ from those of other Centre Rules in that the provisions require that the emergency arbitrator's decision take the form of an Order[18] rather than an Award. This raises the question of whether the Order would have the same status as a relief granted under Article 28(1) of the same Rules.

How would the Orders be enforced? What are the sanctions for non-compliance? Do the relevant national arbitration laws recognize emergency arbitrators or

[18] *Appendix V Article 6 (1)*

indeed pre-arbitral procedures? To what extent would courts enforce orders or awards made by emergency arbitrators? Would an emergency arbitrator be regarded as an arbitrator for the purposes of arbitration legislation and are they seen as granting relief in the course of proceedings? Would the Order of an emergency arbitrator be enforceable under national legislation or under the New York Convention?

Singapore recognizing the difficulties that would arise has amended its Arbitration Act[19] to provide that an emergency arbitrator will enjoy the same status as a regular arbitrator in a properly constituted tribunal and that the decision of an emergency arbitrator whether labeled as an "Order" or an "Award" will be enforceable in Singapore. Hong Kong passed a law allowing its national courts to recognize and enforce both domestic and foreign decisions issued by emergency arbitrators ruling under any rules agreed upon by the parties. In the United States of America, the US Court of Appeals for the 7th Circuit rejected the distinction between orders and awards. The arbitral tribunal's interim measures were upheld as final for enforcement purposes[20].

It is unlikely that the order of an emergency arbitrator would be enforceable under the New York Convention as the order (in the case of ICC) is not described as an Award and may not satisfy the requirement of finality under the convention being an interim order. The order may however be enforceable under other provisions of certain national laws.

Where parties are required by the Arbitration Rules governing the arbitration to give an undertaking to comply with the orders of an emergency arbitrator[21], a claim may lie in breach of contract. As such, arbitral tribunals have the power to reflect non-compliance with the orders of emergency arbitrators in the final award of damages.

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[19] *Singapore Arbitration Act Amendment 2012*
[20] *Publicis Communication v True North Communications Inc. 2006 F.3d 725 14 March 2000*
[21] *See Article 29 (2) ICC Rules*

It should also be noted that orders granted by emergency arbitrators are morally binding on the parties. A party against whom an order is made would be unwise to ignore it except that party intends to adopt a policy of complete default. This is because the tribunal is likely to have a poor view of a party who ignores the order of an emergency arbitrator. The respondent is under psychological pressure to comply with the Order to prevent the drawing of adverse inferences against it by the constituted tribunal. As such voluntary compliance has been the trend.

The Orders of the emergency arbitrator do not bind the tribunal that is subsequently constituted. The arbitral tribunal is at liberty to reconsider, modify, annul or terminate the emergency arbitrator's orders. Where the order is not modified, terminated or annulled, it will remain in force until the arbitral tribunal's final award is rendered unless (a) the applicant fails to file a request for arbitration within ten (10) days of submitting the initial application for relief, (b) the ICC Court accepts a challenge against the emergency arbitrator or (c) the arbitration is terminated before the rendering of a final award[22].

Emergency arbitrators have the power to require the applicant to provide appropriate security before the relief is granted[23]. This helps to cushion the effect of any damage that may occur if the order is wrongly granted.

*So what does this mean for a party in an arbitral proceeding?*

Parties need to know more about emergency arbitrator proceedings. What are the consequences of choosing an emergency arbitrator over the National Courts and vice versa? In which court does the party ultimately need to enforce the emergency relief order and is that jurisdiction favorable to emergency arbitration? Can the relief sought wait until the arbitral tribunal is constituted or for the national court to make a decision? Are the costs involved in engaging with

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[22] *Appendix V Article 6(6)*
[23] *Appendix V Article 6(7)*

an emergency arbitrator prohibitive taking the totality of the claim into consideration?

The real advantage of emergency arbitration is in its ability to enable parties avoid situations where emergency relief is needed and the only court capable of granting relief is in a foreign country with unfamiliar legal procedures or perceived as not being sufficiently independent. The proceedings may be cheaper than proceedings in national courts in some jurisdictions and may be more confidential than national court procedures. However national courts may sometimes be the only available route for emergency relief either because the emergency arbitration provisions do not apply or because in some jurisdictions the power to grant interim relief is reserved in the national courts, such as in Italy and Greece. In addition, national courts will accept exparte applications in appropriate circumstances and their orders are more easily enforced, though may be subject to appeal.

Legislation and case law will need to develop more in jurisdictions in order for the emergency arbitrator provisions of the different Centre's to be more attractive to parties.

**CASE STUDIES**

***CASE ONE***

A claimant sought an injunction to restrain a respondent from calling up bank guarantees, which were provided under a contract for the provision of dredging services at an Indian port. Within forty-eight (48) hours, an emergency arbitrator had been appointed and a schedule established to deal with the application. The application was conducted via a telephone hearing. The bank guarantees in the mean time however had been called and so the emergency arbitrator issued an interim order:

(a) Directing the respondent to deposit the proceeds received into the bank to the credit of the claimant and
(b) That the amount be not withdrawn until a final Award is given by the constituted tribunal.

***CASE TWO***

The claimant applied for relief in order to secure a claim on an outstanding amount relating to a trans-shipment, which the respondent had failed to pay. Two of four requests were denied as they were directed towards third parties. The other requests aimed to prohibit the respondent from disposing of shares and real estate. The emergency arbitrator in denying the application for interim relief held that the Claimant did not show that the sale of such assets would be to his detriment.

***CASE THREE***

Yahoo! Inc. and Microsoft Corporation affirmatively opted-in to the optional rules for emergency relief, since they entered into the contract before the AAA had integrated the provisions into its standard rules.
When Yahoo! Stated that it would pause performance on the contract for some months, Microsoft sought and received an emergency award, preventing Yahoo! from withholding its performance. Yahoo! Objected to the Order on the grounds that it amounted to a final award and not an interim order. The Court reasoned that the rules allowed for “interim, injunctive, or emergency relief”. In that case, Microsoft got everything it wanted from the emergency arbitration without a need for the parties to continue with a full arbitral proceeding and all in a mere twenty-six (26) days.