Emergency Arbitrators and Interim Relief in International Commercial Arbitration

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1. Introduction

The rise of international arbitration has seen the development of many procedures to accommodate parties' ever-changing needs. One such development is the concept of the emergency arbitrator – an arbitrator appointed post-haste upon the application by a party to arbitral proceedings for a decision on an urgent issue that cannot wait until the constitution of the arbitral tribunal. Typically, the emergency arbitrator is appointed to issue 'emergency', 'urgent' or 'conservatory' relief, and his or her jurisdiction and decisions are upheld until the arbitral tribunal is constituted. The emergency arbitrator's jurisdiction and powers cease forthwith on the appointment of the arbitral tribunal, at which point any emergency interim measures issued may be reconsidered, vacated or modified by the arbitral tribunal. The emanation of emergency arbitrator provisions in the rules of many of the world's leading arbitration institutions has raised considerable interest in the international arbitration community, with many beginning to notice the development of a trend that has the potential to change the face of arbitration on a global scale.

The growth of emergency arbitrator provisions is most likely a function of the increasing expediency with which parties to international arbitrations choose to have their disputes settled, and is a clear indication of the capability of arbitration and the flexibility that it offers to its users. Previously, parties were required to make an application to national courts to obtain any relief in exigent matters which arose before the constitution of the arbitral tribunal. In many cases, simply awaiting the constitution of the arbitral tribunal would not suffice, yet

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application to national courts often took equally as long (if not longer). So, emergency arbitrator provisions have added a new practical dimension to the way parties' disputes may be progressed.

2. Emergency arbitrator provisions

While many sets of institutional rules allow for the expedient formation of the arbitral tribunal to mitigate against any delays, fewer go one step further to allow for the appointment of emergency arbitrators. There are recent notable exceptions to this, particularly in the Asia-Pacific region. In Australia, the Arbitration Rules of the Australian Centre for International Commercial Arbitration (ACICA), as amended in 2011, expressly provide for the appointment of emergency arbitrators in Schedule 2. This provision has been kept in the draft of the 2015 Rules released by the ACICA's Rules Sub-Committee for public comment and discussion prior to consideration by the ACICA Board. The 2012 Arbitration Rules of the International Chamber of Commerce (ICC) also incorporate provisions for the appointment of emergency arbitrators. The ICC Rules provide a more detailed procedural regime for emergency arbitrators (mostly with respect to application time frames and particulars) than the ACICA Rules. In Singapore, the Singapore International Arbitration Centre (SIAC) Rules, last amended in April 2013, contain express emergency arbitrator provisions in Schedule 1. Likewise, the 2013 Rules of the Hong Kong International Arbitration Centre (HKIAC) also contain emergency arbitrator provisions.

Most recently, the London Court of International Arbitration (LCIA) introduced emergency arbitrator provisions into its Rules in October, 2014. These are in addition to, and not a substitute for, the parties' right to apply to the courts for interim measures. The appropriate course of action will need to be considered by the parties on a case-by-case basis. If the application for appointment of an emergency arbitrator is successful, the LCIA Court has three days within which to make the appointment. The emergency arbitrator must decide the claim for emergency relief within 14 days of appointment. A hearing is not required and the emergency arbitrator has the option to decide the matter on documents only. The ruling of the emergency arbitrator is temporary and may subsequently be confirmed, varied, discharged or revoked, in whole or in part, once the arbitral tribunal has been appointed. The emergency arbitrator provisions apply only to arbitrations where the arbitration agreement was entered into on or after 1 October 2014, though it is possible to opt out. The provisions apply to arbitration agreements entered into before this date only if the parties expressly opt in.

The provisions of both the ACICA Rules and the ICC Rules enable the appointment of an emergency arbitrator in an arbitration that has commenced (as commencement is defined under the respective Rules) and in which an arbitral tribunal has not yet been appointed. Thus, by accepting ACICA or ICC arbitration, parties accept not only arbitration

according to the ACICA or ICC Rules, but also consent to be bound by the emergency rules and any decisions of the emergency arbitrator. This means the enforceability of an emergency arbitrator's decisions is treated in exactly the same manner as any decisions of a conventional arbitrator. The questions of what constitutes 'arbitral proceedings', or who is an 'arbitrator', or whether an 'award' or an 'order' was issued, are likely to be non-issues for the purposes of enforceability under Australia's International Arbitration Act 1974 (Cth) (or, for example, the UK's Arbitration Act 1996). While there is a paucity of either Australian or UK jurisprudence to confirm this view, a purposive approach – which recognizes that the primary purpose of arbitration legislation is to respect the parties' agreement to arbitrate their disputes – would appear to lend support in favour of the enforcement of emergency arbitrators' orders or awards.

From a different perspective, there may be the potential for a party to be found to be in breach of contract if it fails to comply with an emergency arbitrator's award or order. Both the ACICA and ICC Rules require parties to give an undertaking to comply with any emergency interim measure issued by an emergency arbitrator without delay. In addition, Article 29(4) of the ICC Rules allows arbitral tribunals to take into consideration any non-compliance with an emergency arbitrator's decision when finalizing costs and damages.

The emergency arbitrator procedure in the ACICA Rules calls for ACICA to use its best endeavours to appoint the emergency arbitrator within one business day of its receipt of an application for emergency relief, while the ICC Rules specify 'as short a time as possible, normally within two days' of an application. The arbitrator will be selected on the basis of his or her expertise and immediate availability. While there is no express provision in either set of rules for the parties themselves to choose the emergency arbitrator, both the ACICA and the ICC Rules do not necessarily preclude ACICA or the ICC from appointing a person selected by the parties.

Both the ACICA and ICC Rules allow the emergency arbitrator to grant any interim measures on an emergency basis that he or she deems necessary and on such terms as he or she deems appropriate. Under the ACICA Rules, such emergency interim measures may take the form of an award or of an order and must be made in writing, containing the date when the award or order was made and reasons for the decision. However, under the ICC Rules, the emergency arbitrator's decision is to take the form of a written order and must include the reasons on which it is based, the date on which it was made and the signature of the emergency arbitrator. The emergency procedures under either set of rules do not prejudice a party's right to apply to any competent court for interim measures.

Similar procedures are provided pursuant to Schedule 1 of the 2013 SIAC Rules. A party may make an application for emergency interim relief once it has filed a Notice of Arbitration by notifying the Registrar and the other party or parties of the nature of the relief sought and

why it is requested. If the application is accepted, the President of SIAC should seek to appoint an emergency arbitrator within one business day of receipt of the application. The emergency arbitrator has the power to award any relief deemed necessary and is required to give reasons. Emergency arbitration under the SIAC Rules typically takes around 7–10 days from application to award.

As to Hong Kong, the HKIAC's 2013 Administered Arbitration Rules incorporate an emergency arbitrator procedure enabling parties to seek interim or conservatory relief prior to the constitution of the arbitral tribunal. Any emergency relief granted by an emergency arbitrator has the same effect as an interim measure and is binding on the parties. The HKIAC Rules differ from the ICC Rules in that under the former applications for emergency relief can be made only between the service of the Notice of Arbitration and the constitution of the tribunal. Under the HKIAC Rules, as under the ACICA Rules, the emergency arbitrator's mandate ceases once the tribunal is constituted.

The HKIAC's emergency arbitrator provisions, which constitute Schedule 4 of the Administered Arbitration Rules, enable the parties to appoint an emergency arbitrator within two days of the HKIAC's acceptance of the application. That acceptance will depend on whether the relief sought is truly urgent and cannot wait until the arbitral tribunal is constituted. Once appointed, the emergency arbitrator should issue a decision within 15 days of receiving the file. The emergency decision will bind the parties until the emergency arbitrator or arbitral tribunal decides otherwise, the rendering of a final award by the arbitral tribunal (unless otherwise specified), the termination of the arbitration before the final award, or 90 days have elapsed from the date of the emergency decision without the arbitral tribunal being constituted.

The International Centre for Dispute Resolution (ICDR) – the international division of the American Arbitration Association – released revised International Arbitration Rules, effective 1 May 2014, which provide for the granting of emergency relief by way of an emergency arbitrator on written application by a party before the constitution of the tribunal. On receipt of an application, the ICDR will appoint an emergency arbitrator within one business day. ICDR's emergency arbitrator provisions are contained in Article 6 of the rules and they differ from those of other institutional rules, where the institution has discretion to refuse the application. Since an application must be made on notice to the other party, recourse to the courts at the seat may nonetheless be appropriate in cases where relief is required on an ex parte basis. A request for interim measures from a judicial authority is not deemed incompatible with the emergency arbitrator provisions or the agreement to arbitration.

The most recent version of the Arbitration Rules of the Stockholm Chamber of Commerce (SCC), dating from January 2010, includes provisions for the appointment of an emergency arbitrator. Under the previous SCC Rules, a party could not request an interim measure until the case had been referred to the arbitral tribunal. The emergency

arbitrator mechanism was intended to bridge this gap and provide parties with the possibility of obtaining interim measures before the case is referred to the arbitral tribunal. The SCC Rules allow a request for an emergency decision on interim relief to be made prior to and after the commencement of arbitration, but before the case has been referred to the arbitral tribunal. The decision shall be made no later than five days from the referral of the case to the emergency arbitrator and may be subject to provision of appropriate security. However, the five-day period may be extended by the SCC's board of directors upon a reasoned request from the emergency arbitrator or if it is otherwise deemed necessary. This might be the case, for example, if the respondent has not been served with notice or notification has taken a long time. Such notification is necessary as the emergency arbitrator is not intended to be available on an ex parte basis. As with SIAC, ACICA and the ICC, the SCC's emergency arbitrator provisions are designed as an opt-out solution and thus apply to all SCC arbitrations unless the parties expressly agree otherwise. They even go one step further by applying the opt-out feature in respect of the emergency arbitrator provisions retroactively. This enables parties arbitrating under the SCC Rules to use the emergency procedures even if their arbitration agreement was concluded prior 1 January 2010.

The latest version of the Kuala Lumpur Regional Centre for Arbitration (KLRCA), which entered into force on 24 October 2013, includes provisions for the appointment of emergency arbitrators. Under these provisions, the emergency arbitrator shall act to determine all applications for emergency interim relief until the constitution of the arbitral tribunal. The order or award granted by the emergency arbitrator has the same effect as an award and is binding on the parties.

3. Are emergency arbitrator provisions really useful?

Despite their recent popularity, many arbitration practitioners have looked upon the emergency arbitrator provisions that have emerged in revised editions of institutional rules with a measurable degree of doubt. Some practitioners have seen this as a 'follow the leader' trend and questioned the actual efficacy of such provisions. In particular, their concerns have revolved around the following two questions:

a) What exactly is the definition and nature of an 'emergency' that might necessitate emergency relief and the appointment of an emergency arbitrator?

b) Does the market actually have a need for emergency arbitrators?

Related questions centre on the enforceability of the emergency arbitrator's decisions, which has been addressed in section 2 above.

With regard to the question of what constitutes an 'emergency', Rule 3.5 in Schedule 2 of the ACICA Rules states that a parties requesting an emergency interim measures are required to show that:

(a) irreparable harm is likely to result if the Emergency Interim Measure is not ordered;

(b) such harm substantially outweighs the harm that is likely to result to the party affected by the Emergency Interim Measure if it is granted; and

(c) there is a reasonable possibility that the requesting party will succeed on the merits …

Article 1.3 of Schedule 2 of the ACICA Rules requires the requesting party also to provide details of:

(a) the nature of the relief sought;

(b) the reasons why such relief is required on an emergency basis; and

(c) the reasons why the party is entitled to such relief.

The requirements of Article 1.3 above are quite rudimentary. However, the use of the expression 'irreparable harm' in Article 3.5 calls for the appointment of an emergency arbitrator and the issuance of emergency relief only where there exists an unavoidable and rather dire situation. Examples of such situations might be when one party wishes to prevent the other party from dissipating its assets or from pursuing a more nefarious agenda such as destroying evidence. In comparison, the ICC Rules appear not to make any direct reference to the severity of the circumstances required to justify such an emergency procedure. Article 1(3) of the ICC Emergency Arbitrator Rules is in line with Article 1.3 of the ACICA Rules and simply provides that an application for the appointment of an emergency arbitrator shall contain:

(c) a description of the circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration; …

(e) the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal.

By referring to 'why the applicant needs urgent interim or conservatory measures', the ICC Rules appear to suggest a more party-oriented, subjective approach to the circumstances necessary for the appointment of an emergency arbitrator and the issuance of urgent relief. The same may be said of the SIAC Rules, as paragraph 1 of Schedule 1 requires the applicant to provide reasons in support, after which the President may determine whether to accept the application. The corollary of this is that whereas the ACICA Rules present a more binary distinction between circumstances where the appointment of an emergency arbitrator is necessary and where it is not, the President of the ICC International Court of Arbitration, who is the appointing authority for emergency arbitrators under the ICC Rules, is afforded more discretion when deciding whether the circumstances warrant the appointment of an emergency arbitrator. The disparate requirements of each set of rules leave little wonder as to why so many have questioned when, exactly, the provisions should be invoked.

As to the market's call for emergency arbitrators, there are obvious situations (as mentioned above) that would seem appropriate for the appointment of an emergency arbitrator and the dispensation of urgent

relief. Whether these situations are, in fact, frequently encountered by parties to international arbitrations and justify a formalized procedure is an entirely different question.

While there appears to be no conclusive Australian authority that has passed comment on the issue, one may look to the statistics regarding the use of emergency arbitrator provisions in the rules of other international arbitration institutions in an attempt to glean the market's appetite for such emergency procedures. A number of major international arbitration institutions have reported usage of the emergency arbitrator provisions in their rules.

For example, the ICC International Court of Arbitration administered six applications for emergency measures in 2014 and the same number in 2013.[2] Amounts in dispute in the first ten cases ranged from USD 500,000 to USD 54 million with an average of USD 15 million, indicating that despite the high initial costs involved (a fixed upfront fee of USD 40,000), the use of emergency arbitrator procedures has not been restricted to high value cases.[3] The SIAC[4] received and accepted 12 applications to appoint an emergency arbitrator in 2014. This took the total number of such applications accepted since the inception of its emergency procedure in July 2010 to 42. The Arbitration Institute of the SCC[5] administered emergency arbitrator proceedings in four cases in 2014. One concerned a share purchase agreement, another a construction agreement and the remaining two investment treaty protection agreements. This was more than in 2013, when emergency arbitrator proceedings were used in only one case, and in 2012, when there were two cases.

4. Enforceability of rulings issued by emergency arbitrators

Despite the increasing use of emergency arbitrator proceedings, there are lingering doubts as to the enforceability of the rulings issued in those proceedings and, especially, whether or not they can be considered 'final and binding' and therefore enforceable under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York Convention).

Countries have taken differing approaches to this question and whilst in many cases there has not been enough time and experience of the procedures to allow conclusions, there are some trends and lessons available which should assist institutions and jurisdictions coming to terms with the enforceability of rulings issued by emergency

2 See http://iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/.
3 A. Carlevaris & J. Feris, 'Running in the ICC Emergency Arbitrator Rules: The First Ten Cases' (2015) 25:1 *ICC International Court of Arbitration Bulletin* 25 at 28.
4 SIAC Annual Report 2014, see http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2014.pdf.
5 See http://www.sccinstitute.com/statistics/.

arbitrators. Under the ICC Rules, the emergency arbitrator's decision is rendered in the form of an order, which is binding on the parties and with which they undertake to comply. ICC Arbitration Rules and their Appendix V (Emergency Arbitrator Rules) are silent on the question of enforcement of the emergency arbitrator's order, and it is unclear whether it has the same legal effect as an order[6] for interim measures by an arbitral tribunal under Article 28(1) of the ICC Arbitration Rules.

A recent example is illustrative of the way in which emergency relief is granted and enforced.[7] In the week leading up to the 2015 Australian Formula 1 Grand Prix, the Victorian Supreme Court was presented with an urgent application to enforce a Swiss final arbitral award, which effectively ordered Switzerland's Sauber Motorsports to replace its driver, Giedo van der Garde. The Dutch racing driver had been notified in November 2014 that he would no longer be driving for Sauber Motorsports AG and, within days of notification, made an application for emergency proceedings under Article 43(1) of the Swiss Rules of International Arbitration. He sought interim injunctive relief to restrain Sauber from taking any action. His request was granted by an emergency arbitrator pending final determination at arbitration in February 2015. The final injunction was fast-tracked and heard in London under the Swiss Rules. The sole arbitrator granted a final injunction in favour of van der Garde two weeks before the start of the 2015 season.

On 5 March 2015, van der Garde filed an Originating Application to Enforce Foreign Award with the Supreme Court of Victoria. Four days after being submitted, the application was heard by Justice Croft, who delivered judgment on 11 March 2015, making orders enforcing the award. Sauber immediately commenced an appeal, which the Court of Appeal heard urgently on the morning of 12 March 2015 and gave judgment dismissing the appeal in the afternoon.

This prompt handling of an application for urgent enforcement of a foreign award is reflective of the court's willingness to keep in line with the objectives of the New York Convention and the way in which effective emergency relief can be granted.

The view endorsed by US case law has been that interim measures have sufficient finality for the purposes of their enforcement. This is not because those measures are in fact final by nature, but because they are ordered with the intention of protecting the final award. Thus, in *Publicis Communication* v. *True North Communications Inc.*,[8] the US Court of Appeals for the Seventh Circuit rejected the artificial distinction between 'orders' and 'awards' and upheld the tribunal's interim measures as final for enforcement purposes.

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6 ICC Arbitration Rules, Art. 29(2); ICC Emergency Arbitrator Rules, Art. 6.
7 *Geido Van der Garde BV* v. *Sauber Motorsport AG,* [2015] VSC 80.
8 *Publicis Communication* v. *True North Communications Inc.*, 206 F. 3d 725 (14 March 2000).

This approach was adopted in a 2013 case before the US District Court for the Southern District of New York concerning the emergency arbitrator order in *Yahoo! Inc.* v. *Microsoft Corporation*.[9] In that case, Yahoo's motion to vacate an emergency arbitrator award was rejected. The court found that the relief awarded by the emergency arbitrator was, 'in essence final' and therefore confirmed it for the purposes of recognition and enforcement. The court followed the established view with respect to interim measures, reasoning that the possibility of having a final award on the merits does not prevent the emergency arbitrator from awarding final relief for the purposes of preserving the status quo of the subject of the dispute.

However, in 2011, the US District Court for the Southern District of California came to the opposite conclusion in *Chinmax Medical Systems Inc.* v. *Alere San Diego, Inc.*[10] In this case, the court addressed a request to vacate a decision of an emergency arbitrator. The court denied jurisdiction purporting that the decision was not final and binding for the purposes of the New York Convention. Therefore, finality seems to be recognized as the 'weakest point' of emergency arbitrator orders even before the US national courts.

On a more positive note, a decision of marked significance is that rendered by the Pecherskyi District Court of Kyiv on 8 June 2015 in which it enforced an emergency arbitrator award against the state of Ukraine.[11] The applicants in that case were JKX Oil & Gas plc, Poltava Gas B.V. and JV Poltava Petroleum Company and the relevant emergency arbitrator rules were those of the SCC. Significantly, the court approached the task of enforcing the emergency arbitrator award in accordance with the procedures set out under the New York Convention, thereby overcoming any issues regarding its finality. It might be said that the breakthrough of emergency arbitration into the investor-state arbitral arena represents a major milestone in its development and usurpation worldwide.

It seems that the only definite way to secure the enforceability of emergency arbitrator rulings is to include an express provision in national legislation, as has been done in Singapore and Hong Kong. On 9 April 2012, the Singapore parliament introduced amendments to the International Arbitration Act, which gave the orders of emergency arbitrators the same legal status as those handed down by regularly constituted arbitral tribunals. This legislative amendment distinguishes Singapore by providing clarity that is unavailable in most other jurisdictions, save perhaps for the United States, where courts' decisions suggest that awards and orders issued by emergency arbitrators prior to the constitution of the arbitral tribunal, as foreseen under Article 37 of the ICDR Arbitration Rules, are enforceable.

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9 *Yahoo! Inc.* v. *Microsoft Corporation*, United States District Court, Southern District of New York, 13 CV 7237, 21 Oct. 2013.

10 *Chinmax Medical Systems Inc.* v. *Alere San Diego, Inc.*, Southern District of California, Case No. 10cv2467 WQH (NLS), 27 May 2011.

11 Pecherskyi District Court of Kyiv, case no. 757/5777/15-ц.

The inclusion of a provision in national legislation may affect enforceability not only within that jurisdiction but also outside of it. An illustration comes from India, where in 2014 an emergency arbitrator decision was upheld through interim relief granted by the Bombay High Court.[12] The case concerned an arbitration agreement in which the parties had preserved the right to seek interim relief before the national courts of India, even though the arbitration was conducted outside of the country. One of the parties obtained an order from the emergency arbitrator seated in Singapore and sought to enforce it under provisions relating to interim measures in India. Even though Part II of Indian Arbitration Act states that only final awards are enforceable, the Bombay High Court granted interim relief in similar terms to those of the emergency arbitrator's order. In the words of the court, the 'petitioner has not bypassed any mandatory conditions of enforceability' since it was not trying to obtain direct enforcement of the interim award.[13] Instead, it was independently asking for interim measures against the respondent, by virtue of parties' agreement set out in the contract, although the court did not directly enforce the emergency arbitrator order.

Emergency arbitrator proceedings have become an essential component of international commercial arbitration. Despite an inherent lack of enforceability, some national courts have adopted a position that enables the enforcement of emergency arbitrator orders, and such orders are also enforceable under express provisions contained in some national legislation. As a result, the benefits offered by the emergency arbitrator procedure are not undermined by uncertainty over enforceability, and the orders remain an effective means of emergency relief. However, questions still remain as to how emergency arbitrators' decisions will be enforced outside those jurisdictions and what sanctions should apply to parties who refuse to abide by the decisions of emergency arbitrators.

12 *HSBC Pl Holdings (Mauritius) Ltd* v. *Avitel Post Studioz Ltd and others*, Arbitration Petition No. 1062/2012, judgment of 22 Jan. 2014.
13 Ibid., § 89.

5. Conclusion

While at first blush the results might suggest that the users of international arbitration simply do not have any use for emergency arbitrators, it must be recalled that the incorporation of emergency arbitrator provisions into the rules of arbitration institutions is a recent development. Thus, the counter-argument is that international arbitration practitioners and parties have not yet warmed to the concept, and until they do it can reasonably be expected that the take-up will remain low. It is likely that such take-up will occur organically, so it remains to be seen whether parties will in fact ever make frequent use of the provisions. In any case, a relevant consideration is the effect that an application for the appointment of an emergency arbitrator might have on the remainder of the arbitration proceedings: if the parties' relations are amicable to begin with, will such an application cause any tension, and if tension already exists, will the application make matters considerably worse?